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Shining a Light on Democracy's Dark Lagoon

Helen Louise Norton
University of Colorado Law School

SHINING A LIGHT ON DEMOCRACY'S DARK LAGOON*

HELEN NORTON**

I. INTRODUCTION

The Supreme Court recognizes "government speech" as a defense to First Amendment challenges brought by private speakers who claim that the government has impermissibly excluded them from an expressive opportunity based on their views.[1] If a court characterizes the expression at issue as the government's, that speech is exempt from Free Speech Clause scrutiny, and the plaintiff's claim will fail.[2] As the Court has observed, political accountability measures such as voting and lobbying provide the sole recourse for those unhappy with their government's expressive choices.[3]

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* Andrew v. Clark, 561 F.3d 261, 273 (4th Cir. 2009) (Wilkinson, J., concurring) ("It is vital to the health of our polity that the functioning of the ever more complex and powerful machinery of government not become democracy's dark lagoon.").

** Associate Professor, University of Colorado School of Law. I am grateful to Josie Brown, Dave Duff, Kevin Hall, and the participants in the *South Carolina Law Review*'s Symposium entitled *The U.S. Court of Appeals for the Fourth Circuit: Its Tradition, Its Jurisprudence, and Its Future*. Special thanks to the *South Carolina Law Review* staff for its exceptional work in organizing an outstanding conference.

1. *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009).

2. *Id.* ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he dispositive question is whether the generic advertising . . . is the Government's own speech and therefore is exempt from First Amendment scrutiny.").

3. *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("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."). Note too that constitutional constraints other than the Free Speech Clause may also apply to the government's own expression. *See Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring) ("[E]ven if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.").

To be sure, government speech is enormously valuable in informing the public of its government's principles and priorities.[4] The Supreme Court, however, 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.[5] Especially troubling, the majority has declined to require that the government clearly identify itself as the source of a contested message as a condition of claiming the government speech defense despite the great benefits and negligible costs of such a requirement.[6]

Although the Court has not yet articulated a clear rule for parsing government speech from private speech, it has at times highlighted two factors as key to its characterization of contested speech as government speech—whether the government established the overall message to be communicated and whether the government approved and controlled the message ultimately disseminated.[7] In the Court's most recent government speech decision, for example, Justice Alito's majority opinion focused on these "establishment and control" factors in concluding that a city's decision to accept or reject privately donated monuments for permanent display in a city park constituted the city's own speech.[8] The majority did not go so far, however, as to insist on these

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4. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 698 (1970) ("[Government speech] 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."); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 604 (1980) (describing government speech as providing the public with "the advantage of knowing the collective judgment of the legislature and of knowing the views of its representatives, which would in turn be useful for evaluating them").

5. *See Summum*, 129 S. Ct. at 1130–31 (rejecting a First Amendment challenge to a city's selective decisions about which privately donated monuments to accept for permanent display in a city park on grounds that such decisions reflected the city's own speech); *Johanns*, 544 U.S. at 562–64 (rejecting a First Amendment challenge by dissenting beef producers taxed to fund a generic beef campaign implemented by the Department of Agriculture on grounds that the campaign reflected the government's own speech); Rust v. Sullivan, 500 U.S. 173, 178–80, 193 (1991) (rejecting a First Amendment challenge to regulations that prohibited federally funded family planning clinics from providing counseling or referral information about abortion on grounds that government is free to promote its chosen messages).

6. *Johanns*, 544 U.S. at 564 n.7.

7. *See id.* at 563–64 ("[T]he beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.").

8. *Summum*, 129 S. Ct. at 1134 ("[T]he City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection. The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent's concern; and the City has now expressly set forth the criteria it will use in making future selections." (citations omitted) (quoting *Johanns*, 544 U.S. at 560–61)).

factors as the sole means of distinguishing private speech from governmental speech.[9]

Elsewhere, I have proposed that a public entity seeking to claim the government speech defense should be required to establish that it "expressly claim[ed] the speech as its own when it authorize[d]" the communication and that onlookers understand the speech "to be the government's at the time of its delivery."[10] Requiring the government to make clear its role as a message's source demands very little from the government as a practical matter while providing considerable value in ensuring meaningful political accountability and preventing the development of, to use Judge Wilkinson's elegant phrase, "democracy's dark lagoon."[11]

Absent definitive guidance from the Supreme Court, lower courts still struggle with how to characterize certain associations, alliances, and other entanglements between government and private speakers, thus complicating the government speech question.[12] These challenges will continue to arise in forms of expression both old and new, as the United States Court of Appeals for the Fourth Circuit has been among the first to confront them and among the most thoughtful in so doing.

