

## **The Expanding Government Speech Doctrine in United States Jurisprudence And Its Implications For Internet Privacy And Private Speech**

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### **Abstract**

In *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125 (2009), the U. S. Supreme Court recently decided that a city did not discriminate against a religious sect's views by not accepting its park monument, because park monuments constitute government speech, and therefore government action concerning them is not subject to scrutiny under the First Amendment's Free Speech Clause of the U.S. Constitution. Thus, despite the fact that a park has always been considered a traditional public forum for private speech, government is free to control the messages sent by permanent monuments, even when receiving private assistance for them, because it maintains final approval authority over their selection. *Id.* at 1131-1134.

Although the U.S. Supreme Court has declined to say that the Internet is a traditional public forum, it has been relatively free of regulation and an open source for communication. However, government control of it continues to increase and recent U.S. legislation will provide greater government programs and funding for it as well as regulation of it for access, health, and cyber security. The question is whether such control will benefit individual autonomy and the marketplace of ideas, or constitute government speech that commandeers privacy information and inhibits private speech.

## **The Expanding Government Speech Doctrine in United States Jurisprudence and Its Implications for Internet Privacy and Private Speech**

### **I. Introduction**

The Internet is a relatively new medium of expression about which there has been very little government regulation and a dearth of case law. The United States Supreme Court (hereinafter "the Court") has said that: "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."<sup>1</sup> The Government Speech Doctrine is also new and has evolved into a construct for free speech analysis. This paper seeks to show how the reliance upon the Government Speech Doctrine will advance government programs and regulations, while limiting both Internet privacy and dissent.

### **II. Free Speech Jurisprudence: Its Underpinnings and Evolution**

During the establishment of the United States government, many Federalists believed that the freedom of speech was already guaranteed to the American people, and that therefore the

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<sup>1</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969); *but see FCC v. Fox TV Stations, Inc.*, 129 U.S. 1800, 1820-29 (2009) (Thomas, J. concurring), questioning the validity of different First Amendment treatment of media when based upon "transitory facts."

First Amendment was unnecessary.<sup>2</sup> Nonetheless, it, along with the rest of the Bill of Rights,<sup>3</sup> was adopted as an offensive measure to ensure that an already limited federal government would remain unable to interfere with the freedoms of religion and speech.<sup>4</sup> Today, most would agree that the government has become larger than the Founding Fathers ever anticipated, and that it is axiomatic that the oft evoked Free Speech Clause of the First Amendment of the United States Constitution effectively prevents the government's interference with an individual's right of speech and expression.<sup>5</sup> Not only has the prohibition been applied to the federal government, but it also applies to the states by its incorporation into the Fourteenth Amendment.<sup>6</sup>

The Court has long held that: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market..."<sup>7</sup> The Court has also said: "The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.... speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."<sup>8</sup> In particular, the Court has indicated that: "[T]here is practically universal agreement that a major purpose of th[e] Amendment was to protect the free discussion of governmental affairs...."<sup>9</sup> In *Stromberg v. California*, the Court said the reason for protecting political discourse was so that "government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic[.]"<sup>10</sup> Due to its special purpose and aim, the Court said that: "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."<sup>11</sup> So, protecting public and political speech is essential to the U.S. Republic because it promotes self-government, leading to peaceful change rather than unlawful acts. The Court says that any law which punishes speech

<sup>2</sup> "To Alexander Hamilton a bill of rights was more than unnecessary. It would be dangerous, he said. 'Why declare that things shall not be done which there is no power [in Congress] to do?'" Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787*, (Little, Brown and Company, 6<sup>th</sup> ed. 1986).

<sup>3</sup> U.S. Const. amend. I-X.

<sup>4</sup> See Edward S. Corwin, *American Constitutional History* (Harper Torchbooks, 1965), 205.

<sup>5</sup> See U.S. Const. amend. I: "Congress shall make no law... abridging the freedom of speech."

<sup>6</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>7</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) citing *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945); and *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See also *Turner Broad. Sys. v. FCC*, 507 U.S. 1301 (1993); and *Meyer v. Grant*, 486 U.S. 414, 420 (1988) citing *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.... In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."

<sup>8</sup> *Connick v. Myers*, 461 U.S. 138, 145 (1983) citing *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co.*, 376 U.S. at 269; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); and *Carey v. Brown*, 447 U.S. 455, 467 (1980) (Internal Quotations Omitted).

<sup>9</sup> *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 (1977) citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966) and *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

<sup>10</sup> 283 U.S. 359, 369 (1931), *accord De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

<sup>11</sup> *Id.*

risks being struck down as unconstitutionally vague and overbroad. Laws which are not deemed too vague or overbroad must nonetheless meet the Court’s strict scrutiny test where government must have a significant interest which must be narrowly tailored to meet that interest.<sup>12</sup>

Yet, “[i]t is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.”<sup>13</sup> Thus, not all speech is accorded absolute protection. For instance, even though elementary school students and teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”<sup>14</sup> expression may be curtailed if it “materially and substantially disrupts the work and discipline of the school.”<sup>15</sup> School officials also may sanction offensively lewd and indecent speech in classrooms and assemblies;<sup>16</sup> “exercise editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns;”<sup>17</sup> and “take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”<sup>18</sup> Furthermore, the courts do not accord protection to “fighting words” which tend to incite a breach of the peace;<sup>19</sup> obscenity;<sup>20</sup> or words “inciting or producing imminent lawless action,” which are more than “mere advocacy of the use of force or violence” and are “likely to produce or incite such action.”<sup>21</sup>

A companion expressive right is the Freedom of the Press Clause,<sup>22</sup> which protects publication and circulation through various media.<sup>23</sup> In *Near v. Minnesota*, the Court quoting Blackstone indicates that freedom of the press is also essential to a free government, and that prior restraint of publication is disfavored and presumed unconstitutional.<sup>24</sup> Per *Talley v.*

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<sup>12</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

<sup>13</sup> *Gitlow v. New York*, 268 U.S. 652, 666 (1925); see also *Virginia v. Black*, 538 U.S. 343, 358 (2003) (“[W]e have long recognized that the government may regulate certain categories of expression consistent with the Constitution.”)

<sup>14</sup> *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969).

<sup>15</sup> *Id.* at 513.

<sup>16</sup> *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

<sup>17</sup> *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>18</sup> *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

<sup>19</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 413 (1992); and *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>20</sup> Obscenity is, under contemporary community standards, speech which appeals to the average person’s prurient interest, conveys sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>21</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) citing *Brandenburg v. Ohio*, 395 U.S. 444, 447, (1969) (per curiam).

<sup>22</sup> U.S. Const. amend. I (“Congress shall make no law... abridging the freedom of speech, or of the press.”)

<sup>23</sup> “The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.” *Lovell v. Griffin*, 303 U.S. 444, 452 (1938).

<sup>24</sup> 283 U.S. 697, 714 (1931) (Internal citations omitted). See also *New York Times, Co. v. U.S.*, 403 U.S. 713 (1971); and *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002).

*California*,<sup>25</sup> the right includes anonymity. In addition, the Court has acknowledged that this freedom includes the right “to seek out the news” in places traditionally open to the public.<sup>26</sup>

Similar to this right of access for the press and the “flip side” of the freedom of speech and the press is a concomitant right to know. The Court said in *Stanley v. Georgia* that: “The Constitution protects the right to receive information and ideas.”<sup>27</sup> In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, it also said: “[T]he protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases.”<sup>28</sup> Thus, the First Amendment affords the public the right to receive information and ideas which may not be proscribed by the government.

### A. The *Barnette* Principle

The Court has said: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.... If there are any circumstances which permit an exception, they do not now occur to us.”<sup>29</sup> In *Barnette*, Jehovah’s Witnesses children were expelled from school for refusing to comply with a State Board of Education resolution requiring a salute to the American flag and recitation of the pledge of allegiance.<sup>30</sup> Assessing the situation, the Court observed:

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent.

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<sup>25</sup> 362 U.S. 60, 64-65 (1960).

<sup>26</sup> *Richmond Newspapers v. Virginia*, 448 U.S. 555, 577 (1980) citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

<sup>27</sup> 394 U.S. 557, 564 (1969).

<sup>28</sup> 425 U.S. 748, 757 (1976); accord *Procurier v. Martinez*, 416 U.S. 396, 408-09 (1974); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390; *Stanley v. Georgia*, 394 U.S. at 564; *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Marsh v. Alabama*, 326 U.S. 501, 505 (1946); *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Martin v. Struthers*, 319 U.S. 141, 143 (1943). See also *Board of Education v. Pico*, 457 U.S. 853, 866-67 (1982) (internal quotation marks omitted), where Justice Brennan in a plurality opinion said:

Our precedents have focused not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas. And we have recognized that the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. In keeping with this principle, we have held that in a variety of contexts the Constitution protects the right to receive information and ideas. This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution...

<sup>29</sup> *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); accord, *Bd. of Educ. v. Pico*, 457 U.S. 853, 872 (1982) (“[L]ocal school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books.”)

<sup>30</sup> *Id.* at 626-30.

Authority here is to be controlled by public opinion, not public opinion by authority.<sup>31</sup>

Generally speaking, then, *Barnette* stands for the principle that government officials may not try to control an individual's ideology, compel an individual to espouse a particular message or surrender his or her beliefs or opinions to obtain a public benefit. For the latter prohibition, *Barnett* and other compelled speech cases involve what has come to be known as the unconstitutional conditions problem. In *Sherbert v. Verner*, the Supreme Court specifically said: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."<sup>32</sup> The Court applies this principle in *Keyishian v. Board of Regents*,<sup>33</sup> where it struck down as unconstitutionally vague and overbroad New York laws that conditioned State University of New York's faculty members' continued employment upon signing a certificate attesting to the fact that they had not engaged in "treasonable or seditious" speech or acts and that they were not and had not been members of the Communist Party.<sup>34</sup> Likewise, in *Whitehill v. Elkins*,<sup>35</sup> the Supreme Court struck down a state university's loyalty oath requiring faculty to assure that they were not involved with attempts to overthrow the government because it was so broad as to prevent the faculty from seeking redress of wrongs as well as prevent them from engaging in advocacy and debate.

In *Wooley v. Maynard*, the Supreme Court considered a slight variation of the unconstitutional conditions question, which was "whether the State may constitutionally require an individual to *participate in the dissemination of an ideological message* by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."<sup>36</sup> That is, whether the government may force an individual to carry its message on private property. The Court said it may not, and that New Hampshire effectively required its citizens to use their vehicles as a "mobile billboard" for the State's motto "Live Free or Die," or suffer sanctions.<sup>37</sup> The Court decided that New Hampshire's reasons for requiring the license plate message, easier identification of passenger vehicles and promoting appreciation of history, individualism and state pride, were not compelling enough, nor narrowly-tailored enough, to override Maynard's free speech rights.<sup>38</sup> The Court said: "[W]here the State's interest is to

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<sup>31</sup> *Id.* at 641.

<sup>32</sup> 374 U.S. 398, 404 (1963).

<sup>33</sup> 385 U.S. 589, 590 (1967).

<sup>34</sup> See also *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) ("As in *Cramp v. Board of Public Instruction*, 'the vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.' 368 U.S. 278, 287.... Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.'").

<sup>35</sup> 389 U.S. 54 (1967).

<sup>36</sup> 430 U.S. 705, 713 (1977) (emphasis added).

<sup>37</sup> *Id.* at 713 and 715.

