CONTEXT, NOT CONTENT: MEDIUM-BASED PRESS CLAUSE RESTRICTIONS ON GOVERNMENT SPEECH IN THE INTERNET AGE

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I. INTRODUCTION

Less than twenty-four hours after the election of the forty-fourth president of the United States, Barack Obama’s transition team announced the creation of change.gov, a website intended to be the public’s central source for news and announcements about the new administration.1 It was the first of many clear indications that a campaign that had relied heavily on the internet would continue to use the medium as its candidate became a president.2 On March 26, 2009, the president held the White House’s first-ever “online town hall” meeting, answering voters’ questions live over the internet.3 Harnessing non-traditional media outlets—especially internet resources like YouTube, Facebook and Twitter—was a hallmark of the Obama campaign and has been one of the administration’s earliest priorities.4

President Obama has made clear from the outset that he intends to use the power of the internet to bypass traditional media outlets and take his message directly to the people.5 Many commentators have applauded this move as a welcome change, seeing it as a renewed commitment to governmental transparency and an effective way to circumvent the perceived “characterization” of the news by mainstream media.6 But others have voiced concerns.7 One

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4 Rutenberg & Nagourney, supra note 2.
5 Id. See also Sheryl Gay Stolberg, A Rewired Bully Pulpit: Big, Bold and Unproven, N.Y. TIMES, Nov. 23, 2008, at WK4 (discussing the likelihood that President Obama will use the internet as an electronic “Bully Pulpit”); Sutter, supra note 3 (reporting that the Obama administration “sees the [March 26, 2009] online meeting as a chance for the public to have a “direct line” of communication with the White House”). The president’s efforts have not been limited to the internet. For example he recently made headlines as the first sitting president to appear on The Tonight Show, to deliver, in the words of one reporter, “a fireside chat for the flat-screen age.” Alessandra Stanley, Just a Couple of Average Joes Having a Fireside Chat, N.Y. TIMES, Mar. 21, 2009, at C1.
6 See, e.g., Remi Moncel, President Obama’s Open Government: Welcome First Steps, WORLD RESOURCES INSTITUTE, Jan. 23, 2009, http://www.wri.org/stories/2009/01/president-obamas-open-government-welcome-first-steps (contending that, in the new administration, “[t]he internet’s interactive features will be used to better disseminate government information to a wide audience and increase the level of public participation in decision-making”); Rutenberg & Nagourney, supra note 2 (quoting an Obama media strategist’s view that, although historically “the media has been able to draw out a lot of information and characterize it for people,” there is a “growing appetite from people to do it themselves”).
media commentator considers the government’s “own journalism, their own description of
events of the day” potentially troublesome, because “it’s not an independent voice making that
description.”

Others fear that the government might use the internet “on behalf of only one
point of view,” instead of on behalf of the public.

These mixed reactions are symptomatic of the confused state of the law—and of legal
scholarship—on the issue of government speech. On one hand, communicating with the public
is an essential function of government. The government must be able to inform, and may even
seek to persuade, the general population about its policies and activities. But as government
speech becomes more persuasive, it can begin to resemble propaganda, and disseminating
propaganda is beyond the government’s constitutional authority. As scholars and judges have
attempted to distinguish between permissible government communication and impermissible
propaganda, two difficult interpretational problems have confronted them. First, drawing a line
between persuasion and propaganda can be a very vexing inquiry. Second, even if a particular
form of government speech seems impermissible, it can be difficult to articulate a constitutional
reason for prohibiting it. And with the advent of the new technologies of the “information age,”
these problems have come into particular relief.

The purpose of this paper is to begin to answer both of those questions. First, the Press
Clause of the First Amendment can be used to restrict some forms of government speech. After
a brief introduction to the issue of government speech in Part II and an overview of the historical
treatment it has received from courts and scholars in Part III, in Part IV this paper explains the
constitutional basis for Press Clause limitations on government speech. The Constitution
established the press as a check on government, so when government speech interferes with the
press’s checking function, that speech is unconstitutional. This argument has been considered in
various forms by other authors. But government speech was never squarely addressed by the
United States Supreme Court until its recent decision in Pleasant Grove City, Utah v.
Summum. At first blush, Summum’s holding seems to permit nearly unlimited government
speech, unfettered by the Constitution. However, that language is overly broad, and Part IV
explains why future courts may be willing to consider a Press Clause limitation to the general
Summum liberties.

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7 E.g. Jimmy Orr, Going Online with Obama: Will He Play Fair?, CHRISTIAN SCI. MONITOR, Mar. 26, 2009,
http://features.csmonitor.com/politics/2009/03/26-going-online-with-obama-will-he-play-fair/ (conceding that “[a]
skeptic might be forgiven for being suspicious” about Obama’s internet overtures “since it is all too easy for White
House press aides to pick and choose from the [public’s] questions and relay softballs to the president”).
8 Rutenberg & Nagourney, supra note 2 (quoting Bill Kovach, chairman of the Committee of Concerned
Journalists).
9 Id.
10 See infra Part II.A–B.
11 See infra Part II.B.
12 See infra note 117 and accompanying text.
14 See infra Part III.B.iii.
But that conclusion leads to a second problem: even those writers who see why the Press Clause limits government speech have not been able to clearly articulate when that limitation should come into effect. In Part V, this paper contends for the first time that Press Clause restrictions on government speech should be based on the physical medium used, and not the content expressed, and explains why, in the hands of government, some media pose greater First Amendment dangers than others. Finally, this paper concludes that the internet is the first mass communication medium whose use by the government raises real constitutional concerns. Our current administration is not engaged in impermissible government speech. However, the day may come when it crosses the line. Accordingly, courts faced with Press Clause challenges to government speech should distinguish Summum and consider limiting that speech, especially if it is communicated via the internet.

II. GOVERNMENT SPEECH

A. The Ways Government Speaks

Our government speaks in a host of different ways. To successfully fulfill its role as it defines rights, crafts social programs, manages the economy, taxes, spends and creates laws, government must communicate with the public. Its speech is sometimes indirect: the government’s funding of the National Endowment for the Arts, for instance, carries with it an implicit message that the arts are worthwhile. But when the government’s message is more direct, it can become more controversial.

The government often communicates directly to the public to advocate specific viewpoints. President Theodore Roosevelt was the first to see his office as a “bully pulpit” that allowed him, when he was unsuccessful at getting his way with Congress, to take his case directly to the people. Accordingly, although scholars use the generic label “government speech,” academic discussion has focused almost exclusively on speech by the executive branch, which is often the most aggressive government communicator. For example, during the

18 The government routinely spends money to promulgate a particular message to the public. For example, in 2005 USA Today broke the story that the U.S. Department of Education had paid the conservative columnist Armstrong Williams more than $240,000 to promote the No Child Left Behind Act—a critical component of President Bush’s agenda. Greg Toppo, White House Paid Commentator To Promote Law, USA TODAY, Jan. 7, 2005, at 1A. For a discussion of the “pay-to-praise” scandal, see generally Jodie Morse, Note, Managing the News: The History and Constitutionality of the Government Spin Machine, 81 N.Y.U. L. REV. 843 (2006).
Vietnam War, political and military leaders mounted a campaign to appeal directly to the public and drown out anti-war dissidents’ messages. President Carter’s strategy to fight the Arab oil embargo included communicating a message of conservation to the American public. President Reagan went on television to convince the nation to support the American involvement in Grenada and Lebanon—and to oppose congressional Democrats who were against the military actions. President Clinton tried unsuccessfully to appeal to public opinion and create a sense of crisis to gain support for his health care reform agenda. And President George W. Bush and Vice President Cheney promoted and justified controversial post-9/11 national security programs to the public on dozens of occasions.

While the government has always tried to communicate directly to the public, often to advance a controversial viewpoint, its efforts have intensified in recent years. According to


MARK YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 7 (1983).

Id. at 7–8.


22 See Theda Skocpol, From Social Security to Health Security?, 19 J. HEALTH POL’Y & L. 239, 240 (1994) (noting the president’s appeals); Theodore R. Marmor & Jonathan Oberlander, Paths To Universal Health Insurance: Progressive Lessons from the Past for the Future, 2004 U. ILL. L. REV. 205, 230 (describing the “failure of the Clinton plan”). See also GELDERMAN, supra note 17, at 163 (pointing out that, while President Clinton passed 88% of the legislative measures he sent to Congress, the media dwelled on his failures, including his unsuccessful campaign for health care reform).


24 SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP vii (1986) (noting that “modern presidents routinely appear before the American public on evening television on all kinds of issues ranging from national crises to the commemoration of a presidential library.”); see also Bezanson & Buss, supra note 15, at 1381 (pointing out that “the use of speech by government is expanding and taking new forms, which presents heightened risks that the government may . . . monopolize private speech.”). For a very recent example of President
one study, “the more recent the president, the more often he goes public.”

George W. Bush frequently used his “bully pulpit” to personally lobby the electorate on behalf of his education reforms and tax cuts, his new Medicare program, the Iraq war, and “immigration reform.”

One of the primary reasons that President Bush was able to step up these appeals, both in frequency and in intensity, was that he had at his disposal a medium that was just coming of age—the internet. Politically, the internet is a powerful tool, and President Bush was able to use it to influence popular opinion. For example, to promote his tax cuts, he directed the public to his website, www.bushtaxrelief.com. And by searching for old, allegedly pro-invasion quotations and incorporating them into “rapid-response” releases specifically taking aim at

[Further text continues...]

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25 Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2300 (2001). Another survey by President Clinton’s chief speechwriter found that Clinton spoke, on average, 550 times in public during a given year, compared to 320 for Ronald Reagan and eighty-eight for Harry Truman. *Id.; see also* Gelderman, *supra* note 17, at 8 (observing similar trends). At the beginning of his presidency, some commentators expected George W. Bush to resort less often to public appearances than his predecessor. Corey Cook, *The Contemporary Presidency: The Permanence of the “Permanent Campaign”: George W. Bush’s Public Presidency*, 32 *Presidential Stud. Q.* 753, 755–76 (2004), available at http://www3.interscience.wiley.com/cgi-bin/fulltext/118918213/PDFSTART. But instead, at the beginning of his presidency he traveled and appeared in public at least as often as President Clinton—if not more so. *See id.* at 758 (concluding, based on an empirical study, that “Bush’s first-year domestic travel schedule was remarkably similar in scope to that of Clinton . . . . In fact, Bush was on pace to surpass Clinton’s benchmark number of appearances but dramatically scaled back his travel in the immediate aftermath of September 11.”). Interestingly, as public support for his presidency dropped during his second term, President Bush increased the frequency of his public appeals and solo press conferences. Marthe Joynt Kumar, *Managing the News: The Bush Communications Operation, in The Polarized Presidency of George W. Bush*, 351, 351–52 (George C. Edwards III & Desmond S. King, eds., 2007).

26 For a description of President Bush’s efforts on behalf of his tax cuts, see *Bush Calls on Public To Lobby Congress*, N.Y. Times, Apr. 8, 2001, §1, at 1. Regarding Medicare promotion, see Robert Pear, *Ruling Says White House’s Medicare Videos Were Illegal*, N.Y. Times, May 20, 2004, at A24 (noting how the Bush administration distributed ready-made television news segments touting the new program as a “boon to the elderly”). While a GAO report found that the stories were impermissible “covert propaganda,” it had little way to enforce its decision. *Id.* For more discussion of the GAO as a possible limit on government speech—and why it is inadequate—see infra Part III.A. On the Iraq war, see, e.g., Ron Hutcheson, *Bush Tells Nation “Sacrifice Is Worth It,”* Miami Herald, June 30, 2005, at 1A (describing the president’s attempts to sell the war). On immigration reform, see Mark Silva, *Bush Takes Appeal to Border*, CHI. TRIB., May 19, 2006, at News-22.


