# FREE SPEECH DEAD ZONES

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*The Supreme Court has created an elaborate framework for free speech analysis involving distinctions between content-based and content-neutral government regulations, as well as the application of the levels of scrutiny. But the Court also has created some free speech "dead zones" where First Amendment principles don't apply at all and the government always wins. This Article identifies some of these free speech dead zones—for speech of government employees on the job in the scope of their duties, for government speech, and for speech related to the military. The Article argues that free speech dead zones are undesirable and unnecessary.*

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## I. INTRODUCTION

Although many have praised the Roberts Court for its decisions protecting freedom of speech,[1] I am very troubled by the way in which it has done just the opposite by creating free speech dead zones. These are places where the First Amendment's protection of expression does not apply at all, or at most just barely.

In this Article, I want to identify some of those free speech dead zones and criticize their existence. Free speech dead zones are undesirable because they exempt government regulation of speech from even the most minimal judicial

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1. *See, e.g.*, Ronald K.L. Collins & David L. Hudson, Jr., *The Roberts Court: Its First Amendment Free Expression Jurisprudence: 2005–2021*, 87 BROOK. L. REV. 5, 18 (2021) ("The Roberts Court has made First Amendment free speech jurisprudence the centerpiece of its constitutional agenda more than any previous Supreme Court.").

scrutiny. These free speech dead zones give the government essentially unlimited latitude to regulate expression. Moreover, they are unnecessary because application of traditional tests of First Amendment scrutiny can provide the necessary deference to the government but still allow for meaningful judicial review when needed.

To put this another way, everyone is familiar with the levels of scrutiny articulated by the Supreme Court: rational basis review, intermediate scrutiny, and strict scrutiny.[2] Also, in First Amendment cases, the Court has used "exacting scrutiny."[3] In its most recent case about this, *Americans for Prosperity Foundation v. Bonta*, Chief Justice Roberts said that "exacting scrutiny requires that there be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'"[4] How this is different from intermediate scrutiny—where the test is substantially related to an important government interest[5]—remains a mystery.

But in the First Amendment dead zones, the levels of scrutiny are not applied at all. It appears that the government does not need to even meet rational basis review. There is no protection of free speech whatsoever.

The Court's usual framework for analyzing free speech issues—drawing a distinction between content-based and content-neutral regulation of speech—becomes irrelevant when there is a free speech dead zone.[6] There is no basis at all for challenging the government regulation.

In this Article, I focus on three free speech dead zones: speech of government employees on the job in the scope of their duties, government speech, and expression involving the military and national security. I then conclude by explaining why free speech dead zones are generally undesirable and at the very least the government always should have to meet rational basis review, and ideally a higher level of review, when it restricts expression.

## II. SPEECH OF GOVERNMENT EMPLOYEES

Over a half century, the Supreme Court developed a test for evaluating First Amendment claims by government employees. The Court said that the speech of a government employee is protected if it involves a matter of public concern and

2. Brett Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FINDLAW (Jan. 27, 2014, 9:05 AM), https://www.findlaw.com/legalblogs/law-and-life/challenging-laws-3-levels-of-scrutiny-explained/ [https://perma.cc/6KRS-EURW].

3. *See, e.g.*, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2385 (2021).

4. *Id.* (quoting John Doe No. 1 v. Reed, 561 U.S. 186, 196 (2010)).

5. Craig v. Boren, 429 U.S. 190, 197 (1976) (defining intermediate scrutiny).

6. For a discussion of the importance of the distinction between content-based and content-neutral regulations, *see, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 59–60 (1994) (O'Connor, J., concurring); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 53 (2000); Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1263 (2014).

if, on balance, the speech interests of the employee outweigh the government's interests.[7]

In *Pickering v. Board of Education,* a teacher was fired for sending a letter to a local newspaper that was critical of the way school officials had raised money for the schools.[8] The Supreme Court held that the firing violated the First Amendment.[9] Justice Marshall, writing for the Court, said that its task was to balance the free speech rights of government employees with the government's need for efficient operation.[10] The Court declared:

> [T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[11]

The Court emphasized that there was no indication that Pickering's statements in any way interfered with the teacher's ability to perform or the operation of the school district.[12] The Court also stressed that the speech concerned a matter of public concern: the operation of the school district.[13] Indeed, the Court said that a teacher is likely to have unique and important insights as to the adequacy of educational funding.[14] Although there were some factual inaccuracies in the statement, the Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[15]