<sup>38</sup> *Id.* at 716.

disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.”<sup>39</sup>

Just seven years later, however, the Court held in *Grove City College v. Bell* that Congress’ conditioning Grove City College’s receipt of Basic Educational Opportunity Grants (“BEOG”) through its students’ tuition upon the College’s compliance with Title IX’s prohibition against gender discrimination did not infringe upon the College’s or its students’ First Amendment rights.<sup>40</sup> According to the Court:

Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.... Grove City may terminate its participation in the BEOG program and thus avoid the requirements of § 901(a). Students affected by the Department's action may either take their BEOG's elsewhere or attend Grove City without federal financial assistance.<sup>41</sup>

Further, in *Rumsfeld v. Forum for Academic and Institutional Rights*, the Supreme Court said: “It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly.... Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.”<sup>42</sup>

*Barnett* and *Wooley* appear to be distinguishable from *Grove City College* due to choice. In *Wooley*, for New Hampshire citizens to drive they were compelled to obtain a license plate with the state’s motto; whereas, the College ostensibly was free to accept students who were not BEOG recipients. Also, in *Grove City College* as in *Rumsfeld*, directly requiring compliance with Title IX would have been constitutional, and therefore, the fact that the requirement was attached as condition to the receipt of federal aid did not make it unconstitutional.

Yet, in *FCC v. League of Women Voters*, the Court in essence held that a condition attached to federal grant money given pursuant to the Public Broadcasting Act of 1967<sup>43</sup> did create an unconstitutional condition.<sup>44</sup> The Act established the Corporation for Public Broadcasting to disburse federal grants to noncommercial television and radio stations in support of their operations and educational programming. Owners and operators of noncommercial educational broadcasting stations challenged §399 of the Act, which prohibited grantees from engaging in editorializing, because they alleged the condition required them to surrender their free speech and free press rights in order to receive such funding.<sup>45</sup> The Court ruled: “The statute is not narrowly tailored to address any of the Government's suggested goals.... Nor do we see any reason to deny noncommercial broadcasters the right to address matters of public

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<sup>39</sup> *Id.* at 717.

<sup>40</sup> 465 U.S. 555, 575-76 (1984).

<sup>41</sup> *Id.* at 575.

<sup>42</sup> 547 U.S. 47, 59-60 (2006), citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

<sup>43</sup> Pub. L. No. 90-129, 81 Stat. 365, 47 U. S. C. § 390 *et seq.* (1967), as amended.

<sup>44</sup> 468 U.S. 364, 395 (1984).

<sup>45</sup> *Id.* at 366.

concern on the basis of merely speculative fears of adverse public or governmental reactions to such speech.”<sup>46</sup> The Court distinguished the statute from the situation in *Regan v. Taxation with Representation of Washington*,<sup>47</sup> because unlike the complainants in that case, a noncommercial educational station would be unable “to segregate its activities according to the source of its funding.... [I]t is barred from using even wholly private funds to finance its editorial activity.”<sup>48</sup> Therefore, the fact that the government’s condition did not effectively meet its objective, which the Court noted was a dubious one, and absolutely precluded the stations from editorializing even with private funds meant it was unconstitutional.

## B. Forum Analysis

When individuals seek access to government property or funds, the Court has traditionally used forum analysis to decide what access is warranted in accordance with the Free Speech Clause.<sup>49</sup> Pursuant to forum analysis, different levels of access may be available to speakers depending upon which of three categories of fora exist: the traditional public forum, which consists of streets, sidewalks and other places that have historically been open to the public for speech and debate; the designated (or limited) public forum, which government opens for a particular purpose; and the non-public forum, which is generally closed to expressive activity.<sup>50</sup> In a traditional public forum, the government may only restrict speech based on its content when the restriction is narrowly tailored to serve a significant public interest.<sup>51</sup> In a limited public forum, the Court has recognized generally that: “The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”<sup>52</sup> However, government may do so only in a manner that is reasonable in light of the forum and viewpoint neutral.<sup>53</sup> In a “non-public forum,” government can restrict access if such restrictions are “reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.”<sup>54</sup>

Therefore, government must meet a high standard to restrict speech in an open forum, but if either a limited public forum or a non-public forum exist, government may discriminate on content but not on viewpoint. One problem in applying forum analysis is, as the Court of Appeals for the Seventh Circuit observed, that the “‘forum’ terminology has not always been

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<sup>46</sup> *Id.* at 399 citing *Red Lion*, 395 U.S. at 393.

<sup>47</sup> 461 U.S. 540 (1983).

<sup>48</sup> *League of Women Voters*, 468 U.S. at 400.

<sup>49</sup> See, e.g., *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37 (1983); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788 (1985); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) and *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 830 (1995) (The Court held that the University of Virginia’s creation of student activity funding “is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”)

<sup>50</sup> *Perry*, 460 U.S. at 45-48.

<sup>51</sup> *Id.* at 45.

<sup>52</sup> *Rosenberger*, 515 U.S. at 829.

<sup>53</sup> *Lamb’s Chapel*, 508 U.S. at 392-93 citing *Cornelius*, 473 U.S. at 806.

<sup>54</sup> *Cornelius*, 473 U.S. at 800 citing *Perry Education Association*, 460 U.S. at 46.

clear.”<sup>55</sup> Another problem with its application is that certain content or topics can also be a viewpoint on a particular topic.<sup>56</sup> When speech on a topic has already been allowed in the forum, either by policy or practice, the issue is one of viewpoint discrimination, and government must not treat a particular viewpoint any differently from any other viewpoint on that topic.<sup>57</sup>

In *Rosenberger*, for instance, University of Virginia students who published *Wide Awake*, a Christian student newspaper, sued the University for denying the group funding because of the newspaper’s religious views. The University already subsidized a variety of other student publications and journalistic activities in accordance with its purpose of supporting a broad range of extracurricular student activities that “are related to the educational purpose of the University.”<sup>58</sup> But, it denied funding to *Wide Awake* for fear that providing such funding would violate the Establishment Clause of the First Amendment.<sup>59</sup> Not only did the Court hold that the University would not violate the Establishment Clause by funding this religious group, but also that by not funding it while funding other publishing groups meant the University committed viewpoint discrimination under the First Amendment’s Free Speech Clause.<sup>60</sup>

Dealing with the reverse issue of compelled funding in *Board of Regents of the University of Wisconsin System v. Southworth*,<sup>61</sup> the Court considered whether the University of Wisconsin at Madison was guilty of violating current and former students’ Free Speech rights by disbursing their student activity fees to student organizations whose political and ideological views were offensive to their personal beliefs. The Court said: “[O]ur prior compelled speech

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<sup>55</sup> The Seventh Circuit recently said in *Christian Legal Society v. Walker*, 453 F.3d 853, 866 (7<sup>th</sup> Cir. 2006):

The forum nomenclature is not without confusion. Court decisions also speak of “limited public” fora; most recently this phrase has been used interchangeably with “nonpublic” fora, which means both are subject to a lower level of scrutiny. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001) (identifying limited public fora as subject to the same test as nonpublic fora described in, for example, *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993)). But “limited public forum” has also been used to describe a subcategory of “designated public forum,” meaning that it would be subject to the strict scrutiny test. See, e.g., *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 427, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (Stevens, J. concurring); *Cornelius v. NAACP Legal Def. & Educ. Fund., Inc.*, 473 U.S. 788, 796, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) (noting that appellate court did not decide whether forum in question was a limited public forum or nonpublic forum); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 566 (7<sup>th</sup> Cir. 2001). ... While the parties appeared to agree at oral argument that we are probably dealing with a “limited public forum,” we will not hold them to that agreement because they were plainly arguing for different levels of scrutiny....

To further complicate matters, the Fourth Circuit uses a bi-furcated analysis to distinguish between internal and external speakers; it would use strict scrutiny review if it determined that an institution denied access to a speaker who was within the class of speakers for whom the forum was created; otherwise it would use a viewpoint discrimination analysis. See *ACLU v. Mote*, 423 F.3d 438, 444 (4<sup>th</sup> Cir. 2005).

<sup>56</sup> Even the Supreme Court has difficulty at times making the distinction between what constitutes content and what is viewpoint. See; e.g., *Rosenberger v. University of Virginia*, 515 U.S. at 831-32.

<sup>57</sup> See, e.g.; *Lamb’s Chapel*, 508 U.S. at 391-93.

<sup>58</sup> *Rosenberger*, 515 U.S. at 824.

<sup>59</sup> U.S. Const. amend. I.

<sup>60</sup> *Id.* at 837.

<sup>61</sup> 529 U.S. 217, 220 (2000) (*Southworth I*).

and compelled funding cases are distinguishable *on the basis of the legitimacy of governmental interest*. No one disputes the University's assertion that some educational value is derived from the activities supported by the fee.<sup>62</sup> The Court thus decided that the University could constitutionally compel all students to pay a fee to advance its legitimate educational objective, so long as the proceeds were distributed in a viewpoint neutral manner.

### C. Government Speech Doctrine

It is unclear when courts first recognized the Government Speech Doctrine, because earlier cases simply implied that government was the speaker rather than an individual, such as in public employee cases;<sup>63</sup> in religion in school cases;<sup>64</sup> and in government property and holiday display cases.<sup>65</sup> The Court's first overt mention of the government speech doctrine appears to be in *Keller v. State Bar of California*.<sup>66</sup> In this case, certain lawyers sued the State Bar of California, because they alleged it was using their mandatory dues to advance political and ideological causes with which they disagreed, thereby compelling them to speak in violation of their free speech and associational rights. According to the Court, the State Bar invoked the Government Speech Doctrine for the proposition that it had the authority to use the bar members' funds for any legitimate purpose within its authority. The Court said the "so called government speech doctrine," is that: "government must take substantive positions and decide disputed issues to govern....So long as it bases its actions on legitimate goals, government may speak despite citizen disagreement with its message, for government is not required to be content-neutral."<sup>67</sup> The Court agreed that government has the right to speak about its views:

Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate

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<sup>62</sup> *Id.* at 243 (emphasis added).

<sup>63</sup> *See, e.g.; Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.") More recently, the Court directly invoked the Government Speech Doctrine in *Garcetti v. Ceballos*, 164 L. Ed. 2d 689 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.")

<sup>64</sup> *See, e.g.; Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963); and *Lee v. Weisman*, 505 U.S. 577 (1973).

<sup>65</sup> *See, e.g.; Lynch v. Donnelly*, 465 U.S.668 (1984); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), and *Advisory Board v. Pinette*, 515 U.S. 753 (1995). *See also Wells v. City & County of Denver*, 257 F.3d 1132 (10th Cir. 2001), where the government speech doctrine was recently overtly employed in the religious holiday display context.

<sup>66</sup> 496 U.S. 1 (1990).

<sup>67</sup> *Id.* at 10-11. The Court said the state bar had relied upon *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n. 13 (1977) ("The reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people.")

over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.<sup>68</sup>

The Court ruled that while it was constitutionally permissible for the State Bar to use its members' mandatory dues to promote its purposes of regulating the legal profession and improving the quality of legal services, it could not use such dues to promote "activities of an ideological nature" that fell outside of its purpose.<sup>69</sup> Yet, the Court noted that:

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern.<sup>70</sup>

Thus, the Court indicates that it is not only permissible but imperative that a government agency be allowed to speak in order to advance its policies and goals, but it may not compel funding for political or ideological speech which is not germane to such legitimate objectives. It would be up to future courts to determine where the line between the two falls in any particular case.

#### *1. Government Funding as Speech*

In the year following *Keller*, the Government Speech Doctrine was impliedly applied in *Rust v. Sullivan*,<sup>71</sup> in response to a complaint of both viewpoint discrimination and unconstitutionally compelled speech. Recipients of voluntary family-planning services grants under Title X of the Public Health Service Act,<sup>72</sup> challenged Section 1008 of the Act because it required that "none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."<sup>73</sup> Refuting the viewpoint discrimination argument, the Court said:

Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

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<sup>68</sup> *Id.* at 12-13. But see *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 261 (1977) (Powell, J., Burger, Ch. J., and Blackmun, J., concurring) (Internal quotation marks omitted) (The fact that the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole does not mean that a State or municipality may agree to set public policy on an unlimited range of issues in closed negotiations with one category of interested individuals. Such a commitment by a governmental body to exclude minority viewpoints from the councils of government would violate directly the principle that government must afford all points of view an equal opportunity to be heard.")