28 *Bush Calls on Public To Lobby Congress*, *supra* note 26.
individual legislators, the White House used the internet to mount public relations campaigns against anti-war Democrats.\footnote{29}

But if George W. Bush was the first president in the internet age, Barack Obama is unquestionably the first of that age. His has already been called the first “internet presidency,” with reason.\footnote{30} His campaign used YouTube, instant messaging, and a custom social-networking program based on Facebook to raise money, shape his message and get out the vote.\footnote{31} Many commentators agree that this use of the internet played a major role in getting him into the White House.\footnote{32} Democrats generally portray their party as the party of the internet—although evidence of which major party has made better use of the internet is mixed\footnote{33}—but the effectiveness of the Obama’s internet campaign was still especially noteworthy. Between August and November 2008, Obama was mentioned in 500 million blog posts, compared with John McCain’s 150 million mentions, and had 844,927 MySpace friends compared with McCain’s 219,404.\footnote{34} President Obama’s campaign “Facebooked, Tweeted, texted and YouTubed its way to victory.”\footnote{35}

\footnote{29 Julie Hirschfeld Davis, White House Mounts Anti-Anti-War Campaign: Experts Are at Work on a Public-Relations Offensive Against Democrats Who Say Bush Lied on Iraq, PHILA. INQUIRER, Nov. 18, 2005, at A17.}


\footnote{31 See Adam Nagourney, The ’08 Campaign: Sea Change for Politics as We Know It, N.Y. TIMES, Nov. 3, 2008, at A1 (describing Internet fundraising); Chris Cillizza, White House Cheat Sheet: Bypassing the Media Filter, WASH. POST ONLINE, Feb. 5, 2009, http://voices.washingtonpost.com/thefix/2009/02/white_house_cheat_sheet_around.html (noting how the Internet allowed Obama to “speak directly to his supporters and, as importantly, to undecided voters about the issues of the day.”). After the election, YouTube reported that the Obama campaign’s videos on its site were viewed a total of 100 million times. Pew Project for Excellence in Journalism, Online: Audience, in The State of the News Media 2009: An Annual Report on American Journalism (2009), available at http://www.stateoftheglobalmedia.org/2009/narrative_online_audience.php?media=5&cat=2.}

\footnote{32 See Andrew Rasiej & Micah L. Sifry, “We” Has Power Over “Me,” POLITICO.COM, Feb. 5, 2009 (contending that “[t]he success of Barack Obama’s campaign has ended once and for all the argument about whether the Internet matters in politics.”); Mitch Wagner, Obama Election Ushering in First Internet Presidency, INFO. WEEK ONLINE, Nov. 5, 2008, http://www.informationweek.com/1209/obama.htm (quoting an industry analyst’s view that there is no doubt that “communication through YouTube and other social networks put him over the top.”).}

\footnote{33 Compare Jeffrey H. Birnbaum, Liberal Praise Drawn from Unlikely Source, WASH. POST, Oct. 18, 2004, at E-1 (quoting a right-wing fundraiser’s view that “left-leaning groups are miles ahead in using the world’s most powerful and efficient marketing tool—the Internet—for political advocacy.”) with D. Wes Sullenger, Silencing the Blogosphere: A First Amendment Caution to Legislators Considering Using Blogs To Communicate Directly with Constituents, 13 RICH. J.L. & TECH. 15, 56 (2007) (discussing the 2004 elections, where the Internet allowed Senator John Kerry’s campaign to “raise more campaign money” than George W. Bush but that, “despite the fundraising disadvantage, Bush still won because Republicans increased their turnout at the polls more than the Democrats . . . at least in part [resulting] from Bush’s Internet efforts, which included a total e-mail list of 7.5 million names and 1.4 million volunteers.”).}

\footnote{34 Wagner, supra note 30.}

\footnote{35 Stolberg, supra note 5.}
Recognizing its power, the president and his supporters have made the persuasive use of the internet a top priority in the new administration.\textsuperscript{36} There are early indications that the president intends to rely heavily on the internet to communicate his message directly to the public.\textsuperscript{37} His ambitions seem very broad. According to an internet-politics pioneer who worked on his campaign, he is expected to use the kind of networking that was so successful during his campaign to “transform the White House as well,” by using the internet to push his legislative initiatives.\textsuperscript{38} The president’s popularity and mastery of the internet may allow him to exert a strong influence over Congress.\textsuperscript{39} Clearly, government’s use of the internet has the potential to radically transform its relationship with the public, and to reshape the political system itself. In the age of the internet, the government is speaking like never before.

B. The Paradox of Government Speech

The preceding examples present what commentators have called the paradox of government speech.\textsuperscript{40} Non-neutral speech by the government is “at once integral to democratic society and potentially subversive of core First Amendment values.”\textsuperscript{41} On one hand, government speech is an essential part of a republican democracy. The executive branch could not successfully govern without the ability to “explain, persuade, coerce, deplore, congratulate, implore, teach, inspire, and defend with words.”\textsuperscript{42} But with the government’s power to communicate comes the power to destroy the bedrock of government by consent, because “the power to teach, inform and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime.”\textsuperscript{43} Government has consistently sought to control public perceptions and dominate debate, often successfully.\textsuperscript{44} And at some point, legitimate speech by the government can cross the line and become propaganda, which is anathema to government by

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\item Rutenberg & Nagourney, supra note 2; see also Cillizza, supra note 31 (describing how the Obama administration is seeking to apply its successful internet campaign strategy toward furthering the White House agenda).
\item For further discussion of President Obama’s use of the internet, see infra notes 184–197 and accompanying text.
\item Wagner, supra note 30.
\item Id. (explaining that “Congress will be put between a rock and a hard place if millions of citizens sign up to help the president pass his agenda . . . . If the president says, ‘Here are the members of Congress who stand in the way of us passing health care reform,’ I would not want to be one of those people. You’ll have 10 or 15 million networked Americans barging in on the members of Congress telling them to get in line.”).
\item Cole, supra note 40, at 702. For example, Government can foster the rule of law by supporting laws that are enacted. Bezanson & Buss, supra note 15, at 1380. It can also act to enhance public debate, can encourage forms of expression that might not be incentivized by the private sector, and can bring a particular and distinctive point of view to the public debate. Abner S. Greene, Government of the Good, 53 VAND. L. REV. 1, 8 (2000).
\item Bezanson & Buss, supra note 15, at 1380.
\item Yudof, supra note 40, at 865.
\item Entman, supra note 21, at 66.
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the people.\footnote{William E. Lee, \textit{Manipulating Legislative Facts: The Supreme Court and the First Amendment}, 72 \textit{TUL. L. REV.} 1261, 1268 n.39 (1998) (quoting Beauharnais v. Illinois, 343 U.S. 250, 270 (1952) (Black, J., dissenting)); see also \textit{The Supreme Court, 1986 Term—Leading Cases}, 101 \textit{HARV. L. REV.} 209, 217 (1987) (pointing out that “government speech can both make valuable contributions and pose dangerous risks to a diverse marketplace of ideas.”).} The Founding Fathers were suspicious of governmental rhetoric aimed at winning over popular opinion, fearing that oratory might undermine the “rational and enlightened debate” democracy requires.\footnote{GELDERMAN, supra note 17, at 2–3.} Madison, for example, argued forcefully against a proposed modification to the Virginia state constitution that would have allowed a branch of government to appeal directly to the people to redress constitutional imbalances.\footnote{THE FEDERALIST NO. 49 (James Madison) (contending that “there appear to be insuperable objections against the proposed recurrence to the people, as a provision in all cases for keeping the several departments of power within their constitutional limits.”); see also John C. Eastman, \textit{Judicial Review of Unenumerated Rights: Does Marbury’s Holding Apply in a Post-Warren Court World?}, 28 HARV. J.L. & PUB. POL’Y 713, 726 (2005) and Doni Gewirtzman, \textit{Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture}, 43 U. RICH. L. REV. 623, 646 (2009) (noting Jefferson’s role drafting and supporting the proposed amendment).} This sentiment was rooted in the understanding that the most serious danger of government speech is that it has the potential to undermine “the ability of citizens to think clearly about policy issues and government leaders.” More than any person or corporation, the government has the resources—and interest—to convince the public to support specific social or governmental policies.\footnote{Yudof, supra note 40, at 901.} Its ability to misuse that power raises grave concerns, because government speech can legitimately threaten the balance of power between itself and the people.\footnote{John E. Nowak, \textit{Using the Press Clause To Limit Government Speech}, 30 ARIZ. L. REV. 1, 4–5 (1988).} Our tendency is to associate propaganda with totalitarian governments. But past Supreme Court decisions have countenanced the possibility that our government’s expression can be propaganda too.\footnote{Bezanson & Buss, supra note 15, at 1504. See also Entman, supra note 21, at 67 (citing research that demonstrates that the greatest source of power in the “power flows” among the government, the media and the public is the government).} A seminal article on government speech defines propaganda as “the use of facts, fiction, argument and suggestion, sometimes supported by an effort to suppress inconsistent material, with the calculated purpose of instilling in the recipient certain beliefs, prejudices, or convictions” designed to produce a certain course of action.\footnote{See, e.g., Arkansas Educ. Television Com’n v. Forbes, 523 U.S. 666, 688 (1998) (Stevens, J., dissenting) (explaining that “Congress chose a system of private broadcasters licensed and regulated by the Government, partly because of our traditional respect for private enterprise, but more importantly because public ownership created unacceptable risks of governmental censorship and use of the media for propaganda”); Public Utilities Commission v. Pollak, 343 U.S. 451, 466 (1952) (Black, J., concurring) (finding that, in a case that challenged the constitutionality of government-funded broadcasts on streetcars, “subjecting [transit] passengers to the broadcasting of news, public speeches, views, or propaganda of any kind by any means would violate the first amendment”) (emphasis added).} By that measure, we
see that some of the past actions of our government have quite clearly been propaganda—for instance the Bush administration’s payments to Armstrong Williams. But other types of speech do not seem to raise a problem, like President Carter asking us to conserve energy. It is the cases in between that present the difficult issue of when, exactly, government speech becomes propaganda. And even if government speech is called “propaganda,” how the law should limit it also remains an open question. The next Part describes the various historical attempts to resolve these questions, and reveals why they are no longer adequate.

III. THE RESTRICTION OF GOVERNMENT SPEECH: HISTORICAL PERSPECTIVES

A. The Congress: Legislative Theory

After World War II, at the behest of academics and journalists, Congress began to confront the question of how domestic propaganda—which had been so useful in wartime—could be controlled during peacetime. The 1951 budget contained a provision stipulating that no part of any appropriation in the budget could be used “for publicity or propaganda purposes not heretofore authorized by Congress” and similar prohibitions have been included in every appropriation bill since. But these anti-propaganda provisions have proven to be essentially toothless.

For example, in 1983, House Democrats discovered that the Reagan administration had been paying writers to publish anti-Nicaragua editorials, and referred the matter to the Government Accountability Office (GAO). The GAO found that the activities were essentially “covert propaganda,” but it took no action. Likewise, when the story broke that the Clinton White House had paid networks millions of dollars from the coffers of the Office of National Drug Control Policy to disseminate anti-drug themes on shows such as ER and Beverly Hills 90210, the Republican Congress convened hearings and the matter was referred to the FCC. But although the FCC spoke out against the arrangement, it did not impose any penalties on the broadcasters or the government.

