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2011

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### Recommended Citation

Helen Norton, *Imaginary Threats to Government's Expressive Interests*, 61 Case W. Rsrv. L. Rev. 1265 (2011)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol61/iss4/10>

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# IMAGINARY THREATS TO GOVERNMENT'S EXPRESSIVE INTERESTS

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## INTRODUCTION

As the Supreme Court has recognized, the government must speak in a wide variety of ways if it is to function effectively.<sup>1</sup> Government expression also serves valuable First Amendment interests in enabling members of the public to identify and assess their government's priorities, thus informing and facilitating the public's participation in democratic self-governance.<sup>2</sup> For these reasons, the Court's government speech doctrine exempts the government's own speech from free speech clause scrutiny.<sup>3</sup>

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<sup>†</sup> Associate Professor, University of Colorado School of Law. I am grateful to participants' insightful contributions at the Case Western Reserve University School of Law Symposium, *Government Speech: The Government's Ability to Compel and Restrict Speech*. Thanks too to Al Canner for very thoughtful comments, and to Jordan Bunch for excellent research assistance. Special thanks to the Case Western Reserve University Law Review staff for its exceptional work in organizing an outstanding conference.

<sup>1</sup> See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary."); see also ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* 723 (1965) ("Now it is evident that government must itself talk and write and even listen."); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. REV.* 1713, 1825 (1987) ("[I]t is probably not too outlandish an exaggeration to conclude that government organizations would grind to a halt were the Court seriously to prohibit viewpoint discrimination in the internal management of speech.").

<sup>2</sup> See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 698 (1970) ("Participation by the government in the system of freedom of expression is an essential feature of any democratic society. It enables the government to inform, explain, and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force. Government participation also greatly enriches the system; it provides the facts, ideas, and expertise not available from other sources.").

<sup>3</sup> *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) (characterizing government's own speech as "exempt from First Amendment scrutiny").

But what does this mean in practice? More specifically, how can government protect its legitimate—and, indeed, valuable—expressive interests from encroachment without running afoul of the First Amendment’s free speech protections for private speakers? As the Court has held, the First Amendment permits the government to refuse to allow other parties to join, and thus change or distort, its own message—i.e., private speakers cannot compel the government to deliver their own views.<sup>4</sup>

Too often, however, governmental bodies are asserting their own expressive interests to claim—and some courts are permitting them to exercise—the power to punish private parties’ speech that does not threaten the government’s ability to express its own views. For example, some federal courts have relied on government speech interests to justify the exclusion of peaceful dissenters from attendance at the government’s public functions,<sup>5</sup> and another has invoked government’s expressive interests to justify the punishment of student expression in public schools.<sup>6</sup> By identifying such troubling examples, this essay urges attention to, and concern for, this trend’s potential spread.

This is only the most recent disquieting development to emerge from the Supreme Court’s “recently minted government speech doctrine.”<sup>7</sup> As I have written elsewhere, the Court “has been too quick to defer to public entities’ assertions that contested speech is their own; indeed, it has yet to deny the government’s claim to speech in the face of a competing private claim.”<sup>8</sup> As just one example, the

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<sup>4</sup> See *Sumnum*, 129 S. Ct. at 1134 (characterizing a town’s decision about which monuments to display in its park as the government’s own expressive choice, such that it was free to decline displays that it considered inconsistent with its own message); see also *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 288 (4th Cir. 2008) (holding that the government speech doctrine permits a school board to announce its opposition to pending voucher legislation on its website without requiring it to post the plaintiff’s pro-voucher materials as well); *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1143 (10th Cir. 2001) (holding that the government speech doctrine permits the government to present a holiday message to citizens without incurring a constitutional obligation to incorporate the message of dissenting private parties); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1011–12 (9th Cir. 2000) (holding that the government speech doctrine permits a school district to post materials celebrating Gay and Lesbian Awareness Month on its bulletin boards without requiring it to post a teacher’s anti-gay materials as well).

<sup>5</sup> See, e.g., *Weise v. Casper*, 593 F.3d 1163 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 7 (2010); *Weise v. Casper*, No. 05-cv-02355-WYD-CBS, 2008 WL 4838682, at \*7–8 (D. Colo. Nov. 6, 2008).

<sup>6</sup> See, e.g., *Doe v. Silsbee Ind. Sch. Dist.*, 402 F. App’x 852 (5th Cir. 2010), *cert. denied*, 79 U.S.L.W. 3514 (2011).

<sup>7</sup> *Sumnum*, 129 S. Ct. at 1139 (Stevens, J., concurring).

<sup>8</sup> Helen Norton, *Shining a Light on Democracy’s Dark Lagoon*, 61 S.C. L. REV. 535, 536 (2010); see also Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U.

Court has been far too willing to permit the government to control the speech of its workers to protect its own asserted expressive interests.<sup>9</sup> In *Garcetti v. Ceballos*,<sup>10</sup> the Court held that public employees' speech made "pursuant to their official duties" receives no First Amendment protection because the government should be permitted to "exercise . . . employer control over what the employer itself has commissioned or created."<sup>11</sup> It thus rejected the First Amendment claim of a prosecutor disciplined after writing an internal memorandum critical of the police.<sup>12</sup>

The Court's willingness to permit government control over public employees' expression by characterizing such speech as the government's own for which it has paid a salary—regardless of that expression's value to the public—has deeply disturbing implications not only for government workers' free speech rights, but also for the public's access to information about its government's effectiveness.<sup>13</sup> Indeed, lower courts now routinely apply *Garcetti* to reject First Amendment claims by police officers terminated for challenging public officials' illegal behavior, financial managers discharged for reporting fiscal improprieties, police officers fired for reporting health and safety violations, and health care workers punished for expressing concerns about patient care.<sup>14</sup>

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L. REV. 899, 902 (2010) ("Deference to government, more than any other principle, seems to explain" the Court's government speech determinations.).