<sup>69</sup> *Id.* at 14.

<sup>70</sup> *Id.* at 15.

<sup>71</sup> 500 U.S. 173 (1991).

<sup>72</sup> 84 Stat. 1506, as amended, 42 U.S.C. §§ 300 to 300a-6 (1970).

<sup>73</sup> *Id.* at 179 citing 42 U.S.C. § 300a-6.

“[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.”<sup>74</sup>

The Court said further that simply requiring the recipients to use grant funds for the project's purpose did not equate to “suppressing a dangerous idea.”<sup>75</sup> Refuting the recipients' argument that the Act's prohibition regarding abortion counseling was an unconstitutional condition requiring them to surrender their free speech rights in order to receive the government benefit, the Court objected:

[T]he Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.

... In contrast, our “unconstitutional conditions” cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.<sup>76</sup>

Therefore, although the Court had previously said: “Freedom of speech presupposes a willing speaker,”<sup>77</sup> it now said that government is free to financially encourage its own views through grant recipients and to prevent them from promoting opposing views with such funding without unconstitutionally compelling their speech, as long as it does not cut off the grant recipients' right to espouse opposing views beyond the confines of the funded program.

*Legal Services, Corp. v. Velazquez*,<sup>78</sup> however, illustrates a limitation on government's power when it attempts to advance its views by funding third parties. In this case, the Court considered the constitutionality of the Legal Services Corporation Act,<sup>79</sup> which established the Legal Services Corporation (“LSC”) to issue grant funding to certain legal aid organizations “for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.”<sup>80</sup> Lawyers working for New York City grant recipients, along with their clients and supporters, challenged the

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<sup>74</sup> *Id.* at 193 citing *Taxation with Representation of Washington*, 461 U.S. at 549.

<sup>75</sup> *Rust*, 500 U.S. at 194.

<sup>76</sup> *Id.* at 196-97.

<sup>77</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976).

<sup>78</sup> 531 U.S. 533 (2001).

<sup>79</sup> 88 Stat. 378, 42 U.S.C. § 2996 *et seq.* (1974).

<sup>80</sup> *Legal Svcs. Corp* citing Legal Services Corporation Act, 42 U.S.C. § 2996b(a).

constitutionality of § 504(a)(16) of the Act, alleging it prevented receipt of a grant if the organization “initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system...” The prohibitions applied to *all* of the activities of an LSC grantee, including those paid for by non-LSC funds.<sup>81</sup> The Court reiterated that government was not required to make viewpoint neutral disbursements when it was the speaker and that it could force third parties receiving such disbursements to promote its programs for it, because government is ultimately “accountable to the electorate and the political process for its advocacy.”<sup>82</sup> Yet, the Court added:

Neither the latitude for government speech nor its rationale applies to subsidies for private speech in every instance, however. As we have pointed out, “it does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.” *Rosenberger, supra*, at 834.

Although the LSC program differs from the program at issue in *Rosenberger* in that its purpose is not to “encourage a diversity of views,” the salient point is that, like the program in *Rosenberger*, *the LSC program was designed to facilitate private speech, not to promote a governmental message.*<sup>83</sup>

Thus, the Court said that even in the absence of a technical forum created by government to encourage a diversity of views, the statute was nonetheless unconstitutional because its purpose was to facilitate private speech, not the government’s speech. In other words, lawyers using the funds provided to argue for clients were not government speakers and government could not tell them what they could and could not say. Although it is unclear why the Court determined that the government was funding private speech instead of its own, it is clear that the attorneys had a special relationship with their clients to which government was not a part, and in fact to which government might even have been an opponent; and, government was also not privy to the myriad of potential issues that the attorneys could decide to litigate. Further, unlike *Rust*, but like *League of Women Voters*, grant recipient lawyers were absolutely muzzled from raising the welfare topic in litigation, so the funding essentially constituted an unconstitutional condition.

## 2. *Government Discretion as Government Speech*

In *AETC v. Forbes*,<sup>84</sup> the Court applied the Government Speech Doctrine rationale to contexts where the government inherently must exercise certain discretion. According to the

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<sup>81</sup> *Id.* at 538.

<sup>82</sup> *Id.* at 541.

<sup>83</sup> *Id.* at 542 (emphasis added) citing *Rosenberger*, 515 U.S. at 834. The Court also said: “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.” *Id.* at 547.

<sup>84</sup> 523 U.S. 666, 674 (1998).

Court, the Arkansas Educational Television Commission had not created a designated forum for private speech for a televised political debate, but as a public broadcaster it had engaged in speech activity by exercising editorial discretion in the selection and presentation of its programming.<sup>85</sup> The Court pointed out, though, that the government’s speech was limited to such decisions and did not necessarily extend to the speech of third parties within their programs.<sup>86</sup> The Court also indicated that its rationale was based in part on the fact that “television broadcasters enjoy the ‘widest journalistic freedom’” consistent with their public responsibilities,<sup>87</sup> and that opening up the debate to many candidates may have resulted in less substantive speech, not more.<sup>88</sup> However, the Court also specifically employed forum analysis and found that the candidate debate was a nonpublic forum, and that there was no viewpoint discrimination involved.<sup>89</sup> Forbes, the candidate who had been denied access to the debate, was excluded it said because he did not have appreciable support as a candidate, not because of his views. Thus, the Court indicated that having editorial control did not give the public broadcasters *carte blanche* to engage in viewpoint discrimination.

Another scenario where the Government Speech Doctrine applies because of the government’s inherent discretion is arts funding. In *National Endowment for the Arts v. Finley*,<sup>90</sup> artists had sued the NEA for viewpoint discrimination after their grant funding was denied. Under the National Foundation on the Arts and Humanities Act, grants were awarded to artists on the basis of “artistic excellence and artistic merit... taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”<sup>91</sup> Explaining that subjectivity was unavoidable and absolute neutrality for determining artistic worth amongst a large number of applicants was inconceivable, the Court upheld the NEA’s right to make such judgments. In doing so, it distinguished the case from the viewpoint discriminatory funding in *Rosenberger* by saying:

[T]he Government does not indiscriminately “encourage a diversity of views from private speakers.”... The NEA’s mandate is to make aesthetic judgments, and the inherently content-based “excellence” threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger* -- which was available to all student organizations that were “‘related to the educational purpose of the University,’” *id.* at 824 -- and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater....<sup>92</sup>

Therefore, because the government unavoidably had to exercise discretion in choosing which artistic works were excellent and meritorious, it had not opened up a forum for private speech.

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<sup>85</sup> *Id.* at 674.

<sup>86</sup> *Id.* at 675.

<sup>87</sup> *Id.* at 674 citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

<sup>88</sup> *Id.* at 680-81.

<sup>89</sup> *Id.* at 682-83.

<sup>90</sup> 524 U.S. 569 (1998).

<sup>91</sup> 20 U.S.C. § 951, 954(d)(1) (1965).

<sup>92</sup> *Finley*, 524 U.S. at 586 citing *Rosenberger*, 515 U.S. 834 and 824.

Even so, the Court acknowledged that had the facts shown suppression of a particular viewpoint, it may have reached a different conclusion:

If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not “aim at the suppression of dangerous ideas”... and if a subsidy were “manipulated” to have a “coercive effect,” then relief could be appropriate.<sup>93</sup>

Thus, while the *Finley* Court does not specifically invoke the Government Speech Doctrine, it explicitly says that artists seeking government aid are not speakers and implies that government is when it makes aesthetic judgments; and that while making such judgments does not create a forum to encourage a diversity of views from private speakers, the Court indicates that it still would have been concerned about any viewpoint discrimination. This concern conveys that the Court still considered viewpoint neutrality to be a limitation upon the extent of government’s discretion under the Government Speech Doctrine. In fact, this conclusion is the only one that allows a proper synthesis of the Court’s forum analysis cases with its government speech cases; if no traditional, or limited public forum exists in the government speech context, then a non-public forum must exist, under which government still may not be viewpoint discriminatory.<sup>94</sup>

### 3. *Government Speech and the Internet*

Not only does *U.S. v. American Library Association*,<sup>95</sup> involve the exercise of governmental discretion with funding decisions, but it also marks the first time the Court applied the Government Speech Doctrine to the Internet. The case concerns a constitutional challenge to the Children's Internet Protection Act (“CIPA”),<sup>96</sup> which forbade public libraries from receiving federal financial assistance to provide Internet access to their patrons unless they installed blocking software to prevent obscenity and child pornography from being accessible to minors.<sup>97</sup> Certain libraries, patrons, web site publishers, and others contended that CIPA’s requirement was an unconstitutional condition for the receipt of federal subsidies, because it required libraries “to surrender their First Amendment right to provide the public with access to constitutionally protected speech.”<sup>98</sup> The Court said assuming public libraries had free speech rights to assert in the first instance, their unconstitutional conditions claim would fail, because, as with *Rust*, while Congress does not have the power to induce grant recipients to engage in unconstitutional

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<sup>93</sup> *Id.* at 587 citing *Taxation with Representation of Washington*, 461 U.S. at 550.

<sup>94</sup> See *Cornelius*, 473 U.S. at 806.

<sup>95</sup> 539 U.S. 194 (2003).

<sup>96</sup> Pub L. No. 106-554, Title XVII (2000), 114 Stat. 2763A-335 (2000).

<sup>97</sup> 539 U.S. at 199.

<sup>98</sup> *Id.* at 210.

activities, it may exercise its authority through the Spending Clause<sup>99</sup> “to attach conditions to the receipt of federal assistance in order to further its policy objectives.”<sup>100</sup> It also said:

CIPA does not “penalize” libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance.<sup>101</sup>

So, *American Library Association* appears to extend the reasoning in *Rust* to further erode the compelled speech and unconstitutional conditions cases, because while the Court held that government was not forcing libraries to receive federal funding, unlike *League of Women Voters* where the limitation on editorializing was struck down because it applied even to speech financed by private parties, the Internet blocking software condition was an absolute requirement on recipient libraries' ability to provide Internet access. Thus, they are forced to make a Hobson's choice between encumbered Internet access or no federal funding, regardless of whether they also receive non-governmental funds to provide the Internet to their patrons.

Considering the forum and governmental discretion involved, the Court said:

The principles underlying *Forbes* and *Finley* also apply to a public library's exercise of judgment in selecting the material it provides to its patrons. Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions. Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.<sup>102</sup>

Ironically, then, even though the recipient libraries argued that they wished to exercise their discretion by providing an open forum for their patrons via the Internet, the Court indicated that the discretion inherent in their role was providing selective access.

The Court also disagreed that the library's Internet access created a public forum: A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to “encourage a diversity of views from private speakers,” but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.... As Congress recognized, “the Internet is simply another method for making information available in a school or library.” S. Rep. No. 106-

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<sup>99</sup> See U.S. Const. art. 1 § 8.

<sup>100</sup> 539 U.S. at 203, and 211 quoting *Rust v. Sullivan*, 500 U.S. at 194.

<sup>101</sup> *Id.* at 212.

<sup>102</sup> *Id.* at 205.

141, p 7 (1999). It is “no more than a technological extension of the book stack.”  
*Ibid.*<sup>103</sup>

By categorizing the Internet in a library setting as a technological extension of the book stack, however, the Court overlooks the fact the unlike an actual book stack, access to more cyber materials does not cost more, and that employment of blocking software equates to libraries exercising their discretion to *prevent* access to materials that are readily available.<sup>104</sup> The Court’s reasoning also overlooks the fact that a library patron’s right to research, learn, and pursue recreational interests is part of their right to know associated with the Free Speech Clause, which is curtailed if certain Internet access is blocked.<sup>105</sup> Yet, perhaps the fact that the Act permitted libraries to disable the filtering program “for bona fide research or other lawful purposes” satisfied any concern the Court may have had on that account.<sup>106</sup> Nevertheless, because of the libraries’ inherent discretion and the analogy of the Internet to a book stack, the Court did not reach the question of a library patron’s Free Speech rights.

