COVERT COERCION: GOVERNMENT SPEECH AND ITS COSTS TO FREEDOM

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The First Amendment is a well-known bulwark against a government that might use its regulatory powers to silence speech based on the viewpoint of the speaker. The government speech doctrine extended those protections to the government itself, allowing the government to adopt its own viewpoint when it speaks on its own behalf. The result of the Court's decision to extend First Amendment protections to the government is that the government can use the First Amendment as a shield when it uses viewpoint discriminatory regulation to coerce speakers into silence. The theorists and judges who created the government speech doctrine have argued that the democratic process and the other provisions of the Constitution would be strong enough to stop the government from abusing its speech powers. This Note, however, identifies a gaping hole in their doctrinal framework where low-visibility government speech meets the ambiguity of the coercion-persuasion line. At that critical point, neither the First Amendment, nor the other provisions of the Constitution, nor the democratic process can stop the leviathan's inclination to silence dissent.

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Introduction

Amid the COVID pandemic and the legal fallout of the 2020 election, the Biden Administration attempted to influence social media companies to moderate misinformation.[1] The First Amendment protects misinformation on social media platforms from government control, but the platforms are free to moderate content on their sites however they wish because they are not government actors. Thus, a 2023 suit challenging the Biden Administration's actions alleges that the government commandeered social media companies to do its dirty work by enlisting those companies to moderate content according to the administration's viewpoint preferences.[2] And, perhaps most damningly, the suit alleges that the government officials elicited compliance from the social media companies by threatening increased regulatory enforcement and changes to legal protections for social media platforms if they refused to do the administration's bidding.

Maybe these allegations are not troubling to those who are not particularly concerned for the speech rights of people who peddle misinformation that threatens democracy and public health. Consider another example. Suppose a conservative administration wants to silence liberal speech on college campuses. The First Amendment bars the administration from arresting or otherwise punishing members of

[1] *See infra* Section III.A.

[2] For a detailed discussion of that case, see Missouri v. Biden, 83 F.4th 350, 397 (5th Cir. 2023), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023), *rev'd and remanded sub nom.* Murthy v. Missouri, 144 S. Ct. 1972 (2024); *see also infra* Section III.A (same).

the university community for exercising their protected right to speech and protest. But nothing in the Constitution would prevent a private university from placing onerous restrictions on expression on their own campus.[3] So what course of action does the administration take? It expresses to the universities that it would like them to suppress campus speech, and it threatens using all available leavers of government power to punish universities that do not enforce the government's speech-restrictive preferences.

Of course, this example is not hypothetical. On January 30th, 2025, President Trump signed an executive order to "combat antisemitism." The order promises punishment for "anti-Jewish racism in leftist, anti-American colleges and universities."[4] Then, on March 4th, Trump posted on Truth Social that federal funding to universities which allowed "illegal protests" would stop and that "[a]gitators [would] be imprisoned[] . . . ."[5] Three days later, Trump's Joint Task Force to Combat Anti-Semitism announced the cancellation of $400 million in grants and contracts to Columbia University "due to the school's continued inaction in the face of persistent harassment of Jewish students."[6]

Both examples involve the government speech doctrine—a niche corner of First Amendment law which holds that when the government speaks for itself, it is freed from the viewpoint neutrality requirement. In other words, under this doctrine, the government is not constrained by the First Amendment limitation that would ordinarily prevent it from suppressing disfavored views. So, when the government speaks, what constrains it? What legal force protects civil liberties from the government's speech if not the First Amendment's bar on viewpoint discrimination? These questions and the examples I have discussed highlight the problem at the heart of the government speech doctrine:

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[3] Though such restrictions would violate norms under which universities hold themselves out as bastions of free thought and expression and so willingly subject themselves to First Amendment principles.

[4] *Fact Sheet: President Donald J. Trump Takes Forceful and Unprecedented Steps to Combat Anti-Semitism*, The White House (Jan. 30, 2025), https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-takes-forceful-and-unprecedented-steps-to-combat-anti-semitism [https://perma.cc/XKL6-HYPC].

[5] Donald J. Trump (@realDonaldTrump), Truth Social (Mar. 4, 2025, 7:30 AM), https://truthsocial.com/@realDonaldTrump/posts/114104167452161158 [https://perma.cc/MCR9-QS8B]; *see also* Alex Morey, *Statement on President Trump's Truth Social Post Threatening Funding Cuts for 'Illegal Protests'*, FIRE (Mar. 4, 2025), https://www.thefire.org/news/statement-president-trumps-truth-social-post-threatening-funding-cuts-illegal-protests [https://perma.cc/8RDT-4L2M].

[6] *DOJ, HHS, ED, and GSA Announce Initial Cancellation of Grants and Contracts to Columbia University Worth $400 Million*, U.S. Gen. Servs. Admin. (Mar. 7, 2025), https://www.gsa.gov/about-us/newsroom/news-releases/doj-hhs-ed-and-gsa-announce-initial-cancellation-of-grants-and-contracts-03072025 [https://perma.cc/CFG2-GGSV].

It allows the government to circumvent the First Amendment and violate civil liberties by commandeering private entities to enact rules and regulations the government could not otherwise legally enact. This is the coercive power of the government that this Note seeks to highlight.

In this Note, I examine the First Amendment infirmity caused by the government speech doctrine. In Part I, I describe the government speech doctrine and give the tests courts use to identify government speech. I also offer my original, categorical scheme for organizing government speech cases to better understand and critique the complex web of jurisprudence that forms this doctrine. In Part II, I describe the traditional theories that have been offered up as limitations on government speech and apply them through the framework of my categorical approach. In Part III, I offer two contemporary government speech cases—*Murthy v. Missouri*, and *Burnett Specialists v. Abruzzo*—to serve as case studies for thinking through the failures of traditional theories of limitation on government speech. I argue that the traditional theories of limitation on government speech are an overlapping patchwork of legal doctrine which leaves a gaping hole in the People's constitutional shield against the coercive power of the government. That hole appears at the intersection of two government speech problems: the public-private speaker problem and the persuasion-coercion problem. I conclude that in the set of cases where the electorate is not aware that the government is speaking and the regulated entity is unable to distinguish between persuasion and coercion, the leviathan of government operates without constitutional constraint at great risk to individual liberties and a free society.

I
The Government Speech Doctrine

This Part provides an overview of how the government speech doctrine functions within the broader machine of constitutional law generally and the First Amendment specifically. I begin by defining government speech and explaining how we should conceptualize government speech in contrast to other First Amendment doctrines. I then detail the tests courts use to identify government speech and government speakers. Finally, I propose a new categorical framework to organize existing literature on government speech. I pay special attention to the third category, persuasion-coercion cases, because they most clearly raise the problem I identify in this Note.

A. Defining Government Speech

The core premise of the government speech doctrine is that when the government speaks for itself, it is not subject to the First

Amendment. This has two corollary implications—the two sides of the government speech doctrine coin; one removes a restriction from the government while the other removes a protection.

On the first side, the government speech doctrine means that when the government speaks, it is not confined by the First Amendment's viewpoint neutrality *restriction*.[7] Ordinarily, the First Amendment functions as a check on government action: "Congress shall make no law . . . abridging the freedom of speech . . . ."[8] The Supreme Court has interpreted the First Amendment to mean that when the government regulates speech, it must remain viewpoint neutral.[9] So, when the government regulates speech, it may not favor one speaker over another, punish speech it does not like, or stop someone from speaking because it fears what they may say.

The government speech doctrine is a natural corollary to the viewpoint neutrality requirement. The doctrine absolves the government of the viewpoint neutrality requirement when the government speaks for itself because in order to function, the government must be permitted to take a view since the work of governing requires value judgments.[10] In elections, voters choose one viewpoint over another. The process of legislation involves sparring ideas before one ultimately prevails. The executive chooses to deploy troops, grant pardons, and sign treaties.[11] Prosecutors choose whether to seek the death penalty, press charges, and investigate a civil rights violation.[12] Administrative agencies choose

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[7] *See* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. Rev. 695, 695 (2011) ("[A fundamental] First Amendment [principle is] that 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' And yet, 'the Government's own speech . . . is exempt from First Amendment scrutiny,' even when it has the effect of limiting private speech.").

[8] U.S. Const. amend. I.

[9] *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). In the First Amendment context, "speech" is not limited to literal words; the First Amendment also protects expressive conduct. *See* Tex. v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word."); *see also* Cass R. Sunstein, Democracy and the Problem of Free Speech 181 (1993) ("[A]cts that qualify as signs with expressive meaning qualify as speech within the meaning of the Constitution.").

[10] Leslie Gielow Jacobs, *Government Identity Speech Programs: Understanding and Applying the New* Walker *Test*, 44 Pepp. L. Rev. 305, 315 (2017) ("Government officials and entities must speak to function, and they must tailor their speech according content and viewpoint to fulfill their democratic mandates to implement the particular policy choices of their electorates.").

[11] U.S. Const. art. II, § 2.