<sup>9</sup> As another example of the Court's willingness to defer to government's characterization of contested speech as its own, it has also failed to require government to identify itself publicly as the source of a message as a condition of claiming the government speech defense to a First Amendment claim. See *Johanns*, 544 U.S. at 578 n.8 (Souter, J., dissenting) ("Notably, the Court nowhere addresses how, or even whether, the benefits of allowing government to mislead taxpayers by concealing its sponsorship of expression outweigh the additional imposition on First Amendment rights that results from it. Indeed, the Court describes no benefits from its approach and gives no reason to think First Amendment doctrine should accommodate the Government's subterfuge.").

<sup>10</sup> 547 U.S. 410 (2006).

<sup>11</sup> *Id.* at 421–22.

<sup>12</sup> *Id.* at 424.

<sup>13</sup> See Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 1 (2009) (discussing the current judicial environment and its implications for public employee's First Amendment claims).

<sup>14</sup> See *id.* at 4–5 and 14–15 (detailing examples); see also Norton & Citron, *supra* note 8, at 912 (offering additional examples of lower courts' application of *Garcetti* to dispose of public employees' First Amendment claims). A few judges, however, have resisted this trend by seeking to limit *Garcetti*'s reach—and its often disturbing consequences—by taking a hard look at whether a public employee's contested speech actually occurred pursuant to her official job duties. See, e.g., *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 205 (2d Cir. 2010) (Calabresi, J., dissenting) (urging "a less expansive definition of speech" pursuant to public employees' official duties when deciding whether *Garcetti* applies); *Andrew v. Clark*, 561 F.3d at 272

As just one illustration of the post-*Garcetti* landscape, consider the Eighth Circuit's recent rejection of a First Amendment claim by Omaha's Public Safety Auditor, who was fired after she published a report that urged improvement in the police department's performance in certain areas.<sup>15</sup> The report "describe[d], by analyzing traffic stop complaints, how the [Omaha Police Department] finds itself currently estranged from many of the communities it serves and offers suggestions about how it can repair those relations."<sup>16</sup> The Eighth Circuit found the report to be unprotected speech under *Garcetti* because such expression was part of the auditor's official duties to review citizen complaints against the city's public safety agencies.<sup>17</sup> In other words, *Garcetti* means that even truthful expression by a government worker on a matter of great public importance is entirely unprotected when—and, indeed, because—the worker is simply doing her job.<sup>18</sup>

*Garcetti* and its progeny thus exemplify a government speech doctrine increasingly unmoored from its theoretical underpinnings—one that fails to recognize that the constitutional value of government speech is rooted entirely in its ability to further, rather than frustrate, the government's accountability to its electorate. The remainder of this essay identifies and explores new and related developments, as some lower courts now rely on government speech rationales to limit free speech rights far outside of the public employment context. These cases feature courts that are disturbingly quick to define the government's expressive interests extremely broadly, and quicker still to perceive private individuals' speech as threatening those interests. In short, although government has a substantial interest in protecting its ability to communicate its own views, these courts have been all too willing to imagine threats to that interest where none exist.

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(Wilkinson, J., concurring) (observing that courts' failure carefully to scrutinize whether contested speech was actually delivered pursuant to a public employee's official duties and thus unprotected by *Garcetti* "would have profound adverse effects on accountability in government").

<sup>15</sup> *Bonn v. City of Omaha*, 623 F.3d 587 (8th Cir. 2010).

<sup>16</sup> *Id.* at 589.

<sup>17</sup> *Id.* at 592–93.

<sup>18</sup> Judge Rovner powerfully described this dynamic when reluctantly concurring in the Seventh Circuit's conclusion that the First Amendment does not protect a police officer's reports that his supervisor was engaged in unlawful activity because the officer's statement was made pursuant to his official duties: "Detective Kolatski was performing his job admirably at the time of these events, and although his demotion for truthfully reporting allegations of misconduct may be morally repugnant, after *Garcetti* it does not offend the First Amendment." *Morales v. Jones*, 494 F.3d 590, 599 (7th Cir. 2007) (Rovner, J., concurring in part and dissenting in part).

I: GOVERNMENT'S EFFORTS TO EXCLUDE  
DISSENTING ATTENDEES FROM PUBLIC FUNCTIONS TO  
PROTECT ITS ASSERTED EXPRESSIVE INTERESTS

Some public entities have aggressively asserted—and some courts have accepted—government speech interests to justify the exclusion of non-disruptive dissenters from attendance at the government's expressive public functions.<sup>19</sup> These developments reveal a troubling misunderstanding of what the government speech doctrine does, and does not, empower government to do to protect its expressive interests, and a distressing failure to recall that the First Amendment requires the government's toleration of peaceful dissent.<sup>20</sup>

That government acts as both regulator and speaker (along with its many other roles, such as employer, educator, property owner, etc.) does not mean that we cannot parse those roles when assessing the constitutionality of its action.<sup>21</sup> Although we should be slow to

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<sup>19</sup> First Circuit Judge Torruella presciently anticipated this development in an earlier government speech case. *See Suttcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 337 (1st Cir. 2009) (Torruella, J., dissenting) (“The majority's position has the potential of permitting a governmental entity to engage in viewpoint discrimination in its own governmentally-owned channels so long as the governmental entity can cast its actions as its own speech after the fact. What is to stop a governmental entity from applying the doctrine to a parade? Or official events? It is nearly impossible to concoct examples of viewpoint discrimination on government channels that cannot otherwise be repackaged ex post as ‘government speech.’” (citations omitted)).