The legislative solution has been inadequate for two reasons. First, the GAO, which is the main body responsible for enforcing the anti-propaganda laws, is poorly suited for the task. Its role is only advisory, so its opinions have no precedential weight or legal enforceability. The most it can do is refer matters to Congress for additional investigation. Second, the GAO

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53 Morse, supra note 18, at 853.
55 Morse, supra note 18, at 854–55.
57 Morse, supra note 18, at 855–56.
58 Id. at 859.
59 Id.
60 Id.
is faced with the challenge identified earlier—determining the definition of “propaganda”—but the agency charged with drawing the line around government propaganda has publicly stated that it does not know where that line is.\textsuperscript{61} Recognizing the fact that inadequate statutory prohibitions were partly to blame for the Armstrong Williams scandal during the Bush administration, where reporters discovered that the White House was paying a radio personality to promote the president’s policies,\textsuperscript{62} Democrats in both the House and the Senate introduced legislation in 2005 designed to more actively curb government propaganda.\textsuperscript{63} The House version died in committee.\textsuperscript{64} A weakened Senate version made it out of committee, but never came to a vote.\textsuperscript{65} But even if it had passed—which at the time was considered unlikely—many commentators felt that it would not have had a meaningful effect on government speech.\textsuperscript{66} The unsuccessful 2005 bills are merely another chapter in the long “historical failure” of legislative checks on government propaganda.\textsuperscript{67} In light of this history, placing faith in legislative intervention to define and check abusive government expression seems unwise. Instead, we must look to the Constitution.

**B. The Judiciary: Constitutional Theory**

Because of the absence of legislative provisions regarding government speech, the Supreme Court has turned to the First Amendment. The Court’s responses have been “occasionally bold, but rarely pretty.”\textsuperscript{68} Government speech cases have been called the “ugly stepchild” of First Amendment jurisprudence.\textsuperscript{69} Indeed, the fact that the Constitution does not place any explicit limitations on government speech has made constitutional principles difficult to develop, and the confused guidance from the Supreme Court, which this section examines,

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\item\textsuperscript{62} Supra note 18.
\item\textsuperscript{63} Williams agreed to return a portion of the money, *Armstrong Williams Agrees To Return $34,000*, PR WEEK, Oct. 30, 2006, at 2, and the FCC levied fines against some of the stations who broadcast Williams’ plugs, Clay Calvert, *What Is News?: The FCC and the New Battle over the Regulation of Video News Releases*, 16 COMMLAW CONSPECTUS 361, 365–66 (2008), but no action was brought against government actors.
\item\textsuperscript{64} Federal Propaganda Prohibition Act of 2005, H.R. 373, 109th Cong. (2005).
\item\textsuperscript{65} Truth in Broadcasting Act of 2005, S. 967, 109th Cong. (2005).
\item\textsuperscript{66} See Morse, *supra* note 18, at 864 (contending that, in the face of vigorous objections from lobbyists and the press, “there is little chance” the reforms would succeed); see also Pollack, *supra* note 18, at 1486 (calling the bill’s remedies “inadequate”); Janel Alania, Note, The “News” from the Feed Looks like News Indeed: On Video News Releases, the FCC, and the Shortage of Truth in the Truth in Broadcasting Act of 2005, 24 CARDOZO ARTS & ENT. L.J. 229, 231 (2006) (arguing that “it is difficult to see how the proposed Truth in Broadcasting Act will make a substantial difference in the type and quality of news the American public sees.”).
\item\textsuperscript{67} Morse, *supra* note 18, at 863. See also Pollack, *supra* note 18, at 1485–85 (noting the “minimal” legislative responses to improper government speech).
\item\textsuperscript{68} Bezanson & Buss, *supra* note 15, at 1381.
\item\textsuperscript{69} Note, The Curious Relationship Between the Compelled Speech and Government Speech Doctrines, 117 HARV. L. REV. 2411, 2432 (2004).
suggests that the Court has not yet formulated a clear constitutional theory of government speech.\textsuperscript{70}

\textit{i. Government as a First Amendment Right-Holder}

A threshold issue in government speech analysis is whether the government is a protected speaker under the First Amendment. If it is, it would have a right to speak equal to any other private citizen, and further analysis of constitutional restrictions would be futile. But the prevailing view is that government expression is \textit{not} included within the First Amendment’s protections.\textsuperscript{71} Because the First Amendment has historically served to limit government, and not to protect it,\textsuperscript{72} Professor Mark Yudof, a pioneer of government speech scholarship, notes that interpreting the First Amendment to affirmatively protect government’s right to speak “would be a grave error.”\textsuperscript{73} Reading a First Amendment recognition of government’s freedom to speak is to “turn the Constitution upside-down.”\textsuperscript{74} Hence, because government does not have an unchecked right to speak, there may be at least some theoretical situations in which its speech can be restricted.

\textit{ii. The First Amendment’s Restrictions on Government Speech—Scholarly and Judicial Views}

Whether the First Amendment places limits on government speech, however, is a far more difficult question, and it has correspondingly generated more controversy among

\textsuperscript{70} See Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring) (“To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit.”); see also Kathryn Elizabeth Komp, Note, Unincorporated, Unprotected: Religion in an Established State, 58 VAND. L. REV. 301, 328 (2005) (contending that “guidance from the Court has not been readily forthcoming”); Caroline Mala Corbin, Mixed Speech: When Speech Is Both Private and Governmental, 83 N.Y.U. L. REV. 605, 611–12 (2008) (noting the recent development of government speech doctrine and its corresponding imprecision).

\textsuperscript{71} See Richard Delgado, The Language of the Arms Race: Should the People Limit Government Speech?, 64 B.U. L. REV. 961, 988 (1984) (reviewing other scholars’ conclusions that “government, \textit{qua} government, has no first amendment right to speak.”). But see David Fagundes, State Actors as First Amendment Speakers, 100 NW. U. L. REV. 1637, 1641–42 (2006) (noting that “despite the oft-repeated majority rule, there is a considerable . . . current of dissent”); Laura J. Hendrickson, State Government Speech in a Federal System, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 691, 713 (concluding that “constitutional protection of government speech may be an open question.”). While most scholars have concluded that the First Amendment does not protect the government, the most thorough treatment of the topic to date recommends granting a limited amount of protection. See generally Fagundes, supra note 71, at 1641 (proposing an analytical framework for determining whether government speech is protected).

\textsuperscript{72} Columbia Broadcasting System, Inc. v. Democratic Nat. Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (asserting that “[t]he First Amendment protects the press from government interference; it confers no analogous protection on the Government.”); Yudof, supra note 40, at 867; Fagundes, supra note 71, at 1638 (explaining that “the Speech Clause is typically seen as a bulwark of protection against—rather than a source of rights for—government.”).

\textsuperscript{73} Yudof, supra note 40, at 871.

\textsuperscript{74} Bezanson & Buss, supra note 15, at 1504.
academics. To the extent that a consensus has formed on the issue, it appears that scholars find no explicit restriction on government speech in the First Amendment, so that any limitations are passive, implied by the First Amendment’s protections—in particular by the Press Clause.

Speech and press freedoms were constitutionally protected to ensure the “unfettered interchange” of ideas throughout society. But these protections are more than a mere commitment to free expression and communication “for their own sakes.” Instead, the Constitution plays a structural role in our system of self-government, ensuring the free discussion of government affairs, including candidates, policies and political processes. According to some scholars, freedom of the press and of speech in First Amendment protect these democratic values for two distinct reasons. The first, which Professor Vincent Blasi calls the marketplace-of-ideas function, aims to promote “the search for truth” among the populace in order to encourage “autonomous decisionmaking by citizens.” Both a free press and individual free speech preserve this value.

But the First Amendment also serves a second political function—“checking the abuse of power by public officials.” In practice, this role is most often fulfilled by the press when it provides the public with information it otherwise would not have about the government’s activities. Because of the complexity and rapidity with which modern American government makes decisions, timely reporting that provides context and criticism of the current administration’s policies is an essential precondition for modern democracy.

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77 Id; see also Sullivan, 376 U.S. at 269 (explaining that the interchange of ideas receives the First Amendment protection necessary for bringing about “political and social changes desired by the people.”).
78 Mills v. State of Ala., 384 U.S. 214, 218–19 (1966); see also FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 81–86 (1982) (explaining that First Amendment protections in the Constitution are largely grounded in the understanding that political leaders are fallible, and in a general distrust of the power of government); Yudof, supra note 40, at 867 (noting that the First Amendment was designed to provide important limitations on government’s interference with political discussion and decisionmaking).
79 See Vincent Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521, 538 (expounding the “marketplace of ideas” concept); Morse, supra note 18, at 864 (interpreting Professor Blasi’s theory using the quoted language).
80 Frederick Mark Gedicks, A Two-Track Theory of the Establishment Clause, 43 B.C. L. REV. 1071, 1080 (2002) (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 93–94, 112 (1980)) (arguing that the Speech, Press, Assembly, and Petition Clauses serve the “central function of assuring an open political dialogue and process” and “were centrally intended to help make our government processes work, to ensure the open and informed discussion of political issues, and to check our government when it gets out of bounds.”); see also, e.g., THOMAS I. EMERSON, THE SYSTEM OF FREE EXPRESSION 6–9 (1970) (explaining that “freedom of expression is essential to provide for participation in decision making by all members of society,” especially in the context of political expression); Andrew E. Taslitz, Slaves No More! The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings, 15 GA. ST. U. L. REV. 709, 713 (1999) (contending that “First Amendment protections of free speech, press, and religion enable ordinary citizens, publishers, and clergy to disseminate and debate the wisdom of various Governmental actions.”).
81 Blasi, supra note 79, at 527.
82 Entman, supra note 21, at 70.
government speaks to the public directly, it can communicate the message it wants, but when its message goes out through the press, journalists and editors can add their own viewpoints, allowing listeners to consider, question, and possibly oppose the government’s account of its own activities. Accordingly, members of the Washington press corps often consider themselves “the permanent in-house critics of government.”

Many First Amendment scholars see this dynamic—where a free and independent press, rather than the freedom of individual speech, is the primary check on government speech—as what the Framers of the Constitution intended. There is still scholarly disagreement about whether the Press and Free Speech clauses protect distinct rights or instead form one coextensive protection of expression. And in the past, the United States Supreme Court has declined some efforts to attribute to the Press Clause a special meaning distinct from the Free Speech Clause.

83 Nowak, supra note 49, at 41.
84 KERNELL, supra note 24, at 76 (quoting a senior Washington correspondent).
85 E.g., David A. Anderson, The Origins of the Press Clause, 30 UCLA L. REV. 455, 533–34 (1983); see also Potter Stewart, “Or of the Press,” 26 HASTINGS L.J. 631, 631, 633 (1975) (expounding his thesis that the role the American press played in the Watergate scandal is “precisely the function it was intended to perform by those who wrote the First Amendment” and distinguishing the Press Clause—a “structural provision”—from freedom of speech, which protects the rights of individuals).
87 Anderson, supra note 85, at 456. Numerous cases cited by Professor Anderson and others illustrate this point.
But, although the Supreme Court has never addressed the issue directly, some of its more recent decisions have implicitly acknowledged that the Press Clause and Free Speech Clause protect different activities.88

Viewing the Press Clause as according distinct guarantees is the most logically consistent approach to constitutional interpretation. Justice Stewart famously said that “[i]f the Free Press guarantee meant no more than the freedom of expression, it would have been a constitutional redundancy.”89 Unlike free speech, the press can subject government to “extensive public scrutiny,” and thereby bring governmental corruption and abuse of power into the open.90 In fact, the press is viewed by many as the “fourth estate” of government, whose role is to check the activities of the three branches.91 Most individual citizens “either cannot, or choose not to, compete in public debates dominated by the press and the government,”92 so it is “only the mass dissemination of information can truly check governmental abuses of power.”93 Thus, for the purposes of “checking government power, speech was an afterthought, if it was viewed as serving that function at all; the press was expected to be the primary source of restraint.”94

88 Jon Paul Dilts, The Press Clause and Press Behavior: Revisiting the Implications of Citizenship, 7 COMM. L. & POL’y 25, 27 (2002). In Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, the Court struck down, on First Amendment grounds, a tax that singled out the press because “differential treatment, unless justified by some special characteristic of the press . . . is presumptively unconstitutional.” Minneapolis Star and Tribune Co. v. Minnesota Com’r of Revenue, 460 U.S. 575, 585, 591 (1983). More recently, in McConnell v. Federal Election Commission, the Court upheld a statute that regulated political expression by corporations but exempted media corporations, saying that the press-only exception was “wholly consistent with First Amendment principles.” McConnell v. Federal Election Com’n, 540 U.S. 93, 208–09 (2003). In its most recent government-speech decision, Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1139 (2009), the Supreme Court discussed the First Amendment generally, the Free Speech Clause and the Establishment Clause but did not mention the Press Clause—perhaps implicitly acknowledging that applying the latter to the facts of Summum would lead to a different result. See generally Part IV. A infra (discussing the Press Clause implications of the Summum decision).

