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

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\(^5\) *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 a 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
have voiced concerns. One 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 re-

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7 E.g. Jimmy Orr, Going Online with Obama: Will He Play Fair?, CHRISTIAN SCIENCE 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.
cent 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.

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

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14 See infra Part III.B.iii.
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 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

municates about one particular topic—the environment—see Jonathan Cannon & Jonathan Riehl, Presidential Greenspeak: How Presidents Talk About the Environment and What It Means, 23 STAN. ENVT'L. L.J. 195, 198–99 (2004). According to Cannon and Riehl, presidents use their “bully pulpit” to “appeal directly to the public”—for example, to sway opinion against recalcitrant legislators, to affect their chances for reelection, and also to achieve “immediate policy objectives.” Id.


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

Id. at 7–8.


promoted and justified controversial post-9/11 national security programs to the public on dozens of occasions.\textsuperscript{23}

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.\textsuperscript{24} According to one study, “the more recent the president, the more often he goes public.”\textsuperscript{25} 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.”\textsuperscript{26}


\textsuperscript{24} SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP, at 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 Obama’s appeals to the public, see Anne Davies, President Urges Americans To Back Stimulus Package, SYDNEY MORNING HERALD, Mar. 26, 2009, http://www.smh.com.au/world/president-urges-americans-to-back-stimulus-package-20090325-9aha.html?page=1 (reporting on the president’s prime-time press conference appeal to Americans to support his budget proposal).

\textsuperscript{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. Martha Joyn 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).

\textsuperscript{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 Peat, 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,
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 individual legislators, the White House used the internet to mount public relations campaigns against anti-war Democrats.

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. 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. Many commentators agree that this use of the internet played a major role in getting him into the White House.

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. 27 For analysis of the political power of the internet, see generally Adam Nagourney, Internet Injects Sweeping Change into U.S. Politics, N.Y. TIMES, Apr. 2, 2006, at 1-1 (describing the internet’s power as a political tool), Jose Antonio Vargas, Republicans Seek To Fix Short-Sightedness, WASH. POST, Nov. 25, 2008, at C1 (noting the differential use of the internet between Democrats and Republicans and its likely effect on the presidential election’s outcome). Compare the previous stories with Elisabeth Bumiller, Direct to the People, The Old-Fashioned Way, INT’L. HERALD TRIB., Oct. 17, 2005, at News-3 (noting uncertainty as to the impact of President Bush’s Saturday addresses over traditional radio). For more discussion of the internet as a political tool, see infra Part V.B.i–ii.

28 Bush Calls on Public To Lobby Congress, supra note 26.
29 Julie Hirshfeld 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.
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,
tray their party as the party of the internet—although evidence of which major party has made better use of the internet is mixed—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. President Obama’s campaign “Facebooked, Twitted, texted and YouTubed its way to victory.”

Recognizing its power, the president and his supporters have made the persuasive use of the internet a top priority in the new administration. There are early indications that the president intends to rely heavily on the internet to communicate his message directly to the public. 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. The president’s popularity and mastery of the internet may allow him to exert a strong influence over Congress. 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

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”).

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”).

30 Wagner, supra note 30.
31 Stolberg, supra note 5.
32 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).
33 For further discussion of President Obama’s use of the internet, see infra notes 184–197 and accompanying text.
34 Wagner, supra note 30.
35 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’).
The preceding examples present what commentators have called the paradox of government speech. Non-neutral speech by the government is “at once integral to democratic society and potentially subversive of core First Amendment values.” 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.” 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.” Government has consistently sought to control public perceptions and dominate debate, often successfully. And at some point, legitimate speech by the government can cross the line and become propaganda, which is anathema to government by the people. 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. 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. 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 citi-

41 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).
42 Bezanson & Buss, supra note 15, at 1380.
43 Yudof, supra note 40, at 865.
44 Entman, supra note 21, at 66.
46 GELDERMAN, supra note 17, at 2–3.
47 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, 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, 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).
zens 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. Its ability to misuse that power raises grave concerns, because government speech can legitimately threaten the balance of power between itself and the people.

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. 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. 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 PERSPEC-

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48 Yudof, supra note 40, at 901.
50 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).
51 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).
52 Robert D. Kamenshine, The First Amendment’s Implied Political Establishment Clause, 67 CAL. L. REV. 1104, 1126 n.81 (1979). Black’s Law Dictionary provides a similar definition: “The systematic dissemination of doctrine, rumor, or selected information to promote or injure a particular doctrine, view, or cause.” BLACK’S LAW DICTIONARY 1252 (8th ed. 2004). Interestingly, Black’s categorizes the entry under “international law,” providing support for the idea that we see propaganda as a foreign phenomenon. Id.