<sup>20</sup> The protection of peaceful dissent furthers the values most often identified at the heart of the First Amendment, which include protecting individual interests in autonomy and self-expression, facilitating citizen participation in democratic self-government, and contributing to the discovery of truth and the development of knowledge. *See, e.g.,* Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1411 (1987) (“Most theoretical writings have suggested variants of four different values as critical to speech protection: individual development, democratic government, social stability, and truth.” (footnotes omitted)).

Indeed, the developments described in this essay illustrate Mark Yudof's great fear—expressed in his groundbreaking work on government speech—that government would use its own speech to falsify consent by excluding dissent. MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 15 (1983). For more contemporary concerns that the Court's government speech doctrine may facilitate the suppression of dissent, see Joseph Blocher, *Government Viewpoint and Government Speech*, 52 B.C. L. REV. 695 (2011) (arguing that the government speech doctrine rewards viewpoint discrimination); Timothy Zick, *Summum, the Vocality of Public Places, and the Public Forum*, 2010 BYU L. REV. 2203 (encouraging courts and officials to avoid many of the potentially troubling implications of *Summum*).

<sup>21</sup> The government is unique among all speakers—indeed, among all actors—because of its coercive power as sovereign. To be sure, however, there remains a meaningful distinction between government expression and government coercion. *See, e.g.,* Alan K. Chen, *Right Labels, Wrong Categories: Some Comments on Steven D. Smith's, Why is Government Speech Problematic?*, 87 DENV. U. L. REV. ONLINE (Aug. 12, 2010, 9:14AM), <http://www.denverlawreview.org/government-speech/> (“First Amendment doctrine appropriately distinguishes between these two scenarios because the government's own speech can rarely influence the

assume that government expression is inevitably coercive given the considerable instrumental value of transparently governmental speech,<sup>22</sup> we should be slower still to excuse government's punishment of private expression as an acceptable means of protecting its expressive interests. Yet some courts have displayed a disconcerting willingness to defer to government's claim that it may engage in coercion to protect its expression.

For example, the Supreme Court recently denied certiorari in *Weise v. Casper*,<sup>23</sup> a case in which the lower courts expressly invoked government speech concerns to justify the exclusion of nondisruptive private citizens from an official governmental function based simply on their dissenting views.<sup>24</sup> *Weise* involved a First Amendment challenge by two individuals who were forcibly ejected from President Bush's speech on Social Security that was otherwise open to the public simply because they arrived at the event's parking lot in a car with a "No More Blood for Oil" bumper sticker.<sup>25</sup> As described by the Tenth Circuit on appeal, "Sometime before the President's speech, the White House Advance Office established a policy of excluding those who disagree with the President from the President's official public appearances."<sup>26</sup>

The federal district court found no constitutional violation, using language that suggests a vivid imagination with respect to threats to government's expressive interests: "Plaintiffs [sic] complaint is essentially that they were not permitted to participate in the President's speech. President Bush had the right, at his own speech, to ensure that only his message was conveyed. When the President speaks, he may choose his own words."<sup>27</sup>

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public debate in the same qualitative or quantitative way as when it excludes private speakers' ideas from the marketplace.").

<sup>22</sup> See Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 45 (2000) (explaining that government persuasion is distinguishable from government coercion).

<sup>23</sup> 593 F.3d 1163 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 7 (2010).

<sup>24</sup> *Weise v. Casper*, No. 05-cv-02355-WYD-CBS, 2008 WL 4838682, at \*7-8 (D. Colo. Nov. 6, 2008).

<sup>25</sup> *Id.* at \*1-2.

<sup>26</sup> *Weise*, 593 F.3d at 1165.

<sup>27</sup> *Weise*, 2008 WL 4838682, at \*8 (emphasis omitted). The district court then cited a Tenth Circuit government speech case, *Wells v. City & Cnty. of Denver*, 257 F.3d 1132 1143 (10th Cir. 2001), which held that the government speech doctrine permits the government to present a holiday message to citizens without incurring a constitutional obligation to incorporate the message of dissenting private parties. *Id.* at \*8. But unlike the plaintiff in *Wells* (who sought to require the city to include her message objecting to government endorsement of the holidays in its public holiday display), the *Weise* plaintiffs did not seek to have the President or any other government speaker incorporate a dissenting message of their own.

True enough. But the plaintiffs in no way threatened that choice. They did not seek to participate in the President's speech or to interfere with his chosen message. They sought only to listen to it—and to ask a question if questions were permitted<sup>28</sup> Indeed, although the government speech doctrine certainly permits President Bush to control the content of his own speech and to refuse to share the event's podium and microphone with dissenters (or any other speakers), his expressive interests are in no way threatened by the mere presence of those who may disagree with his views.