[12] *See* Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 Temp. Pol. & Civ. Rts. L. Rev. 369, 370 (describing the contours of prosecutorial discretion).

which people will be deported, which chemical emissions will be regulated, and which houses will be knocked down to make room for highways.[13] Each of these decisions require the government to adopt a viewpoint and often, to promote it through words, funding, and actions. Justice Rehnquist provides a helpful example of this phenomenon: "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism."[14] Thus, the government speech doctrine is a practical necessity.[15]

The other side of the government speech doctrine coin dictates that when the government speaks, it is not entitled to the *protection* of the First Amendment.[16] That is, while the government is a speaker, it does not have the First Amendment rights—such as protection from government retaliation—to which private speakers are entitled. This wrinkle becomes especially important when we drill down from thinking of the government as a speaker in the abstract to thinking of individual government officials as speakers. When an individual government employee speaks in their official capacity, they are a government speaker.[17] They are exempt from the viewpoint neutrality requirements of their office, but they are *not* entitled to any individual speech protections.[18] This is why a public official may be punished by the government for their official speech at a press conference, for example, but not for their speech on their personal social media account.[19]

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13 *See* Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts"*, 33 Geo. Immigr. L.J. 261, 271 (2019) (discussing the powers of immigration law judges); Toxic Substances Control Act, 15 U.S.C. §§ 2601–2629 (1976) (conferring power on the EPA to regulate chemical substances and mixtures); *see, e.g.*, Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity through Highway Reconstruction*, 73 Vand. L. Rev. 1259, 1281 (2020) (discussing Birmingham, Alabama city and state officials' use of interstate highways to maintain residential segregation).

14 Rust v. Sullivan, 500 U.S. 173, 194 (1991) (citation omitted).

15 *See* Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. 863, 865 (1979) (describing why government expression is "critical to the operation of a democratic polity"); Matal v. Tam, 137 S. Ct. 1744, 1757 (2017) ("[I]mposing a requirement of viewpoint-neutrality on government speech would be paralyzing.").

16 Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("[W]hen 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.").

17 *See infra* Section I.B.2.

18 *Garcetti*, 547 U.S. at 421.

19 In the Supreme Court's recent *Lindke v. Freed* decision, Justice Barrett announced that the test for distinguishing between a government employee's private and official speech "turns on substance, not labels." 144 S. Ct. 756, 766 (2024). That is, when deciding whether a

Viewing the two sides of the coin together, the government speech doctrine creates tension in the First Amendment. It frees the government of its usual constraints while simultaneously depriving individual government employees of their usual liberty. The doctrine operates like a categorical exception to the First Amendment, but unlike the other categorical exceptions which identify a type of speech the First Amendment does not protect, it identifies a type of state action the First Amendment does not constrain. Because it affirmatively protects rather than constrains government action, the government speech doctrine is the black sheep of First Amendment jurisprudence.

B. Identifying Government Speech

In general, how a court chooses to categorize speech in First Amendment cases is outcome determinative. Whether a law regulates expression that is purely speech or speech mixed with conduct changes the level of constitutional scrutiny it must undergo.[20] Whether a space is a traditional public forum or a designated public forum determines what restrictions the government can impose on speakers in that space.[21] Whether a political comic is libel or satire determines whether the artist is entitled to publish it.[22]

The government speech doctrine fits this mold: How we categorize a speaker—as the government or a private individual—determines whether they are protected by the First Amendment, constrained by the First Amendment, or in the case of a public employee speaking for the government, abandoned by the First Amendment's protection. The Supreme Court's government speech decisions have instituted at least two tests for identifying government speech: One is used to distinguish government from private speech and the second is used to distinguish

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government employee is entitled to First Amendment protections for their speech, the courts will look to the substance of the speech to determine whether it is the speaker's private speech or government speech. The former is entitled to First Amendment protections. The latter is not.

[20] *See* Juliet L. Dee, *From Pure Speech to Dial-A-Porn: Negligence, First Amendment Law and the Hierarchy of Protected Speech*, 13 Commc'ns & L. 27, 28 (1991) ("[J]udges have looked to various Supreme Court decisions suggesting that . . . there is a 'hierarchy' in which some types of speech receive a greater degree of protection than others. Highest on the hierarchy is 'pure' or 'core' speech, involving the expression of ideas.").

[21] *See* Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 Ind. L.J. 267, 270 (2004) (noting that "the public's right of access to government property for speech purposes differs depending on that property's forum status").

[22] *See* Leslie Kim Treiger, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege*, 98 Yale L.J. 1215, 1216 (1989) ("In *Gertz v. Robert Welch, Inc.*, the Supreme Court carved out an exception to the *New York Times* standard . . . . Under *Gertz*, opinions are protected even where defamatory.").

government from private speakers. In the following two sections, I provide a summary of those tests which is critical to a foundational understanding of the real-world function of the doctrine.

1. When Is Speech Government Speech?

One way the Court defines government speech is in contrast with private speech. Indeed, the most recent developments in the government speech doctrine were made in response to cases that blurred the line between government and private speech.[23] These cases have usually involved controversies where the government "adopts" the message of a private speaker and makes it its own.[24] When the government adopts the private speaker's message, the government may favor the viewpoint of that message without running afoul of the First Amendment. Contrast that with cases where the government does not adopt, but rather, provides a forum for a private message. In those cases, the government may host the private speaker in a government-controlled forum, but the government may not favor their message over that of another private speaker.[25] So, how do we know when the government is adopting versus merely platforming a private message?

In 2009, Justice Alito's majority opinion in *Pleasant Grove City v. Summum* paved the way for a revival of the government speech doctrine.[26] Six years later, in *Walker v. Texas*, the majority of the Court relied on Alito's *Summum* opinion to fashion a three-part test to determine what constitutes government speech.[27] The *Walker* test asks "(1) whether the medium at issue has historically been used to communicate messages from the government; (2) whether the public reasonably interprets the government to be the speaker; and (3) whether the government maintains editorial control over the speech."[28] Unlike *Summum*, however, the *Walker* decision was deeply divided.[29] Alito dissented in *Walker* and argued that the Court should draw a different test from *Summum*. He agreed with the majority that

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23 For a discussion of category two cases, see *infra* Section I.C.2.

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25 *See* Jacobs, *supra* note 10, at 315 ("In many instances where the government facilitates private speech by granting access to property or providing resources, the Free Speech Clause limits the government's discretion to restrict the content of the messages broadcast from the 'forum.'").

26 555 U.S. 460 (2009); *see infra* Section I.C.2. For a brief history of the origins of the government speech doctrine, see *infra* Part II.

27 *See infra* notes 57–61 and accompanying text.

28 Pulphus v. Ayers, 249 F. Supp. 3d 238, 247 (D.D.C. 2017) (citing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 209–13 (2015)). For a detailed summary and analysis of the *Walker* test, see Jacobs, *supra* note 10, at 346–73.

29 *Summum* was unanimous, *Walker* was 5–4.

the first relevant factor relates to history and, specifically, whether "long experience" has led the public to associate the type of speech with the government.[30] But his other two factors differ from the *Walker* majority. His second factor concerns whether the government is selective about which speech it will allow or whether the government has "thrown open" a forum for private speakers.[31] Alito's third factor considers whether "spatial limitations" were at play in the government's decision to accommodate the speech.[32] The difference in the test, of course, led Alito to a different outcome.[33]

The inconsistency between Alito's majority opinion in *Summum*, the majority opinion in *Walker*, and Alito's dissent in *Walker* reflects a deeply confused doctrinal framework. Unsurprisingly, the *Walker* test leaves much to be desired in terms of clarity and consistency in outcomes. Lower courts have dutifully attempted to apply the *Walker* majority's test to decide when the government is itself speaking, but they often reach disparate conclusions when they consider similar cases.[34] Despite division in the Supreme Court about which factors are relevant and division in the lower courts about how to apply the factors, the *Walker* test remains the Court's primary tool for differentiating between government-adopted speech and private speech hosted by the government.

2. When Is an Individual a Government Speaker?

It is easy to identify government speech when the source of the speech is clearly the government. When the government publishes a report, for example, that report is clearly government speech. The issue becomes slightly more complicated when the source of the speech is an agent of the government, like a police officer, the President's Press Secretary, or the Surgeon General. Labeling an individual as a government speaker strips away the First Amendment protections that would otherwise be available to that speaker.[35] Given the severe

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30 *Walker*, 576 U.S. at 228 (Alito, J., dissenting).

31 *Id.*

32 *Id.* at 228–29. For a detailed comparison of the majority and minority tests in *Walker*, see Clay Calvert, *The Government Speech Doctrine in* Walker*'s Wake: Early Rifts and Reverberations on Free Speech, Viewpoint Discrimination, and Offensive Expression*, 25 Wm. & Mary Bill Rts. J. 1239, 1249–54 (2017).

33 *See Walker*, 576 U.S. at 235–36 (Alito, J., dissenting) ("Allowing States to reject specialty plates based on their potential to offend is viewpoint discrimination.").

34 *See* Jacobs, *supra* note 10, at 331–39 (describing the uneven application of the *Walker* test in the lower courts).

35 *See* Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 Ohio St. L.J. 815, 824 (2020) (noting that public officials' speech is not covered by the Free Speech Clause if it is government speech).

consequences of the government speech label, the Court uses a separate test to determine when an individual's speech is attributed to the government because of their identity as a government official.