In *Connick v. Myers*,[16] the Court added an additional requirement to the *Pickering* approach. An assistant district attorney, angry over a transfer to a different section in the office, circulated a memorandum soliciting the views of other attorneys in the office concerning the transfer policy, the level of morale, and the need for establishment of a grievance committee.[17] The attorney was fired and sued alleging a violation of the First Amendment.[18]

The Supreme Court ruled against the attorney, emphasizing that the speech was not protected by the First Amendment because it did not involve comment

7. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
8. *Id.*
9. *Id.* at 574–75.
10. *Id.* at 568.
11. *Id.*
12. *Id.* at 572–73.
13. *Id.*
14. *Id.* at 572.
15. *Id.* at 574.
16. 461 U.S. 138 (1983).
17. *Id.* at 140–41.
18. *Id.* at 141.

upon matters of public concern.[19] The Court, in an opinion by Justice Byron White, said:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. . . . When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.[20]

The Court said that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."[21] Although Myers's statements related to the performance of supervisors and policy in a public office, the Court said that it did not involve matters of public concern, especially because she was not seeking to inform the public.[22]

In *Rankin v. McPherson*, the Court applied *Connick* and found that a public employee's statement was protected by the First Amendment when she declared, after hearing of an assassination attempt directed at President Ronald Reagan, "[i]f they go for him again, I hope they get him."[23] The Court held that firing the employee because of the statement violated the First Amendment because it concerned a matter of public concern.[24] The Court, in an opinion by Justice Marshall, said that

> [t]he statement was made in the course of a conversation addressing the policies of the President's administration. It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President. . . . The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.[25]

The Court said that if a statement is of public concern, then a court must balance the employee's First Amendment rights with the state's interest in the "effective functioning of the public employer's enterprise."[26] The Court found that the speech was protected by the First Amendment because there was "no evidence that it interfered with the efficient functioning of the office."[27]

Admittedly, this is a test that is deferential to the government, but unquestionably it provides some protection for the speech of government employees. Unfortunately, rather than follow this test, in *Garcetti v. Ceballos*, the Court abandoned it and created a free speech dead zone by holding that there is *no* First

19. *Id.* at 154.
20. *Id.* at 143–46.
21. *Id.* at 147–48.
22. *Id.* at 154.
23. 483 U.S. 378, 380 (1987).
24. *Id.* at 386.
25. *Id*. at 386–87.
26. *Id.* at 388.
27. *Id.* at 388–89.

Amendment protection for the speech of government employees on the job in the scope of their duties.[28]

Richard Ceballos, a supervising district attorney in Los Angeles County, concluded that a witness in one of his cases, a deputy sheriff, was not telling the truth.[29] He wrote a memorandum to this effect and felt that he was required by the Constitution to inform the defense.[30] As a result of this speech, Ceballos alleged that his employers retaliated against him, including transferring him to a less desirable position and denying him a promotion.[31]

The issue before the Supreme Court was whether Ceballos's speech was protected by the First Amendment.[32] Although, as explained above, the Supreme Court long has held that there is constitutional protection for the speech of government employees,[33] it ruled against Ceballos.[34] It is crucial to note that none of the Justices disputed that the speech involved a matter of public concern: the integrity of the sheriff's department and the district attorney's duty to ensure a fair trial.[35]

In ruling against Ceballos, the Court drew a distinction between speech "as a citizen" as opposed to "as a public employee"; only the former is protected by the First Amendment.[36] Justice Kennedy stated: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, *and the Constitution does not insulate their communications from employer discipline*."[37] The Court expressed great concern about the disruptive effects of allowing employees to bring First Amendment claims based on their on-the-job speech.[38] Justice Kennedy wrote that allowing such claims "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents."[39] Kennedy observed that civil service protections provide safeguards for employees for retaliation for their speech.[40]

*Garcetti v. Ceballos* was a 5-4 decision, and the dissent strongly objected to the holding that there is *no* First Amendment protection for the speech of government employees on the job in the scope of their duties.[41] The dissent was expressly concerned about the whistleblower who exposes wrongdoing in the

28. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
29. *Id.* at 413–14.
30. *Id.* at 414.
31. *Id.* at 415.
32. *Id.* at 417.
33. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
34. *Garcetti*, 547 U.S. at 426.
35. *Id.* at 424.
36. *Id.* at 421.
37. *Id.* (emphasis added).
38. *Id.* at 423.
39. *Id.*
40. *Id.* at 425–26.
41. *Id.* at 428–29 (Souter, J., dissenting).

workplace, often benefiting the public, but who would have no protection from reprisals.[42] The dissent noted that civil services protections are often nonexistent or limited.[43]

*Garcetti* is thus a categorical exception from constitutional protection for speech that is on the job in the scope of the employee's duties.[44] The Court created a First Amendment dead zone. This was precisely Justice Breyer's point in his dissent:

> The majority answers the question by holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." In a word, the majority says, "never." That word, in my view, is too absolute.
>
> Like the majority, I understand the need to "affor[d] government employers sufficient discretion to manage their operations." And I agree that the Constitution does not seek to "displac[e] . . . managerial discretion by judicial supervision." Nonetheless, there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards seem readily available—to the point where the majority's fears of department management by lawsuit are misplaced. In such an instance, I believe that courts should apply the *Pickering* standard, even though the government employee speaks upon matters of public concern in the course of his ordinary duties.[45]

The Court was explicit that it was not changing the First Amendment law with regard to other speech by government employees.[46] The Court stated that its holding "relates only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints (such as those at issue in cases like *Pickering* and *Connick*) that are made outside the duties of employment."[47] But this leads to the anomaly that Ceballos's speech would have been protected if he had written a memorandum to the *Los Angeles Times*, but not one to his supervisor.[48]

The Court's reasoning is flawed on many levels.[49] It draws a false distinction between speech as a "citizen" as opposed to speech as a "government employee."[50] Government employees do not give up their citizenship or their free

42. *Id.* at 439.
43. *Id.* at 440–41.
44. *See id.* at 446 (Breyer, J., dissenting).
45. *Id.*
46. *Id.* at 424.
47. *Id.*
48. *Id.* at 422.
49. For strong criticisms of *Garcetti v. Ceballos*, see Ruben J. Garcia, *Against Legislation:* Garcetti v. Ceballos *and the Paradox of Statutory Protection for Public Employees*, 7 FIRST AMEND. L. REV. 22 (2008); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 563 (2008); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4, 34 (2009).
50. *Garcetti*, 547 U.S. at 423, 430.

speech rights when they walk into a government office building. Only once in the more than decade since *Garcetti v. Ceballos* was decided has this Court clarified the line between speech as a "citizen" and speech as a "government employee."[51] In *Lane v. Franks*, the Court unanimously held that a government employee's First Amendment rights were violated when he was fired for truthful testimony he gave in court pursuant to a subpoena.[52]

Edward Lane was fired from his state job after he testified at a criminal trial, even though he appeared after being subpoenaed and testified truthfully.[53] The Court said that, under *Garcetti v. Ceballos*, his speech was protected because it was speech as a "citizen" and not as a "government employee": "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment."[54]

The Court stressed that government employees are speaking as citizens even when they express information learned on the job and emphasized the importance of such expression:

> Speech by citizens on matters of public concern lies at the heart of the First Amendment, which was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This remains true when speech concerns information related to or learned through public employment. After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights. There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For "[g]overnment employees are often in the best position to know what ails the agencies for which they work." "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."[55]

What is striking is that all of this could be said about Ceballos's speech as well: He did not renounce his citizenship when he became a deputy district attorney, and there is great value in exposing misconduct and lies by police officers testifying as witnesses.[56]

Moreover, the Court wrongly assumes that there are whistleblower and civil service protections when often none exist. Many government employees have no whistleblower protections, while in some jurisdictions it is quite limited in scope.[57]

51. Lane v. Franks, 573 U.S. 228, 235–36 (2014).
52. *Id.* at 242.
53. *Id.* at 233.
54. *Id.* at 238.
55. *Id.* at 235–36 (citations omitted).
56. Garcetti v. Ceballos, 547 U.S. 410, 415 (2006).
57. *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 100 (2000).