II. LONGSTANDING CHALLENGES INVOLVING COMPLICATED PARTNERSHIPS

In a context that raises challenging questions about both state and personal identity, controversy continues over whether state specialty license plate programs should be considered the government's own speech.[13] The South Carolina legislature, for example, sought to issue a "Choose Life" plate, but not a plate with a prochoice message, to communicate its views on abortion.[14] Virginia

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9. For example, the majority opinion also alluded to the test preferred by a number of the concurring justices when it noted that observers would likely attribute the expression to the city. *See id.* ("The City's actions provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand, unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf."); *id.* at 1139 (Stevens, J., concurring) ("Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government will be able to avoid political accountability for the views that it endorses or expresses through this means."); *id.* at 1142 (Souter, J., concurring) ("[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.").

10. Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 599 (2008).

11. Andrew v. Clark, 561 F.3d 261, 273 (4th Cir. 2009) (Wilkinson, J., concurring).

12. *See* Norton, *supra* note 10, at 590–91.

13. *See id.* at 590.

14. *See* Planned Parenthood of S.C. Inc. v. Rose (*Rose I*), 361 F.3d 786, 787 (4th Cir. 2004) (Michael, J., writing separately). In *Rose I*, the panel concurred in the judgment only. *Id.* Judge Luttig and Judge Gregory concurred in the judgment but wrote separate opinions. *Id.* at 800 (Luttig, J., concurring in the judgment); *id.* at 801 (Gregory, J., concurring in the judgment).

earlier rejected the Sons of Confederate Veterans' request for a specialty plate depicting a confederate flag because Virginia sought to prevent the mistaken impression that it endorsed that flag.[15] In both cases, the Fourth Circuit concluded that the plates could not be characterized as the government's own speech and thus upheld the private plaintiffs' First Amendment claims that the State had impermissibly rejected their proposed messages based on viewpoint.[16]

Unlike the Supreme Court majority, the Fourth Circuit in these cases has appropriately emphasized meaningful political accountability as key to public entities' ability to claim the government speech defense.[17] In *Planned Parenthood of South Carolina Inc. v. Rose*,[18] Judge Michael observed, "The government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process."[19] I fully agree: in any government speech dispute, courts should focus on whether the government's identity as speaker is sufficiently clear to ensure that the public can hold it accountable for its expressive choices.

Once we identify the appropriate focus—as the Fourth Circuit has—the inquiry then turns on determining whether onlookers are likely to understand the contested messages as reflecting the view of the private party, the government, or both. To be sure, specialty license plates present hard cases.[20] Although the plates are manufactured, issued, and owned by the State and prominently feature the State's name, private parties choose to display them on their own property: their cars. States additionally complicate the inquiry when they invite private individuals or organizations to provide input into the messages' substantive content.

In *Rose*, for example, Judge Michael found that the government's role as speaker was not sufficiently clear in the specialty license plate context to trigger the government speech defense.[21] Although he acknowledged the complexity of

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15. *See* Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 613–16 (4th Cir. 2002).

16. *See Rose I*, 361 F.3d at 794 (Michael, J., writing separately) (concluding that the speech at issue was a mixture of private speech and government speech); *id.* at 800 (Luttig, J., concurring in the judgment) (concluding that the speech at issue was hybrid speech); *id.* at 801 (Gregory, J., concurring in the judgment) (expressing belief that the speech at issue had elements of both private speech and government speech); *Sons of Confederate Veterans*, 288 F.3d at 621 (concluding that the speech at issue constituted private speech).

17. *See Rose I*, 361 F.3d at 795–96 (Michael, J., writing separately); *Sons of Confederate Veterans*, 288 F.3d at 618.

18. 361 F.3d 786 (4th Cir. 2004).

19. *Id.* at 795–96 (Michael, J., writing separately).

20. For an extensive discussion of the cues that onlookers and courts may use to determine a message's source, see Norton, *supra* note 10, at 603–18, which concludes that onlookers rely on a variety of cues to a message's source, including not only express indications of a message's origin, but also less direct signals like a message's physical location or onlookers' expectations based on past practice.