The test comes from *Garcetti v. Ceballos*, where the Court articulated that when a public employee makes statements "pursuant to their official duties," their speech is government speech.[36] Consequently, the Court reasoned, when a public employee speaks pursuant to their official duties, they are not speaking as a citizen and "the Constitution does not insulate their communications . . . ."[37] The Supreme Court's recent decision in *Lindke v. Freed* added another dimension to the analysis for courts to use to identify when a public official's social media posts are considered government speech. In that case, the unanimous Court held that a public employee's speech on social media is "attributable to the State" only if the official "(1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority" when they spoke.[38]

C. Organizing Government Speech

Putting the ambiguity in the courts' doctrinal tests to one side, the government speech doctrine has been further clouded by the vast body of legal scholarship on the topic. Existing scholarship on the doctrine is exceedingly complex because the theory behind the doctrine depends greatly on the context of the controversy at hand. Further complicating the problem, scholars have skipped the step of organizing the different types of government speech cases. As a result, their arguments often talk past one another because government speech is not just one thing—it can be broken down into at least three paradigms and each one is associated with its own unique problems. For this reason, I propose a novel categorical framework for conceptualizing the government speech doctrine.

My framework identifies three categories for organizing government speech cases based on the type of government speech at issue. My categories include cases that involve the government selectively funding a particular message, cases that involve government adoption of private speech, and cases that involve the line between persuasion and coercion when the government advocates its own message. In this Note, I will describe the categories of government speech as three distinct groups for the sake of theoretical and conceptual clarity, but I recognize that

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[36] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
[37] *Id.*
[38] Lindke v. Freed, 144 S. Ct. 756, 762 (2024).

real-world cases can fluctuate between and among these categories, sometimes involving two or more types of government speech or defying categorization altogether. In the latter sections of this Note, I will focus on a set of problems that is peculiar to "category three" cases, but I offer the complete framework as a method of organizing and clarifying existing and future government speech scholarship.

1. Category One: Funding

The first category of government speech controversies involves government funding. These cases appeared first in the development of the government speech doctrine and laid the foundation for its eventual expansion in cases like *Summum*. The funding cases involve First Amendment challenges to the government's choice to fund one message over another. In these cases, courts tend to hold that the government is not subject to First Amendment restrictions (i.e., it does not need to be viewpoint neutral) when it makes funding decisions.

Rust v. Sullivan, one of the first government speech doctrine cases, falls into the funding category.[39] Title X of the 1970 Public Health Service Act authorized the Secretary of Health and Human Services to administer grants to entities that assist in family planning.[40] In 1988, HHS promulgated regulations that governed the administration of the Title X grants and placed conditions on the funding.[41] The *Rust* plaintiffs were doctors who oversaw programs funded by Title X.[42] They sued on behalf of themselves and their patients, arguing, among other things, that the regulations "violate[d] the First Amendment by impermissibly discriminating based on viewpoint" because the regulations prohibited counseling about ending a pregnancy while compelling counseling about carrying the pregnancy to term.[43] The Supreme Court rejected the doctors' argument. In a parsimonious statement of the government speech doctrine's central principle, Chief Justice Rehnquist wrote, "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the

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[39] 500 U.S. 173 (1991); Corbin, *supra* note 35, at 822.

[40] 42 U.S.C. § 300a–6 (repealed 2021).

[41] Namely, recipients of Title X funds could not "provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning . . .", or engage in activities that "encourage, promote or advocate abortion as a method of family planning," and grant recipients must organize their Title X projects to be "physically and financially separate" from abortion-related activities. 42 C.F.R. §§ 59.8–59.9 (1998).

[42] *Rust*, 500 U.S. at 181.

[43] *Id.* at 192.

public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[44]

Since *Rust*, the Supreme Court has repeatedly confirmed that the government is entitled to take a viewpoint in funding decisions.[45] This is a broad category because a large percentage of the government's messaging comes from funding. This category swallows up funding decisions made at any level of government, from public school budgets to international aid programs, and immunizes those decisions from First Amendment scrutiny.

2. Category Two: Government Adoption of Private Speech

The second category of government speech cases are those that concern the government's relationship to private speech. In each of these cases, plaintiffs challenge a government policy that seems to favor a private speaker by providing a platform for one private speaker's message but not another's. The Court's approach to these cases is to allow the government to favor a viewpoint by giving it a platform so long as the speech is indeed the government's and the platform is not a public forum.

In 2005, Summum—a Salt Lake City-based minority religion recognized by the IRS for its tax-exempt mummification service[46]—sued Pleasant Grove City, Utah, after the city refused to install Summum's religious monument in a public park.[47] Summum had requested that Pleasant Grove City display a monument bearing the Seven Aphorisms of Summum in Pioneer Park alongside a Ten Commandments Monument donated by the Fraternal Order of Eagles.[48] When Pleasant Grove refused the request, Summum challenged the decision, arguing that by refusing to display its monument in the public park, the city had violated Summum's right to free speech under the First Amendment.[49]

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[44] *Id.* at 193.

[45] *See, e.g.*, United States v. Am. Libr. Ass'n, 539 U.S. 194, 199 (2003) (approving provisions of the Children's Internet Protection Act which barred public libraries from receiving federal assistance to provide internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them); *see also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572 (1998) (approving provisions of the National Foundation on the Arts and the Humanities Act which require grant recipients to meet certain criteria of "decency and respect for the diverse beliefs and values of the American public").

[46] *About Summum*, SUMMUM, https://www.summum.us/about [https://perma.cc/Y6LR-T7JC].

[47] Pleasant Grove City v. Summum, 555 U.S. 460, 465–66 (2009).

[48] *Id.* at 464–65.

[49] *Id.* at 465–66.

The ensuing litigation made its way to the Supreme Court where the Justices grappled with the question of whether the government can make content-based decisions about expression through permanent monuments in public parks.[50] In general, the First Amendment bars the government from regulating speech based on the content or viewpoint of the speaker,[51] but the government speech doctrine provides a carveout to that rule when the government is speaking for itself.[52] The source of the doctrine is opaque, but it began to take shape when Justice Alito invoked it to escape *Summum*'s constitutional conundrum and hold that "the City's decision to accept certain privately donated monuments while rejecting respondent's . . . is not subject to the Free Speech Clause."[53]

Summum is the quintessential example of a "category two" government speech case. The Court centered its analysis around a single question: Is the government engaging in its own expressive conduct or is it providing a forum for private speech?[54] This is the operative question in category two cases, and the answer dictates the outcome because if the government is speaking for itself, then the First Amendment's viewpoint neutrality requirement does not apply. That is, the government may favor one message (e.g., Christianity's Ten Commandments) over another (e.g., Summum's Seven Aphorisms). On the other hand, if the government is merely providing a forum for private speech, then the case lands squarely in the First Amendment's forum analysis doctrine where the government faces varying levels of restraint depending on the nature of the forum.[55] In *Summum*, the Court held that the government's choice to exclude Summum's monument was not subject to First Amendment restrictions because "[p]ermanent monuments displayed on public property typically represent government speech" and thus, the forum analysis did not apply.[56]

In *Walker*, the Court confronted the *Summum* question again, this time in the context of a Texas law which, among other things, allowed

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50 *Id.* at 464.

51 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.").

52 Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression."); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment Scrutiny.").

53 *Summum*, 555 U.S. at 481.

54 *Id.* at 467.

55 For a discussion of the First Amendment forum doctrine, see Jacobs, *supra* note 10, at 316–21.

56 *Summum*, 555 U.S. at 470.

vehicle owners to choose from a variety of pre-selected designs for their license plates.[57] Under the statute, the Texas Department of Motor Vehicles Board (the "Board") may offer designs from three sources: (1) designs called for by the state legislature; (2) designs proposed by state-designated private vendors; and (3) designs proposed by nonprofit entities. Importantly, the statute provides the Board with authority to approve or reject proposed designs if they "might be offensive to any member of the public . . . ."[58] When Texas refused to allow the Sons of Confederate Veterans to place the Confederate Flag on their proposed license plate, the group argued that the government violated the Free Speech Clause by discriminating against their speech.[59] Like the *Summum* Court, the *Walker* Court began its analysis by choosing whether the analytical framework for government speech or private speech in a public forum applied—they ultimately concluded that the forum analysis did not apply because the "state-issued specialty license plates [lay] far beyond [the historic] confines" of relevant, government-created forums.[60] The *Walker* Court's reasoning became the test for identifying government speech.[61]

The cases in category two are slightly more difficult to identify than those in category one because, while the message may be adopted by the government, the voice sometimes appears to be that of a private party. Also, these cases seem to pose a high risk of violating constitutional provisions like the Establishment Clause because if the government adopts the *religious* viewpoint of a private speaker, it can easily become an endorsement of that religion at the exclusion of others.[62]

3. Category Three: The Persuasion-Coercion Line

The third category of government speech cases involves the line between permissible persuasion and illegal coercion. When the government speaks, its message is backed by the strongarm power of the state, and while the government is permitted to advocate a viewpoint on its own behalf, including by using persuasion, it is not entitled to do so using coercion. In the context of government speech,

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57 Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 203–04 (2015).