Comparing *American Library Association* to *Ashcroft v. ACLU (ACLU II)*<sup>107</sup> which involved a challenge to another Internet regulation, the Child Online Protection Act (“COPA”),<sup>108</sup> demonstrates the effectiveness of the Government Speech Doctrine on enabling legislation to withstand constitutional scrutiny. In *ACLU II*, Internet service providers and others sought an injunction against the enforcement of COPA, because they alleged that by criminalizing any knowing commercial Internet posting that was harmful to minors it violated their right to free speech.<sup>109</sup> Using its strict scrutiny test, the Court ruled that COPA “was not narrowly tailored to serve a compelling Government interest, was overbroad, and was not the least restrictive means available for the Government to serve the interest of preventing minors from using the Internet to gain access to materials that are harmful to them.”<sup>110</sup> Granted *American Library Association* involved the use of filtering software provided through public libraries that was determined in *ACLU II* most likely to be a less restrictive means of preventing minors from gaining access to harmful materials, but because government restricted Internet access to such materials via funding restrictions, thereby making the speech the government’s,

<sup>103</sup> *Id.* at 206-207 citing *Rosenberger, supra*, at 834.

<sup>104</sup> *See id.* at 236-37 (Souter, J. and Ginsberg, J. dissenting) (“At every significant point, however, the Internet blocking here defies comparison to the process of acquisition. Whereas traditional scarcity of money and space require a library to make choices about what to acquire, and the choice to be made is whether or not to spend the money to acquire something, blocking is the subject of a choice made after the money for Internet access has been spent or committed.... blocking (on facts like these) is not necessitated by scarcity of either money or space.”)

<sup>105</sup> *See id.* at 216 (Kennedy, J., concurring) (“The Act directly restricts the public’s receipt of information.”)

<sup>106</sup> *Id.* at 201 citing 20 U.S.C. § 9134(f)(3). *But see id.* at 216 (Breyer, J. concurring) (“In ascertaining whether the statutory provisions are constitutional, I would apply a form of heightened scrutiny, examining the statutory requirements in question with special care. The Act directly restricts the public’s receipt of information.”)

<sup>107</sup> 542 U.S. 656 (2004); affirmed by *ACLU v. Mukasey*, 534 F.3d 181 (3<sup>rd</sup> Cir. 2008); cert. denied by *Mukasey v. ACLU*, 2009 U.S. LEXIS 598 (2009). *See also Reno v. ACLU*, 521 U.S. 844 (1997), where the Supreme Court struck down as unconstitutional the Communications Decency Act of 1996, 47 U.S.C. § 223 (1934).

<sup>108</sup> 112 Stat. 2681-736, 47 U.S.C.S. § 231 (1998).

<sup>109</sup> *ACLU II*, 542 U.S. at 661.

<sup>110</sup> *Id.* at 673 and 678.

the Court decided that it did not need to determine whether there was a legitimate free speech issue for the libraries, their patrons or Web publishers, let alone decide whether the software was a narrowly tailored means of reaching its compelling interest of avoiding harmful materials.

#### 4. *Government Speech Via Private Speakers*

While *Rust* dealt with the issue of requiring private speakers to carry the government’s message when accepting government funds for a program, more recent cases have dealt with the government’s adoption of private messages as its own. In *Johanns v. Livestock Marketing Association*,<sup>111</sup> the Court considered the Beef Promotion and Research Act of 1985,<sup>112</sup> which required domestic producers to pay an assessment to a Beef Board to fund beef-related projects, including promotion and research.<sup>113</sup> A large portion of the funds raised were spent on advertising written by private parties in the beef industry under message parameters set by Congress and the Secretary of Agriculture.<sup>114</sup> Certain state beef associations and beef producers brought suit to contest the use of their assessments for advertising because it compelled them to subsidize speech to which they objected.<sup>115</sup> The Court said:

We have sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true “compelled-speech” cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and “compelled-subsidy” cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity. We have not heretofore considered the First Amendment consequences of government-compelled subsidy of the government’s own speech.<sup>116</sup>

Despite the fact that the Court acknowledged that the assessments for beef advertising were very similar to those for mushroom advertising struck down as compelled speech in *United States v. United Foods, Inc.*,<sup>117</sup> it determined that unlike *United Foods*, the beef advertising constituted government speech because it was part of a larger regulatory scheme.<sup>118</sup> The Court explained:

“Compelled support of government”—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. “The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this

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<sup>111</sup> 544 U.S. 550, 553-554 (2005).

<sup>112</sup> 99 Stat. 1597, 7 U.S.C. § 2901 *et seq.* (1985).

<sup>113</sup> 544 U.S. at 553-54.

<sup>114</sup> *Id.* at 554.

<sup>115</sup> *Id.* at 556.

<sup>116</sup> *Id.* at 557.

<sup>117</sup> 533 U.S. 405, 416 (2001) (“We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself.”)

<sup>118</sup> 544 U.S. at 558-59.

broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.” ...We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.<sup>119</sup>

Therefore, the Court determined that while it is constitutionally impermissible for government to compel an individual to *say* something with which he or she disagrees, government may legitimately compel an individual to *pay* it to make the same statement. The fact that the Beef Board employed a third party advertiser to develop and essentially deliver the message did not change the analysis, because the Court said: “When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.<sup>120</sup> Thus, while it would be constitutionally impermissible under *Keller* and the “compelled subsidy” line of cases for government to require beef associations and beef producers to subsidize a private entity’s advertisements with which they disagreed if such advertisements were not germane to the Beef Promotion and Research Act’s purposes, the Court now deems such subsidies permissible if government sets the parameters for, and approves of, the private entity’s message.

The dissenting Justices disagreed with the majority’s justification for the expansion of the Government Speech Doctrine, and said:

The Court accepts the defense unwisely. The error is not that government speech can never justify compelling a subsidy, but that a compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own. Otherwise there is no check whatever on government’s power to compel special speech subsidies, and the rule of *United Foods* is a dead letter.... [I]f government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable by indicating that the content actually is a government message, not just the statement of one self-interested group the government is currently willing to invest with power. Sometimes, as in these very cases, government can make an effective disclosure only by explicitly labeling the speech as its own.<sup>121</sup>

So, if the rationale for allowing government to speak is that it is held accountable by the electorate for what it says, then the dissent notes that government must be transparent and inform citizens that it has adopted a private party’s message in order to enable citizens to hold government accountable.<sup>122</sup>

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<sup>119</sup> *Id.* at 559 citing *Southworth*, 529 U.S. at 229.

<sup>120</sup> *Id.* at 561-563.

<sup>121</sup> *Id.* at 571-572 (Souter, J., Stevens, J., and Kennedy, J. dissenting). See *Southworth*, 529 U.S. at 235.

<sup>122</sup> Although the majority contends that requiring government to label the message as its own is unnecessary because the overall message was already vetted politically and passed as law, *id.* at 563, the dissent believes that government

In the most recent government speech case, *Pleasant Grove City v. Summum*,<sup>123</sup> the Court expanded the Government Speech Doctrine further by explicitly stating that no free speech analysis was necessary when the speech was deemed the government's.<sup>124</sup> The Court ruled that Pleasant Grove City did not discriminate against the views of Summum, a religious organization, by refusing to accept its park monument despite previously accepting a Ten Commandments monument.<sup>125</sup> It did so by reasoning that government's acceptance of park monuments generally constitutes government speech, and therefore such action is not subject to any forum analysis to determine if government has been viewpoint discriminatory.<sup>126</sup> So, despite the fact that a public park has always been considered a traditional public forum, the Court said that the City did not have to be content-neutral when deciding whether to accept Summum's monument into the forum because of its permanence. Yet, the lack of any free speech analysis is a departure from the Court's precedents, because even in *Finley* and *Forbes*,<sup>127</sup> which the Court uses by analogy to say that government maintains discretion due to the park's capacity to only accept a limited number of donated monuments, the Court employed forum analysis affirming that even when the government is speaking in a closed forum, government must still be at least be viewpoint-neutral.

Relying upon *Johanns*, the Court further ruled: "A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message;" and that in this case the City "effectively controlled" the Park monuments' messages simply by exercising "final approval authority" over their selection.<sup>128</sup> So, while the Court in *Johanns* indicates that government may adopt private messages as its own where it essentially controls the overall message from beginning to end, the *Summum* Court indicates that all government must do is simply accept the private speech as its own. In response to Summum's inference that the City's adoption of the Ten Commandments monument meant it had adopted a religious message, the Court said that monuments can convey various messages and that government does not necessarily adopt the

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must still alert the message recipients that the message is its own. For lack of transparency regarding government speech *see; e.g.; Santa Fe Independent School District v. Doe*, 530 U.S. 290, 301-303 (2000), where despite the fact that a school district asserted that it had created a forum for private speech by establishing a policy to allow student-led, student-initiated prayer at football games, the message was actually the government's because neither the school district's policy nor its practice showed that it had opened up its pre-game ceremony to indiscriminate use of the student body. As such, the speech was government endorsement of religion which violated the First Amendment's Establishment Clause. *Id.* at 305. The case reveals that there are times when government may attempt to mask itself as the actual speaker – even through a political process – by using private speakers, and that there is, therefore, a need to require that government officially adopt its third party messages as well as an appropriate test to use to discern whether it is attempting not to do so.

<sup>123</sup> 129 S. Ct. 1125 (2009).

<sup>124</sup> *Id.* at 1129.

<sup>125</sup> *Id.* at 1138.

<sup>126</sup> *Id.* at 1131. As its rationale for why forum analysis was unworkable in this context, the Court said: "The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program," and "where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place." *Id.* at 1137-38.

<sup>127</sup> *See Forbes*, 523 at 587, and *Finley*, 524 at 587.

<sup>128</sup> *Id.* at 1131, 1134.

same message as the donor intends.<sup>129</sup> Thus, the Court appears to be expanding the Government Speech Doctrine further by indicating that government does not have to control the message from beginning to end; all it must do is grant final approval of it, while at the same time deciding what meaning to attach to it.

Although the Court said that monuments in public parks clearly represent government speech, it conceded that: “There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech.”<sup>130</sup> The Court further acknowledged that Summum “voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint,” but it said that Summum’s suggestion that governments should engage in a formal process, such as adopting a resolution, to embrace the messages sent by monuments they accept was unnecessary and not constitutionally required.<sup>131</sup> Yet, the Court did not indicate how it would allay Summum’s legitimate concern, and it established no test or dividing line between legitimate government speech and unconstitutional viewpoint discrimination.

While Justice Stevens, joined by Justice Ginsberg, concurred in the judgment, he cautioned: “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.”<sup>132</sup> Justice Souter

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<sup>129</sup> *Id.* at 1135. Despite the fact that the Court said that categorizing speech as the government’s “does not mean that there are no restraints,” using compliance with the Establishment Clause as an example, see *Id.* at 1131-32; the Court nonetheless seemed unconcerned about deeming the City’s previous acceptance of a Ten Commandments monument as government speech. *Id.* at 1135. Previously, however, in *Capital Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 754 (1995), the Court had said that:

[A]ttribut[ing] private religious expression to a neutrally behaving government, has no antecedent in this Court’s Establishment Clause jurisprudence, which has consistently upheld neutral government policies that happen to benefit religion. Where the Court has tested for endorsement, the subject of the test was either expression by the government itself, *Lynch*, *supra*, or else government action alleged to discriminate in favor of private religious expression or activity, see, e.g., *Allegheny*, *supra*.

In *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005), the Court invalidated two Kentucky counties’ Ten Commandment displays because the counties did not have a secular purpose for accepting the displays; and in *Van Orden v. Perry*, 545 U.S. 677, 701 (2005), where the Court considered Texas’ acceptance of a similar Ten Commandments statue, the Court did not resort to government speech, but simply explained that Texas had not violated the Establishment Clause, because the monument had a secular moral and historical message in addition to a religious one. Perhaps the *Summum* Court did not determine whether the adoption of the Ten Commandments monument sent an impermissible religious message or not because the Summum group only raised a viewpoint discrimination challenge rather than an Establishment Clause challenge. But, it is curious that the Court would indicate that government speech does not give government a pass on Establishment Clause scrutiny while not considering whether the City’s acceptance of the Ten Commandment’s monument should receive such scrutiny.