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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.\textsuperscript{53} 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.\textsuperscript{54} 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.\textsuperscript{55} 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 \textit{ER} and \textit{Beverly Hills 90210}, the Republican Congress convened hearings and the matter was referred to the FCC.\textsuperscript{56} But although the FCC spoke out against the arrangement, it did not impose any penalties on the broadcasters or the government.\textsuperscript{57}

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.\textsuperscript{58} Its role is only advisory, so its opinions have no precedential weight or legal enforceability.\textsuperscript{59} The most it can do is refer matters to Congress for additional investigation.\textsuperscript{60} Second, the GAO 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}

\textsuperscript{53} Morse, \textit{supra} note 18, at 853.
\textsuperscript{55} Morse, \textit{supra} note 18, at 854–55.
\textsuperscript{57} Morse, \textit{supra} note 18, at 855–56.
\textsuperscript{58} \textit{Id.} at 859.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
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, Democrats in both the House and the Senate introduced legislation in 2005 designed to more actively curb government propaganda. The House version died in committee. A weakened Senate version made it out of committee, but never came to a vote. 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. The unsuccessful 2005 bills are merely another chapter in the long “historical failure” of legislative checks on government propaganda. 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.” Government speech cases have been called the “ugly stepchild” of First Amendment jurisprudence. 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, suggests that the Court has
not yet formulated a clear constitutional theory of government speech.

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 not included within the First Amendment's protections. Because the First Amendment has historically served to limit government, and not to protect it, 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." Reading a First Amendment recognition of government's freedom to speak is to "turn the Constitution upside-down." 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.

ii. The First Amendment's Restrictions on Government Speech—Scholarly and Judicial Views

Whether the First Amendment places limits on government speech,

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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).

71 See also 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, 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, at 1641 (proposing an analytical framework for determining whether government speech is protected).

72 Columbia Broadcasting System, Inc. v. Democratic Nat. Committee, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (asserting that "[the 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").

73 Yudof, supra note 40, at 871.

74 Bezanson & Buss, supra note 15, at 1504.
however, is a far more difficult question, and it has correspondingly generated more controversy among 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—

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77 Id. See also New York Times Co. v. 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”).
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. When the 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. But, although the

81 Blasi, supra note 79, at 527.
82 Entman, supra note 21, at 70.
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. See, e.g., Herbert v. Lando, 441 U.S. 153, 170 (1979) (subjecting editorial thought
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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. 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.” Unlike free speech, the press can subject government to “extensive public scrutiny,” and thereby bring governmental corruption and abuse of power into the open. In fact, the press is viewed by many as the “fourth estate” of government, whose role is to check the activities of the


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 seeEntman, 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”).
three branches.\textsuperscript{91} Most individual citizens “either cannot, or choose not to, compete in public debates dominated by the press and the government,”\textsuperscript{92} so it is “only the mass dissemination of information can truly check governmental abuses of power.”\textsuperscript{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.”\textsuperscript{94} 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.\textsuperscript{95} 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.”\textsuperscript{96} In the words of one scholar, “[w]hen government misuses its power to communicate we do have a

\textsuperscript{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. \textit{Id.}


\textsuperscript{93} Nowak, supra note 49, at 14.

\textsuperscript{94} Anderson, supra note 85, at 533–34. \textit{See also} C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 1998 (1994) (explaining that, while free speech is a fundamental personal right, constitutional press freedoms protect an \textit{institution} “because of its contribution to various forms of human good—in particular, the press’s contribution to checking governmental abuses”).

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

\textsuperscript{96} Note, supra note 69, at 2412. \textit{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”).
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.98 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.”99 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 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.”101 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, how-

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.
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”).
ever, because it held that this was not government speech, the Court did not extend Rust.\textsuperscript{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.\textsuperscript{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.\textsuperscript{107} In the process, however, the Court reaffirmed Rust’s permissive treatment of government speech.\textsuperscript{108} Finally, in Johanns 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.\textsuperscript{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.”\textsuperscript{110} But while the Court broadly framed the issue to be “whether the generic 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.\textsuperscript{111} And in its most recent government-speech

\begin{itemize}
  \item \textsuperscript{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”).
  \item \textsuperscript{106} Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536 (2001).
  \item \textsuperscript{107} Id. at 542-43.
  \item \textsuperscript{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 convey specific information pertaining to its own program”).
  \item \textsuperscript{110} Id. at 562, 567 (emphasis added).
  \item \textsuperscript{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).
\end{itemize}
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 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 Amend-
ment’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. 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. The press’s constitutional

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116 E.g., Choose Life Ill., 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 on government speech); Kamenshine, supra
role is to provide the public with another perspective on 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

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).