Nevertheless, the Tenth Circuit affirmed the lower court's dismissal of the plaintiffs' claims on qualified immunity grounds, citing—inter alia—the Supreme Court's most recent government speech decision, *Pleasant Grove City v. Summum*, before concluding that the law is not clearly established as to “how to treat the ejection of a silent attendee from an official speech based on the attendee's protected expression outside the speech area.”<sup>29</sup> In other words, the appellate court suggested that the emergence of the government speech doctrine sufficiently muddied the legal waters to uphold the defendants' qualified immunity claim:

At the most general level, Plaintiffs are correct that the government usually cannot discriminate against a speaker based on that speaker's viewpoint. But in qualified immunity cases, except in the most obvious cases, broad, general propositions of law are insufficient to suggest clearly established law. That is because the clearly established law must be such that it would put a reasonable official on notice that his conduct was unlawful. That is particularly true here. Beyond the abstract principle that the government ordinarily cannot discriminate based upon viewpoint, however, a First Amendment claim must be situated somewhere within the free speech jurisprudence because we accord speech various levels of protection depending upon the nature of the speech, the speaker, and the setting. *See, e.g., Pleasant Grove City v. Summum* . . . (because government speech ‘is not subject to

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<sup>28</sup> *Weise*, 593 F.3d at 1165–66 (“Plaintiffs claim that they never disrupted the event, intended to disrupt the event, or indicated that they would disrupt the event. [One of the plaintiffs] would have asked the President a question, if given the opportunity.” (citation omitted)).

<sup>29</sup> *Id.* at 1170.

the Free Speech Clause,' the government as speaker can discriminate on the basis of viewpoint).<sup>30</sup>

....

... To be sure, in some obvious situations, general authority may put a reasonable public official on notice that his or her conduct is violative of constitutional rights. This is not one of them.<sup>31</sup>

But as Judge Holloway made clear in a vigorous and well-reasoned dissent, this should have been an easy win for the plaintiffs:

On what basis could a representative of the executive branch have thought, on seeing Plaintiffs alight from Ms. Weise's car with its bumper sticker, that they could be excluded from a public event solely because Ms. Weise had chosen to exercise her most fundamental First Amendment right *outside* of the event and in the complete absence of *any* indication that Plaintiffs intended to even speak at the event, much less any indication of any intent to disrupt the event?<sup>32</sup>

Justice Ginsburg echoed this bewilderment in her dissent from the Supreme Court's denial of certiorari (joined by Justice Sotomayor): "I cannot see how reasonable public officials, or any staff or volunteers under their direction, could have viewed the bumper sticker as a permissible reason for depriving [the plaintiffs] of access to the event."<sup>33</sup>

Other public officials have offered similarly expansive arguments in defense of their efforts to exclude potential dissenters from public functions. For example, in *Liberty & Prosperity 1776, Inc. v. Corzine*,<sup>34</sup> the governor of New Jersey asserted a government speech defense to excuse the exclusion and arrest of dissenters from a town hall meeting at a high school auditorium where he proposed to present a financial restructuring and debt reduction plan to town citizens for

<sup>30</sup> *Id.* at 1167–68 (citations omitted).

<sup>31</sup> *Id.* at 1170.

<sup>32</sup> *Id.* at 1175 (Holloway, J., dissenting).

<sup>33</sup> *Weise v. Casper*, 131 S. Ct. 7, 7 (2010) (Ginsburg, J., dissenting). Justice Ginsburg also noted, however, that this particular suit (in which the defendants were volunteers rather than government employees) could be distinguished from still-pending suits against the White House officials alleged to have ordered the ejection—suits that "may offer this Court an opportunity to take up the issue avoided today." *Id.* at 8.

<sup>34</sup> 720 F. Supp. 2d 622 (D. N.J. 2010).

their feedback.<sup>35</sup> The governor had permitted a nonprofit organization supportive of his plan (Save Our State) to set up registration tables, display literature and signs, and place a banner over the auditorium's stage.<sup>36</sup> The city police advised the plaintiffs (who opposed the governor's plan), however, that they could not peacefully display signs or distribute literature in the auditorium or on the facility's grounds, and arrested the plaintiffs when they did so.<sup>37</sup> In his motion to dismiss the plaintiffs' First Amendment challenge, the governor asserted that he was entitled to qualified immunity because he

adopted the speech of Save Our State, transforming it into government speech. . . . The premise of the argument is that by adopting Save Our State's speech, it not only transformed Save Our State's speech into government speech, it also eliminated any security or disruption risks posed by Save Our State's displaying of signs and distributing of literature, such that the Court could find that those content-neutral rationales and not viewpoint-discrimination explained the restriction on Plaintiffs' identical behavior.<sup>38</sup>

The federal district court appropriately rejected the governor's argument and denied his motion to dismiss the plaintiffs' First Amendment claim.<sup>39</sup> In so holding, it recognized that the government speech doctrine empowers the governor to control the podium or the microphone at his official events,<sup>40</sup> but not to exclude non-disruptive private parties with different views who posed no threat to his ability to deliver his governmental message:

The Governor could, for example, invite the President of Save Our State to introduce him at the meeting without also permitting [the plaintiff] to give some opening remarks. As in this case, the Governor could also hang the Save Our State banner above the stage, and perhaps permit only Save Our State to set up registration tables.

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<sup>35</sup> *Id.* at 624–25.

<sup>36</sup> *Id.* at 625.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 630–31.

<sup>39</sup> *Id.* at 633.

<sup>40</sup> *Id.* (“The discriminatory treatment of who may hang a banner on the stage is permissible because the existence of a limited public forum does not itself give any speaker the right to get up on stage during another speaker's time, or to otherwise become a part of the organizing speaker's message.”).

However, in this case, the State is actually asking for something more than what a private speaker would be entitled to: the ability not just to control its own speech and prevent disruption, but the ability to exclude even peaceful, non-disruptive dissent that does not confuse or impair the government's message.

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Holding signs and distributing leaflets at a state-sponsored rally is not the same as directly participating in the message being expressed in the rally. And therefore the right of the government to control its message does not extend to control over that dissenting speech.<sup>41</sup>

The government speech doctrine empowers the government to choose certain messages as its own, but not to ensure the absence of those with dissenting views from its expressive functions (especially through their forcible ejection or arrest, as occurred in these cases). In both *Weise* and *Corzine*, the government's message was transparently governmental: President Bush could make clear his views on Social Security, and Governor Corzine his views on financial restructuring. In neither case did the presence of peaceful dissenters threaten the delivery of those views. Yet, in both cases, the government claimed more power than the government speech doctrine provides it.