21. *See Rose I*, 361 F.3d at 794 (Michael, J., writing separately).

the analysis,[22] Judge Michael ultimately concluded that the State violated the First Amendment by excluding plates with prochoice countermessages.[23] In particular, he emphasized his concern about onlookers' inability to recognize the plates as the government's own message for which it could thus be held politically accountable: "[T]he State's advocacy of the pro-life viewpoint may not be readily apparent to those who see the Choose Life plate . . . ."[24] He explained this point in the following way:

> Those who see the Choose Life plate displayed on vehicles, and fail to see a comparable pro-choice plate, are likely to assume that the presence of one plate and the absence of another are the result of popular choice. . . . The State can thereby mislead the public into thinking that it has already won support for the position it is promoting. . . .
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> . . . [C]ontinuing transparency is essential to accountability. Given the array of specialty license plates available in South Carolina, a citizen is less likely to associate the plate messages with the State. . . . As the citizen becomes less likely to associate specialty plate messages with the State, the State's accountability for any message is correspondingly diminished.[25]

Reasonable people can—and do—reach different conclusions as to whom onlookers will hold responsible for the plates' messages. In making such assessments, for example, I tend to agree with Judge Gregory's and Judge Niemeyer's dissents from the denial of rehearing en banc in *Sons of Confederate Veterans v. Commissioner of the Virginia Department of Motor Vehicles*.[26] Judge Gregory emphasized what he saw as the government's reasonable fear that it would be misunderstood as endorsing a message with which it did not agree if it were required to produce and issue a license plate with the Confederate flag logo next to the identifier *Virginia* in large letters:

> I would have hoped, if rehearing were granted, that we would consider the government's interest in avoiding "speech by attribution;" that is, the government's right not to be compelled to speak by private citizens. . . .

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22. *See id.* at 789 (noting that the "Choose Life" message was developed and proposed by state legislators rather than by private speakers and that the legislature approved the plates in a special act of authorization, thus signaling the government's role as the message's author in at least some respect). Judge Shedd emphasized those same facts—the State's role in authorizing the plates—in identifying the State as the speaker: "If a government cannot be deemed to speak through such a statute, then I wonder how it can speak at all." Planned Parenthood of S.C. Inc. v. Rose (*Rose II*), 373 F.3d 580, 589 (4th Cir. 2004) (Shedd, J., dissenting from the denial of rehearing en banc).

23. *Rose I*, 361 F.3d at 799 (Michael, J., writing separately).

24. *Id.* at 795.

25. *Id.* at 798–99.

26. 305 F.3d 241 (4th Cir. 2002).

> . . . [T]hat there will be a perception of government endorsement of the Confederate flag is undeniable. . . . [T]he display of the Confederate flag *will* be attributed to Virginia.[27]

Judge Niemeyer defended Virginia's decision to refuse to issue a state plate that featured the Confederate flag logo for similar reasons. He noted that "the State has only indicated that the Confederate Flag logo should not be included on a license plate issued and owned by the state and bearing the name 'VIRGINIA' on the top."[28] He argued:

> I respectfully submit that it is impossible to avoid the conclusion that the Commonwealth of Virginia, by manufacturing license plates, placing its name at the top of those plates, and retaining ownership of them, is the speaker of any message contained on those plates, even though the message may have been adopted by the State pursuant to an application submitted by a licensee.[29]

Such competing assessments led Judge Luttig thoughtfully to resist the invitation to characterize such expression as entirely governmental or entirely private, noting instead the possibility of "hybrid" speech.[30] He declined, however, to grant the government the power to control the viewpoint of such speech.[31]

Elsewhere, I have offered my view that the better approach would understand specialty license plates not as primarily private speech or even as hybrid speech, but as "joint speech" between the government and those private parties who choose to display those plates.[32] In other words, sometimes speech may most accurately be described as simultaneously reflecting the views of governmental speakers and private speakers, both of whom have chosen to share a message.[33] This is especially the case when a public actor offers private speakers a voluntary opportunity to join the government's own speech—an opportunity that may be especially attractive because it appears to carry some indication of government endorsement or imprimatur.[34] This concept of joint

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27. *Id.* at 252 (Gregory, J., dissenting from the denial of rehearing en banc).