58 Tex. Transp. Code Ann. § 504.801(c).

59 *Walker*, 576 U.S. at 206.

60 *Id.* at 215 ("But forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.").

61 *See supra* Section I.B.1.

62 Though beyond the scope of this Note, see Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After* Summum, 19 Wm. & Mary Bill Rts. J. 1 (2010), for more discussion on this point.

coercion occurs when the government uses its power of speech to achieve ends through indirect influence that it would not be able to achieve through direct action under the Constitution. So theoretically, the government can speak in favor of same-sex marriage, but it would cross the line of unconstitutional coercion if it used its speech to imply that churches which refuse to perform same-sex marriage ceremonies would be subject to IRS audits. Because the government cannot directly regulate a church's marriage policies and practices, it cannot do so using indirect means.

Bantam Books, Inc. v. Sullivan was decided well before the explicit development of the government speech doctrine, but it illustrates one of the doctrine's biggest hurdles—distinguishing between mere persuasion and coercion.[63] The case involved a Rhode Island Commission (the Commission) designed by the state's legislature to "encourage morality in youth."[64] The Commission's task was to "educate the public" about literature containing obscene and indecent material that might risk "corruption of the youth."[65] Importantly, the Commission was empowered to "investigate and recommend the prosecution of all violations" of the state's obscenity laws.[66] The Commission operated by notifying distributors that certain books or magazines had been marked as objectionable for children.[67] These notices typically included a reminder of the Commission's duty to "recommend to the Attorney General prosecution of purveyors of obscenity."[68] Several publishers challenged the law that created the Commission, alleging that it was a government censorship scheme designed to circumvent "the constitutionally required safeguards for state regulation of obscenity . . . ."[69] Their argument was that those in receipt of the Commission's notices would readily comply with the Commission's request "rather than face the possibility of some sort of a court action" against them.[70] While the State asserted that the Commission's notices were "in the nature of mere legal advice," the Court agreed with the plaintiffs that the notices "plainly serve as instruments of regulation independent of the laws against obscenity."[71] The Court ultimately

63 372 U.S. 58 (1963).
64 *Id.* at 59.
65 *Id.*
66 *Id.* at 60.
67 *Id.* at 61.
68 *Id.* at 62.
69 *Id.* at 60–61, 64.
70 *Id.* at 63.
71 *Id.* at 68–69.

struck down Rhode Island's Commission, concluding that its operations circumvented the safeguards of the criminal process.

Bantam Books is a clear example of how the government can use its speech to make an end-run around other constitutional provisions by compelling a regulated party to act through veiled threats rather than direct regulation. The problem, though, is determining when the government's statement of its own policy position amounts to coercion. A more recent example of that problem from the Ninth Circuit is *Kennedy v. Warren*.[72] The case revolved around a pseudoscientific book entitled *The Truth About COVID-19: Exposing the Great Reset, Lockdowns, Vaccine Passports, and the New Normal*, which peddles false claims and misinformation about the COVID-19 pandemic.[73] In September 2021, Senator Elizabeth Warren sent a letter to Amazon criticizing their promotion of that book, among others, and accusing Amazon of engaging in a "pattern and practice" of "mislead[ing] consumers about COVID-19 prevention [and] treatment . . . ."[74] She asserted that Amazon's failure to prevent the spread of falsehoods was "unethical, unacceptable, and potentially unlawful . . . ."[75]

The book's authors, along with Robert F. Kennedy Jr., who wrote the foreword, sued Senator Warren. They argued that Warren's letter "violated their First Amendment rights by attempting to intimidate Amazon and other booksellers into suppressing their publication" and sought a preliminary injunction requiring Warren to remove the letter from her website and issue a public retraction.[76]

The Ninth Circuit framed its analysis under the precedent of *Bantam Books* and its Ninth Circuit progeny—cases that distinguish between persuasion as "permissible government speech" and coercion as "unlawful government censorship."[77] In those cases, the Ninth Circuit articulated the general rule that "public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of government power or

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72 66 F.4th 1199 (9th Cir. 2023).

73 Joseph Mercola & Ronnie Cummins, The Truth About COVID-19: Exposing the Great Reset, Lockdowns, Vaccine Passports, and the New Normal (2021); *see* Jonathan Jarry, *The Upside-Down Doctor*, McGill Off. for Sci. & Soc'y (June 4, 2021), https://www.mcgill.ca/oss/article/covid-19-health-pseudoscience/upside-down-doctor [https://perma.cc/JEA6-5GJQ] (describing Dr. Mercola's book and his questionable background).

74 *Warren Investigation Finds Amazon Provides Consumers With COVID-19 Vaccine Misinformation in Search Results*, Sen. Elizabeth Warren (Sept. 8, 2021), https://www.warren.senate.gov/oversight/letters/warren-investigation-finds-amazon-provides-consumers-with-covid-19-vaccine-misinformation-in-search-results [https://perma.cc/2KMD-RS3U].

75 *Id.*

76 *Kennedy*, 66 F.4th at 1205.

77 *Id.* at 1207.

sanction."[78] The court also relied on the Second Circuit's four-factor test for distinguishing between persuasion and coercion, which examines: "(1) the government official's word choice and tone; (2) whether the official has regulatory authority over the conduct at issue; (3) whether the recipient perceived the message as a threat; and (4) whether the communication refers to any adverse consequences if the recipient refuses to comply."[79]

The Ninth Circuit reasoned that Warren's word choice and tone militated against a finding of coercion, because "our system of government requires that elected officials be able to express their views and rally support for their positions," including through the use of forceful criticism of other speakers and platforms.[80] In assessing whether the letter could reasonably be construed as a threat, the court declared that not every official's legal opinion reasonably resembles a threat, noting that it would *not* be coercive for a public official to "warn a company that its practices could spur *other* government officials to consider legal action."[81]

The court also credited the fact that no single Senator has unilateral power to penalize a platform like Amazon and, therefore, Senator Warren lacked regulatory authority to actually coerce Amazon.[82] Thus, the court found that it would be unreasonable for Amazon to read Warren's letter as a threat and that it is more natural to read Warren as relying on her persuasive authority rather than coercive power as a government official. Further, there was no evidence that Amazon understood Senator Warren's letter to be a threat because they did not respond by making any changes to their actions.[83] And, the court found, the threatened adverse consequences were too imaginative to meet the final prong of the test.[84] Given the foregoing analysis, the Ninth Circuit concluded that Warren's letter did not constitute coercion.[85] While the Supreme Court overturned the Second Circuit's decision in *Vullo*, it affirmed the test which the Ninth Circuit and other lower courts have

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78 *Id.* (citing Am. Fam. Ass'n v. City of San Francisco, 277 F.3d 1114 (9th Cir. 2002)).

79 *Id.* at 1207 (citing Nat'l Rifle Ass'n of Am. v. Vullo, 49 F.4th 700, 715 (2d Cir. 2022)). The Supreme Court itself considered *Vullo* in 2024. Interestingly, the Court affirmed the Second Circuit's four-factor framework but came out the other way when they applied the analysis. Nat'l Rifle Ass'n of Am. v. Vullo, 144 S. Ct. 1316, 1328, 1330 (2024).

80 *Id.* at 1208 (citing Bond v. Floyd, 385 U.S. 116, 135–36 (1966)).

81 *Id.* at 1209 (emphasis added).

82 *Id.* at 1210 (adding that "[t]he letter could be viewed as more threatening if it were penned by an executive official with unilateral power that could be wielded in an unfair way if the recipient did not acquiesce").

83 *Id.* at 1210–11.

84 *Id.* at 1211–12.

85 *Id.* at 1207.

continued to rely on to distinguish between persuasive and coercive government speech.[86]

Category three cases are central to the problem this Note identifies. These cases present a loophole which the government can exploit to circumvent the iron-clad provisions of the Constitution that limit the government's power to interfere with First Amendment freedoms. In Part III, I discuss this problem in detail. But first, in Part II, I provide an overview of the efforts of legal academics to place theoretical limits on the government speech doctrine.

II
The Theory of the Government Speech Doctrine

The historical roots of the government speech doctrine can be traced back to fleeting discussions of the First Amendment's relationship to government communications, which appear in the literature as early as the 1940s.[87] But the topic began to capture scholars' attention in the late 1970s. After the Court decided *First National Bank of Boston v. Bellotti*—in which it struck down a law barring campaign contributions by corporations on First Amendment grounds[88]—it considered *City of Boston v. Anderson*, which concerned a similar First Amendment issue but replaced corporation-speakers with government-employee-speakers.[89] In *Anderson*, the Supreme Judicial Court of Massachusetts enjoined municipal government employees who were using city funds and official time to influence a referendum.[90] The Massachusetts Court differentiated the case from *Bellotti* and concluded that while "[t]he Constitution of the United States . . . does not forbid all government communications and publications which are not neutral and purely informative,"[91] the state's compelling interest in preserving free and fair elections "survives the exacting scrutiny to which such a restriction must be subjected."[92] The municipal employees appealed to Justice Brennan,

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[86] *See* Nat'l Rifle Ass'n of Am. v. Vullo, 144 S. Ct. 1316, 1328 (2024) ("The parties and the Solicitor General . . . . embrace the lower courts' multifactor test as a useful, though nonexhaustive, guide [for distinguishing between lawful attempts at persuasion and unlawful coercion]. Rightly so.").