The government speech doctrine provides public entities with a defense to free speech claims by private speakers who seek to join, alter, or otherwise interfere with the government's delivery of its own views. But in neither case did the plaintiffs seek any such thing. In *Weise*, the plaintiffs did not seek to share the microphone nor the podium with the President, but instead sought merely to listen. In *Corzine*, the plaintiffs did not seek to require the government to print out literature expressing their dissenting views, nor to reserve them an auditorium for their own press conference; instead, they sought merely to attend the event and peacefully distribute their own literature. Only in *Corzine*, however, did the court take appropriate care to determine whether, if at all, a private speaker would undermine the government's ability to deliver its own views, carefully attending to whether the dissenting speech would in fact "interfere or be confused with" that of the government.<sup>42</sup>

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<sup>41</sup> *Id.* at 633–34 (footnote omitted).

<sup>42</sup> *Id.* at 634 ("It does not follow from *Hurley* or its logic that the rightful temporary

## II: GOVERNMENT CONTROL OF STUDENT SPEECH TO PROTECT ITS ASSERTED EXPRESSIVE INTERESTS

Next consider the Fifth Circuit's recent decision upholding a public school's punishment of student speech, which illustrates yet another context in which lower courts have invoked government's expressive interests to scuttle private speakers' First Amendment claims. In *Doe v. Silsbee Independent School District*,<sup>43</sup> the court considered a public high school student's First Amendment challenge to her dismissal from the cheerleading squad when she failed to cheer for a basketball player who she alleged had sexually assaulted her.<sup>44</sup> (Rather than cheering, she folded her arms and remained silent when the player in question was at the free throw line.)<sup>45</sup>

The Supreme Court has repeatedly emphasized that public school students do not shed their First Amendment rights at the schoolhouse gates,<sup>46</sup> even while making clear that those rights are not coextensive with those of adults in other settings in light of the practical realities of the school environment.<sup>47</sup> Indeed, the Court has recognized students' (and other individuals') strong expressive interest in not being compelled by the government to speak in a way contrary to their values.<sup>48</sup> Along these lines, requiring an individual to cheer for

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occupier of the limited public forum may exclude from the forum all competing messages of any kind, regardless of whether they would interfere or be confused with the speech of the organizer. . . . The Court has no reason to believe that government's power should be greater than that of a private speaker in these circumstances." )

<sup>43</sup> 402 F. App'x 852 (5th Cir. 2010), *cert. denied*, 79 U.S.L.W. 3514 (2011).

<sup>44</sup> According to news reports, the athlete later "pleaded guilty to a reduced charge of misdemeanor assault. He was fined \$2,500 and ordered to perform 150 hours of community service and take an anger-management course." Bob Egelko, *Cheerleader Suit Tackles Students' Rights Issue*, S. F. CHRON., Nov. 5, 2010, at A1.

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

<sup>46</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>47</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (explaining that First Amendment rights must be applied in light of the special circumstances found in schools); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (explaining that the same latitude given to an adult using an offensive form of expression to make a political point is not necessarily extended to children in public schools).

<sup>48</sup> See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (holding that the First Amendment does not permit a state to compel an objecting private speaker to display the state's motto on his car's license plate); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that the First Amendment does not permit public schools to compel objecting students to salute the flag). Recall that one of the First Amendment's primary purposes in protecting speech from government constraint is to preserve individuals' interest in autonomy and self-expression. See Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 423 (1980) ("Over the years, we have come to view freedom of expression as essential to: (1) individual self-fulfillment; (2) the advance of knowledge and the discovery of truth; (3) participation in decisionmaking by all members of society; and

her alleged attacker offers an unusually powerful example of an action repugnant to individual autonomy. But in a per curiam opinion by Judges Clement, Garza, and Owen, the Fifth Circuit panel made no mention of that interest, emphasizing instead the school's expressive interests and characterizing the plaintiff as "contractually required to cheer for the basketball team."<sup>49</sup> It then rejected her First Amendment claim in a single paragraph:

In her capacity as cheerleader, H.S. served as a mouthpiece through which [the school] could disseminate speech—namely, support for its athletic teams. Insofar as the First Amendment does not require schools to promote particular student speech, [the school] had no duty to promote H.S.'s message by allowing her to cheer or not cheer, as she saw fit. Moreover, this act constituted substantial interference with the work of the school because, as a cheerleader, H.S. was at the basketball game for the purpose of cheering, a position she undertook voluntarily.<sup>50</sup>

The Fifth Circuit's cursory discussion variously alluded to *Tinker v. Des Moines Independent Community School District*,<sup>51</sup> *Hazelwood School District v. Kuhlmeier*,<sup>52</sup> and the government speech doctrine to support its ruling. But none of these doctrines provides sufficient justification to dismiss the plaintiff's First Amendment claim, especially when we remain attentive to the constitutional purposes underlying each. The remainder of this Part considers each in turn.

#### A. Government Speech

Although the *Silsbee* opinion never directly mentioned the term "government speech," nor did it cite to any government speech decision, the Fifth Circuit's reference to the school's interest in disseminating speech through the cheerleader-as-mouthpiece<sup>53</sup> indicates a focus on the school's power to protect its own expression. To be sure, public schools—like other government entities—have a

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(4) maintenance of the proper balance between stability and change.").