28. *Id.* at 249 (Niemeyer, J., dissenting from the denial of rehearing en banc).

29. *Id.* at 251.

30. *See id.* at 245 (Luttig, J., respecting the denial of rehearing en banc) (noting the possibility of hybrid governmental and private speech).

31. *See id.* at 247 (concluding that the State may not engage in viewpoint discrimination where the private component of such hybrid speech is substantial and "the government's interest in its speech component is less than compelling").

32. *See* Norton, *supra* note 10, at 618–22.

33. *Id.* at 620–21.

34. *See* Higgins v. Driver & Motor Vehicle Servs. Branch, 13 P.3d 531, 541 n.4 (Or. Ct. App. 2000) (en banc) (Wollheim, J., concurring) ("[T]he license plate bears the imprimatur of the state. Petitioner wants the state's endorsement of his message. . . . [A] bumper sticker would not

speech "values both speakers' interests in expressive integrity" by understanding such speech to require both parties' endorsement, "thus permitting the government to control the content of its own expression but not to compel others to join it."[35]

Recall, for example, the Supreme Court's decision in *Wooley v. Maynard*,[36] which held that the government could not require an objecting private speaker to display the state's motto on his car's license plate.[37] In *Rose*, Judge Michael cited *Wooley* for the proposition that license plate messages "are associated at least partly with the vehicle owners."[38] But *Wooley* also supports the additional proposition that the government retains the power to control the character of its own expression and to permit—but not to force—others to join that expression.[39] Indeed, the *Wooley* Court "raised no quarrel with New Hampshire's communicative choice to feature its motto 'Live Free or Die' on the State's license plates,"[40] and it did not permit the dissenting private speaker to force the government to change its message to his liking.[41]

Along these lines, for example, the government may decide that it will print and sell "Drill, Baby, Drill" license plates—or bumper stickers or screen savers—but that it will not print and sell license plates featuring the message "Go Green." That expressive choice offers voters important information that furthers their ability to evaluate their government (even if—and perhaps especially if—the public finds the government's expression objectionable).[42] The government speech defense should thus be understood to prevent a private speaker from forcing the government to display messages with which the government disagrees on its license plates (or bumper stickers or screen savers).[43] Those who agree with the government's view may choose to buy and display those messages, but the First Amendment does not permit the government to compel anyone to do so, and it may not prevent anyone from producing bumper stickers or screen savers with their own countermessage.[44]

In other words, so long as the government's identity as speaker is clear, recognizing the possibility of joint speech acknowledges the strength of the

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satisfy petitioner's desire to have the state endorse the words he chooses to display."), *aff'd*, 72 P.3d 628 (Or. 2003).

35. Norton, *supra* note 10, at 620–21.

36. 430 U.S. 705 (1977).

37. *Id.* at 713.

38. Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 794 (Michael, J., writing separately) (citing *Wooley*, 430 U.S. at 717; Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002)).

39. *See Wooley*, 430 U.S. at 717.

40. Norton, *supra* note 10, at 621 (citing *Wooley*, 430 U.S. at 717).

41. *See Wooley*, 430 U.S. at 717.

42. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 21 (2009).

43. Norton, *supra* note 10, at 621.

44. *Id.*

government's expressive interests without relieving it of accountability for that speech. This requires the government up front to design and claim the expression transparently as its own.[45] Again, so long as the government's identity as speaker is clear both at the time of the message's creation as well as at the time of its delivery, private parties' voluntary participation in developing or delivering that message need not strip that speech of its governmental character.[46] By identifying two points at which the government must expose its expressive choices, such a requirement also helps answer the "legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint."[47] Of course, the government also remains free to create a specialty license plate program from which it disclaims any speech interest of its own and instead creates some sort of forum for private expression, in which case traditional Free Speech Clause principles apply, including the ban on viewpoint discrimination against private speakers.[48]

Despite my disagreement with Judge Michael's conclusions as to whether onlookers are likely to attribute specialty license plate messages to the State in these concededly tough cases,[49] I commend his attention to meaningful political accountability and his refusal simply to defer to the government's claims to speech as its own. The Fourth Circuit's opinions in this area, moreover, have been very influential, further demonstrating their forcefulness. Although the circuits remain split on whether to characterize specialty plates as private speech or government speech,[50] the split is heavily weighted towards the Fourth Circuit's view.[51]

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45. *See id.* at 625.

46. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) (concluding that a Department of Agriculture promotional campaign remained government speech even though private parties participated in the campaign's development).

47. Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1134 (2009).

48. Norton, *supra* note 10, at 619.

49. *See* Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 798–99 (4th Cir. 2004) (Michael, J., writing separately).

50. Norton, *supra* note 10, at 590.

51. The Seventh, Eighth, and Ninth Circuits, for example, have relied heavily on the Fourth Circuit's analysis in *Rose* in refusing to characterize "Choose Life" plates as government speech. *See* Roach v. Stouffer, 560 F.3d 860, 867 (8th Cir. 2009); Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008); Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 965 (9th Cir. 2008). The Sixth Circuit, in contrast, "concluded that Tennessee's issuance of a 'Choose Life' license plate reflected the legislature's own pro-life views and thus constituted government speech within the state's power to control." Norton, *supra* note 10, at 590 (citing ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375–77 (6th Cir. 2006)). The Supreme Court has so far declined numerous petitions for certiorari on this issue. *See White*, 547 F.3d 853, *cert. denied*, 130 S. Ct. 59 (2009); *Stanton*, 515 F.3d 956, *cert. denied*, 129 S. Ct. 56 (2008); *Bredesen*, 441 F.3d 370, *cert. denied*, 548 U.S. 906 (2006); *Rose*, 361 F.3d 786, *cert. denied*, 543 U.S. 1119 (2005).

III. EMERGING CHALLENGES INVOLVING NEWER EXPRESSIVE TECHNOLOGIES

Most government speech disputes to date have involved fairly traditional forms of expression.[52] Emerging technologies, however, have transformed the ways in which the government—along with the rest of us—actually communicates. Although the Supreme Court has yet to grapple with the constitutional significance of the government's increasing use of Web 2.0 and other newer expressive technologies,[53] the Fourth Circuit has again been among the leaders in addressing these challenges.

More specifically, in *Page v. Lexington County School District One*,[54] the Fourth Circuit considered a dispute over whether a public school board's use of Web sites, emails, and hyperlinks to other Web sites constitutes the government's own speech that it may control exempt from Free Speech Clause scrutiny.[55] After passing a resolution announcing its opposition to pending school voucher legislation, the school board in that case authorized public communication of its views on the district's Web site, as well as in emails and letters to parents and school employees.[56] A supporter of the voucher legislation, Randall Page, then requested that he be allowed to post his provoucher materials on the district's Web site.[57] When the district declined, he filed suit, arguing that the denial constituted viewpoint discrimination in violation of the First Amendment.[58] Among other things, Mr. Page objected to the fact that the district's Web site linked to Web sites of other organizations that shared the district's opposition to the voucher legislation.[59] He argued that the district had thus opened up its Web site as a type of speech "forum from which he could not be excluded based on his viewpoint."[60]

The Fourth Circuit rejected Mr. Page's claim.[61] It agreed with the school district that the government speech doctrine permits the school to communicate its own viewpoint via Web site and email without any obligation to allow others to join or distort that expression:

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52. *See, e.g.*, *Summum*, 129 S. Ct. at 1131 (physical monuments displayed in public park); Garcetti v. Ceballos, 547 U.S. 410, 420–22 (2006) (written memoranda); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553–55 (2005) (television and print advertising); Rust v. Sullivan, 500 U.S. 173, 178–80 (1991) (verbal family planning counseling).

53. For more extensive discussion of these changes and what they might mean for the government speech doctrine, see Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. (forthcoming 2010).

54. 531 F.3d 275 (4th Cir. 2008).

55. *Id.* at 277–78. I served pro bono as counsel of record to amici in support of the defendant-respondent school board in this case on appeal. *See* Brief for National School Boards Association et al. as Amici Curiae Supporting Respondent, *Page*, 531 F.3d 275 (No. 07-1697).

56. *Page*, 531 F.3d at 278–79.

57. *Id.* at 279.

58. *Id.* at 279–80.

59. *Id.* at 283.

60. *Id.*

61. *Id.* at 285.