<sup>130</sup> *Id.* at 1132.

<sup>131</sup> *Id.* at 1134. See also *Amicus Curiae* Brief of The Rutherford Institute Supporting Respondent, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665), 2008 U.S. S. Ct. Briefs Lexis 636: “To determine what constitutes “government speech” and when—if indeed ever—so called ‘government speech’ may be restrained by the First Amendment, this Court should establish exacting standards when government grants access to favored private speech, but denies it to others.”

<sup>132</sup> *Id.* at 1139 (Stevens, J., and Ginsberg, J., concurring).

added: “Because the government speech doctrine, as Justice Stevens notes, *ante*, at 1 (concurring opinion), is ‘recently minted,’ it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored.”<sup>133</sup> Several justices thus indicate their concern that the Government Speech Doctrine may conflict with the Court’s other doctrines. Indeed, the *Sumnum* Court appears to disregard the need to apply forum analysis even to a non-public forum to guard against viewpoint discrimination, and it fails to see how government’s adoption of private speech may conflict with its compelled-subsidy cases.

The Court may have only recently minted the Government Speech Doctrine, and may not have determined its affect on its precedents, but the other branches of federal government have figured out how to use to advance its programs, including Internet-related programs.

### III. Free Speech and the Internet

No one would doubt the importance of the Internet to global society today: it is abundantly evident that federal, state, and local governments inform and serve the public via their own web pages, private entities advertise and conduct business through it, and at the end of 2008 46 million U.S. households (41%) banked on-line.<sup>134</sup> It has also been increasingly used as a tool for individual speech as 90% of the 79% of adults in the United States who use the Internet have an e-mail account.<sup>135</sup> Recent legislation also makes it clear that the federal government intends to invest more in the Internet’s infrastructure,<sup>136</sup> digitize all American’s health records,<sup>137</sup> and attempt to cure the Internet’s vulnerability to cyber crime and security attacks.<sup>138</sup> All of these federal legislative initiatives will affect privacy and private speech due to the “recently minted government speech doctrine.”

The Internet undoubtedly has been and is used as a medium for free expression and publication, but how should the Court legally treat this new medium? In *American Library Association*, the Court did not categorically declare that the Internet was not a traditional or designated public forum, but it did say that it was not so in the context of public libraries; and, it asserted that because the Internet was only a recent “resource” for speech that it would decline to include it within the historical venues considered traditional public fora.<sup>139</sup> The Court’s uncertainty regarding the type of forum it is dealing with is understandable. Forum analysis

<sup>133</sup> *Id.* at 1141 (Souter, J., concurring in the judgment).

<sup>134</sup> “Retail Internet Banking Vendors: Shifting Gears to Optimize the Online Channel,” Celent, January 9, 2009, [http://www.celent.com/124\\_493.htm](http://www.celent.com/124_493.htm).

<sup>135</sup> Internet Activities, Pew Internet & American Life Project, July 15, 2009, <http://www.pewinternet.org/Static-Pages/Trend-Data/Online-Activites-Total.aspx>.

<sup>136</sup> The Broadband Data Improvement Act of 2008, Pub. L. No.: 110-385 (2008) provides federal grants to entities who will determine Internet availability throughout their state and encourage Internet Service Providers (“ISP’s”) to offer coverage to areas which are identified as underserved.

<sup>137</sup> The Health Information Technology Act (“HITECH”), Pub. L. No. 111-5, Title VIII (2009), was passed as part of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (2009), and amends the Health Insurance Portability Act (HIPAA), Pub. L. No. 104-191 (1996).

<sup>138</sup> Cyber Security Act of 2009, S. 773, April 1, 2009, is designed to address the U.S.’s “unacceptable vulnerability to massive cyber crime, global cyber espionage, and cyber attacks that could cripple our critical infrastructure.”

<sup>139</sup> *American Library Association*, 539 U.S. at 205-206.

applies to *government property* or *government funding*, and there is no one entity, government or private, nor any person who could be said to own and finance the Internet.<sup>140</sup> Although it is conceivable that forum analysis could be used to restrict Internet services provided through government outside of the library context, individuals, private businesses and ISP's have heretofore had virtually unfettered access and freedom of speech while using or supplying services on the Internet. In fact, as *Reno v. ACLU* demonstrates, government attempts to directly regulate Internet speech risk being attacked on vagueness and overbreadth grounds.<sup>141</sup> Yet in 1997, the Court noted that while “the vast democratic fora of the Internet” had not been subject to general government supervision and regulation as was the case for the broadcast industry, government nonetheless had the authority to regulate it.<sup>142</sup> However, after *Sumnum*, where the Court determined that any free speech analysis is irrelevant when speech—even that of third parties—is deemed the government's, there are times when government regulation of the Internet conceivably will not be subject to much scrutiny.

### **A. The Fairness Doctrine and the Government Speech Doctrine**

Within the past several years there has been action in Congress regarding the Fairness Doctrine—which had consisted of various Federal Communications Commission (FCC) requirements that radio and television broadcasters present and fairly cover each side of public

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<sup>140</sup> In *Reno v. ACLU*, 521 U.S. at 849-853 (1997), quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 and 838 (E.D. Pa. 1996), the Court defines the Internet:

The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called "ARPANET"... which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is “a unique and wholly new medium of worldwide human communication.”

...  
“No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web.”

*But see* Adam D. Thierer, “Net Neutrality” *Digital Discrimination or Regulatory Gamesmanship in Cyberspace?*, Cato Institute, Jan. 12, 2004, <http://www.cato.org/pubs/pas/pa507.pdf> (“[W]hile no one entity controls [the Internet] in its entirety, many individual segments of the Internet are privately owned and operated.”)

<sup>141</sup> 521 U.S. 844, striking down §§ 223(a) and 223(d) of the Communications Decency Act as vague and overbroad content-based regulations. *See also Ashcroft v. ACLU*, 542 U.S. 656 (2004) (*ACLU II*) striking down the Child Online Protection Act as not a narrowly-tailored regulation of speech when a less restrictive means through filtering software was available to satisfy government's compelling interest of protecting children from the exposure to commercial pornography on the World Wide Web.

<sup>142</sup> *Reno v. ACLU*, 521 U.S. at 868-869. While the Supreme Court indicates in *FCC v. League of Women Voters* 468 U.S. at 376, that it had long held that Congress had the authority to regulate broadcast regulation pursuant to its Commerce Clause power, *see* art. 1, § 8, Cl 3, its analysis of cases involving the FCC's attempts to regulate the Internet assume rather than state that Congress' Commerce Clause authority extends to the Internet.

issues and which was repealed by the FCC in 1987<sup>143</sup>—as well as discussion regarding whether it would apply to the Internet.<sup>144</sup> Yet, the Fairness and Accountability in Broadcasting Act,<sup>145</sup> which was proposed in Congress in 2005 to essentially revive the Fairness Doctrine,<sup>146</sup> has never reached the House floor.<sup>147</sup> Nevertheless, because of concerns about its revival and breadth of application, a Broadcaster Freedom Act bill was recently introduced in the Senate<sup>148</sup> and the House Committee on Energy and Commerce<sup>149</sup> to prevent the FCC from implementing Fairness Doctrine regulations. This bill has not progressed either, and Speaker of the House Nancy Pelosi indicates that the Democrats will not support it because they prefer the Fairness Doctrine.<sup>150</sup> President Obama, however, has publicly opposed reviving it.<sup>151</sup> But if Congress does pass a law that applies the Fairness Doctrine to the Internet, how would the Supreme Court analyze it, and in what way might the analysis be affected by the Government Speech Doctrine?

In *Red Lion Broadcasting Co. v. FCC*,<sup>152</sup> the Court upheld the Fairness Doctrine in response to a challenge that it violated a broadcaster's free speech rights, because it determined that the government had a role in allocating scarce broadcast frequencies in a manner that promoted the public interest by ensuring that a broadcaster aired a balanced presentation of views.<sup>153</sup> The Court's rationale was that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>154</sup> The Court also believed that the Fairness Doctrine would not infringe upon the broadcaster's free speech rights, because the station was free "to carry a particular program or to publish [its] own views."<sup>155</sup> However, the Court said that if the

<sup>143</sup> FCC Ruling in *Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

<sup>144</sup> See, e.g. FCC Commissioner: Return of Fairness Doctrine Could Control Web Content, Business and Media Institute, <http://www.businessandmedia.org/articles/2008/20080812160747.aspx>, August 13, 2008, and U.S. Regulatory Czar Nominee Wants Net 'Fairness Doctrine,' World Net Daily, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=96301>, April 27, 2009.

"As the president stated during the campaign, he does not believe the Fairness Doctrine should be reinstated," White House spokesman Ben LaBolt told FOXNews.com.

<sup>145</sup> H.R. 501, 109<sup>th</sup> Cong. (2005).

<sup>146</sup> Senator Richard Durbin, who proposed the bill, claims that it does not reinstate the Fairness Doctrine, but simply reaffirms existing law. Amy Schatz, *Senate Votes to Kill Fairness Doctrine, But GOP Concerns Remain*, Washington Wire, The Wall Street Journal, Feb. 26, 2009, <http://blogs.wsj.com/washwire/2009/02/26/senate-votes-to-kill-fairness-doctrine-but-gop-concerns-remain/>.

<sup>147</sup> Referred to the Subcommittee on Telecommunications and the Internet on February 25, 2005.

<sup>148</sup> S. 34, 111<sup>th</sup> Cong. (2009).

<sup>149</sup> H.R. 226, 111<sup>th</sup> Cong. (2009).

<sup>150</sup> Pelosi Supports Return of Fairness Doctrine, Accuracy in Media, Bethany Stotts, <http://www.aim.org/aim-column/print/pelosi-support-return-of-fairness-doctrine/>, June 26, 2008.

<sup>151</sup> *White House: Obama Opposes 'Fairness Doctrine' Revival*, FoxNews.Com, <http://www.foxnews.com/politics/first100days/2009/02/18/white-house-opposes-fairness-doctrine/>, February 18, 2008.

<sup>152</sup> 395 U.S. 367, 386 (1969).

<sup>153</sup> *Id.* at 396, 400-401.

<sup>154</sup> *Id.* at 390 citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); and *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-362 (1955).

<sup>155</sup> *Id.* at 396.

FCC determined the Fairness Doctrine: “[has] the net effect of reducing rather than enhancing” free speech, its rationale and ruling would probably be different.<sup>156</sup> In fact the FCC did make such a determination. In *League of Women Voters*, the Court notes the FCC’s proposal to repeal the Fairness Doctrine, because it had determined that it had “impeded, rather than furthered, First Amendment objectives” and because it chilled free speech it was therefore no longer in the public interest.<sup>157</sup> So, any attempts by Congress to pass an act that directly applies the Fairness Doctrine to the Internet will have to overcome the presumption that it infringes free speech, unless the FCC reverses its prior finding.

Additionally, the government would have to overcome the fact that the Internet has been treated differently than broadcast media. In *Legal Services Corp v. Velazquez*, the Court said: “Where the government uses or attempts to regulate a particular medium, we have been informed by [the medium’s] accepted usage in determining whether a particular restriction on speech is necessary for the program’s purposes and limitations.”<sup>158</sup> The initial rationale of Fairness Doctrine, of there being a scarcity of broadcast frequencies, does not fit the Internet, at least not yet. Per the Court in *Reno v. ACLU*, “unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a ‘scarce’ expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds.”<sup>159</sup> In response to the federal government’s asserted significant interest to regulate the content of speech on the Internet to foster its growth, the Court also said:

We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the *free exchange of ideas* than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.<sup>160</sup>

Thus, any Congressional attempts to directly regulate Internet speech will likely fail unless the evidence clearly overcomes not only the FCC’s prior reasons for repealing, but also the Court’s similar presumption that governmental regulation of the content of Internet speech is more likely to interfere with the free exchange of ideas than to encourage it.