<sup>49</sup> *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App'x 852, 853 (5th Cir. 2010), *cert. denied*, 79 U.S.L.W. 3514 (2011).

<sup>50</sup> *Id.* at 855.

<sup>51</sup> 393 U.S. 503 (1969).

<sup>52</sup> 484 U.S. 260 (1988).

<sup>53</sup> *Silsbee*, 402 F. App'x at 855.

wide variety of views to communicate, and the government speech doctrine appropriately permits them to protect that expression from distortion by private speakers. Examples include a school district's decision to express its opposition to pending school voucher legislation on its website and in e-mails and letters to parents and school employees,<sup>54</sup> as well as a school district's expression of support for Gay and Lesbian Awareness Month celebrations through postings on its bulletin boards.<sup>55</sup> In both cases, federal appellate courts applied the government speech doctrine to reject First Amendment claims by private speakers who sought to require the schools to alter their own message by delivering or posting the plaintiffs' contrary views on the school's website, bulletin boards, and letters to parents and employees.<sup>56</sup> As the Ninth Circuit explained,

The narrow question we must answer is whether the First Amendment compels a public high school to share the podium with a teacher with antagonistic and contrary views when the school speaks to its own constituents on the subject of how students should behave towards each other while in school. The answer to this question clearly is no.<sup>57</sup>

But even if the Fifth Circuit meant to apply the government speech doctrine to the facts in *Silsbee*, whether the plaintiff's silence undermined the school's expressive interest in supporting its athletic teams is not at all clear, and deserves careful examination. Here, the plaintiff did not seek to have the school express support for, or help her deliver, her own opinions. She did not demand that the school post her views on its website or bulletin boards nor include her message in its letters to students and employees. She simply declined to cheer.

Yet the Fifth Circuit engaged in no such analysis; instead it permitted the school to protect its own expressive interests by controlling—even compelling—her speech. In so doing, perhaps the panel sought to treat students who engage in certain roles as akin to

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<sup>54</sup> *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 278–79 (4th Cir. 2008).

<sup>55</sup> *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000).

<sup>56</sup> *Page*, 531 F.3d at 281–85 (holding that the First Amendment did not require the school district to post the plaintiff's pro-voucher materials on its website, which announced the school's opposition to pending voucher legislation, while emphasizing that the First Amendment would not permit the government to punish dissenters for expressing their views on their own websites); *Downs*, 228 F.3d at 1013–14 (holding that the First Amendment did not require the school district to permit the plaintiff to post materials questioning homosexuality's morality on school bulletin boards celebrating Gay and Lesbian Awareness Month).

<sup>57</sup> *Downs*, 228 F.3d at 1005.

public employees under *Garcetti*—i.e., as speakers whose expression pursuant to their “official” (here, cheerleading) duties is unprotected by the First Amendment and thus entirely within the school’s control.<sup>58</sup> More specifically, the panel’s reference to the plaintiff as “contractually required to cheer”<sup>59</sup> and “as a mouthpiece through which [the school] could disseminate speech”<sup>60</sup> is reminiscent of the *Garcetti* Court’s characterization of public employees’ speech “pursuant to [their] official duties” as speech that “the employer itself has commissioned or created” and is thus permitted to control without running afoul of the First Amendment.<sup>61</sup> Just as we saw in *Garcetti*,<sup>62</sup> the *Silsbee* court appears to impose a formalistic bright-line rule to dispose of a plaintiff’s First Amendment claims rather than engage in the “often-challenging but entirely commonplace task of balancing constitutional interests.”<sup>63</sup> In both cases, the courts were entirely too quick to defer to government’s purported expressive interests without any discussion of whether the plaintiff’s speech actually threatened those interests, much less any consideration of the plaintiff’s considerable countervailing free speech interests.

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<sup>58</sup> See *Silsbee*, 402 F. App’x at 855 (“[A]s a cheerleader, H.S. was at the basketball game for the purpose of cheering, a position she undertook voluntarily.”).

<sup>59</sup> *Id.* at 853.

<sup>60</sup> *Id.* at 855.

<sup>61</sup> *Garcetti v. Ceballos*, 547 U.S. 401, 421–22 (2006). That *Garcetti*’s effects have the potential to spread in this way is further supported by various courts’ past willingness to extend First Amendment doctrine governing public employees’ speech to the expression of students and private speakers who engage in contractual and other relationships with public entities. See, e.g., *Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad.*, 127 S. Ct. 2489, 2495 (2007) (relying on public employee precedents for guidance in assessing First Amendment claims of a private school that had voluntarily joined a governmental athletic association); *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 674–76 (1996) (relying on public-employee speech precedents for guidance in assessing First Amendment claims of an independent contractor); *Lowery v. Euverard*, 497 F.3d 584, 596–98 (6th Cir. 2007) (relying on public-employee speech precedents for guidance in assessing First Amendment claims of student-athletes); *Decotiis v. Whittemore*, 680 F. Supp. 2d 263, 268 n.2 (D. Me. 2010) (relying on public-employee speech precedents for guidance in assessing the First Amendment claims of a government contractor); see also Nicole B. Cásarez, *The Student Press, the Public Workplace, and Expanding Notions of Government Speech*, 35 J.C. & U.L. 1, 7 (2008) (noting parallel developments in the Court’s First Amendment doctrines governing public employee and student speech).

<sup>62</sup> See 547 U.S. at 421 (“[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . .”).

<sup>63</sup> Norton, *supra* note 13, at 33.