> This case reduces to the straightforward circumstance where the Lexington School District determined to oppose the pending Put Parents in Charge Act and charged its School/Community Relations Director to communicate that message to virtually anyone who would hear it. The School/Community Relations Director employed the School District's website, e-mail facility, and other distribution methods to communicate the message to constituent schools, students, and the public. Throughout its campaign, the School District maintained control over the development and dissemination of its message, and it never allowed private persons to participate in the channels through which it disseminated its message so as to create a public forum. We agree with the district court that the School District engaged in government speech and that its speech did not implicate the First Amendment or Page's First Amendment rights.[62]

This case powerfully illustrates government expression's value to the public. A politically accountable public education body—the elected school board—publicly took a position on proposed public education policy and communicated that position on a Web site that clearly identified its governmental origins.[63] Not only may voters find those views helpful in informing their own opinions, they now know where their elected officials stand and can try to elect new board members if they disagree with that position.[64]

After recognizing the value of government speech to the public, the next step is to empower the government to deliver that speech to the public in an effective manner. The constitutional analysis should not vary with the type of expressive technology at issue. Today, of course, effective communication often requires the use of Web sites along with links to other materials that further support the speaker's message. So long as the governmental source of the message is apparent—in other words, so long as the government speaker makes clear that it is linking to other speakers' Web sites to bolster its explanation of its own position—the government's inclusion of those links in support of its own views should not strip those views of their governmental character.

The facts in *Page* made for a relatively easy decision because the design and context of the government's Web site made clear the government's identity as source of that particular viewpoint.[65] As the Fourth Circuit panel recognized, this situation is very different from situations where a school board or other government body creates a chat room or other forum for the ventilation of individual views on pending legislation or any other topic; in those contexts,

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62. *Id.* at 288.

63. *See id.* at 282.

64. *Cf. id.* at 287 ("It is therefore appropriate for the School District to defend public education in the face of pending legislation that it views as potentially threatening of public education.").

65. *See id.* at 278.

First Amendment principles would not permit the government to exclude speakers on the basis of their viewpoint.[66] Nor, of course, could the government prevent Mr. Page from starting his own Web site promoting his views or sending his own emails or letters.

Finally, Mr. Page additionally argued for limits on the government's ability to speak on certain matters or to target its speech to certain audiences, objecting to the school board's speech on pending legislation directed to potential voters.[67] The Fourth Circuit again remained appropriately focused on political accountability as the touchstone of, and the sole remedy for those unhappy with, government speech:

> [Mr. Page's] argument is grounded on the proposition that when the School District attempts to influence legislation, its position is not checked by the "ballot box," which is the traditional justification for accepting the government speech doctrine. . . .
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> In this case, Page assumes erroneously that the ballot box is not available to check the government speech. He overlooks that "[school] board members are elected. They may be removed, at the next election, if the voters disagree with the manner in which they have exercised their discretion. No more immediate 'ballot box' remedy is suggested by the case law," as the district court appropriately noted.
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> Many courts have rejected First Amendment challenges to government speech involving advocacy regarding ballot measures. While the issue in this case is not a ballot measure before individual voters, but rather a bill before the state legislature, grass-roots lobbying of the type witnessed here nonetheless presents no greater concerns from a democratic accountability standpoint than advocacy regarding measures on the ballot. The ultimate target for the School District's campaign against the Put Parents in Charge Act was the State's General Assembly, and members of the General Assembly—the ones who will ultimately vote on the measure—are themselves public officials and have an independent responsibility to decide the public interest.[68]

Again, the Fourth Circuit has proven influential in this area, as the First Circuit recently relied heavily on *Page* to reach a similar result in a case challenging a government's rejection of the plaintiff's request that the government's Web site include a hyperlink to a Web site of the plaintiff.[69]

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66. *See id.* at 284–85.
67. *Id.* at 287.
68. *Id.* at 287–88 (second alteration in original) (citations omitted).
69. Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 318–19, 335 (1st Cir. 2009) (rejecting, on government speech grounds, the plaintiff's First Amendment challenge to the town's refusal to include a hyperlink to his Web site on its own Web site).