89 Stewart, supra note 85, at 633.

90 Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). The Supreme Court has also called the press the “watchdog of government activity,” saying that a “basic assumption of our political system” is that the press serves “as an important restraint on government.” Leathers v. Medlock, 499 U.S. 439, 446–47 (1991). See also Jonathan Mermin, Free but Not Independent: The Real First Amendment Issue for the Press, 39 U.S.F. L. REV. 929, 953 (2005) (describing the press’s role exposing government corruption); Bezanson & Buss, supra note 15, at 1504 (explaining that the very purpose of the Press Clause is “to confine and limit government in order to preserve individual liberty”). But see Entman, supra note 21, at 67 (arguing that, when officials speak in harmony about a particular event or issue, “the media tend to mirror the dominant line”).

91 See, e.g., Stewart, supra note 85, at 634 (“The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches.”). According to a leading First Amendment scholar, there is an implied separation of powers principle in the Press Clause that is analogous to the explicit principles separating the three branches of government. Nowak, supra note 49, at 12. That separation protects the press’s ability to perform its watchdog function beyond the reach of governmental control. Id.


93 Nowak, supra note 49, at 14.

94 Anderson, supra note 85, at 533–34. See also C. EDMIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 1998 (1994) (explaining that, while free speech is a fundamental personal right, constitutional press freedoms protect an
While the Speech Clause protects individuals’ ability to exercise their democratic responsibilities, it is the Press Clause that keeps government from abusing theirs.

Accepting the view that the Press Clause was intended as a check on government implies some First Amendment limitations on government speech. However, these restrictions are indirect, countenancing a press corps that is sufficiently strong and independent to provide the public with its own version of the government’s story. That passive protection is the extent of the limitations most scholars find in the First Amendment. The general view is that there is no safety net—i.e., no active prohibition on how the government can speak. Commentators have assumed that the press will be powerful enough to perform its checking function, and have concluded that those protections are sufficient. This has led to the conclusion that the Constitution does not impose any restriction whatsoever on most forms of government speech, and that the government has “virtually boundless discretion to say what it wishes.” In the words of one scholar, “[w]hen government misuses its power to communicate we do have a problem, but this does not mean that we have a First Amendment problem.”

iii. Judicial Development of the “Government Speech” Doctrine

This view has become embodied in current Supreme Court jurisprudence through the development of the so-called “government speech doctrine.” The doctrine’s root was Rust v. Sullivan, which contemplated whether the government could constitutionally prohibit doctors working in federally-funded family planning clinics from providing advice about abortion. The Court held that the restriction was permissible because, unlike private speakers, the doctors in Rust spoke for the government and “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.” Whatever that language stands for, it does not seem to grant unlimited speech rights to the government. Nevertheless, it marks the humble beginnings of a doctrine which eventually has become much more expansive.

For more than a decade, the Court reached several government-speech decisions that were no broader than Rust. In Rosenberger v. Rector and Visitors of University of Virginia, the

\[institution\] “because of its contribution to various forms of human good—in particular, the press’s contribution to checking governmental abuses”).

95 See Yudof, supra note 40, at 897–906 (considering and rejecting the possibility of direct First Amendment limitations on government speech).

96 Note, supra note 69, at 2412; see also Greene, supra note 41, at 4 (declaring that the Constitution generally “imposes no hurdle to government speech, even speech that backs a specific viewpoint in a matter of current social interest.”); Jay Alan Sekulow & Erik M. Zimmerman, Pleasant Grove City V. Summum: Upholding the Government’s Authority To Craft its Own Message Through Privately Donated or Funded Monuments, Memorials, and Artwork, 3 CHARLESTON L. REV. 175, 187 (2009) (summarizing the current state of the law: “When the government restricts private expression, a variety of constitutional free speech protections are triggered. If the government is itself the speaker, however, it generally can select the precise message it wants to deliver.”); Pollack, supra note 18, at 1466 (referring to “the government’s almost unbounded entitlement to choose its own speech”).

97 Schauer, supra note 16, at 385; see also Note, supra note 69, at 2411 (summarizing the current doctrine’s position that “whatever limitations exist on government speech, they are not to be found in the First Amendment.”).


99 Id. at 194.
Court held that a university’s refusal to fund a student-run Christian newspaper was unconstitutional viewpoint discrimination. 100 In dicta, however, *Rosenberger* redefined *Rust* as a formal test: the government cannot compel private speech, but if it is using a private speaker to promulgate a government message, it is “entitled to say what it wishes.”107 Importantly, though, that interpretation of *Rust* was limited to situations where the government “appropriates public funds to promote a particular policy of its own.”102 In *Board of Regents of University of Wisconsin System v. Southworth*, students at the University of Wisconsin challenged a mandatory student activity fee used to support student organizations whose viewpoints they found objectionable.103 Reversing the lower courts, the Supreme Court allowed the fee.104 Again, however, because it held that this was not government speech, the Court did not extend *Rust*.105

In *Legal Services Corp. v. Velazquez*, the Court considered the constitutionality of a statute that prohibited funding from the Legal Services Corporation, a federally-funded legal aid program, to be used for the representation of clients who aimed to challenge the existing welfare law.106 Although, like *Rust*, it involved a compelled-speech challenge, the Court held the restriction unconstitutional, because it judged the speech at issue—the LSC attorneys’ advocacy—to be private speech and thus distinguishable from *Rust*.107 In the process, however, the Court reaffirmed *Rust*’s permissive treatment of government speech.108 Finally, in *Johans v. Livestock Marketing Association*, the Supreme Court considered beef producers’ challenge of a federal law that required them to pay an assessment which funded advertisements promoting beef.109 The Supreme Court vacated the Eighth Circuit’s ruling and held that “Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.”110 But while the Court broadly framed the issue to be “whether the generic

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101 *See Rosenberger*, 515 U.S. at 832–36 (making the distinction between government speech and private speech); *see also*, e.g., *Griffin v. Sec’y of Veterans Affairs*, 288 F.3d 1309, 1324–25 (Fed. Cir. 2002) (interpreting *Rosenberger*).
102 *Rosenberger*, 515 U.S. at 833.
104 *Southworth*, 529 U.S. at 221 (holding that the “First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.”).
105 *Id.* at 299 (explaining that “[w]here the University speaks, either in its own name through its regents or officers . . . the analysis likely would be altogether different,” and accordingly explicitly declining to “reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself”).
107 *Id.* at 542–43.
108 *Id.* at 541 (internal citations omitted) (explaining that “viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government used private speakers to transmit specific information pertaining to its own program.”).
110 *Id.* at 562, 567 (emphasis added).
advertising at issue is the Government’s own speech and therefore is exempt from First Amendment scrutiny,” its actual holding, which only applied the exemption to compelled-funding situations, was much narrower.

Thus, Rosenberger, Southworth, Velazquez and Johanns all reached limited holdings. Language in these decisions indicating that government is entitled to say what it wants is therefore necessarily dictum. But these dicta have provided a springboard for lower courts to steadily begin expanding Rust’s permissive government speech doctrine beyond compelled-funding and compelled-speech cases. Between 2002 and 2008, all but one circuit offered the chance to expand government speech using Rust’s dicta chose to do so.111 And in its most recent government-speech decision, the Supreme Court follows that majority and grants government speech broad exemptions from First Amendment challenges.

In Pleasant Grove City, Utah, v. Summum, the plaintiff, a religious organization, had written Pleasant Grove’s mayor twice to request permission to build a stone monument containing “the Seven Aphorisms of SUMMUM.”112 Although this was neither a compelled-speech nor a compelled-funding case, the Court considered it under the following rule:

If petitioners [the city and mayor] were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to speak for itself. It is entitled to say what it wishes, and to select the views that it wants to express.113 Applying its rule, the Court held that the City’s refusal to accept the monument was government speech, and therefore entirely exempt from First Amendment scrutiny.114 Just like the lower courts, the Supreme Court cobbled together dicta from Southworth, Rosenberger and Rust along

111 In 2002, the Federal Circuit held that “the government is entitled to full control over its own speech without violating the First Amendment, whether it speaks with its own voice or enlists private parties to convey its message, and the remedy for dissatisfaction with its choices is political rather than judicial.” Griffin v. Sec’y of Veterans Affairs, 288 F.3d 1309, 1324–25 (Fed. Cir. 2002). In 2005, the D.C. Circuit held that the “First Amendment’s free speech clause does not limit the government as speaker,” People for the Ethical Treatment of Animals, Inc. v. Gittens, 414 F.3d 23, 28 (D.C. Cir. 2005), and again in 2007 that “[v]iewpoint discrimination raises no First Amendment concerns when the government is speaking,” DKT Intern., Inc. v. U.S. Agency for Intern. Dev., 477 F.3d 758, 763 n.5 (D.C. Cir. 2007). In 2008, the Fourth Circuit held that “Government’s own speech . . . is exempt from First Amendment scrutiny,” Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 280 (4th Cir. 2008), and the Seventh Circuit held that “when the government speaks, it is entitled to say what it wishes . . . [a]ccordingly, when the government is the speaker, it may choose what to say and what not to say; it need not be neutral,” Choose Life Ill., Inc. v. White, 547 F.3d 853, 859 (7th Cir. 2008). The Ninth Circuit stood alone in opposition to the expansionary trend in holding that “[t]he First Amendment may limit government speech that makes private speech difficult or impossible or that attributes a government message to a private speaker.” Caruso v. Yamhill County, 422 F.3d 848, 855 (9th Cir. 2005).
113 Id. at 1131 (internal quotations and citations omitted).
114 Id.
with a much narrower holding in *Johanns* to create a vastly expanded government speech doctrine, under which government’s right to speak is nearly unlimited. Justice Stevens’s claim that “[t]he Court’s opinion in this case signals no expansion of [government speech] doctrine” is either misguided or disingenuous. 115 *Summum* represents the first time the Supreme Court has adopted such an expansive view of government speech.

Thus, the status quo, as understood both by scholars and judges is that, while the checks on government guaranteed by the First Amendment’s freedoms may implicitly limit the government’s expression, the Constitution does not actively restrict what the government can say. Instead, the government apparently has virtually limitless authority to communicate its message, which must be tested in the “marketplace of ideas” that the Free Speech and Free Press Clauses create. However, there are several reasons to believe that this understanding of the government’s right to speak is far too expansive—and too simplistic.

IV. THE CONSTITUTIONAL BASIS FOR AFFIRMATIVE RESTRICTIONS OF GOVERNMENT SPEECH

Constitutional scholarship and, more recently, judicial decisions have roundly disclaimed the idea of affirmative First Amendment restrictions on government expression, instead finding that government is entitled to say “what it wishes,” unfettered by the First Amendment.116 At first glance, the multiplicity of sources espousing this viewpoint would seem to validate its soundness, but their concordance belies two theoretical shortcomings. First, the view is based on a misapplication of the Court’s holding in *Rust* and subsequent cases. In reality, the principle that government can say what it wants is best seen as a shorthand that masks a much more complicated, and possibly nuanced, view of the relationship between the First Amendment and government expression. Second, and more importantly for this discussion, the view that government can say what it wants is premised on the assumption of a press powerful enough to contradict it. For reasons we will see below, that view is becoming increasingly questionable, suggesting that it may be time to revise the post-*Rust* expansion of the “government speech” doctrine. And dictum in the Supreme Court’s most recent government speech decision, *Pleasant Grove City, Utah v. Summum*, suggests that in future cases, the Court may be willing to do so by recognizing a Press Clause limitation on the otherwise expansive government speech doctrine.