*B. Analysis under Tinker v. Des Moines Independent  
Community School District*

In *Tinker*, the Supreme Court interpreted the First Amendment to permit public schools to regulate student speech at school that “materially disrupts classwork or involves substantial disorder” or “would materially and substantially disrupt the work and discipline of the school.”<sup>64</sup>

Of the Court’s various rules governing public schools’ ability to regulate student speech, *Tinker* is by far the least deferential to the government.<sup>65</sup> In *Tinker*, the Court made clear that the school’s interest must be “more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>66</sup> Instead, the school must show that the regulated speech is reasonably likely to “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”<sup>67</sup> Applying this rule, the Court found that a school could not make such a showing with respect to students wearing black armbands at school in protest of the Vietnam War, and held their discipline to be a First Amendment violation.<sup>68</sup>

Although the Fifth Circuit does not say so explicitly, its conclusion in *Silsbee* that the plaintiff’s act “constituted substantial interference with the work of the school”<sup>69</sup> suggests that it intended to apply *Tinker*’s substantial interference test to the cheerleader’s expression. If so, however, its *Tinker* analysis is enormously, and inappropriately,

<sup>64</sup> 393 U.S. 503, 513 (1969).

<sup>65</sup> See, e.g., *Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2007) (interpreting the First Amendment to permit schools to “restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986) (interpreting the First Amendment to permit schools to regulate students’ lewd and vulgar speech at an official assembly). Neither *Fraser* nor *Morse* require schools to justify their actions by showing that student speech on those topics was or would be disruptive.

<sup>66</sup> *Tinker*, 393 U.S. at 509; see also *id.* at 508–09 (“[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength . . .” (citation omitted)).

<sup>67</sup> *Id.* at 513 (alteration omitted) (quoting *Burnside v. Byars*, 363 F. 2d 744, 749 (5th Cir. 1966)).

<sup>68</sup> *Id.* at 513–14.

<sup>69</sup> *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App’x 852, 855 (5th Cir. 2010), *cert. denied*, 79 U.S.L.W. 3514 (2011). The panel opinion had cited to *Tinker* itself in the preceding paragraph. *Id.*

deferential to the school's expressive interests. Note, for example, that the panel asserted only that the plaintiff's speech interfered with the school's expressive interest in cheering on its athletic teams<sup>70</sup> rather than identifying any threatened disorder or disruption to "schoolwork or discipline" of the sort identified in *Tinker* as an interest sufficient to justify regulation of student speech on school premises.<sup>71</sup> Whether a school's interest in protecting its own expression—here, an interest in cheering for its sports teams—is ever sufficient to justify the punishment of student speech under *Tinker* remains a substantial question that the Fifth Circuit did not address.

Even if a school's interest in cheering for its athletic teams could be considered sufficiently weighty to satisfy *Tinker*, the Fifth Circuit offered no discussion—much less required any showing—that she "material[ly] and substantial[ly] interfere[d]"<sup>72</sup> with that interest: she did not curse, yell at, or cheer against the athlete nor did she cheer for the other team. She simply remained silent. A thoughtful analysis in this case—and a fair application of *Tinker*'s rigorous scrutiny—would have considered whether her silence, without more, materially and substantially interfered with the school's interests.

### C. Analysis under *Hazelwood School District v. Kuhlmeier*

In *Hazelwood*, the Supreme Court crafted a more deferential rule that applies to "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."<sup>73</sup> There it distinguished schools' regulation of student speech on school premises generally (e.g., the type of regulation rigorously scrutinized in *Tinker*) from schools' efforts to avoid being inaccurately perceived as promoting or sponsoring student speech:

The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators'

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

<sup>71</sup> *Tinker*, 393 U.S. at 511.

<sup>72</sup> *Id.* *Tinker* requires that schools prove that the student speech to be regulated actually cause, or reasonably be forecast to cause, material and substantial disorder or disruption. *Id.* at 514.

<sup>73</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); see also *Morse*, 127 S. Ct. at 2627 ("[*Hazelwood*] does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur."); *id.* at 2637 (Alito, J., concurring) (characterizing *Hazelwood* as "allow[ing] a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ").

authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.<sup>74</sup>

The Court then interpreted the First Amendment to permit schools to “exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>75</sup> In developing such a rule, the *Hazelwood* Court sought to protect schools’ power to “assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”<sup>76</sup> It then applied its new rule to uphold as constitutional a school’s refusal to publish articles in its newspaper discussing student experiences with birth control, pregnancy, and divorce.<sup>77</sup>

Although its extremely cursory discussion does not makes its mode(s) of analysis clear, the *Silsbee* court’s statement that the school had no duty to “promote” the plaintiff’s speech<sup>78</sup> appears to invoke the deferential *Hazelwood* test.<sup>79</sup> But none of the *Hazelwood* Court’s

<sup>74</sup> *Hazelwood*, 484 U.S. at 271.

<sup>75</sup> *Id.* at 273. The *Hazelwood* Court identified the school’s pedagogical concerns over newspaper articles on students’ experience with birth control, pregnancy, and divorce to include student and family privacy, journalistic fairness, and readers’ maturity. *Id.* at 274–75.

<sup>76</sup> *Id.* at 271 (“A school may “disassociate itself . . . from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.” (internal quotation marks and citation omitted)). Some of the Supreme Court’s other student speech cases also signal its concern that schools not be misunderstood as endorsing views that may be antithetical to their chosen educational mission. See *Morse v. Frederick*, 127 S. Ct. 2618, 2618 (2007) (crediting concern that a principal’s failure to discipline the plaintiff’s speech “would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986) (“[I]t was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.”).

<sup>77</sup> *Hazelwood*, 484 U.S. at 272–73.