IV. SHINING A LIGHT ON THE LAGOON'S DARK WATERS

Finally, note that the Supreme Court dramatically expanded the government's ability to claim the speech of its employees as its own in *Garcetti v. Ceballos*.[70] There, the Court considered a First Amendment challenge by a prosecutor who had been disciplined for his internal memo that criticized a police affidavit as deliberately inaccurate.[71] Characterizing a government employer as free to exercise "employer control over what the employer itself has commissioned or created,"[72] the majority held that public employees' speech made "pursuant to their official duties" receives no First Amendment protection from employer discipline.[73] The majority thus "created a bright-line rule that treats public employees' speech delivered pursuant to their official duties as the government's own speech" that it "may control free from First Amendment scrutiny."[74]

As I have discussed elsewhere, *Garcetti* has been by far the most consequential of the Court's government speech decisions in real world terms.[75] Although governments "frequently hire workers specifically to monitor and flag dangerous or illegal conditions, *Garcetti* now . . . empowers the government to punish them for doing just that."[76] Lower courts thus "routinely apply *Garcetti* to dispose of the constitutional claims" of police officers and a wide variety of other public employees who were fired because they performed their jobs in flagging unlawful, unsafe, or otherwise improper conduct.[77]

Those seeking to limit *Garcetti*'s reach—and its often disturbing consequences—must now distinguish it by taking a hard look at whether a public employee's contested speech actually occurred pursuant to her official job duties.[78] The Fourth Circuit demonstrated thoughtful leadership in this area in *Andrew v. Clark*.[79] That case involved a First Amendment challenge by police officer Michael Andrew, who had been disciplined after writing (and later sharing with a reporter) a memo that recommended an investigation into the department's use of deadly force against a barricaded suspect where "there were no hostages and no evidence that the suspect intended to commit further violence from within his apartment."[80] Citing *Garcetti*, the district court dismissed the

70. 547 U.S. 410 (2006).
71. *Id.* at 413–15.
72. *Id.* at 422.
73. *Id.* at 421.
74. Norton, *supra* note 42, at 12.
75. *See id.* at 11–16.
76. *Id.* at 13–14.
77. *Id.* at 14–15.
78. *See id.* at 13.
79. 561 F.3d 261 (4th Cir. 2009).
80. *Id.* at 264–65.

officer's case.[81] However, the Fourth Circuit vacated the lower court's order of dismissal,[82] identifying a question of fact as to whether the officer's official duties actually required him to write a memo on this particular event, much less share it with the media.[83]

Judge Wilkinson's concurrence eloquently identified the high stakes in the case, observing that a contrary result "would have profound adverse effects on accountability in government."[84] Among other things, he wondered whether the expressive changes brought by the Internet would contribute to the loss of government watchdog efforts long undertaken by traditional news organizations, expressing concern that "intense scrutiny of the inner workings of massive public bureaucracies charged with major public responsibilities is in deep trouble."[85]

> [T]he First Amendment should never countenance the gamble that informed scrutiny of the workings of government will be left to wither on the vine. That scrutiny is impossible without some assistance from inside sources such as Michael Andrew. Indeed, it may be more important than ever that such sources carry the story to the reporter, because there are, sad to say, fewer shoeleather journalists to ferret the story out.
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> . . . This case may seem a small one, involving a single incident in a single locality, but smaller cases are often not without larger implications. The court is right to note that at this early stage, we cannot foresee who will prevail. But as the state grows more layered and impacts lives more profoundly, it seems inimical to First Amendment principles to treat too summarily those who bring, often at some personal risk, its operations into public view. It is vital to the health of our polity that the functioning of the ever more complex and powerful machinery of government not become democracy's dark lagoon.[86]

Even though reasonable people might disagree on the answers, the Fourth Circuit has been asking exactly the right questions, thus shining a light on democracy's (sometimes dark) waters. In sum, it has recognized the great value of government speech to the public while remaining mindful that such value turns on the public's ability to ascertain the speech's governmental source and has thus insisted that the government remain meaningfully accountable to the public for its speech as a condition of claiming the government speech defense.

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81. Andrew v. Clark, 472 F. Supp. 2d 659, 660 (D. Md. 2007) (citing Garcetti v. Ceballos, 547 U.S. 410 (2006)), *aff'd in part, vacated in part*, 561 F.3d 261 (4th Cir. 2009).
82. *Andrew*, 561 F.3d at 263.
83. *See id.* at 267.
84. *Id.* at 272 (Wilkinson, J., concurring).
85. *Id.* at 272–73.
86. *Id.* at 273.

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