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.*
clauses, it remained silent regarding the Press Clause.\footnote{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 \textit{supra} in notes 81–93 and accompanying text.} The question of how the Court is likely to rule if faced with a challenge that particular government speech impinges on the \textit{press’s} right to unfettered expression in violation of the Constitution remains open.

\textbf{B. Courts May Consider Press Clause Limitations Differently}

The dicta and concurrences in \textit{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 \textit{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.”\footnote{Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 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”).} 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.\footnote{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”).} He suggested asking “whether a government action burdens speech disproportionately in light of the action’s tendency to further a legitimate government objective.”\footnote{Id.} 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”\footnote{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).}—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 \textit{Summum} reveal that the Supreme Court’s confused government speech jurisprudence has not yet precluded such speech from being challenged on Press Clause grounds.\footnote{For a discussion of the confused state of government speech doctrine, both in the courts and among scholars, see \textit{supra} Part III.} If the Press Clause provides a First Amendment basis for ac-
tively 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 wishes, because its viewpoint will be tested by the press in the marketplace of ideas.\(^{134}\) This is the indirect restriction many scholars agree is in the Constitution.\(^{135}\) 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,\(^{136}\) 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.\(^{137}\) 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.\(^{138}\) Indeed, even as a “mass communicator,” it is difficult to see how the government’s speech could limit the speech of *individuals*. But it can limit the effectiveness of the press’s speech.\(^{139}\) Thus, it is much more likely that government speech would impinge on the press’s right than on individuals’ rights.

\(^{133}\) *Supra* notes 81–93 and accompanying text.

\(^{134}\) 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.


\(^{138}\) 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.
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.\textsuperscript{140} The government expends significant money and effort to promote its own viewpoints, so that opposing speakers often operate at a disadvantage.\textsuperscript{141} Hence, a government does not need to directly curtail the activities of private media outlets “if it can effectively displace them by subsidizing the ‘friendly’ press or, better still, by establishing an inexhaustibly more powerful press committed exclusively to its own view.”\textsuperscript{142}

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.\textsuperscript{143} 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.”\textsuperscript{144} 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.”\textsuperscript{145} 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.”\textsuperscript{146} 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.”\textsuperscript{147} When the government speaks in such a way as to overpower the press, the Constitution requires that the government’s

\textsuperscript{140}Entman, \textit{supra} note 21, at 66. \textit{Cf.} Komp, \textit{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”).

\textsuperscript{141}Delgado, \textit{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, \textit{supra} note 40, at 707.


\textsuperscript{143}\textit{Supra} notes 89–93 and accompanying text.

\textsuperscript{144}Nowak, \textit{supra} note 49, at 24.

\textsuperscript{145}\textit{Id.} at 35.

\textsuperscript{146}Yudof, \textit{supra} note 40, at 898.

\textsuperscript{147}Nowak, \textit{supra} note 49, at 15.
speech be restricted.\textsuperscript{148}

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.\textsuperscript{149} However, even scholars who have correctly identified the constitutional problem with government speech have had difficulty overcoming a second obstacle: crafting a solution to the constitutional problem is difficult because answering the question of \textit{whether} the Press Clause can impose limits on government speech does not help us determine \textit{when} those limits should apply.

A. \textit{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.\textsuperscript{150} Even commentators who believe that some government speech is impermissible recognize that most is not only allowed, but necessary for good governing.\textsuperscript{151} 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.\textsuperscript{152} On the other hand, the First Amendment countenances the danger that government will misuse that freedom for propaganda.\textsuperscript{153} 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 con-

\textsuperscript{148} Steven Shiffrin, \textit{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.").

\textsuperscript{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 \textit{Summum} decision. No author has yet investigated the Press Clause implications of government speech after \textit{Summum}.

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

\textsuperscript{151} \textit{Supra} notes 40–42 and accompanying text.

\textsuperscript{152} Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1131 (2009).

\textsuperscript{153} \textit{Supra} notes 43–52 and accompanying text.
cerning the permissible scope of government speech.\textsuperscript{154}

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.\textsuperscript{155} 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 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.

\textbf{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.\textsuperscript{156} 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 proclama-

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

\textsuperscript{155} Professor Yudof, for example, recognizes that the Constitution could provide a basis for limiting of 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 Kamenshine 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”).

\textsuperscript{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.
motions have tended to be more measured and moderate than in the past.\textsuperscript{157} 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.