Congress thus would most likely have a better chance of applying the Fairness Doctrine to the Internet by employing the Government Speech Doctrine through government subsidies, because the government gets to say what it wants when it is the speaker. Broadband operators

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<sup>156</sup> *Id.* at 393.

<sup>157</sup> 468 U.S. at 380 n.12. Repeal or Modification of the Personal Attack and Political Editorial Rules, 48 Fed. Reg. 28298, 28301 (proposed June 21, 1983).

<sup>158</sup> 531 U.S. at 543.

<sup>159</sup> 521 U.S. at 870.

<sup>160</sup> *Id.* at 885 (emphasis added).

and web publishers would have a choice regarding whether to accept such funding, which acceptance would preclude them from arguing that compliance with the Fairness Doctrine is an unconstitutional condition, so long as Congress did not muzzle them on certain topics but simply required them to provide opposing points of view. Yet, if as in *Legal Services Corporation*, broadband operators and web publishers were able to argue that Congress had reduced the First Amendment to a simple semantic exercise by essentially making the condition of compliance with the Fairness Doctrine its entire funding program, then the condition might still be deemed a violation of free speech.

### **B. Net Neutrality and the Government Speech Doctrine**

In a 2005 Policy Statement, the FCC said:

In section 230(b) of the Communications Act of 1934, as amended (Communications Act), Congress describes its national Internet policy as preserving “the vibrant and competitive free market that presently exists for the Internet” and “to promote the continued development of the Internet.” In section 706(a) of the Act, Congress charges the FCC with “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability”—broadband—“to all Americans.”<sup>161</sup>

Relying upon Title I of Communications Act as its basis for exercising jurisdiction over Internet service providers, the FCC stated that it was adopting the policy “to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers.”<sup>162</sup> The policy contains four principles, which have been deemed the “network neutrality” principles:

- Consumers are entitled to access the lawful Internet content of their choice.
- Consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- Consumers are entitled to connect to their choice of legal devices that do not harm the network.
- Consumers are entitled to competition among network providers, application and service providers, and content providers.<sup>163</sup>

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<sup>161</sup> See FCC Policy Statement, FCC 05-151 (Sept. 23, 2005), 20 F.C.C.R. 14986 citing 47 U.S.C. § 230(b) and 706(a).

<sup>162</sup> *Id.* See also *NCTA v. Brand X*, 545 U.S. 967 (2005).

<sup>163</sup> *Id.* See *In re Formal Complaint of Free Press & Pub. Knowledge*, 23 FCC Rcd 13028 (2008), where a complaint was brought against Comcast Corporation for not following the Net Neutrality policy. The FCC decided that Comcast unreasonably targeted and interfered with peer-to-peer (P2P) applications, which was undue discrimination that squelched “the dynamic benefits of an open and accessible Internet.” The FCC required Comcast to divulge the details of its network management practices, and provide a compliance plan explaining how it intended to stop the discriminatory practices by the end of 2008 with its new non-discriminatory network management practices. Comcast filed a motion to dismiss the FCC’s decision, which was ultimately granted by the D.C. Circuit Court of Appeals on the grounds of mootness. *Comcast Corp. v. FCC*, 2009 U.S. App. LEXIS 7028, 2-3 (D.C. Cir. 2009).

President Obama has stated that he is in favor of these Net Neutrality principles. During his campaign for the presidency he released his plans for the Internet, which included the aspiration to: “Ensure the full and free exchange of ideas through an open internet and diverse media outlets.”<sup>164</sup> The plan read: “A key reason the Internet has been such a success is because it is the most open network in history. It needs to stay that way. Barack Obama strongly supports the principle of network neutrality to preserve the benefits of open competition on the Internet.”<sup>165</sup> Then, in May, 2009, as president he said: “I remain firmly committed to net neutrality so we can keep the Internet as it should be -- open and free.”<sup>166</sup>

In the American Recovery and Reinvestment Act of 2009<sup>167</sup> (ARRA), Congress authorized \$7.2 billion to expand the U.S.’s access to broadband services. Of that amount, \$4.7 billion will be used to establish the Broadband Technology Opportunities Program (“B-Top”) under the National Telecommunications and Information Administration (NTIA) in conjunction with the FCC, and \$2.5 billion will be used to establish the Broadband Initiatives Program for rural America under the Rural Utilities Service (RUS).<sup>168</sup> Similar to President Obama’s Plan, and despite the fact that 90% of adults in the U.S. already use the Internet, Congress has designed B-Top to accomplish the following objectives:

- To provide consumer access to broadband service in unserved areas of the country;
- To provide improved consumer access to broadband service in underserved areas of the country;

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<sup>164</sup> “Science, Technology and Innovation for a New Generation,” November, 2008, <http://www.barackobama.com/issues/technology/#open-internet>.

<sup>165</sup> The plan expounded:

Users must be free to access content, to use applications, and to attach personal devices. They have a right to receive accurate and honest information about service plans. But these guarantees are not enough to prevent network providers from discriminating in ways that limit the freedom of expression on the Internet. Because most Americans only have a choice of only one or two broadband carriers, carriers are tempted to impose a toll charge on content and services, discriminating against websites that are unwilling to pay for equal treatment. This could create a two tier Internet in which websites with the best relationships with network providers can get the fastest access to consumers, while all competing websites remain in a slower lane. Such a result would threaten innovation, the open tradition and architecture of the Internet, and competition among content and backbone providers. It would also threaten the equality of speech through which the Internet has begun to transform American political and cultural discourse. Barack Obama supports the basic principle that network providers should not be allowed to charge fees to privilege the content or applications of some web sites and Internet applications over others. This principle will ensure that the new competitors, especially small or non-profit speakers, have the same opportunity as incumbents to innovate on the Internet and to reach large audiences. Obama will protect the Internet’s traditional openness to innovation and creativity and ensure that it remains a platform for free speech and innovation that will benefit consumers and our democracy.

<sup>166</sup> *Obama Reaffirms Net Neutrality Pledge*, Tech Daily Dose, NationalJournal.com, May 29, 2009, <http://techdailydose.nationaljournal.com/2009/05/obama-reaffirms-net-neutrality.php>.

<sup>167</sup> Pub. L. No. 111–5, 123 Stat. 115 (2009).

<sup>168</sup> The Act authorizes RUS “to extend loans, loan/grant combinations, and grants to projects where at least 75 percent of an RUS-funded area is in a rural area that lacks sufficient access to high speed broadband service to facilitate rural economic development.” 74 Fed. Reg. 130 (Jan. 2, 2009).

- To provide broadband access, education, awareness, training, equipment, and support to community anchor institutions (*e.g.*, schools, libraries, medical facilities), or organizations and agencies serving vulnerable populations (*e.g.*, low income, unemployed, aged), or job creating strategic facilities located in state- or federally designated economic development areas;
- To improve access to, and use of, broadband service by public safety agencies; and
- To stimulate the demand for broadband, economic growth, and job creation.<sup>169</sup>

Per the Act, NTIA must “impose contractual conditions on B-Top grants that would, at a minimum, adhere to the principles contained in the FCC’s broadband policy statement.”<sup>170</sup> In other words, as a condition of receiving a B-Top grant, recipients must comply with the FCC’s four Net Neutrality principles.<sup>171</sup> In addition, funding applicants must agree to four other stipulations, which mirror President Obama’s Internet plan, subject to law enforcement needs and reasonable network management practices, and which “will apply for the life of the awardee’s facilities used in the project and not to any existing network arrangements”:

- (1) Not favor any lawful Internet applications or content over others. This requirement ensures neutral traffic routing. Without a nondiscrimination condition, network operators could give preferential treatment to affiliated services, or charge some application and content providers for “fast lanes” that would put others at a competitive disadvantage.
- (2) Display network management policies in a prominent location on the service provider’s Web page and provide notice to customers of changes to these
- (3) Connect to the public Internet directly or indirectly, such that the project is not an entirely private closed network.
- (4) Offer interconnection, where technically feasible, on reasonable rates and terms to be negotiated with requesting parties. This includes both the ability to connect to the public Internet and physical interconnection for the exchange of traffic.<sup>172</sup>

While Congress is attempting to deploy, or grow, the Internet per the Communications Act, and the asserted goal for Network Neutrality and ARRA’s Internet regulations are to encourage a free exchange of ideas, the Court in *Reno v. ACLU* said it would view the regulation of Internet speech skeptically. So, if the B-Top conditions were applied as direct content-based regulations to remove barriers to Internet speech, regardless of how laudable the objectives might be, government would have to overcome the presumption that regulation of the Internet is more

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<sup>169</sup> See ARRA, § 6001(b), 123 Stat. at 512–13. B-Top has three components: Broadband Infrastructure, Public Computer Centers, and Sustainable Broadband Adoption. 74 Fed. Reg. (July 9, 2009).

<sup>170</sup> *Id.*

<sup>171</sup> FCC’s Broadband Policy Statement (FCC 05–151 20 F.C.C.R. 14986).

<sup>172</sup> See 74 Fed. Reg. 130.

likely to interfere with the free exchange of ideas than to encourage it. Further, there are those who believe that Net Neutrality is not only unnecessary to promote Internet speech, but also that it will actually infringe upon certain network owners' speech.<sup>173</sup> Verizon has called Net Neutrality a "backward looking, heavy handed regulation that would undermine consumer choice and inhibit innovation and investment in broadband."<sup>174</sup> The broadcasting and cable industry asserts that Net Neutrality regulations would violate the free speech rights of broadband operators; that per the Court's *NCTA v. Brand X*<sup>175</sup> decision that such operators are not required to carry all content indifferently like common carriers; that the regulations would equate to compelled speech by forcing operators to convey messages against their will, and surrender the exercise of their discretion to block content or subscriber messages; and, that they act like an updated Fairness Doctrine by requiring operators to present balanced views of controversial issues.<sup>176</sup> Granted the Court declared in *Brand X* that the FCC had the power to enforce regulations against broadband operators, but the Comcast lawsuit and these broadband industry statements indicate the likelihood that more operators will challenge any direct application of the FCC's Net Neutrality Policy, or even a law codifying it.

What potential effect might the Government Speech Doctrine have on the issue of Net Neutrality and Internet free speech? To begin with, through its spending power authority Congress may legitimately "attach conditions to the receipt of federal assistance in order to further its policy objectives,"<sup>177</sup> so compliance with the FCC's Net Neutrality Policy as a condition for the receipt of B-Top funds to further a more open Internet appears legitimate. Unlike the broadcasters in *League of Women Voters*, who were compelled to obtain a government license in order to conduct business, broadband operators would have a choice regarding whether to accept B-Top funding, preventing B-Top recipients from raising a

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<sup>173</sup> Tim B. Lee of the Cato Institute says:

Concerns that network owners will undermine free speech online are particularly misguided. Network owners have neither the technology nor the manpower to effectively filter online content based on the viewpoints being expressed, nor do profit-making businesses have any real incentive to do so. Should a network owner be foolish enough to attempt large-scale censorship of its customers, it would not only fail to suppress the disfavored speech, but the network would actually increase the visibility of the content as the effort at censorship attracted additional coverage of the material being censored.

Tim B. Lee, *The Durable Internet: Preserving Network Neutrality without Regulation*, Cato Institute, Nov. 12, 2008, <http://www.cato.org/pubs/pas/pa-626.pdf>.