Simply put, *Garcetti v. Ceballos* created a First Amendment dead zone, an area where free speech protections do not apply at all. The result is that the whistleblower who suffers retaliation after reporting misconduct to supervisors is left with no constitutional protection whatsoever.[58]

The free speech dead zone is unnecessary because the approach under *Pickering* and *Connick* is sufficient to protect the government's interest while still according some protection for the speech of government employees.[59] Under the traditional approach to the speech of government employees, there would be First Amendment protection only if the speech involved a matter of public concern and, on balance, the speech interests outweighed the government interests.[60] Never does the Court explain why that would be insufficient to protect the government or why this is not a preferable approach compared to a complete exclusion from the First Amendment for speech on the job in the scope of an employee's duties.

## III. GOVERNMENT SPEECH

Another example of a free speech dead zone is where the Court says that the government is the speaker. In these cases, the First Amendment does not apply at all. *Rust v. Sullivan* was one of the first cases to invoke this approach.[61]

*Rust* involved a challenge to a federal regulation that prohibited recipients of federal funds for family-planning services from providing "counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning."[62] The regulations prohibited recipients of federal money "from referring a pregnant woman to an abortion provider, even upon specific request."[63] Also, the rules "broadly prohibit a [recipient of funds] from engaging in activities that 'encourage, promote or advocate abortion as a method of family planning.'"[64]

Chief Justice Rehnquist, writing for the Court, upheld the regulation on the ground that the government could decide what activity to subsidize.[65] He wrote:

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

58. *Id.* at 100–05.

59. *See* Norton, *supra* note 49, at 16.

60. *Garcetti*, 547 U.S. at 417–18 (describing the traditional *Pickering*/*Connick* approach).

61. 500 U.S. 173, 198–99 (1991); *see* Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 904 (2010) (identifying *Rust* as the first case in which the Supreme Court began "sketch[ing] out" the government speech doctrine).

62. *Rust*, 500 U.S. at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1989)).

63. *Id.* at 180.

64. *Id.* (quoting 42 C.F.R. § 59.10(a)).

65. *Id.* at 173.

one activity to the exclusion of another. "A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."[66]

In other words, by deeming the speech to be that of the government, there is no basis for a First Amendment challenge. This also was the holding in *Pleasant Grove, Utah v. Summum*.[67]

Pioneer Park in Pleasant Grove, Utah has 15 monuments, 11 of which were privately donated.[68] One of these is a large Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.[69] Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah.[70] On two separate occasions in 2003, Summum's president wrote a letter to Pleasant Grove's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of Summum" and be similar in size and nature to the Ten Commandments monument.[71] The city refused the request, and Summum sued.[72] Summum claimed that for the city to allow a monument from some religions but not others violated the First Amendment.[73]

The federal district court ruled against Summum, but the Tenth Circuit reversed and found that the government was engaged in impermissible content-based discrimination by denying access to the Summum monument but permitting the Ten Commandments display.[74] The Supreme Court unanimously reversed and ruled in favor of the City of Pleasant Grove, with Justice Samuel Alito writing for the Court.[75] The Court held that, by allowing placement of donated permanent monuments in a public park, the city was exercising a form of government speech not subject to scrutiny under the free speech clause.[76]

Justice Alito began by declaring that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[77] The Court quoted its prior decision in *Johanns v. Livestock Marketing Association*,[78] declaring that "[t]he Government's own speech . . . is exempt from First Amendment scrutiny."[79] Justice Alito also explained that "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."[80] In other words, the fact that the Ten Commandments monument had been donated by a private group did not prevent the government from

66. *Id.* at 193 (citations omitted) (quoting Regan v. Tax'n with Representation, 461 U.S. 540, 549 (1983)).
67. 555 U.S. 460, 481 (2009).
68. *Id.* at 464.
69. *Id.* at 465.
70. *Id.*
71. *Id.*
72. *Id.* at 465–66.
73. *Id.* at 466.
74. *Id.* at 466–67.
75. *Id.* at 460.
76. *Id.*
77. *Id.* at 467.
78. 544 U.S. 550, 553 (2005).
79. *Pleasant Grove*, 555 U.S. at 467 (quoting *Johanns*, 544 U.S. at 553).
80. *Id.* at 468.

adopting it and making it government speech.[81] Justice Alito declared: "it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech."[82]