\textit{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.”\textsuperscript{158} Many of the pioneers of government speech theory operated from the same assumption.\textsuperscript{159} 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.\textsuperscript{160} But at that time, cable television was only in one in five homes.\textsuperscript{161} Cellular phones, personal computers and the internet were in their infancies.\textsuperscript{162} In 1985, Professor Delgado noted that commu-

\textsuperscript{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).

\textsuperscript{158} Schauer, supra note 16, at 383.

\textsuperscript{159} See Van Alstyne, 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).

\textsuperscript{160} Yudof, supra note 40, at 10–12.


\textsuperscript{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.
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.

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. 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”).

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”).

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).


net media is more durable than print or broadcast media, because its content can be easily and repeatedly accessed over a longer period of time.\textsuperscript{170} It is very pervasive, much more so than equivalent print forms.\textsuperscript{171} For example, internet messages can be amplified by repeated forwarding, allowing recipients to become speakers in their own right.\textsuperscript{172} It is both easy to access and easy to disseminate information on the internet.\textsuperscript{173} And, unlike other media, the internet is a largely unregulated medium where, most often, “anything goes.”\textsuperscript{174} Thus, commentators have noted how internet content is permeating every American’s daily life.\textsuperscript{175}

The lack of regulation, the flexibility of technology and the two-way ease of access have resulted in a massive proliferation of individual

\textsuperscript{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”).


\textsuperscript{171} See Lyrissa Barnett Lidsky, 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.”).

\textsuperscript{172} Stacey D. Schesser, Comment, A New Domain for Public Speech: Opening Public Spaces Online, 94 CAL. L. REV. 1791, 1797 (2006). See also Lidsky, supra note 171, at 864 (noting how easy it is for individuals to rapidly “republish” information received via the internet).

\textsuperscript{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 information, 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”).

\textsuperscript{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”).

\textsuperscript{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 pervasiveness concerns as radio transmissions); see also Rothman, supra note 170, at 138 (“Internet media is much more pervasive than traditional media.”).
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.” 176

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.177

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.178 But recent empirical research supports the opposite conclusion: the internet may be making communication less democratic. Surprisingly, websites’ “visibility” to internet users is actually very skewed, with a very few highly-visible websites and a very “long tail” of nearly invisible ones.179 Because “the topology of the Web prevents us from seeing anything but a

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) (posing 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”).
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 in federal

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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 rejected the idea of casting votes for federal offices via the Internet”).

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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.” 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.” 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.”

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.

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.” Those efforts have already begun in earnest. For example, the president has used YouTube to change a presidential routine—the weekly Saturday radio address—into a newsworthy event. Members of the

184 Supra note 32 and accompanying text.
185 Supra note 5 and accompanying text.
186 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”).
187 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).
188 Parisella, supra note 30.
189 Stolberg, supra note 5.
190 For a description of President Bush’s use of the radio address, and its middling results, see Bumiller, supra note 27.
191 Cillizza, supra note 31.
public, who spent more than 14 million hours during the campaign watching official videos on the internet,\(^\text{192}\) have already logged onto the weekly address site millions of times.\(^\text{193}\) The audio version of the address is consistently among the ten most popular podcasts on iTunes.\(^\text{194}\) And one of the primary vehicles the administration has used to garner support for the $787 billion American Recovery and Reinvestment Act\(^\text{195}\) is the White House’s recovery.gov website.\(^\text{196}\) 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,\(^\text{197}\) 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.\(^\text{198}\) Two weeks earlier, the Rocky Mountain News shut down, and within two weeks, the Tucson Citizen folded as

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\(^{192}\) Wagner, supra note 30.


\(^{194}\) 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).

well.199 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.”200 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.201 Many other newspapers are on the brink of bankruptcy or are searching for buyers.202 And other media are not immune. Between 2002 and 2007, for example, total viewership for evening network news dropped nearly 20%.203 Local television and radio news stations have experienced similar trends.204

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.205 According to a recent survey by the Pew Research Center for the People and the Press, Americans are largely abandoning print

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200 Pérez-Peña, supra note 199.
202 Pérez-Peña, supra note 199.