[87] *See e.g.*, Zechariah Chafee, Jr., Government and Mass Communications 732–34 (1947) (discussing whether the government should participate in the market of mass communication).

[88] 435 U.S. 765 (1978).

[89] 439 U.S. 1389 (1978).

[90] Anderson v. City of Boston, 380 N.E.2d 628, 630–32 (Mass. 1978).

[91] *Id.* at 637.

[92] *Id.* at 638 (citing *Bellotti*, 435 U.S. at 786).

as Circuit Justice, who stayed the judgment of the Massachusetts Court, relying on *Bellotti*.[93]

The Supreme Court began to explicitly adopt government speech doctrine principles in cases like *Rust v. Sullivan*, in which the Court held that the government does not violate the First Amendment when it places viewpoint-discriminatory conditions on government subsidies.[94] The Court reasoned that the nature of government is such that it cannot function without the ability to discriminate between viewpoints.[95] For example, the creation of a government program designed to promote democracy cannot necessitate the creation of a parallel program designed to promote fascism—such a requirement would make it impossible for the government to function.[96] In *Summum*, Alito seizes on that reasoning when he contemplates how cluttered parks would be if the government were barred from choosing between permanent monuments.[97]

These earliest government speech cases spurred the legal academy to grapple with the complicated fact that while the First Amendment protects speakers *from* the government, the government can itself be a speaker. The theoretical debate comes down to different views of whether the First Amendment should protect government speech at all. One side sees the government as a speaker who needs protection within the marketplace of ideas because it provides information as a counterweight to other strong voices, like those of corporations. The other side thinks protecting government speech poses too great a risk that the marketplace of ideas will be flooded with government propaganda. In the following section, I sketch out the battle lines of that debate. In Sections II.B and II.C, I recount the story as it is told by the victors—the proponents of government speech and scholars who have accepted the doctrine and have turned their attention to limiting it rather than arguing against it wholesale. Their proposed theories of

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93 *Anderson*, 439 U.S. at 1390 (granting stay application after "balanc[ing] . . . the equities" between the "corporate industrial and commercial opponents of the referendum . . . free to finance their opposition" on one hand, while, "[o]n the other hand, unless the stay is granted, the city is forever denied any opportunity to finance communication to the statewide electorate of its views in support of the referendum as required in the interests of all taxpayers, including residential property owners.").

94 Rust v. Sullivan, 500 U.S. 173, 200 (1991).

95 *Id.* at 194 ("To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.").

96 *Id.*

97 Pleasant Grove City v. Summum, 555 U.S. 460, 479 (2009).

limitation form the basis for my argument in Part III that the government speech doctrine exposes a gaping hole in constitutional protection.

A. Battle Lines of the Government Speech Doctrine Debate

In a 1992 article, Professor David Cole summarized the main arguments in favor of the government speech doctrine. He theorized that government speech might warrant protection for three reasons: (1) government functions through communication and persuasion, (2) government speech facilitates informed self-government, and (3) government acts as a counterweight to "private concentrations of wealth," which have the potential to dominate the marketplace of ideas.[98] Thus, under this theory, in addition to allowing the government to function, government speech helps balance the marketplace of ideas and ensure that no private speaker dominates the marketplace of ideas and, consequently, the democratic process.

Cole's first argument is clearly reflected in judicial opinions that justify courts' expansions of the government speech doctrine. In *Summum*, Justice Alito focuses on the practical necessity of government speech, reasoning that "it is not easy to imagine how the government could function" if it lacked freedom to "speak for itself," "say what it wishes," and "select the views that it wants to express."[99] In *Walker*, Justice Breyer relies on Alito's reasoning in *Summum* to uphold the Texas government's choice not to allow images of the Confederate Flag to be printed on their customizable license plates.[100] Breyer shares Alito's concern that barring government speech would have adverse effects on the function of government. In *Walker*, he asks, "[h]ow could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary?"[101]

Courts have also hinted at the informed self-government rationale as a reason for expanding the government speech doctrine. In *Summum*, Alito raises concerns about limiting to the private sector "debate over issues of great concern."[102] In Breyer's view, the Free Speech Clause creates and protects the marketplace of ideas. That marketplace, in

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98 David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. Rev. 675, 702–03 (1992).

99 555 U.S. at 467–68 (citations omitted).

100 Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208–09 (2015); *see supra* notes 47–53 and accompanying text.

101 576 U.S. at 207.

102 *Summum*, 555 U.S. at 468.

turn, creates informed voters who provide a check on the government's speech through the democratic process.[103]

Cole's third rationale is controversial. Courts are wary about allowing the government to interfere in the marketplace of ideas because of the risk that the government could use the doctrine to control the content of private speech.[104] The role of government speech in the marketplace of ideas is also the subject of much debate in academic literature.[105] Mark Yudof, an expert in the field of free expression, for example, argues against the view that government speech should be protected as a matter of right because he finds incomprehensible the idea that the government should be able to wield its own First Amendment rights against the interests of the community—such a theory would run counter to the widely-accepted purpose of the First Amendment: to limit government.[106] Yudof also takes issue with the practical effects of constitutionalizing the government's right to speak; he is concerned that while individuals may have the right to hear the government's message, that right is outweighed by "an interest in the free flow of information and opinions"—an interest that all people share.[107] Yudof's concern is about the risk that government would be too powerful a speaker if it were protected in the marketplace of ideas. If courts protect government speech, they protect propaganda that can flood the marketplace of ideas and dilute the democratic process.

B. Limitations on Government Speech

In a carefully balanced constitutional system such as ours, any doctrine that leaves government power unrestrained should make us nervous. The government speech doctrine is one such doctrine because it frees the government of restraints under the First Amendment. Indeed, the problem that decisively dominates the literature on government speech is, if the Free Speech Clause does not limit government speech, then what does? In their seminal government speech cases, Justices Breyer and Alito repeat the traditional argument that government speech is subject to two types of limitation: electoral

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103 *Walker*, 576 U.S. at 207.

104 *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 200 (1991) (limiting the application of the government speech doctrine "in areas that have 'been traditionally open to the public for expressive activity'" (citation omitted)).

105 *See, e.g.*, Mary-Rose Papandrea, *The Missing Marketplace of Ideas Theory*, 94 Notre Dame L. Rev. 1725 (2019) (criticizing Justice Kennedy and the Court for failing to apply the marketplace of ideas theory throughout the development of the government speech doctrine).

106 Yudof, *supra* note 15, at 867.

107 *Id.* at 872.

and constitutional.[108] This Section describes those traditionally accepted mechanisms and raises questions about their efficacy as constraints on the government's power of speech.

1. The Democratic Process

In *Board of Regents v. Southworth*, Justice Kennedy provides a clear statement of the theory that the democratic process, not the Free Speech Clause, is the primary check on government speech: "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."[109] In *Summum*, Alito cites *Southworth* and concludes that, in lieu of Free Speech Clause restrictions, government speech is regulated by other constitutional protections like the Establishment Clause, other laws, regulations and practices, and, importantly, the democratic process.[110] Even Justice Stevens—a staunch opponent of the government speech doctrine—finds comfort in the fact that if the government decides to use its speech to communicate offensive or partisan messages, government speakers are still bound by the Establishment Clause, the Equal Protection Clause, and "the checks imposed by our democratic process."[111]

Despite the Court's embrace of the democratic process rationale, scholars criticize it sharply.[112] In her book *The Government's Speech and the Constitution*, Professor Helen Norton agrees with Breyer and Alito that the democratic process functions as a check on the government's speech.[113] But she notes that in order to hold the government accountable for its speech, voters must *know* when the government is speaking.[114] This is what Norton calls a "first-stage government speech problem[]"—the problem of determining when the government itself is speaking.[115] "Because the public can hold the government politically

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108 Pleasant Grove City v. Summum, 555 U.S. 460, 468–69 (2009).

109 529 U.S. 217, 235 (2000).

110 555 U.S. at 468–69.

111 *Id.* at 482 (Stevens, J., concurring).

112 For a critical analysis of the theory that the democratic process limits government speech, see Michael Kang & Jacob Eisler, *Rethinking the Government Speech Doctrine, Post-Trump*, 2022 U. Ill. L. Rev. 1943, 1951–54.

113 *See* Helen Norton, The Government's Speech and the Constitution 23 (2019) ("I urge what I call the transparency principle – that is, an insistence that the governmental source of a message be transparent to the public – as key to solving these first-stage government speech problems.").

114 *Id.* at 29.