A. *Summum* Does Not Preclude Press Clause Challenges to Government Expression

Because of the press’s constitutional purpose as the government’s watchdog, it is relatively straightforward to argue that government speech should be limited when it impedes that role.117 The press’s constitutional role is to provide the public with another perspective on

115 See id. at 1139 (Stevens, J., concurring) (contending that the Court’s decision was based on precedent).
116 E.g., Choose Life III., 547 F.3d at 859; Greene, supra note 41, at 68–69.
117 For discussion of the press’s watchdog role, see supra notes 81–93 and accompanying text. This argument has been propounded by some First Amendment scholars, such as Professor Nowak. Supra note 49, at 11 (concluding that “the press clause limits . . . government mass communications.”). Other scholars have suggested this conclusion obliquely. See Yudof, supra note 40, at 897 (noting possible First Amendment justifications for limits
the government’s activities, one which may be different from the official version of events. Without a strong press, that opposing viewpoint will be missing, and the First Amendment’s “interrelated goals of a robust public debate, an autonomous citizenry, and informed self-government would be significantly compromised.” However, as intuitively appealing as this construction of the Press Clause might be, the Supreme Court’s expansion of the government speech doctrine in Summum seriously jeopardizes its applicability. The Court’s view that “[t]he Government’s own speech is exempt from First Amendment scrutiny” and that “Government is not restrained by the First Amendment from controlling its own expression” might seem to definitively preclude any Press Clause restrictions on government speech. However, the Court may have spoken too broadly. While Summum closed the door on Speech Clause challenges to government speech, it opened a window for the Press Clause.

Indeed, despite the Court’s broad language, Summum’s holding reveals quite clearly that the decision was based on the Free Speech Clause, and not the Press Clause or the First Amendment as a whole. Members of the Summum organization claimed that the city’s speech violated their individual right to free speech, and not any right asserted as members of the press. And while some of the Court’s opinion appears to indicate that the government’s “right to speak for itself” is entirely exempt from First Amendment scrutiny, in the very same paragraph states that “the Free Speech Clause”—not the whole amendment—“does not regulate government speech.” In fact, the opinion later states that its holding “does not mean that there are no restraints on government speech,” specifically insisting that “government speech must comport with the Establishment Clause.” If the Establishment Clause, which is part of the First Amendment, is a viable restriction on government speech, then Summum’s broad government speech rights cannot be based on the entire amendment. Unfortunately, while Summum discussed the Free Speech and Establishment clauses, it remained silent regarding the Press Clause. The question of how the Court is likely to rule if faced with a challenge that particular government speech impinges on the press’s right to unfettered expression in violation of the Constitution remains open.

on government speech); Kamenshine, supra note 52, at 1107 (reading a “political establishment” prohibition in the First Amendment that would presumably protect Press Clause interests as well as free speech).

118 Supra notes 89–93 and accompanying text.

119 Cole, supra note 40, at 704.

120 See Yudof, supra note 40, at 898 (noting the “persuasive appeal” of this analytical approach).


122 Id. (quoting Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 139, n. 7 (1973) (Stewart, J., concurring)).

123 For a discussion of Summum’s holding, see supra notes 112–115 and accompanying text.

124 Summum, 129 S. Ct. at 1129, 1131.

125 Id. (emphasis added).

126 Id.

127 One suspects that the Court wanted to avoid the controversial issue of the circumstances in which the Press and Free Speech Clauses protect different rights discussed supra in notes 81–93 and accompanying text.
B. Courts May Consider Press Clause Limitations Differently

The dicta and concurrences in *Summum* indicate that the Court might be amenable to a special exception to its broad government speech doctrine when that speech interferes with the press. First, individual justices’ concurrences indicate a desire to keep the holding in *Summum* limited. For example, Justice Stevens notes that “even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses” and that “these constitutional safeguards ensure that the effect of today’s decision will be limited.”128 The most informative concurrence may be Justice Breyer’s, which was based on his view that the formalistic government speech doctrine could lead to perverse results.129 He suggested asking “whether a government action burdens speech disproportionately in light of the action’s tendency to further a legitimate government objective.”130 Under this standard, the Court might very well follow the Ninth Circuit’s lead and find that the Press Clause limits “government speech that makes private speech difficult or impossible”131—in other words, that most applications in which the government’s non-neutral speech displaces the media would be unconstitutional. But no matter which way the Court were to decide a future case, the holding, dicta and concurrences in *Summum* reveal that the Supreme Court’s confused government speech jurisprudence has not yet precluded such speech from being challenged on Press Clause grounds.132 If the Press Clause provides a First Amendment basis for actively limiting government speech, that basis is undisturbed by the holding in *Summum*. The next section considers whether such a basis exists.

C. Courts Should Consider Press Clause Limitations Differently

A primary purpose of the Press Clause was to establish a free, independent press to provide a check on government speech. Assuming that the government respects that freedom, the thinking goes, the press will be able to perform its checking function by acting as an independent speaker in the marketplace.133 In other words, the government can speak as it

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128 *Summum*, 129 S. Ct. at 1139 (2009) (Stevens, J., concurring); see also id. at 1141 (Souter, J., concurring) (contending that, “because the government speech doctrine . . . is ‘recently minted,’ it would do well for us to go slow in setting its bounds.”).

129 See id. at 1140 (Breyer, J., concurring) (declaring that, in his view, “courts must apply categories such as ‘government speech,’ ‘public forums,’ ‘limited public forums,’ and ‘nonpublic forums’ with an eye towards their purpose-lest we turn ‘free speech’ doctrine into a jurisprudence of labels” and hence “we must sometimes look beyond an initial categorization.”).

130 Id.

131 R.J. Reynolds Tobacco Co. v. Shewry, 384 F.3d 1126, 1140 (9th Cir. 2004), amended and superseded on denial of rehearing by R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906 (9th Cir. 2005).

132 For a discussion of the confused state of government speech doctrine, both in the courts and among scholars, see supra Part III.

133 Supra notes 81–93 and accompanying text.
wishes, because its viewpoint will be tested by the press in the marketplace of ideas. This is the indirect restriction many scholars agree is in the Constitution. But a fundamental assumption of this line of thought is that the press will always be able to speak loudly enough to counter the government’s version of events.

However, the media industry is in the midst of massive technological and economic changes, and those changes are fundamentally calling into question whether the media is—or will remain—strong enough to counter the government’s voice in the marketplace. We will explore these changes in detail later, but for the moment we can consider the question theoretically. If, arguendo, the assumption that the media can speak loudly enough to counter the government’s communication is false, the view of limitless government speech under the First Amendment becomes untenable.

Writers have noted several problems that government speech has the potential to raise. Of those dangers, the one that most clearly implicates the media is the possibility that government can speak in such a way as to drown out the voices of the media in the marketplace. Indeed, even as a “mass communicator,” it is difficult to see how the government’s own speech could limit the speech of individuals. But it can limit the effectiveness of the press’s speech. Thus, it is much more likely that government speech would impinge on the press’s right than on individuals’ rights.

Despite the presence of the First Amendment, it is possible—at least in theory—for government’s communication to exert such strong control over the press that it will have difficulty disseminating sufficient information to keep the government accountable. The government expends significant money and effort to promote its own viewpoints, so that opposing speakers often operate at a disadvantage. Hence, a government does not need to directly curtail the activities of private media outlets “if it can effectively displace them by

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134 See Nowak, supra note 49, at 5 (stating that “the most important reason why we have not had to confront a serious danger regarding propaganda is the existence of the private sector mass media . . . which has acted as a countervailing force to governmental speech.”).
135 See supra notes 81–93 and accompanying text (discussing the view that the Press Clause only passively limits government speech).
136 Infra Part IV.B.
137 See, e.g., Bezanson & Buss, supra note 15, at 1488–96 (describing problems of monopoly, deception and distortion, and attribution); Delgado, supra note 71, at 990 (noting concerns of “‘drowning out’, falsification of consent, and self-perpetuation”).
138 See The Supreme Court, 1986 Term—Leading Cases, supra note 45, at 210 (contending that government speech can “drown out competing views”).
139 See infra notes 217–220 and accompanying text.
140 Entman, supra note 21, at 66. Cf. Komp, supra note 70, at 328 (contending that issues surrounding the government speech doctrine raise “questions as to what happens when the very act of government speech . . . monopolizes the marketplace of ideas”).
141 Delgado, supra note 71, at 990. One commentator observes that the government’s speech poses even greater risks than corporate speech, because its financial resources are much greater than those of corporations, and it has a more compelling interest in dominating the marketplace of ideas. Cole, supra note 40, at 707.
subsidizing the ‘friendly’ press or, better still, by establishing an inexhaustibly more powerful press committed exclusively to its own view.”

When the government’s communication curtails First Amendment press rights, the letter and purpose of the Constitution dictate that the government’s right to speak must be subservient to that of the press. As other scholars have pointed out, the basis for this conclusion is quite clear. The Press Clause constitutionally enshrined the press as an essential “fourth estate” of government whose role is to provide the public a check on the activities of its government. But the “mass dissemination of information to the American public by government agencies circumvents and undercuts the role of the private sector press in our democratic system.” And if the government’s own accounts were to become the main way “by which the public received information about government actions, the press could not perform its checking function.” Communication by the government, if it replaces the press, can threaten the “processes of consent through indoctrination and the withholding of vital information, thereby undermining the power of the citizenry to judge intelligently and to communicate those judgments.” Hence, the Constitution dictates that the government cannot speak in a way that impairs the media’s ability “to engage in mass communications to the public regarding both political and nonpolitical matters of public concern.” When the government speaks in such a way as to overpower the press, the Constitution requires that the government’s speech be restricted.

V. MEDIUM, NOT CONTENT: THE FIRST AMENDMENT BASIS FOR RESTRICTING GOVERNMENT SPEECH

Hence, the Press Clause allows us to clear one hurdle. When it interferes with the press, the government’s speech must be restricted in order to preserve the press’s constitutional checking function. Other scholars have correctly recognized that it is what the Constitution requires. However, even scholars who have correctly identified the constitutional problem with government speech have had difficulty overcoming a second obstacle: crafting a solution to

143 Supra notes 89–93 and accompanying text.
144 Nowak, supra note 49, at 24.
145 Id. at 35.
146 Yudof, supra note 40, at 898.
147 Nowak, supra note 49, at 15.
148 Steven Shiffrin, Government Speech, 27 UCLA L. REV. 565, 607 (1979) (“If a system of free expression is to be preserved, either custom, or statutes, or constitutionally based limitations must provide assurances that government speech will not unfairly dominate the intellectual marketplace.”).
149 See, e.g., Nowak, supra note 49, at 11 (concluding that “the press clause limits . . . government mass communications.”). Although Professor Nowak explains this conclusion most explicitly, other scholars have recognized its veracity as well. See Yudof, supra note 40, at 897 (noting that the historical assumptions about government and the role of the Constitution “justify and interpretation of the first amendment that encompasses limits on government expression”). Note, however, that these authors all wrote before the Supreme Court’s Summum decision. No author has yet investigated the Press Clause implications of government speech after Summum.
the constitutional problem is difficult because answering the question of whether the Press Clause can impose limits on government speech does not help us determine when those limits should apply.