<sup>174</sup> Broadband Providers Resist Net Neutrality, High Speed ISP News, June 17, 2009, <http://www.high-speed-isp.com/news/tag/net-neutrality/>. Verizon was accused of initially refusing to allow NARAL to send text messages across its mobile messaging network, viewing them as SPAM under its policy until receiving political pressure to allow it. Verizon spokesperson Jeffrey Nelson said: "The decision to not allow text messaging on an important, though sensitive, public policy issue was incorrect, and we have fixed the process that led to this isolated incident." See Verizon's Abortion Block Raises Net Neutrality Concerns: Telecom reverses course, blames "incorrect interpretation" of its policies, ConsumerAffairs.com, [http://www.consumeraffairs.com/news04/2007/09/verizon\\_abortion.html#ixzz0LKvBvZsH&D](http://www.consumeraffairs.com/news04/2007/09/verizon_abortion.html#ixzz0LKvBvZsH&D).

<sup>175</sup> 545 U.S. at 976 and 996.

<sup>176</sup> Randolph J. May, *Net Neutrality and Free Speech*, Broadcasting and Cable, Sept. 17, 2006, [http://www.broadcastingcable.com/article/105815-Net\\_Neutrality\\_and\\_Free\\_Speech.php](http://www.broadcastingcable.com/article/105815-Net_Neutrality_and_Free_Speech.php).

<sup>177</sup> *American Library*, 539 U.S. at 203.

compelled speech argument. Also, government might claim per *Johann* and *Sumnum* that it has bought or adopted a B-Top recipient's free speech right to exercise discretion. As such, government may fund all content and viewpoints if it chooses and the broadband operators may not object. So, ironically, where the Government Speech Doctrine was used in *Forbes* for the proposition that government broadcasters have editorial discretion to make choices among speakers, in the case of the Internet, it may be used for the proposition that broadband operators, as the government's adopted speakers, *do not* have such discretion.

Interestingly, the conditions attached to B-Top funding make it probably that profitable broadband operators will refuse the grant, if they realize the discretion they surrender by accepting it. Start-up broadband operators, though, may more readily accept the funding, seeing the grant as a way to get a leg up on the well-established competition. If such a scenario occurs, then President Obama's aspiration that the Internet have diverse media outlets will be realized.

### C. Health Records and the Government Speech Doctrine

Another part of the ARRA includes the Health Information Technology for Economic and Clinical Health Act (HITECH).<sup>178</sup> In Candidate Obama's Plans for the Internet, he indicated his desire to make "use of health information technology to lower the cost of health care."<sup>179</sup> He explained that: "Most medical records are still stored on paper, which makes them difficult to use to coordinate care, measure quality, or reduce medical errors. Processing paper claims also cost twice as much as processing electronic claims," so, as president, he intended to invest in "standards-based electronic health information systems, *including electronic health records.*"<sup>180</sup> Yet, along with that conversion effort, he indicated that he would pursue "robust protection against misuses of particularly sensitive kinds of information, such as e-health records and location data that do not fit comfortably within sector-specific privacy laws."<sup>181</sup>

Currently, somewhere around 20% of physician's medical records are in electronic form,<sup>182</sup> but HITECH's goal is that every American's medical record be transferred into an electronic health record (EHR) by 2014.<sup>183</sup> Section 13402 of ARRA governs required notifications in the event of a privacy breach. It states that upon discovery of a breach a covered entity<sup>184</sup> must "notify each individual whose unsecured protected health information has been, or is reasonably believed by the covered entity to have been, accessed, acquired, or disclosed as a result of such breach." Vendors of personal health records<sup>185</sup> also have a duty to notify, and

<sup>178</sup> ARRA § 13001(b), 123 Stat. at 112 *et seq.* (2009). Pub. L. No. 111-5, Title-XIII (2009).

<sup>179</sup> "Science, Technology and Innovation for a New Generation," November, 2008, [http://www.barackobama.com/issues/technology/index\\_campaign.php](http://www.barackobama.com/issues/technology/index_campaign.php).

<sup>180</sup> *Id.* (emphasis in original).

<sup>181</sup> *Id.*

<sup>182</sup> Caroline Trump, EMR Software is Environmentally Friendly and Saves Healthcare Dollars, AC Associated Content, Mar. 26, 2009,

[http://www.associatedcontent.com/article/1583950/benefits\\_of\\_electronic\\_medical\\_records.html](http://www.associatedcontent.com/article/1583950/benefits_of_electronic_medical_records.html).

<sup>183</sup> ARRA § 13101, 42 USC § 3001(c)(3)(C)(3)(A)(ii).

<sup>184</sup> "Covered entities" are "(1) A health plan, (2) A health care clearinghouse, and (3) A health care provider who transmits any health information in electronic form." ARRA § 13400(3) incorporating 45 CFR § 160.103.

<sup>185</sup> *Id.* at § 13407(a).

business associates<sup>186</sup> must notify a covered entity of a breach. However, notification is not required for any inadvertent disclosure or unintentional “acquisition, access, or use” by a covered entity’s or business associate’s employee, so long as the information “is not further acquired, accessed, used, or disclosed.”<sup>187</sup> Although health care providers under HIPAA generally do not have to abide by their patients’ request to restrict uses and disclosures of their medical records,<sup>188</sup> as another privacy and personal autonomy measure, HITECH permits individuals to opt out of allowing their records to be published for medical research.<sup>189</sup> Yet, in addition to covered entities, business associates and vendors, the federal and state governments will also have access to the medical records to accomplish “enterprise integration” of EHRs.<sup>190</sup>

David Blumenthal, the National Coordinator for Health Information Technology for HITECH, is tasked with overseeing enterprise integration by ensuring that proper technology is used to transition paper records to EHRs and that privacy is maintained.<sup>191</sup> As an incentive for healthcare providers “to adopt, implement, and effectively use certified EHR technology that allows for the electronic exchange and use of health information,” the National Coordinator will provide them with grants and loans from 2011 to 2014.<sup>192</sup> Those who do not become meaningful EHR users will begin to lose a percentage of Medicare payments each year starting in 2016.<sup>193</sup>

According to the American Medical Association, HITECH clarified some of the confusion raised by HIPAA by defining a medical records breach, and improved it by requiring healthcare providers to notify patients when a breach occurs.<sup>194</sup> In regards to privacy, it appears that EHRs will not be stored in any one particular database, but the records will be disbursed in different locations and exchanged between providers only when necessary.<sup>195</sup> “Participation in this program by healthcare providers isn’t mandatory, but the \$19 billion in federal subsidies and the penalties for Medicare and Medicaid doctors are powerful incentives to join.”<sup>196</sup>

<sup>186</sup> A “business entity” provides legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services to a covered entity. § 13400(2) incorporating 45 CFR § 160.103.

<sup>187</sup> § 13400(1)(B). The notification must occur “without unreasonable delay and in no case later than 60 calendar days after the discovery of a breach” by a covered entity or business associate. § 13402(d)(1). The Department of Health and Human Services is in the public comment stage of issuing final regulations regarding such breaches. Fed. Reg. 79 (Apr. 27, 2009).

<sup>188</sup> 45 CFR § 164.522(a)(1)(ii).

<sup>189</sup> ARRA § 13405(a).

<sup>190</sup> *Id.* at § 13301, 42 U.S.C. § 3013(d)(d). “Enterprise integration” is defined as “the electronic linkage of health care providers, health plans, the government, and other interested parties, to enable the electronic exchange and use of health information among all the components in the health care infrastructure in accordance with applicable law, and such term includes related application protocols and other related standards. ARRA § 13101, 42 USC § 300(2).

<sup>191</sup> See generally §§ 13202 and 3001.

<sup>192</sup> §§ 3012(a) and 4101.

<sup>193</sup> Social Security Act, 42 U.S.C. 1395w-4(a)), §1848(a), as amended 2009.

<sup>194</sup> *A Physician’s Role Following a Breach of Electronic Health Information*, Report of the Council on Ethical and Judicial Affairs, CEJA Report 3-A-09, Presented by: Regina M. Benjamin, MD, Chair, <http://www.securityprivacyandthelaw.com/uploads/file/AMA%20CEJA%20Report%203-A-09%20Breach%20of%20Security%20in%20Electronic%20Health%20RecordsAMENDED.doc>.

<sup>195</sup> See ARRA § 13101, 42 USC § 300(2) describing Enterprise Integration as “electronic linkage of health care providers, health plans the government, and other interested parties.”

<sup>196</sup> Maureen Martin, “HITECH Increases Exposure of Personal Care Records,” The Heartland Institute, June 1, 2009,

What, if any affect will the Government Speech Doctrine have on the implementation of HITECH? In particular, could it be used to diminish patient privacy and individual autonomy? The National Coordinator is tasked with being the watchdog to ensure that the issue of patient privacy is treated with paramount importance and that intentional breaches are penalized. Yet, no notification is required for unintentional disclosures, and there are a larger number of entities, including the federal and state governments, to whom HITECH will grant easy access to EHRs under certain conditions. While individuals may opt out of their medical records being used for medical research, there is no right to opt out of having those records digitized and used as part of the national enterprise integration system if his or her healthcare provider is a meaningful EHR user. Individuals also do not have a privacy interest in, or a private right of action concerning, their medical records being digitized, and in accordance with HIPAA a patient's consent is generally not required for them to be released for treatment, payments or healthcare operations.<sup>197</sup> A healthcare provider participating in the Enterprise Integration program most likely will not be able to claim ownership of the EHRs either. In fact, since the provider is accepting a government grant to create EHRs from paper records, then pursuant to *Johann and Summum*, even though the government is using the provider as a private source to convert the records, the government has a strong argument that it has exercised its discretion to control the conversion process, and that by paying the providers for the EHRs it is "adopting" them as its own. So, while HITECH gives patients more protection than HIPAA with the notification of medical records breaches, the employment of the Government Speech Doctrine will enable government to have greater control over the digitized version of such records and to provide greater access to them.

#### **D. Cybersecurity and the Government Speech Doctrine**

In an address he made in May, 2009, President Obama said: "We meet today at a transformational moment—a moment in history when our interconnected world presents us, at once, with great promise but also great peril."<sup>198</sup> He noted that: "According to one survey, in the past two years alone cyber crime has cost Americans more than \$8 billion."<sup>199</sup> He also said:

Al Qaeda and other terrorist groups have spoken of their desire to unleash a cyber attack on our country—attacks that are harder to detect and harder to defend against. Indeed, in today's world, acts of terror could come not only from a few extremists in suicide vests but from a few key strokes on the computer—a weapon of mass disruption.<sup>200</sup>

So, because of this vulnerability, he said:

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<http://www.heartland.org/policybot/results/25293/HITECH%20increases%20Exposure%20of%20Personal%20Care%20Records.html>.

<sup>197</sup> See 45 C.F.R. §§ 160.102 *et seq.*

<sup>198</sup> Remarks By The President On Securing Our Nation's Cyber Infrastructure, The White House, Office of the Press Secretary, May 29, 2009.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

From now on, our digital infrastructure—the networks and computers we depend on every day—will be treated as they should be: as a strategic national asset. Protecting this infrastructure will be a national security priority. We will ensure that these networks are secure, trustworthy and resilient. We will deter, prevent, detect, and defend against attacks and recover quickly from any disruptions or damage.

President Obama’s characterization of the Internet infrastructure in America as a “strategic national asset,” is certainly transformation for our federal government. Heretofore, the Internet had not been considered owned by anyone and certainly wasn’t deemed a “national asset.”

To quell private sector fears of digital nationalization, the President continued:

[W]e will strengthen the public/private partnerships that are critical to this endeavor. The vast majority of our critical information infrastructure in the United States is owned and operated by the private sector. So let me be very clear: My administration will not dictate security standards for private companies. On the contrary, we will collaborate with industry to find technology solutions that ensure our security and promote prosperity.

Yet, he also indicated that his administration would continue to pump federal dollars into cutting-edge research and development to meet the 21<sup>st</sup> Century’s digital challenges, and into the American information infrastructure, which will include, among other things, “laying broadband lines to every corner of America; building a smart electric grid to deliver energy more efficiently; [and] pursuing a next generation of air traffic control systems...” Finally, he said:

Let me also be clear about what we will not do. Our pursuit of cybersecurity will not—I repeat, will not include—monitoring private sector networks or Internet traffic. We will preserve and protect the personal privacy and civil liberties that we cherish as Americans.