115 *Id.*

accountable for its expressive choices only when it actually understands the contested expression as the government's . . . ," she argues, "we should require the government's transparency as a condition of claiming the government speech defense."[116] For Norton, transparency is the silver bullet to ensure that political accountability is an operative restraint on government speech, but political accountability does not solve all of the government speech doctrine's problems.[117]

Some scholars have gone even further in criticizing the democratic process rationale and suggest that the first Trump administration was a "stress test" on the theory.[118] They argue that government speech like Trump's "provocative and disruptive political comments" interferes with "the capacity of individuals to engage in free and fully developed reasoning" and, therefore, it interferes with the electorate's ability to use the democratic process as a check on government speech.[119] So the problem with depending on the democratic process to limit government speech is that government speech can distort the democratic process.[120]

2. Other Constitutional Provisions

Other theories of limitation on government speech rely on Constitutional provisions other than the Free Speech Clause.[121] Specifically, judges and scholars have proffered the Establishment Clause and the Due Process Clause as potential backstops for the government's speech power.[122]

Norton suggests that the Due Process Clause limits government speech when the "consequences of, and the motivations underlying, the government's speech . . . deprive[] its listeners of specific liberties in ways akin to the government's lawmaking or other regulatory actions."[123] This occurs, for example, when a police officer's lies coerce

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116 *Id.* at 6.

117 *Id.* at 43.

118 *See, e.g.*, Kang & Eisler, *supra* note 112, at 1952, 1956.

119 *Id.* at 1946.

120 *See also* Yudof, *supra* note 15, at 898 ("[F]reedom of expression and association are critical to the processes of consent that justify and legitimate government in a democracy. Government speech may threaten those processes . . . through indoctrination and the withholding of vital information, thereby undermining the power of the citizenry to judge intelligently and to communicate those judgments.").

121 Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015). But Justice Breyer suggests that the Free Speech Clause itself can limit government speech in the sense that it could operate to stop the government from "compel[ing] private persons to convey the government's speech." *Id.*

122 These are what Helen Norton refers to as "second-stage" government speech problems. For a more detailed discussion, see NORTON, *supra* note 113, chs. 2, 4 (discussing the Establishment Clause and the Due Process Clause, respectively).

123 *Id.* at 134.

an involuntary waiver of rights.[124] Another way the government's speech can violate the Due Process Clause is when the "expressive, or dignitary, consequences of the government's speech . . . humiliates or shames its targets because they have exercised protected liberties."[125] In both of these cases, the Due Process Clause could theoretically function as a bulwark against the government's speech.

The Establishment Clause similarly operates as a limit on government speech because while government officials are free to offer a prayer at the beginning of a session of Congress or ask for God's protection for American troops, they cannot engage in speech that has the effect of coercing listeners into religious practice, endorse one religion to the exclusion of others, or seek to advance a religion through their speech.[126]

Yudof has, however, identified two problems with constitutional limitations on government speech; one is analytical, and the other is institutional.[127] The analytical problem is that constitutional constraints on government speech require us to know a lot about the government's intent.[128] That is, the government would have the burden to justify challenged communications. Yudof worries that burden would too heavily interfere with the governmental functions that necessitate government speech in the first place.[129] At the same time, Yudof doubts whether the federal judiciary can be trusted to enforce the limits on government speech since "[o]f all branches of government, the judiciary relies most on the power of words, symbols, and customs to persuade and ultimately to enforce its decisions and legitimate its powers."[130] That is, a theory of constitutional limitation on government speech requires restraints on government speech to be enforced by the biggest government speakers: judges.

C. Applying Theories of Limitation in Each Category

How persuasive the arguments for limiting government speech using the electoral process or the Constitution are changes depending

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124 *Id.*

125 *Id.*

126 *See id.* at 70–71.

127 Yudof, *supra* note 15, at 897–99. Yudof's arguments are specifically in response to theories of First Amendment constraints on government speech, but they also apply to theories of Due Process constraints.

128 *Id.*

129 *Id.* at 898 ("[I]f the falsification of consent and the domination of communications are perils, the cabining of governmental powers to educate, to inform, to sponsor and publish research, and to lead is equally perilous.").

130 *Id.*

on which category the government speech falls into. In funding cases, the electoral process can be an effective tool for voters to limit the government's speech. The government's funding decisions are transparent enough for voters to know when the government is speaking through money, so these cases clear Norton's transparency concerns. Also, the people responsible for funding decisions are relatively close to the electorate. That is, Congress—the body ultimately responsible for the "purse"—is readily accountable to voters in elections that occur every two years (for Representatives) or six years (for Senators). Also, Yudof's concerns about flooding the marketplace of ideas with government-funded speech are less convincing when we consider the fact that foreign governments, corporations, and individual billionaires can now compete with U.S. government-funded speech. Even if the government wasn't subject to any speech restrictions, it still would not necessarily be the most powerful (i.e., richest) speaker in the marketplace of ideas.

We can reach a similar conclusion in cases that walk the line between government and private expression. The democratic process is an apt tool for limiting this type of government speech. In fact, the *Walker* Court presciently addressed Norton's transparency concern by building transparency into its test; one of the *Walker* factors asks whether the public would reasonably interpret the government to be the speaker.[131] Thus, if the government is the speaker, the public would reasonably know it and could, therefore, exercise its electoral power to limit the government's speech.[132] Alternatively, if the government argues that it is the speaker, but the public would not reasonably agree with that argument, then courts should not apply government speech doctrine and should instead subject the government's action to the full scrutiny of the Free Speech Clause.

Category three government speech, which sits on the line between permissible persuasion and illegal coercion, raises even more concerns. Unlike the first two categories, persuasion-coercion cases generally arise under less public circumstances. That is, they usually occur when a government actor speaks to an individual party that is under their regulatory or adjudicatory authority.[133] Because of its targeted,

131 Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 212, 216 (2015).

132 For an empirical analysis of public perceptions of category two government speech, see Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 SUP. CT. REV. 33.

133 *See e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (adjudicating a dispute between the Rhode Island legislature's Commission to Encourage Morality in Youth, and publishers and distributors of books); *Burnett Specialists v. Cowen*, 140 F.4th 686 (5th Cir. 2025) (adjudicating a dispute between the General Counsel of the NLRB and an employer).

private nature, this type of government speech is less responsive to the democratic process. These cases pose unique problems for the theories of government speech limitation, so the remainder of this Note is devoted to their consideration. In the next part, I provide two contemporary examples of cases that present the coercion-persuasion problem and argue that the existing theories of government speech limitation fail to adequately protect against this type of government speech.

III
The Hole in the Government Speech Doctrine

This Part applies the foregoing discussion to two recent cases that raise a unique set of government speech issues. Both of these category three cases involve speech that is not visible to the public, either because the government was speaking through private channels or because the issue was not high profile enough to permeate the public consciousness. Both cases also rest on the line between persuasion and coercion. By applying the traditional theories of limitation—the democratic process and other constitutional provisions—to these two cases, I reveal a gaping hole in the government speech doctrine's underlying theory. Namely, when the government's speech is both difficult to identify and approaches the line of coercion, the government operates with no democratic or constitutional constraints. Judges and scholars comfort themselves that the traditional theories of limitation are an adequate protection against the speech power of the state, but their analysis fails to account for this growing category of government speech which, left unrestrained, threatens civil liberties.

A. Missouri v. Biden

In May 2022, the Attorneys General of Missouri and Louisiana filed a complaint in the United States District Court for the Western District of Louisiana.[134] The complaint accused the defendants—President Biden, seven Biden Administration officials, and five executive agencies[135]—of "open collusion with social-media companies to suppress disfavored speakers, viewpoints, and content on social-media platforms . . . ."[136] Plaintiffs alleged that the federal government, through Section 230's protection of social media companies and "other legal benefits" like the absence of antitrust enforcement, created and controlled social media

[134] Complaint at 1–2, Missouri v. Biden, No. 3:22-cv-1213, 2023 WL 5841935 (W.D. La. July 4, 2023).
[135] *Id.*
[136] *Id.* at 3.

companies.[137] Plaintiffs further alleged that because of the government's actions, "there has been an unprecedented rise of censorship and suppression of free speech—including core political speech—on social-media platforms."[138] Plaintiffs argued that social media companies' moderation decisions—like Twitter blocking the New York Post story about Hunter Biden's laptop, Facebook's "campaign to censor speech advocating for the [COVID-19] lab-leak theory," Twitter's, YouTube's, and Facebook's removal of misleading information about mask mandates and COVID-19 lockdowns, and various platforms' removal of misinformation about election security—constituted government action because the platforms were coerced into making those decisions by Biden Administration officials.[139] The crux of the complaint was that because Biden Administration officials, using their official authority, "[t]hreatened, [c]ajoled, and [c]olluded" with social media companies to impose viewpoint and content-based restrictions,[140] the platforms' actions amounted to government action and, therefore, violated the First Amendment's requirement of viewpoint neutrality.[141]

In their motion to dismiss, Defendants invoked the government speech doctrine to counter Plaintiffs' coercion argument.[142] Citing *Walker*, Defendants argued that "when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position."[143] Defendants concluded "[t]hat type of standard government speech does not, and cannot, amount to the type of 'coercion' necessary to convert private conduct into state action."[144] And they asserted, "[t]hat conclusion does not change simply because the Government is advocating action by a social media company, rather than an energy company, a health care company, a news company," and so on.[145]

Both the District Court and the Fifth Circuit agreed with Plaintiffs that Biden Administration officials had exercised enough influence over social media companies to treat their content moderation

137 *Id.*

138 *Id.* at 4.

139 *Id.* at 16–28.

140 *Id.* at 28.