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”).
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.\footnote{Pew Research Center for the People & the Press, \textit{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.} 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.\footnote{See Pew Research Center for the People & the Press, \textit{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%).} As readership has dropped, so has advertising revenue, which is the lifeblood of the newspaper industry, declining approximately 25 percent since 2007.\footnote{Pérez-Peña, \textit{supra} note 199.} Classified websites like Craigslist.com have been to print classifieds what “the internal combustion engine was to horse-drawn buggies.”\footnote{Pérez-Peña, \textit{supra} note 205 (reporting the decline in advertising revenue).} 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.\footnote{Pew Project for Excellence in Journalism, \textit{Online, in The State of the News Media 2009: An Annual Report on American Journalism} (2009), available at http://www.stateofthenewsmedia.org/2009/narrative_online_intro.php?media=5.} 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.\footnote{Pew Project for Excellence in Journalism, \textit{Top News Sites (Hitwise)}, in The State of the News Media 2009: An Annual Report on American Journalism (2009), available at http://www.stateofthenewsmedia.org/2009/narrative_online_audience.php?media=5&cat=2#OnAudHitwise.} 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. 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.

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. 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 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

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213 Id.


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.
MEDIUM-BASED PRESS CLAUSE RESTRICTIONS ON GOVERNMENT SPEECH

donned 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.\textsuperscript{217} And these new internet sources “cater to more individualized and fractured tastes.”\textsuperscript{218} 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.\textsuperscript{219} 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.”\textsuperscript{220}

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 \textit{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.\textsuperscript{221} According to the majority opinion, “each medium of expression presents special First Amendment problems.”\textsuperscript{222} 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.”\textsuperscript{223} Because the medium in \textit{Pacifica} was more pervasive than others, the FCC could restrict it in ways that would be impermis-

\begin{footnotesize}

\textsuperscript{218} Candeub, \textit{supra} note 205, at 1554.

\textsuperscript{219} Id.

\textsuperscript{220} Pérez-Peña, \textit{supra} note 199.


\textsuperscript{222} Id. at 748.

\textsuperscript{223} Id.
\end{footnotesize}
sible with respect to other media and still remain within the bounds of the Constitution.\textsuperscript{224} Analogizing to \textit{Pacifica}, some commentators have proposed similar medium-based restrictions on the internet outside the government speech context.\textsuperscript{225} Others argue that the internet is even \textit{more} pervasive than broadcasts.\textsuperscript{226}

In another example of medium-based restriction on speech, in \textit{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.\textsuperscript{227} 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.\textsuperscript{228} Therefore, \textit{Maynard} limits “the ways a state can speak and not the substance of its expression.”\textsuperscript{229}

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. \textit{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.\textsuperscript{230} Analogizing to \textit{Pacifica}, the government argued that the internet should receive less constitutional protection than other forms of speech.\textsuperscript{231} But the Supreme Court explicitly rejected this argument, according the highest level of scrutiny to communications on the internet.\textsuperscript{232} The Ninth Circuit has explained that First Amendment protections on the internet are equiva-

\textsuperscript{224} Bruce W. Sanford & Michael J. Lorenger, \textit{Teaching an Old Dog New Tricks: The First Amendment in an Online World}, 28 CONN. L. REV. 1137, 1151 (1996) (noting how “\textit{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”).

\textsuperscript{225} See generally id. (proposing some content restrictions).

\textsuperscript{226} See Mehmet Konar-Steenberg, \textit{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 \textit{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”).


\textsuperscript{228} Id. at 717.

\textsuperscript{229} Yudof, supra note 40, at 892.


\textsuperscript{231} See Brief for the Appellants at ¶ (C)(1)(a), Reno v. American Civil Liberties Union, No. 96-511 (U.S. Jan. 21, 1997), \textit{available at} http://www.ciec.org/SC_appeal/970121_DOJ_brief.html (arguing that “[t]he approach Congress enacted is constitutional under \textit{Pacifica}” because “[l]ike broadcast stations, the Internet is establishing an increasingly ‘pervasive presence’ in the lives of Americans”).

\textsuperscript{232} Reno v. American Civil Liberties Union, 521 U.S. at 868–70.
lent to those granted “prior to the high-tech era.” And the Second Circ-


cuit has also expressed its disinclination towards judicial activism regard-


233 ing its application of the First Amendment to the internet. 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.” Limiting government speech is consistent with these judicial priorities, and hence does not con-

flict 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.” The weakening of traditional media means that the balance of power in the marketplace is shifting toward the government—so the im-

236 plicit 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.

233 Clement v. California Dept. of Corrections, 364 F.3d 1148, 1151 (9th Cir. 2004).

234 See Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 584 (2d Cir. 2000) (ob-

serving 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”).

235 Reno v. American Civil Liberties Union, 521 U.S. at 849.

236 See, e.g., Kamenshine, 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, 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 government-

234 mental policy”); Komp, supra note 70, at 870 (suggesting that some communications can be so voluminous as to “inundate the marketplace”).
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 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.