A. The Problem: Content-Based Regulation of Government Speech

The root of this conceptual difficulty is the “dual nature” of government speech as both necessary for good administration and potentially threatening an informed, autonomous citizenry. Even commentators who believe that some government speech is impermissible recognize that most is not only allowed, but necessary for good governing. The Supreme Court has said that “[t]o govern, government has to say something,” and “it is not easy to imagine how government could function if it lacked” this freedom. On the other hand, the First Amendment countenances the danger that government will misuse that freedom for propaganda. But between these “polar extremes—the provision of information to members of the body politic and attempts to sway public opinion through propaganda that stifles dissent—it [is] difficult for the Court to draw a line concerning the permissible scope of government speech.”

Unfortunately, this perceived difficulty has caused some of the leading commentators to settle for much weaker limitations on government expression than the Press Clause might otherwise permit. But there is a simple reason commentators have reached these logical impasses: they have confused the issue. It may true that the government speaks on a multitude of subjects, and that distinguishing between what content is acceptable and what content is propaganda is a daunting task. But the Constitution does not require that we distinguish good

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150 See Yudof, supra note 40, at 898 (arguing that the explicit constitutional limitation does not “comport with the dual nature of government expression”).

151 Supra notes 40–42 and accompanying text.


153 Supra notes 43–52 and accompanying text.

154 RONALD D. ROTUNDA & JOHN E. NOWAK, 5 TREATISE ON CONSTITUTIONAL LAW § 20.11(b) (4th ed. 2008).

155 Professor Yudof, for example, recognizes that the Constitution could provide a basis for limiting government speech. Yudof, supra note 40, at 898. But the difficulty distinguishing between “government propaganda and indoctrination” and “government information” leads him to the rather weak conclusion that direct restrictions are unworkable, and the best solution is an indirect “chipping away” at the problem by allowing government speech concerns to inform traditional First Amendment decisions. Yudof, supra note 40, at 899, 906. Professor Kameshine distinguishes between “political” and “nonpolitical” speech, and suggests prohibiting only the former, but immediately recognizes that drawing that line “may be difficult”—and fails to explain what, exactly, nonpolitical governmental speech is. Kamenshine, supra note 52, at 1113. To the extent that nearly all the government says is “political,” his test might be much more restrictive in practice than it appears in theory. Likewise, Professor Nowak observes that the government is engaged in a host of different types of speech, and hence that it is impossible “for the judiciary to create a single test . . . that would determine the constitutionality of all forms of government speech.” Nowak, supra note 49, at 34. He only reaches the modest conclusion that there are no absolute constitutional bars and that right-of-reply to government expression is enough. Nowak, supra note 49, at 41; see also Shiffrin, supra note 148, at 600–01 (noting “the concern that government speech could result in unacceptable domination of the marketplace and the need for measures to confine the danger” but concluding that “drowning out” considerations provide an “unworkable test”).

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government speech from bad based on its content. Instead, the distinction between permissible and impermissible speech should be based on the medium the government uses.

B. The Solution: The Practical Basis for Medium-Based Restrictions

The government has been speaking persuasively to the American public since the days of the Revolution, but the vast majority of scholarly articles and judicial decisions identifying government speech as a problem have been written very recently. Other commentators have noticed this phenomenon, but none has examined its implications. Government is saying the same things to the public as it always has—if anything, its proclamations have tended to be more measured and moderate than in the past. Thus, the reason that government speech is raising concerns that it did not raise before cannot be its content. What has changed is the medium the government uses. The problem is not what the government is saying, it is how it is saying it—and therein lies the solution to restricting government speech.

i. New Media and The Advent of the Internet

The lack of explicit constitutional restrictions on government speech may partly be explained by the fact that the Framers did not foresee the possibility that “government might speak so loudly that it would drown out other voices.” Many of the pioneers of government speech theory operated from the same assumption. But the Framers and early scholars had no way of fully comprehending the effects of the rapid rise of powerful new communication media that would call that assumption into question. Nearly all academic discussion of the problem of government speech has taken place over the past twenty-five years, and most of it has been much more recent than that. During that time, communication technology has experienced changes that are nothing short of revolutionary. In 1979, when Professor Yudof wrote his seminal article on government speech, he concluded that government speech using modern technologies created new constitutional problems. But at that time, cable television was only in one in five

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156 Although the proliferation of Free Speech and Free Press litigation generally is a relatively recent phenomenon in American constitutional law, MARC A. FRANKLIN ET. AL., MASS MEDIA LAW 2–7 (7th ed. 2005), government speech doctrine is even more recent. For example, Professor Yudof’s article, supra note 40, identified by many as the seminal article on government speech scholarship, was written in 1979.

157 See supra notes 15–29 and accompanying text (describing ways different governments spoke in the past); GELDERMAN, supra note 17, at 1–10 (chronicling the rise of the presidential “bully pulpit” from Theodore Roosevelt’s presidency onward).

158 Schauer, supra note 16, at 383.

159 See Van Alstine, supra note 142, at 534 (noting that, thus far the problem of powerful government speech “has been largely hypothetical”); Kamenshine, supra note 52, at 1153 (conceding that government advocacy does not presently pose “a serious threat to democratic processes in this country”). This may help explain why the First Amendment limitations these authors proposed, if any, were generally rather weak. See supra notes 155 and accompanying text (describing the weak limitations proposed by other scholars).

160 Yudof, supra note 40, at 10–12.
homes. In 1985, Professor Delgado noted that communications technology could magnify the government’s already powerful voice, but the technologies he had in mind were “reports, releases, films, commercials, and press conferences.” Three years later, when Professor Nowak first proposed Press Clause limitations on government speech, one way he justified his conclusion was by pointing to the rapid changes in mass media technology. His fear, though, was the growth in cable television and the widespread use of communications satellites. While these authors foreshadowed the government-speech implications of new technologies, they all wrote before the widespread adoption of the most powerful new technology of all—the internet. None of them mentions personal computers, much less the internet. Yet now, a few decades later, the internet is indisputably becoming the world’s prime communication medium.

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162 Cellular phone technology was invented in the early 1970s, Radio Telephone System, U.S. Patent No. 3,906,166 (filed Oct. 17, 1973), but was not widely available for much of the 1980s. See, e.g., Peter J. Schuyten, Mobile Phones: New Advances, N.Y. TIMES, Apr. 17, 1980, at D2 (“Obtaining a mobile radiotelephone service in some large metropolitan areas is all but impossible these days . . . [a]nd the few who do manage to get one find out quickly that using the service can be a trial at best.”); Tom Farley, The Cell-Phone Revolution, AM. HERITAGE INVENTION & TECH., Winter 2007, at 8, available at http://www.americanheritage.com/articles/magazine/it/2007/3/2007_3_8.shtml (providing an excellent discussion of the history of cell phone technology in the United States). Personal computers predated cell phones somewhat, but did not gain much public acceptance until the 1980s. See Yonatan Even, The Right of Integrity in Software: An Economic Analysis, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 219, 229 n.27 (2006) (explaining that “[t]he first home/small office computers appeared on the market as kits in 1975–1976.”). Of the three technologies, the internet was the last to become mainstream. Barry M. Leiner et al., A Brief History of the Internet, INTERNET SOCIETY, Dec. 10, 2003, available at http://www.isoc.org/internet/history/brief.shtml (noting that by 1985, while the “Internet was already well established as a technology supporting a broad community of researchers and developers,” it was merely beginning to be used “other communities for daily computer communications”).
163 Delgado, supra note 71, at 990–91.
164 Nowak, supra note 49, at 6.
165 Id. at 6–7.
166 The first academic article to raise the government-speech implications of the internet was published in 1999, and only addressed the topic superficially. See Steven G. Gey, Fear of Freedom: The New Speech Regulation in Cyberspace, 8 TEX. J. WOMEN & L. 183, 185–86 (1999) (discussing government speech theory’s impact on internet access at public libraries).
The internet is different from—and more powerful than—older communication media for several reasons. It has opened up new means of communication, such as chat rooms, newsgroups and e-mail, which can be transmitted across vast distances “without degradation, decay, or substantial delay.”

It permits mass communication at much lower cost. Internet media is more durable than print or broadcast media, because its content can be easily and repeatedly accessed over a longer period of time. It is very pervasive, much more so than equivalent print forms. For example, internet messages can be amplified by repeated forwarding, allowing recipients to become speakers in their own right. It is both easy to access and easy to disseminate information on the internet. And, unlike other media, the

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169 Thomas B. Nachbar, Paradox and Structure: Relying on Government Regulation To Preserve the Internet’s Unregulated Character, 85 MINN. L. REV. 215, 215 (2000) (explaining that the “Internet allows people to communicate quickly, across the globe, and at extremely low cost”).
171 See Lyrissa Barnett Lidisky, Silencing John Doe: Defamation and Discourse in Cyberspace, 49 DUKE L.J. 855, 863 (2000) (noting that internet communications are “communicated through a medium more pervasive than print,” and commenting on the implications of that fact in defamation law); see also Laura Leets, Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?, 6 COMM. L. & POL’Y 287, 288 (2001) (“As scholars have noted, the Internet is a powerful forum of communication with its broad reach, interactivity and multi-media capability to disseminate information.”).
172 Stacey D. Schesser, Comment, A New Domain for Public Speech: Opening Public Spaces Online, 94 CAL. L. REV. 1791, 1797 (2006); see also Lidisky, supra note 171, at 864 (noting how easy it is for individuals to rapidly “republish” information received via the internet).
173 Regarding the ease of access, see Joel M. Schumm, Names, Please: The Virtual Victimization of Children, Crime Victims, the Mentally Ill, and Others in Appellate Court Opinions, 42 GA. L. REV. 471, 475–76 (2008) (“The pervasiveness of Internet access and the ease with which information of all types and sources may be accessed by search engines such as Google now allow virtually anyone—employers, neighbors, acquaintances, and even adversaries—to access a wealth of personal information about others with a few keystrokes.”); Alan F. Williams, Prosecuting Website Development Under the Material Support to Terrorism Statutes: Time to Fix What’s Broken, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 365, 399 (2008) (noting how the Supreme Court has sometimes exclusively focused on strengths of the internet, such as “a vast virtual library of reach, the ability of those with limited means to publish, a decentralized structure, the lack of significant control or supervision, and ease of access”).
Regarding the ease of dissemination, see Jennifer LaMaina, Wipe Out in ACLU v. Johnson: Can Any Regulation of Surfing the Net Withstand Constitutional Scrutiny?, 8 VILL. SPORTS & ENT. L.J. 137, 137 (2001) (“The Internet (‘Net’) is an increasingly powerful medium in twenty-first century society, interconnecting people and ideas on a global scale. Never before has the dissemination of information, images and messages been so effortless and unrestricted as it has been in cyberspace.”).
internet is a largely unregulated medium where, most often, “anything goes.” Thus, commentators have noted how internet content is permeating every American’s daily life.

The lack of regulation, the flexibility of technology and the two-way ease of access have resulted in a massive proliferation of individual speakers on the internet. Indeed, “[w]ith the rise of the Internet as a powerful medium of mass communication and a new public forum, anyone with a dial-up account ‘can become a town crier with a voice that resonates farther than it could from any soapbox.’”

The implications of the Internet’s rapid development for the function performed by an expressive access right should be obvious. The Internet provides private individuals with the opportunity to circumvent the institutional media as both a source of communicative power and as a method of information retrieval. It may be true that an individual’s power to reach the public through the Internet does not match that of a national television network. The fact remains, however, that the individual’s power to instantaneously convey her message to a wide audience has grown significantly in recent years, because of this technological advance.

This proliferation of voices might seem to bode well for democratic discourse and provide an important check on improper government speech. Indeed, some writers—especially during the internet’s infancy—felt that the internet would provide greater access to the marketplace of ideas. But recent empirical research supports the opposite conclusion: the internet may be making communication less democratic. Surprisingly, websites’ “visibility” to internet users is

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174 Sato, supra note 168, at 709 (describing the internet as “highly unregulated; cyberspace is not subject to any central control and operates without any supervision. . . . Since there is no supervising or police-like authority which overlooks activity on the Internet, ‘anything goes’ in cyberspace”). See also Nachbar, supra note 169, at 215 (calling the internet “a place with relatively few rules”).