141 *Id.* at 72–78.

142 Memorandum in Support of Defendants' Motion to Dismiss the Second Amended Complaint for Lack of Subject-Matter Jurisdiction and Failure to State a Claim at 62, Missouri v. Biden, No. 3:22-cv-1213, 2023 WL 5841935 (W.D. La. July 4, 2023).

143 *Id.* at 62–63 (quoting Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015)).

144 *Id.* at 63.

145 *Id.*

decisions as state action.[146] The Fifth Circuit modified the District Court's injunction, adding that "Defendants, and their employees and agents, shall take no actions, formal or informal, directly or indirectly, to coerce or significantly encourage social-media companies to remove, delete, suppress, or reduce, including through altering their algorithms, posted social-media content containing protected free speech."[147] Demonstrating its particular concern about informal coercion, the Fifth Circuit added that Defendants were enjoined from "compelling the platforms to act, such as by intimating that some form of punishment will follow a failure to comply with any request, or supervising, directing, or otherwise meaningfully controlling the social-media companies' decision-making processes."[148] The Biden Administration applied to the Supreme Court for emergency relief, which the Court treated as a petition for a writ of certiorari.[149] The Court ultimately reversed the Fifth Circuit on standing, holding that Plaintiffs did not establish causation between their injuries and Defendants' conduct.[150]

The Supreme Court's disposal of the case on standing grounds is not directly relevant to this Note's inquiry, but the litigation leading up to their ultimate disposition is instructive. The factual circumstances that gave rise to the case offer a clear example of the doctrinal problem area this Note seeks to identify. The *Missouri v. Biden* plaintiffs alleged that social media platforms were being subjected to coercive government speech when Biden Administration officials gave instructions on how the platforms should approach content moderation related to public health and election misinformation.[151] One stark example is the District Court's finding that a Biden Administration official sent Facebook a message accusing Facebook of "not 'trying to solve the problem'" and warning Facebook that the White House was "[i]nternally . . . considering [its] options on what to do about it."[152] The District Court and the Fifth Circuit were both sympathetic to the allegation of coercion. This is reflected in the Fifth Circuit's injunction against Defendants' actions, which might have implied that punishment would follow failure to comply with their request.

While the content of the government's speech raises serious coercion questions which should give us pause, the source of the

146 Missouri v. Biden, 83 F.4th 350, 392 (5th Cir. 2023), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023).

147 *Id.* at 397.

148 *Id.*

149 *Murthy*, 144 S. Ct. at 7.

150 Murthy v. Missouri, 144 S. Ct. 1972, 1997 (2024).

151 *See supra* notes 134–41 and accompanying text.

152 Joint Appendix at 7, *Murthy*, 144 S. Ct. 1972 (No. 23-411) (alterations in original).

government's speech is equally alarming. The government speakers in this case are government officials from the White House, the Office of the Surgeon General, and the CDC. And the speech consisted of conversations and email messages which were not in the public record.

B. Burnett Specialists v. Abruzzo

On April 7, 2022, Jennifer Abruzzo, General Counsel of the National Labor Relations Board (NLRB) issued a memo to the NLRB's Regional Directors, Officers-in-Charge, and Resident Officers with the subject line "The Right to Refrain from Captive Audience and other Mandatory Meetings."[153] In the memo, Abruzzo announced her view on the legality of so-called "captive-audience meetings" under the National Labor Relations Act (NLRA).[154] The memo detailed Abruzzo's plan to "urge the Board" to reconsider its precedent and adopt a rule against captive audience meetings.[155]

A few months later, a group of Texas staffing agencies sued Abruzzo and the NLRB, arguing that the memo was an "unlawful attempt to silence employer speech in violation of the First Amendment."[156] Specifically, Plaintiffs argued that Abruzzo's interpretation of the NLRA "directly restricts employer speech on the basis of its content, viewpoint, and speaker . . . ."[157] Plaintiffs sought a declaratory judgment that the memo was unconstitutional and an injunction preventing Abruzzo and the NLRB from "taking action under this new interpretation against Plaintiffs' businesses."[158]

The Eastern District of Texas disposed of the matter on the grounds that Abruzzo's decisions about whom to prosecute are unreviewable because they are within her prosecutorial discretion.[159] Also, the District Court concluded that it lacked jurisdiction because of the NLRA's grant of exclusive jurisdiction over unfair labor practice claims

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153 Memorandum 22-04 from Jennifer A. Abruzzo, Gen. Couns., NLRB, to All Reg'l Dirs., Officers-in-Charge, and Resident Officers 1 (Apr. 7, 2022) [hereinafter Abruzzo Memo], https://apps.nlrb.gov/link/document.aspx/09031d458372316b [https://perma.cc/6DLY-KY5X].

154 *Id.* at 2–3. The phrase "captive audience meetings" refers to the practice by employers of requiring employees to attend meetings where employers discourage unionization. *Id.* In 1948, the Board held that the practice does not violate the NLRA. Babcock & Wilcox Co., 77 N.L.R.B. 577, 579 (1948), *overruled by* Amazon.com Servs. LLC, 373 N.L.R.B. 136 (2024).

155 Abruzzo Memo, *supra* note 153, at 1.

156 Complaint at 1–3, Burnett Specialists v. Abruzzo, No. 4:22-cv-00605, 2023 WL 5660138 (E.D. Tex. Aug. 31, 2023), *aff'd sub nom.* Burnett Specialists v. Cowen, 140 F.4th 686 (5th Cir. 2025) [hereinafter Burnett Complaint].

157 *Id.* at 2.

158 *Id.*

159 *Burnett*, 2023 WL 5660138, at *5.

to the NLRB.[160] Plaintiffs appealed to the Fifth Circuit which affirmed the District Court's decision that the Plaintiffs lacked standing because they could not establish a credible threat of enforcement.[161]

While the Fifth Circuit agreed with the District Court without reaching the merits of Plaintiffs' First Amendment claims, some of the questions during oral argument highlight why the circumstances that gave rise to this case are interesting for government speech purposes. At oral argument, Judge Catharina Haynes sat on the three-judge panel questioning Matt Miller, counsel for the Appellants. During a line of questioning she asked, "But I mean why can't [Abruzzo] try to convince people to do something she wants them to do? . . . Does she have First Amendment rights to speak out about what she's concerned about?"[162] Miller replied, "Well, she would, but when she speaks in her official capacity she's speaking on behalf of the government. And that speech is an executive action. And that executive action carries with it . . . a threat that employers can be prosecuted. And that's what causes these employers to change their behavior . . . ."[163]

Like *Murthy v. Missouri*, this case raises the issue of coercive government speech, but unlike *Murthy v. Missouri*, the government speech at issue is transparent to the public and subject to the constitutional limitations of the Due Process Clause.

C. Applying the Limiting Theories

Murthy v. Missouri and *Burnett Specialists* squarely present the problem this Note is worried about: What limits government speech when it comes from a government actor who is not particularly visible to the public and teeters on the line between persuasion and coercion without clearly crossing into illegal coercion? In this Section, I apply the traditional theories of limitation to *Murthy v. Missouri*- and *Burnett*-type government speech situations to test how effectively they work as a backstop to government power.

1. Democratic Process

The democratic process limitation on government speech heavily relies on the premise that government speech is visible to the public. In *Vullo*, Justice Sotomayor observed that "nothing [in the case] prevents

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160 *Id.*

161 *See Burnett Specialists v. Cowen*, 140 F.4th 686 (5th Cir. 2025).

162 Oral Argument at 11:40–12:37, Burnett Specialists v. Abruzzo, No. 4:22-cv-00605, 2023 WL 5660138 (E.D. Tex. Aug. 31, 2023), https://www.ca5.uscourts.gov/OralArgRecordings/23/23-40629_10-8-2024.mp3 [https://perma.cc/QH4M-GGMQ].

163 *Id.* at 12:37–12:52.

government officials from forcefully condemning views with which they disagree."[164] Instead, "the Constitution 'relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks.'"[165] She clarified, however, that "where . . . a government official makes coercive threats in a private meeting behind closed doors, the 'ballot box' is an especially poor check on that official's authority."[166]

It is straightforward that the electorate cannot react to something it does not know about. Thus, government speech can evade public scrutiny in two ways. First, government speech can come from a source that is not particularly visible to voters. The General Counsel of the NLRB is an example of a government speaker who is not visible to the public because, while she communicates with regulated parties and may be well recognized within the sphere of labor lawyers and special interest groups, her speech rarely makes headlines and will probably never be a visible issue in national elections. The second way that government speech can evade democratic review is that it can occur privately outside of the public record. That is the situation when administration officials have off-the-record communications with regulated entities like the emails and phone calls exchanged in *Murthy v. Missouri*.[167]

The democratic process theory of limitation is aspirational at best, particularly when it applies to officials at varying levels of government. For example, the democratic process could certainly work to curb the speech of highly visible, directly elected government officials like the President, members of Congress, or local officials, but that does not account for nearly all government speech. The power of government speech is wielded by government employees in all levels of government from the President of the United States to the commissioners of the Metropolitan Water Reclamation District of Greater Chicago. While I have every confidence in the good people of Chicago to cast liberty-preserving votes in presidential elections, I fear that relying on them to police Water Reclamation commissioners is a bridge too far.