Few would argue that the President’s concern about cyber attacks is illegitimate. In a little more than a week after his speech, North Korean hackers unsuccessfully attempted a cyber-attack on the White House, the Pentagon, and the New York Stock Exchange in addition to successfully affecting South Korean government sites.<sup>201</sup> The Cybersecurity Act of 2009<sup>202</sup> was also introduced in Congress to fix this “unacceptable vulnerability to massive cyber crime, global cyber espionage, and cyber attacks that could cripple our critical infrastructure.”<sup>203</sup> Generally, the Act aims to establish a new relationship between the government and the private sector on

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<sup>201</sup> <sup>201</sup> Matthew Weaver, “*Cyber attackers target South Korea and US*,” guardian.co.uk, <http://www.guardian.co.uk/world/2009/jul/08/south-korea-cyber-attack>.

<sup>202</sup> S. 773, 111th Cong. (2009).

<sup>203</sup> Press Release, U.S. Senate Committee on Commerce, Science and Transportation, Chairman Rockefeller and Senator Snowe Introduce Comprehensive Cybersecurity Legislation, (Apr. 2009) [http://commerce.senate.gov/public/\\_files/Cyberbillsummaryonepagerplusthreepagesummarypressrelease1Apr090.pdf](http://commerce.senate.gov/public/_files/Cyberbillsummaryonepagerplusthreepagesummarypressrelease1Apr090.pdf).

cyber-security by, among other things: 1) creating and supporting Regional Cybersecurity Centers for the promotion and implementation of “enforceable cyber-security standards” among small and mid-sized businesses;<sup>204</sup> 2) granting the National Institute of Standards and Technology (NIST) with the authority to establish those measurable and auditable cyber-security standards not only for government and its contractors but also for its grantees;<sup>205</sup> 3) granting the Secretary of Commerce (hereinafter “Secretary”) “access to all relevant data” regarding “federal government and private sector owned critical infrastructure information systems and networks” regardless of “any provision of law, regulation, rule, or policy restricting such access;”<sup>206</sup> and 4) granting the President the power to shut down critical Internet infrastructure for national security purposes.<sup>207</sup> So, if this bill becomes law, small and mid-sized businesses will be encouraged to adopt cyber-security standards, while businesses receiving government grants will be required to follow them. Further, the Secretary will have access to a private businesses’ Internet infrastructure and network data if he deems them to be relevant to national security, and the President will have the power to shut down that critical infrastructure. The legislation also requires the President to report to Congress on “the feasibility of an identity management and authentication program” for the Internet’s critical infrastructure while allowing for “appropriate civil liberties and privacy protections.”<sup>208</sup>

What affect might the application of the Government Speech Doctrine have on Internet speech should this legislation become law? The proposed Regional Cybersecurity Centers will be non-profit institutions and organizations who receive federal financial aid to host a Center.<sup>209</sup> As such, they will clearly be acting as the government’s agents for the cyber-security program, and therefore their speech will most assuredly be considered government speech, because government gets to say what it wants through its programs. Such an arrangement, however, should not create any free speech conflicts since the nonprofits should know what their role is when choosing to apply and become a government agent to host a Center.

Yet, a few of the legislation’s provisions, specifically the Secretary’s power to have access to all relevant data regarding critical Internet infrastructure systems and networks and the President’s power to shut down the critical Internet infrastructure for national security purposes, may well create free speech conflicts. Regarding the Secretary’s power, while private network owners might not have a problem sharing with the Secretary their actual cyber-security threats of which they become aware, they might have an objection to sharing how they are vulnerable to such threats, because doing so may reveal trade secrets, other proprietary information and private communications. Thus, in addition to a violation of privacy rights complaint, network and system owners might challenge any direct action the Secretary took to obtain the information—regardless of any provision of law—on the grounds that it equates to compelled speech under the

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<sup>204</sup> S. 773, 111th Cong. § 5 (2009).

<sup>205</sup> *See id.* § 6.

<sup>206</sup> *See id.* § 14(b)(1).

<sup>207</sup> *See id.* § 18(1)(B)(2).

<sup>208</sup> *See id.* § 17.

<sup>209</sup> *See id.* § 5.

Free Speech Clause since government would be forcing them to speak about things they would rather keep private. Even though a legal battle might ensue, the infrastructure and network owners' free speech claim ultimately might fail for a variety of reasons. First, to the extent that the government is unable to obtain the information on its own through surveillance under the USA Patriot Act of 2001,<sup>210</sup> a right to privacy claim would most likely fail, because government could argue that it has a compelling interest<sup>211</sup> in national security. It would assert that this interest is directed only to obtaining "relevant" information that will prevent cyber criminals from capitalizing upon Internet network vulnerabilities, and that that right overrides network and system owners' proprietary and other rights.<sup>212</sup> Second, a compelled speech claim that government is forcing the network and system owners to speak about matters against their will would most likely fail. Despite the similarity to *Keyishian* and *Whitehill*, where fear of reprisal—such as having their access to the government-owned portions of the Internet infrastructure shut down—would be used to force them to speak, government's compelling interest in national security, which is narrowly-tailored to just relevant information affecting the Internet's infrastructure, would override the owners' proprietary and privacy interests since loss of autonomy for those companies and others are threatened.

Government might, however, have an easier time obtaining the vulnerability information by relying upon the Government Speech Doctrine. Considering the B-Top, RUS and other government funding that has been, and will be, directly and indirectly applied to the nation's Internet infrastructure under ARRA, government will probably be able to assert that it is one of the larger Internet's infrastructure owners, and as such, per *Forbes* it maintains the discretion to determine reasonable access of private network and system owners to participate in, and speak through, that "forum." Per *Summum*, it might also assert that it refuses to "adopt" the semi-permanent access of potentially security-vulnerable players to its forum. The government's defense might be even stronger if the owners had previously accepted any B-Top grants, because government could claim per *Rust* that the owners have acted as its agents to enhance the Internet's infrastructure to provide greater consumer access to the Internet, and therefore government may require the surrender of vulnerability information as a reasonable condition of that role, because such vulnerabilities have the potential of preventing such access.

The arguments justifying the President's power to interrupt speech, publication, commerce and possibly affect other rights by shutting down critical Internet infrastructure are similar to the Secretary's power to compel the disclosure of infrastructure and network owners'

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<sup>210</sup> 50 U.S.C. § 1805 and 1842. Even if infrastructure and network owners believed that government would try to obtain information from them surreptitiously, they would lack standing to bring a free speech challenge unless they could show a greater probability of an actual search than just the existence "of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose." *Laird v. Tatum*, 408 U.S. 1, 10 (1972).

<sup>211</sup> See; e.g., *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) citing *Department of Navy v. Egan*, 484 U.S. 518, 528, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988) ("Government has a compelling interest in protecting truly sensitive information from those who, "under compulsion of circumstances or for other reasons, . . . might compromise [such] information.")

<sup>212</sup> An infrastructure or network owner might be able to obtain a court order, however, requiring the government not to further disclose the proprietary information.

vulnerabilities. Any facial challenge to the Cybersecurity Act regarding the constitutionality of this power would raise the question of whether shutting down the Internet's infrastructure is a narrowly-tailored remedy to achieve the government's compelling interest in national security for any and all threats. The courts might hold that the Act is not narrowly-tailored, because it grants the President the ability to shut down the Internet's entire infrastructure, consequently interrupting the nation's speech and commerce, when it may only be necessary to shut down a small portion of it to address a localized cyber-security threat. However, if as the legislation anticipates, most public and private entities will be following the same Internet security standards, then government may be able to counter and successfully prove that such uniformity will require a massive shut-down to prevent greater vulnerability, such a domino effect of security breaches and/or outages.

Even assuming that the courts determine from a facial challenge to the Cybersecurity Act that the Presidential power is narrowly-tailored and constitutional, a large-scale Internet shut down would still almost certainly draw as applied free speech and press complaints along with demands for damages from individuals and businesses who had their conversations and/or business interactions halted. Rather than defend the challenges by arguing that it had a significant or compelling national security interest that was narrowly-tailored by shutting down no more of the Internet than was necessary, government could invoke the Government Speech Doctrine to avoid any free speech analysis at all. With the amount of government funds directly and indirectly spent on enhancing the nation's broadband infrastructure, it might be able to assert that it is one of the nation's largest owners of the Internet's critical infrastructure. As such, per *Forbes* and *Summum*, it would have a good argument that it maintains discretion over when to allow communication and commerce traversing across its network, giving it the right to determine when it was reasonably necessary to close its virtual public forum in response to a potential cyber attack. The as applied challenges to the shut down would thus most likely fail.

#### **IV. CONCLUSION**

Thus, a review of Court's free speech jurisprudence reveals that the interpretation and limitations of the Free Speech Clause has evolved over the years, as has the size of the U.S. government. The Clause's general purpose of guarding against government's inhibition of the marketplace of ideas so that citizens may speak on public issues and bring about political and social change to govern themselves is still viable, but government is becoming a bigger player in that marketplace through the Government Speech Doctrine. As government programs are increasingly advanced through third parties, the Court has determined that it may sometimes exercise discretion regarding who it chooses to fund for a program without being viewpoint discriminatory, and that once chosen it generally may compel those third parties to speak in lockstep with it. While initially it could not silence those third parties by absolutely precluding them from giving an opposing view outside of the confines of its program, it is unclear whether they may do so now in certain contexts after *American Library Association*. The government may also compel special interest groups to fund certain programs so long as its goal is legitimate and the principle

object of the program is not speech, but the Court gives no clear test for determining whether either requirement is met. In addition, it appears that government may now adopt the speech of third parties associated with advancement of those programs, even if it has not exercised discretion or control over the messages prior to their acceptance or has received private subsidies for them, and it need not make such adoption clear to the general public. Further, now that the Court has announced in *Summum* that no free speech analysis is necessary when the speech is deemed the governments, there are concerns that there is nothing to restraint government from possibly being viewpoint discriminatory.

As government begins to invest directly and indirectly in the Internet, which up to this point has been relatively free from government control, the Government Speech Doctrine will enable it to assume the position of a significant Internet speaker having the authority to regulate the Internet speech of others. B-Top subsidies to broadband operators will most likely prove to be an effective means of implementing the FCC's Net Neutrality Policy without opposition; and, those broadband operators who choose to retain their autonomy by not accepting B-Top funding end up competing against those who do accept the funding, which will diversify broadband ownership and result in government regulation what Internet access is provided to the public. As government invests in the enterprise integration of electronic health records, healthcare costs may be lowered and research of various illnesses may be enhanced, but government's incentives to healthcare providers for digitizing medical records will enable government to claim ownership of EHRs, thereby diminishing individual autonomy. Further, as a newly declared national asset, government's compelling interest in national security along with its critical infrastructure funding will enable it to designate the Internet as a public forum warranting conditions be met prior to access consistent with its security goals, and including the power to close access and disrupt Internet speech and commerce in response to cyber security threats.

### References

- Amici Curiae* Brief of the Commonwealth of Virginia, Thirteen Other States and Puerto Rico Supporting Petitioners, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665), 2008 U.S. S. Ct. Briefs Lexis 636.
- Amicus Curiae* Brief of The Rutherford Institute Supporting Respondent, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665), 2008 U.S. S. Ct. Briefs Lexis 636.
- Article: "Fear of Freedom: The New Speech Regulations in Cyberspace," Steven G. Gey, 8 *Tex. J. Women & L.* 183, 1999.
- Article: "The Measure of Government Speech: Identifying Expression's Source," Helen Norton, 88 *B.U.L. Rev.* 587, 2008.
- Article: "The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech," Mary Jean Dolan, 31 *Hastings Const. L.Q.* 71 (2004).

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