175 See William D. Araiza, Captive Audiences, Children and the Internet, 41 BRANDEIS L.J. 397, 407–08 (2003) (applying “captive audience theory” to the internet and concluding that it raises the same perversiveness concerns as radio transmissions); see also Rothman, supra note 170, at 138 (“Internet media is much more pervasive than traditional media.”).


178 E.g., Donald J. Kochan, The Blogosphere and the New Pamphleteers, 11 NEXUS 99, 99 n.2 (2006) (quoting Jeffrey Rosen, The End of Obscenity, BALT. SUN, June 28, 1996, at 15A) (contending that the internet is “reducing the costs of entry for both speakers and listeners and creating relative equality” among participants, helping to establish “a perfectly deregulated marketplace of ideas”); Lidsky, supra note 171, at 894 (asserting that “the Internet promises to eliminate structural and financial barriers to meaningful public discourse, thereby making public discourse more democratic and inclusive, less subject to the control of powerful speakers, and, at least potentially, richer and more nuanced” and that it therefore “promises to make the marketplace of ideas more than just a hollow aspiration.”); Eugene Volokh, Cheap Speech and What it Will Do, 104 YALE L.J. 1805, 1832 (1995) (positing that the internet might “both democratize the information marketplace—make it more accessible to comparatively poor speakers as well as rich ones—and diversify it”).
actually very skewed, with a very few highly-visible websites and a very “long tail” of nearly invisible ones. Because “the topology of the Web prevents us from seeing anything but a mere handful of the billion documents out there,” one of the most influential empirical studies found a “complete absence of democracy, fairness, and egalitarian values on the Web.” On the internet, while everyone has theoretically equal power to communicate, in reality a handful of powerful speakers can dominate the speech marketplace.

ii. Government’s Use of the Internet

Evidence shows that the U.S. government is making use of the internet’s power to become one of that handful of dominant speakers. The internet is rapidly becoming the government’s prime method of communicating with the public. The Louisiana State University Libraries Federal Agency Directory counts nearly 1400 distinct federal government websites, and more than 11,400 state and local governments now have publicly-accessible websites online. Moreover, many Americans support using the internet in a limited role to communicate with their public officials. And perhaps the most successful user of the internet


180 Bracha & Pasquale, supra note 179, at 1159 (quoting ALBERT-LÁSZLÓ BARABÁSI, LINKED: HOW EVERYTHING IS CONNECTED TO EVERYTHING ELSE AND WHAT IT MEANS FOR BUSINESS, SCIENCE, AND EVERYDAY LIFE 56 (2003)).


183 See Rebecca Fairley Raney, National Briefing Washington: Poll on Internet’s Role in Governance, N.Y. TIMES, Feb. 26, 2002, at A20 (citing a poll conducted by the Council for Excellence in Government that found that nearly two-thirds of respondents felt that “e-mail messaging would make agencies and public officials more accountable, but 63 percent reject the idea of casting votes for federal offices via the Internet”).
in federal government history is our new president. Not only did his campaign’s masterful use of the power of the internet play a large part in getting Barack Obama into the White House, but the president has made it a clear priority of his new administration to use the internet to build consensus, to advocate for the passage of legislation, and to foster transparency, all by communicating his message “directly to the public.”\footnote{Michael J. Gerhardt, Privacy, Cyberspace, and Democracy: A Case Study, 32 CONN. L. REV. 907, 916 n. 33 (2000). For a discussion of the historical concept of the presidential “bully pulpit,” see generally GELDERMAN, supra note 17; see also Parisella, supra note 30 (noting that “Obama firmly believes the presidential bully pulpit is the way to go” and that he uses the internet “to sell his policies directly to the American public.”).} The internet offers presidents a modern “bully pulpit” that can allow them “simply to bypass Congress and the media that they do not like (or that does not like them) and to address the public whenever they please as directly as possible.”\footnote{Cillizza, supra note 31. President Obama has also been a master at reaching the audience he wants, rather than the one the media has picked for him. See Obama To Appear on “The Tonight Show” Thursday (NPR radio broadcast Mar. 17, 2009), available at http://www.npr.org/templates/story/story.php?storyId=101988460 (noting how Obama will be the first sitting president to appear on “The Tonight Show” but will also be the first president since Grover Cleveland to decline his inaugural invitation to the Gridiron Dinner).} Recognizing that, thanks to the internet, “the power of the media is overrated,” President Obama and his team have “push[ed] out the message that he wanted to dominate the day rather than the message the media was focused on.”\footnote{Parisella, supra note 30. Stolberg, supra note 5.} With Obama, the presidential bully pulpit has expanded again. Already labeled the Internet President, Obama is evidently intent on getting out of the Washington “bubble” to sell his policies directly to the American public. His regular use of the bully pulpit since the inauguration has kept his personal approval ratings high, above even the levels of support his policies enjoy.\footnote{Cillizza, supra note 31.} The talk in Washington is how “Mr. Obama will transfer his technological tricks from the campaign trail to the White House, and use his impressive social networking skills to rally support for an ambitious agenda.”\footnote{Stolberg, supra note 5.} Those efforts have already begun in earnest. For example, the president has used YouTube to change a presidential routine—the weekly Saturday radio address\footnote{For a description of President Bush’s use of the radio address, and its middling results, see Bumiller, supra note 27.}—into a newsworthy event.\footnote{Cillizza, supra note 31.} Members of the public, who spent more than 14 million hours during the campaign watching official videos on the internet,\footnote{Wagner, supra note 30.} have already logged onto the weekly address site millions of times.\footnote{See, e.g., YouTube, Your Weekly Address, http://www.youtube.com/watch?v=RDfpd8GV9dI (last visited Mar. 19, 2009) (showing more than a million views of the January 24, 2009, weekly address).} The audio version of the address is consistently

\footnote{Supra note 32 and accompanying text. Supra note 5 and accompanying text.}
among the ten most popular podcasts on iTunes. And one of the primary vehicles the administration has used to garner support for the $787 billion American Recovery and Reinvestment Act is the White House’s recovery.gov website. The messages contained in these websites and podcasts are by no means sinister propaganda. In them, the president and his team do what other administrations have always done—speak to the public to advocate for their point of view. But the messages are unquestionably persuasive, all the more so because of the government’s use of the new media. Now, more than ever, a robust press corps is needed to question the government’s view of events. What raises a constitutional problem is that a strong press might soon not exist.

iii. The Demise of Traditional Mass Media

What exacerbates the problem of the government’s increasingly prominent message is the fact that the mass media is rapidly transforming toward a form that provides less checks on government speech. In March, 2009, after 146 consecutive years of publishing the Seattle Post-Intelligencer printed its last issue. Two weeks earlier, the Rocky Mountain News shut down, and within two weeks, the Tucson Citizen folded as well. This left each of these cities with only one daily—and industry observers suggest that some of these one-newspaper markets will soon become “no-newspaper markets.” This has already happened in smaller markets: on March 23, 2009, the New York Times reported that four Michigan markets—Flint, Saginaw, Bay City and Ann Arbor—would be losing their daily papers. Many other newspapers are on the brink of bankruptcy or are searching for buyers. And other media are not immune. Between

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194 Apple iTunes, Podcast Homepage, Top Podcasts (last visited Mar. 19, 2009).
196 RECOVERY.GOV, www.recovery.gov (last visited Mar. 19, 2009). The website is currently run by the White House’s Office of Management and Budget, Alice Lipowicz, Officials Struggle with Data for Recovery.Gov, FED. COMPUTER Wk., Mar. 19, 2009, http://fcw.com/articles/2009/03/19/data-is-a-challenge-for-recovery.gov.aspx, but its functions may eventually be transferred to the Recovery Accountability and Transparency Board, an oversight group established by the American Recovery and Reinvestment Act, Who Runs Recovery.gov?, RECOVERY.GOV (last visited Mar. 19, 2009). Although it is characterized as an informational resource, the site is unquestionably designed to persuade. The website features a video of the president explaining and promoting the Act, and describes how it will “save or create good jobs immediately.” While the website declares itself the “centerpiece” of the government’s efforts at “full transparency and accountability,” id, some commentators are skeptical. See Chris Soghoian, Recovery.Gov Blocked Search Engine Tracking, CNET NEWS, Feb. 19, 2009, available at http://news.cnet.com/surveillance-state/?tag=rb_content,overviewHead (analyzing the technical design of the website and wondering if it provides evidence that the administration’s “much-publicized commitment to transparency is simply hype”).
197 See, e.g., supra note 196 (noting the persuasive elements of the recovery.gov website).
200 id.
202 Pérez-Peña, supra note 199.
2002 and 2007, for example, total viewership for evening network news dropped nearly 20%.

Local television and radio news stations have experienced similar trends.

The implosion of traditional news outlets can be attributed to a multitude of causes, but many commentators agree that the internet is a prime factor. According to a recent survey by the Pew Research Center for the People and the Press, Americans are largely abandoning print newspapers as they turn to the internet for news. Furthermore, while online readership is growing rapidly, that growth has failed to offset the decline in print readership so overall news consumption is decreasing. Between 2000 and 2008, the percentage of respondents who read print newspapers for their news decreased by nearly 30%, while the percentage of internet news readers increased more than 60%, and for the first time, more respondents used the internet for news than newspapers or radio newscasts. As readership has dropped, so has advertising revenue, which is the lifeblood of the newspaper industry, declining approximately 25 percent

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205 See, e.g., Project for Excellence in Journalism, Network TV, in The State of the News Media 2008: An Annual Report on American Journalism (2008), available at http://www.stateofthenewsmedia.org/2008/narrative_special_advertising.php?media=13 (concluding that “digital technology . . . has, effectively, splintered mass media.”); Richard Pérez-Peña, Paper Cuts: An Industry Imperiled by Falling Profits and Shrinking Ads, N.Y. TIMES, Feb. 7, 2008, at C1 (pointing out that newspaper advertising revenue fell in 2007, and attributing the decline to the “long-term shift of advertising to the—especially classified ads for things like jobs, cars and houses” that accelerated in 2006 and also noting the industry consensus that “newspapers have done a poor job adapting to the Internet and working creatively and aggressively to sell ads.”); see also Adam Candeub, Media Ownership Regulation, the First Amendment, and Democracy’s Future, 41 U.C. DAVIS L. REV. 1547, 1609 (2008) (arguing that the internet “is transforming media structure”).

206 Pew Research Center for the People & the Press, Newspapers Face a Challenging Calculus: Online Growth, but Print Losses are Bigger (2009), available at http://pewresearch.org/pubs/1133/decline-print-newspapers-increased-online-news. In 2006, 43% of respondents said they read a newspaper yesterday—either in print or online—but two years later that number had dropped to 39%.

207 See Pew Research Center for the People & the Press, Key News Audiences Now Blend Online and Traditional Sources (2008), available at http://people-press.org/report/444/news-media, (percentage of survey respondents who responded “read a newspaper yesterday” dropped from 47% to 34% while percentage “online for news three or more days a week” increased from 23% to 37%).
since 2007.\textsuperscript{208} Classified websites like Craigslist.com have been to print classifieds what “the internal combustion engine was to horse-drawn buggies.”\textsuperscript{209} By most accounts, the traditional mass media is an endangered species.