Here, my point is not merely theoretical; the question of whether the public can accurately identify government speech has an empirical answer. In a 2017 article, Daniel Hemel and Lisa Larrimore Ouellette published the results of a survey in which they studied how public

164 Nat'l Rifle Ass'n of Am. v. Vullo, 144 S. Ct. 1316, 1332 (2024).

165 *Id.* (quoting Shurtleff v. City of Boston, 142 S. Ct. 1583, 1589 (2022)).

166 *Id.*

167 Note that those communications came into the public record only because of litigation. Absent a legal challenge to the government's speech, the democratic process wouldn't be able to check that speech because no one would have ever known about the speech.

perceptions interact with the government speech doctrine.[168] The survey presented respondents with potential government speech scenarios containing various substantive messages and "asked (1) whether the respondent 'associate[s]' the message with the government, (2) whether the government's action indicates that it 'endorses' the message it issues, or (3) whether the government's action 'conveys a message on [its] behalf.'"[169] Hemel and Ouellette found, among other things, that the substance of the message affected whether people perceived it to be government speech.[170] For example, respondents were more likely to identify messages about Abraham Lincoln as government speech than messages about Mickey Mouse.[171] Perhaps more concerningly, respondents were more likely to identify policy messages about abortion as government speech than messages about religion.[172]

So what is the problem? Hemel and Ouellette's study shows that people have the most difficulty identifying the most *troubling* types of government speech—messages that they do not think the government is constitutionally able to convey. As Hemel and Ouellette put it, "respondents who recall something about separation of church and state from their high school civics classes might be skeptical that religious messages could constitute government speech."[173] But as this Note has discussed, religious messages and speech favoring a viewpoint *can* constitute government speech and may be among the most dangerous types of government speech. So, the government speech we should be most concerned about—speech supporting religion or private interests—is the speech that is *least* identifiable to the public at large.

In the best-case scenario, the electorate would recognize government speech, and when the government message crosses lines of permissibility, the electorate would constrain it by voting. That approach *might* work in a category one case where the government is grappling with funding for a national issue like abortion. The approach might also work in a category two case, like a monument in a public park, where the speech is visible by nature and in some sense physically associated with the government. It is, however, extremely strained to say that the electorate can police category three government speech like the speech in *Murthy v. Missouri* and *Burnett Specialists*.

168 Hemel & Ouellette, *supra* note 132, at 66.
169 *Id.* at 68 (alterations in original) (citations omitted).
170 *Id.* at 73–74, 75 fig.3.
171 *Id.* at 74, 75 fig.3.
172 *Id.*
173 *Id.* at 74–75.

2. *Constitutional Limitations*

Assuming we have legitimate doubts about the efficacy of the electoral process to act as a backstop on government speech, we have no choice but to turn to provisions of the Constitution and hope they are better suited to the task. This Note has specifically explored the Establishment and Due Process Clauses, though other provisions like the Equal Protection Clause may also serve this purpose.

First, consider the constitutional limitations on government speech in the *Murthy v. Missouri* scenario. The speech at issue does not directly implicate the Establishment Clause, so that solution is off the table. It does, however, implicate, albeit indirectly, the exercise of a fundamental right. As the *Murthy v. Missouri* plaintiffs argued, when the Biden Administration directed social media platforms to moderate content, it was directing private parties to curtail the speech of their users.[174] Given the First Amendment's state action requirement, the social media platforms *can* exclude speech based on its content while the government *cannot*. Thus, one could fairly argue that the Biden Administration was making an end run around the First Amendment by using its speech to influence the social media companies to curtail the speech of individuals on their platforms because the government itself could not legally curtail that speech. Under Norton's conception, this violates due process.[175]

Now consider the constitutional limitations on government speech in the *Burnett Specialists* scenario. Like *Murthy*, the government speech in *Burnett Specialists* does not implicate the Establishment Clause but may implicate the Due Process Clause. In *Burnett Specialists*, the plaintiffs alleged that the General Counsel's memo had a chilling effect on their right to speak to their employees in the context of captive audience meetings.[176] Unlike the *Murthy v. Missouri* scenario, however, it's not clear that the General Counsel's speech was making an end run around the Constitution. In fact, Abruzzo followed up the memo with a statement that employers would not be prosecuted for captive audience meetings, but rather that, in adjudications related to *other* labor law violations, agency counsel would adopt the position that the NLRB should change its captive audience meeting rule.[177] While the government's speech

174 *See supra* notes 132–41 and accompanying text.

175 *See supra* notes 123–25 and accompanying text.

176 Burnett Complaint, *supra* note 156, at 7.

177 *See* Robert Iafolla, *Abruzzo's Plan to Overhaul NLRB Precedent Still in Need of Cases*, Bloomberg Law: Daily Lab. Rep. (Mar. 1, 2023, 4:41 PM), https://news.bloomberglaw.com/daily-labor-report/abruzzos-plan-to-overhaul-nlrb-precedent-still-in-need-of-cases [https://perma.cc/2HJT-35V3] ("Abruzzo also said NLRB lawyers won't issue complaints for conduct that's legal under current board law that she wants changed, unless there are related alleged violations of current law.").

in both *Murthy v. Missouri* and *Burnett Specialists* was coercive in the sense that it threatened government sanctions in response to the exercise of protected rights, in *Burnett Specialists* the formal process of agency adjudication stood between the threat and the sanction.[178] In *Murthy v. Missouri*, no such process existed, and the targets of the government speech were unshielded in the face of the government's threats.

Where does the current government speech doctrine leave the social media platforms in the *Murthy v. Missouri* scenario? The government speaks to them with veiled threats, directing them to adopt its content moderation preferences or face political punishment. The speech comes from obscure sources within the vast bureaucracy of the federal government and within the privacy of off-the-record emails and meetings, so it largely escapes scrutiny by the electorate. The government uses its power of speech as a backchannel because it cannot enforce its content moderation preferences directly without running afoul of the First Amendment. At this point, the social media companies have nowhere to turn but the courts—with the hope that a federal judge, speaking for the government, will impose restraints on the government's power to speak. Here, we run squarely into Yudof's analytical and institutional problems.[179] If we want to bring the Constitution to bear in our quest to limit government speech, we need to know what motivates the government's speech. That is, we need to know whether the government's aim is to suppress conservative social media posts or simply to communicate to the platforms its preference for content moderation. Then, if the Biden Administration *actually* brought an antitrust enforcement action against Facebook, for example, we would need to know whether the enforcement action was in response to Facebook's failure to comply with their content moderation preferences.

Take my example from the introduction: To invoke the Constitution to limit the Trump Administration's speech against universities, we would need to be able to show that the government's goal was to undermine liberal institutions and suppress student speech and not simply to curb the spread of antisemitism. We would need to be able to show that the administration cut the university's funding in retaliation for its failure to suppress student speech, and not because it failed to enforce anti-discrimination laws. Even if we could clear these analytical hurtles, we would still be relying on federal judges—who derive their sole power from

178 When the government speaker is a prosecutor, as the NLRB General Counsel is, there are a host of considerations that change the analyses. That discussion is beyond this Note. For a thoughtful argument that publicly employed attorneys' speech should not be considered government speech for government speech doctrine purposes, see Margaret Tarkington, *Government Speech and the Publicly Employed Attorney*, 2010 BYU L. Rev. 2175 (2010).

179 *See supra* notes 127–30 and accompanying text.

their ability to speak with the force of law—to apply the coercion label and stop the government from speaking. This is an extremely dubious framework for securing incredibly vulnerable civil liberties.

The problem this Note identifies is theoretical in the sense that it is a doctrinal difficulty that exists because of the practical necessity of government speech. The harm, however, is extremely literal. In a country where the marketplace of ideas is controlled by CEOs of social media platforms who act at the bidding of the President and where student activists are arrested for exercising their First Amendment rights, we should be extremely protective of free speech rights. Accordingly, while outside the scope of this Note, one possible solution is for courts to adopt a presumption of coercion in category three cases where the government speaker is not visible to the public. That is, when a private party sues the government for using its speech to pressure the violation of civil liberties, courts should assume the government's speech is coercive and place on the government the burden of proving that it did not extract compliance through threats of prosecution or regulatory enforcement.[180] Such a solution would properly place the responsibility of protecting liberty on the courts without requiring judges to restrict their own speech powers. It would also require the government to be more transparent in its use of speech, allowing it to govern without steamrolling basic freedoms.

Conclusion

Traditional theories for limiting government speech are based on a disorganized view of the doctrine. This has led to doctrinal failure where hard-to-identify government speech intersects with the persuasion-coercion problem. This is both because the public does not know that it is the government speaking and because judges are reticent to risk their own power by labeling government speech as coercion without the requisite insight into the government's intent in speaking. In this particular type of government speech case, regulated parties are left at the mercy of government speakers with no constitutional protections. This gap in constitutional protection created by the government speech doctrine needs to be remedied or it will continue to be used by the government to circumvent the Constitution and trample individual liberty.

[180] While the details of this proposal are beyond the purview of this Note, I raise it here to flag it as an area for potential future exploration.