<sup>78</sup> *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App’x 852, 855 (5th Cir. 2010), *cert. denied*, 79 U.S.L.W. 3514 (2011). The panel cited *Hazelwood* as support. *Id.*

<sup>79</sup> To be sure, government has a significant interest in protecting the integrity of its own expression—i.e., in ensuring that it is held politically responsible only for its own views, and not those of others mistakenly attributed to it. See Helen Norton, *Not for Attribution: Government’s Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1347 (2004) (“First Amendment values are not frustrated by government efforts to protect its expression that deprive a private speaker of only the opportunity to speak in a setting that mistakenly conveys the government’s endorsement of his or her speech, while leaving the

concerns appears to be implicated in *Silsbee*: neither the school nor the Fifth Circuit identified any way in which the plaintiff's speech interfered with learning or any other pedagogical goal, exposed any observer to inappropriate speech, or misled reasonable onlookers to interpret her silence as reflecting the school's views.

More specifically, the deferential *Hazelwood* rule first requires a determination that reasonable onlookers will likely misattribute the student's speech to the school, as the *Hazelwood* Court appropriately recognized schools' interest in ensuring that "the views of the individual speaker are not erroneously attributed to the school."<sup>80</sup> To be sure, a school's efforts to educate are too easily undermined if it cannot ensure that contrary private opinions are not mistakenly assigned to it. But this interest is only threatened when the school can demonstrate its reasonable concern that others' speech will be mistakenly understood as its own. Consider, for example, a student's non-disruptive replies to a teacher's in-class questions in which the student expresses opinions inconsistent with the school's views on certain matters. No one would interpret the student's speech as bearing the school's imprimatur simply because it occurred in the context of the classroom—i.e., school-sponsored curricular speech. For this reason, a thoughtful application of *Hazelwood* would certainly permit the teacher or any school official to disagree with or otherwise rebut the student's speech through counter-speech—but not to punish the student for her dissenting views when they posed no danger of being mistakenly attributed to the school.<sup>81</sup>

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speaker free to deliver the same message elsewhere.”). The Supreme Court has yet to consider, and thus the lower courts have yet to work out, the relationship between its *Hazelwood* rule and the more recent emergence of its government speech doctrine—even though both involve attention to government's expressive interests. For scholarly treatment of the issue, see Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 722 (2009) (arguing that school-sponsored activities should be characterized as a “nonforum”—a new category “located on the free speech doctrinal continuum between the nonpublic forum and government speech”—and not subject to free speech clause scrutiny); Casarez, *supra* note 61, at 1 (proposing a “hybrid speech analysis” to balance the interests of individual and government speakers in school-sponsored activities, as well as in public employment).

<sup>80</sup> *Hazelwood*, 484 U.S. at 271.

<sup>81</sup> See *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring) (“The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's ‘educational mission.’ . . . [S]ome public schools have defined their educational missions as including the inculcation of whatever political and social views are held by [school officials and faculty].”).

What are the dangers that the *Silsbee* plaintiff's opinions would be mistakenly attributed to the school? On one hand, the plaintiff was "on duty" as a cheerleader in a school uniform at a school-sponsored athletic event.<sup>82</sup> On the other hand, she simply remained silent; she did not cheer against the athlete nor for the other team. Under the circumstances, the likelihood that reasonable onlookers would interpret her silence as reflecting the school's views remains unexamined and unproven.<sup>83</sup>

A thoughtful analysis under *Hazelwood* would have considered whether the plaintiff's silence in this context would mislead reasonable observers into assigning certain views to the school. But rather than carefully considering whether her speech posed any threat to the school's expressive interests by leading viewers inaccurately to attribute her views to the school, the Fifth Circuit instead simply assumed threats to those interests.<sup>84</sup>

#### CONCLUSION

The government's expressive claims in these cases are potentially breathtaking in scope, as they assert the power to punish private parties' speech that does not threaten the government's ability to express its own views. Even more troubling, some lower courts permit government entities to exercise this power, deferring to the government's assertions that the plaintiffs' speech endangers its own expressive interests.

But other lower courts resist these arguments, recognizing that a meaningful commitment to free speech instead requires skepticism of the government's expressive claims unless and until the government can persuade us that its efforts are not a pretext for squelching private

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<sup>82</sup> For a discussion of the circumstances under which a public employee's speech might reasonably be understood as bearing the imprimatur of his or her governmental employer, see Norton, *supra* note 13, at 47–67.

<sup>83</sup> For a discussion of how onlookers use a variety of "source cues" to determine the source of a message, see Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U.L. REV. 587, 607–09 (2008).

<sup>84</sup> Finally, even if the school could show the danger of such misattribution, *Hazelwood* still requires that the school show that its action in dismissing the student was "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. The school made no such argument, see Brief of Appellee, *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App'x 852 (5th Cir. 2010) (No. 09-41075), and the Fifth Circuit discussed none. *Id.*

Another unresolved issue—although not one in play in *Silsbee*—is whether *Hazelwood* permits schools to engage in viewpoint-based distinctions in addressing their pedagogical concerns. See, e.g., Samuel P. Jordan, Comment, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555 (2003) (explaining the circuit split on whether *Hazelwood* creates a constitutional exception allowing viewpoint restrictions on student expression for pedagogical purposes).

dissent.<sup>85</sup> Which trend will prevail depends on how carefully we think about the circumstances under which private speech actually threatens the government's expressive interests. Respect for First Amendment values should caution us to be slow to imagine such threats.

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<sup>85</sup> For additional examples of lower courts skeptical of government's asserted expressive interests, see Norton & Citron, *supra* note 8, at 917, 929–30; Norton, *supra* note 8, at 537–42, 546–47.