Instead, traditional news outlets are rapidly being replaced by online sources. In 2008, the internet surpassed all sources except television as the destination for national and international news.\textsuperscript{210} This shift has changed the way the public receives its news. Although some internet content is provided by traditional media companies who have gone online, much of it also comes from brand-new, electronic-only sources. In 2008, for example, three of the top five news sites by traffic volume, according to one survey, had no traditional analogue—Yahoo News, Google News and the Drudge Report.\textsuperscript{211} And other online sites continue to be ascendant. After barely registering in the political debate in 2004, huffingtonpost.com was among the twenty most visited sites during the 2008 election.\textsuperscript{212} Between 2007, politico.com and realclearpolitics.com both increased their readership by about 500\%.\textsuperscript{213} Studies have shown that these changes make a difference—online news outlets report the news differently than “legacy” media. For example, in 2008, the Rod Blagojevich scandal was the sixth-most popular story in print and broadcast, but did not crack the top ten online.\textsuperscript{214}

The internet has not only redefined the major players, but it has also dramatically increased their number. The internet’s very nature makes online news cheaper to produce, and hence allows for more outlets. And more outlets allows each to be much more topic- or viewpoint-specific, which some commentators have called the “splintering” of the news online.\textsuperscript{215} For instance, a single individual might visit cnn.com for her national news, slate.com for political commentary, espn.com for sports and tmz.com for celebrity gossip. Liberals have Daily Kos, conservatives have the Drudge Report, and libertarians have libertarian.com. Roman

\textsuperscript{208} Pérez-Peña, supra note 199; see also Pérez-Peña, supra note 205 (reporting the decline in advertising revenue).

\textsuperscript{209} Pérez-Peña, supra note 199.


\textsuperscript{213} Id.


Catholics can visit catholicnews.com while Evangelicals browse CBN.com. Five people who may have previously been faithful NBC Nightly News watchers might very well depend on five totally different news sources once they make the switch online. Thus, as the internet creates a much larger number of speakers, each one’s voice becomes relatively less strong.  

The reason this matters, from a constitutional standpoint, is that the new internet media may prove a poor substitute for the traditional media’s checking function of government speech. An influential empirical study found that, from 1996 to 2000, politically interested Internet users abandoned traditional media at a much greater rate than they increased their use, and did so at a greater rate than internet users who were not interested in politics. Thus, instead of the situation that prevailed in the past—where several large media outlets were influential enough to coherently challenge the government—the number of speakers is multiplying to the point where none of them will have sufficient influence to counter the government’s story. The splintering of the news on the internet has been called a “media dystopia,” and it raises concerns that the new media will be unable to perform the same role as the traditional mass media. The transition to digital-only newspapers “may presage an era of news organizations that are smaller, weaker and less able to fulfill their traditional function as the nation’s watchdog.”

C. The Legal Basis for Medium-Based Restrictions on Government Speech

Medium-based restrictions are not only wise from a practical standpoint; they also have a sound basis in Constitutional theory and in judicial history. First, other cases provide precedent for medium-based restrictions on speech that would normally be protected by the First Amendment. In FCC v. Pacifica Foundation, the Supreme Court held that the FCC could regulate “indecent” content on the airwaves—even if the same content might be protected if it were published in print—and that a New York radio station had therefore violated the law when it broadcast George Carlin’s “filthy words” monologue in the middle of the afternoon.

216 MIT’s Nicholas Negroponte has dubbed the new custom-edited newspapers “The Daily Me.” Mark S. Nadel, Customized News Services and Extremist Enclaves in Republic.Com, 54 STAN. L. REV. 831, 833 (2002) (citing NICHOLAS NEGROPONTE, BEING DIGITAL 153 (1995)). In his book Republic.com, Professor Cass Sunstein argues that over-reliance on Daily Mes threatens the very foundations of American democracy by “restrict[ing] the attention of even open-minded citizens to the few areas of their specialized interests.” Id. (reviewing CASS SUNSTEIN, REPUBLIC.COM (2001)). Professor Sunstein worries that excessive use of customized internet news will “leave individuals oblivious of many of the shared experiences that now unify the nation as well as the challenging new viewpoints and issues that now reach them via unexpected or unchosen exposures”). Id.


218 Candeub, supra note 205, at 1554.

219 Id.

220 Pérez-Peña, supra note 199.

According to the majority opinion, “each medium of expression presents special First Amendment problems.” The special problem that broadcasts over the airwaves presented was their pervasiveness. “Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.” Because the medium in *Pacifica* was more pervasive than others, the FCC could restrict it in ways that would be impermissible with respect to other media and still remain within the bounds of the Constitution. Analogizing to *Pacifica*, some commentators have proposed similar medium-based restrictions on the internet outside the government speech context. Others argue that the internet is even more pervasive than broadcasts.

In another example of medium-based restriction on speech, in *Wooley v. Maynard*, the Supreme Court upheld an injunction that allowed a group of New Hampshire Jehovah’s Witnesses to conceal the “Live Free or Die” motto emblazoned on state license plates. The Court held that the state could not compel citizens to become couriers for its message, but explicitly refused to hold that the message itself was inappropriate. Therefore, *Maynard* limits “the ways a state can speak and not the substance of its expression.”

A potential barrier to these proposed medium-based constitutional restrictions of government speech is the fact that American courts have generally accorded speech on the internet broad protections under the First Amendment. *Reno v. American Civil Liberties Union*, the first U.S. Supreme Court case to address the issue, involved a challenge to federal legislation limiting the dissemination of sexual content on the internet. Analogizing to *Pacifica*, the government argued that the internet should receive less constitutional protection than other forms of speech. But the Supreme Court explicitly rejected this argument, according the highest

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222 Id. at 748.
223 Id.
224 Bruce W. Sanford & Michael J. Lorenzer, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1151 (1996) (noting how “*Pacifica* illustrates the Supreme Court’s attempt to distinguish among the various media based on the level with which they intrude into the average person’s daily life and the ease with which exposure to offensive material distributed by way of those media can be avoided.”).
225 See generally id. (proposing some content restrictions).
226 See Mehmet Konar-Stenberg, *The Needle and the Damage Done: The Pervasive Presence of Obsolete Mass Media Audience Models in First Amendment Doctrine*, 8 VAND. J. ENT. & TECH. L. 45, 67 (2005) (contending that “WiFi, distributed computing, popups, and convergence devices are giving new meaning to the phrase ‘pervasive presence’” on the internet); Araiza, *supra* note 175, at 408 (arguing that, like in *Pacifica*, “users of the Internet may be put to a very difficult choice,—use an extraordinarily powerful information medium, present in the home and always beckoning, or leave.”).
228 *Id.* at 717.
229 Yudof, *supra* note 40, at 892.
231 See Brief for the Appellants at ¶ (C)(1)(a), *Reno v. American Civil Liberties Union*, No. 96-511 (U.S. Jan. 21, 1997), available at http://www.ciec.org/SC_appeal/970121_DOJ_brief.html (arguing that “[t]he approach Congress enacted is constitutional under *Pacifica*” because “[l]ike broadcast stations, the Internet is establishing an increasingly ‘pervasive presence’ in the lives of Americans.”).
level of scrutiny to communications on the internet.\footnote{232} The Ninth Circuit has explained that First Amendment protections on the internet are equivalent to those granted “prior to the high-tech era.”\footnote{233} And the Second Circuit has also expressed its disinclination towards judicial activism regarding its application of the First Amendment to the internet.\footnote{234}

However, the fact that American courts have almost universally given speech on the internet broad protections does not preclude regulating government speech. If anything, it supports it. We have seen that the threat posed by government speech on the internet is the drowning out or interference with the public’s free expression and the media’s checking function. And courts have been much more solicitous toward individual speech than toward any countervailing governmental interests—even ones with particular “legitimacy and importance.”\footnote{235} Limiting government speech is consistent with these judicial priorities, and hence does not conflict with Supreme Court internet speech decisions.

Furthermore, medium-based Press Clause restrictions on government speech are justified by the constitutional purpose of the Clause. The purpose of the Press Clause was to establish the press as a watchdog on government. An implicit assumption was that the press would always be able to speak strongly enough to perform that function, so long as it was free from active attempts by the government to silence it. But technology has called that assumption into question. Many commentators now agree that the government has the means to dominate the “marketplace of ideas.”\footnote{236} The weakening of traditional media means that the balance of power in the marketplace is shifting toward the government—so the implicit limitations provided by the Press Clause’s freedoms are no longer enough. To preserve the Press’s constitutional checking role in the internet age, active prohibitions are required. If courts find that government speech via a particular medium is drowning out the press, the government’s speech must be silenced.

VI. CONCLUSION

The rise of the government media and the decline of traditional mass media are in the process of creating an environment that the first scholars to write about government speech never

\footnote{232} \textit{Reno v. American Civil Liberties Union}, 521 U.S. at 868–70.
\footnote{233} \textit{Clement v. Cal. Dept. of Corrections}, 364 F.3d 1148, 1151 (9th Cir. 2004).
\footnote{234} \textit{See Name.Space, Inc. v. Network Solutions, Inc.}, 202 F.3d 573, 584 (2d Cir. 2000) (observing that “the lightning speed development of the Internet poses challenges for the common-law adjudicative process” and hence left the court “wary of making legal pronouncements based on highly fluid circumstances”).
\footnote{235} \textit{Reno v. American Civil Liberties Union}, 521 U.S. at 849.
\footnote{236} \textit{See, e.g.}, Kamenshine, \textit{supra} note 52, at 1104, 1106 (contending that the “government has the potential to use its unmatched arsenal of media resources . . . to obtain political ends, to nullify the effectiveness of criticism, and, thus, to undermine the principle of self-government” and that “[t]he penetration of government into more and more aspects of modern life, including the field of mass communication . . . raise[s] grave issues as to the proper role of government in controlling communication and molding thought and expression in a democratic society.”); Nowak, \textit{supra} note 49, at 4–5 (stating that “the government, more than any corporate entity or group of private persons, has the ability to convince a large segment of the populace to support specific provisions regarding social or governmental policy.”); Komp, \textit{supra} note 70, at 870 (suggesting that some communications can be so voluminous as to “inundate the marketplace”).
thought would be possible. The internet is eroding the power of the traditional media, while simultaneously reinforcing and consolidating the government’s power as a speaker. And the online “new media”—the internet news sources that are supplanting traditional media outlets—are too fragmented to provide a coherent alternative to the government’s version of events. At least for the time being, the government is emerging as one of the few monolithic speakers on the internet. These dynamics are working together to create the very real possibility that the government’s speech on the internet will drown out the mass media.

This is not to say that the government’s message is inappropriate. So far, the Bush and Obama administrations have used the internet for the same types of speech as government has always engaged in. But while the content has remained the same, the context of government speech has changed. The government’s use of the internet has the potential to limit—if not outright negate—the media’s constitutional role as the “fourth estate,” the check on government enshrined by the Press Clause of the First Amendment. It is the government’s access to the power of the internet, and not its speech itself, that raises constitutional problems. Therefore, the Constitution requires that the government’s use of that medium be restricted to the extent that it interferes with the checking function of the press.

The purpose of this paper is not to argue that the government should never be allowed to speak persuasively—that is an essential function of government which should be preserved. Nor is its purpose even to argue that the government can never speak persuasively on the internet. Instead, its goal is to point out that Press Clause protections are fundamentally different from Free Speech protections, and that distinction is very important for future legal challenges to persuasive government speech. The Supreme Court’s recent decision in Summum precludes Free Speech challenges, but leaves the door open to challenges grounded in the Press Clause. Moreover, contrary to historical government speech theory, the rise of the internet is in the process of dramatically changing the balance of power between the government and the press, a balance that was created in the Constitution to promote democracy and discourage despotism. Both legal and factual circumstances suggest that courts may soon be called upon to adjudicate whether particular forms of government speech unconstitutionally limit the press’s checking function. When that happens, courts should abandon the current standard that “government is entitled to say what it wishes.” Instead, the Press Clause allows government speech to be silenced when it interferes with the press’s checking function. And the determination of what speech “interferes” should be based on the medium the government uses, and not the content it expresses. The next challenge to government speech may very well be made in the context of internet communication, and because the medium itself is so powerful that its use by the government raises serious constitutional concerns, courts should give serious consideration to restricting persuasive government speech on the internet.