*Pleasant Grove* is the first time that the Court has said that the government can adopt private speech as its own and thereby avoid the First Amendment.[83] This has potentially broad implications. Could a city allow a pro-war demonstration in a city park while denying access to an antiwar demonstration by adopting the former as its government speech? Justice Alito recognized the danger that the "government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint."[84] But it is unclear how this can be avoided under the principle that the government can adopt private speech as government speech and the First Amendment then does not apply. A distinction can be drawn between the permanent monument in *Pleasant Grove* and a transitory demonstration, but it is not clear why that should matter under the First Amendment.[85] This problem led Justice Stevens in a concurring opinion to express concern about the "recently minted government speech doctrine."[86]

After *Pleasant Grove*, a crucial question in First Amendment litigation becomes whether the government is the speaker or whether the government is creating a forum for private speech. The First Amendment applies only in the latter instance.[87] The Court returned to this issue in *Walker v. Texas Division, Sons of Confederate Veterans* where, in a 5-4 decision, the Court held that the Texas Department of Motor Vehicles did not violate the First Amendment in refusing to issue a license plate with the confederate battle flag.[88]

Texas, like all states, requires license plates on cars.[89] In Texas, people can have either the general type of plate issued by the state, or they may have specialty plates.[90] For one type of specialty plate, a nonprofit organization asked the Texas Department of Motor Vehicles Board to approve a design and then issue plates with it.[91] The Texas Division of the Sons of Confederate Veterans proposed a specialty license plate design featuring a confederate battle flag, but the board rejected the proposal.[92]

The Supreme Court held that the board did not violate the First Amendment because license plates are government speech, and when the government is the

81. *See id.*
82. *Id.* at 472.
83. *See id.* at 468.
84. *Id.* at 473.
85. *See id.* at 464.
86. *Id.* at 481 (Stevens, J., concurring).
87. *Id.* at 464. Also, if the government is the speaker and the monument, as in *Pleasant Grove*, is a religious symbol, then this would seem to heighten the establishment clause issue. The Court in *Pleasant Grove* expressly said it was not addressing that question. *Id.* at 468.
88. 576 U.S. 200, 219–20 (2015).
89. *Id.* at 204.
90. *Id.*
91. *Id.* at 205–06.
92. *Id.* at 206.

speaker it cannot violate the speech clause of the First Amendment.[93] Justice Breyer, writing for the majority, said: "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."[94] The Court explained: "[w]ere the Free Speech Clause interpreted otherwise, government would not work."[95] The government must be able to express messages such as to encourage recycling or energy conservation or vaccination of children.[96]

The Court said that the license plate is government speech, and therefore the choice of the board to not allow the confederate flag does not violate the First Amendment.[97] The Court stressed that license plates have long communicated messages from the state and that license plate designs are perceived by the public as coming from the state.[98] The Court said that Texas license plates are essentially government IDs.[99] The Court stressed that Texas retains control over the content of its license plates.[100] The Court said that Texas was not creating a forum for private speech, where the First Amendment would apply, but that here Texas was speaking for itself.[101]

Justice Alito wrote the dissenting opinion, joined by Chief Justice Roberts and Justices Scalia and Kennedy.[102] Justice Alito stressed that by allowing private organizations to place words and symbols on license plates, the state created a forum for private speech.[103] He lamented: "[t]his capacious understanding of government speech takes a large and painful bite out of the First Amendment."[104] Justice Alito concluded his dissenting opinion: "[m]essages that are proposed by private parties and placed on Texas specialty plates are private speech, not government speech. Texas cannot forbid private speech based on its viewpoint. That is what it did here."[105]

I agree with the conservative Justices in this case and am very troubled by the government speech doctrine as a First Amendment dead zone. Texas created a forum for private organizations to place their messages on license plates.[106] It did not need to do so and at any time could stop allowing this.[107] But so long as it makes this forum available, it should not be able to pick and choose which messages it likes and which it wants to forbid. Justice Breyer's opinion creates a

93. *Id.* at 219–20.

94. *Id.* at 207. It is worth noting the unusual composition of the majority: Justice Breyer's opinion was joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan.

95. *Id.*

96. *Id.* at 207–08.

97. *Id.* at 219–20.

98. *Id.* at 208.

99. *Id.* at 212.

100. *Id.* at 213.

101. *Id.* at 209.

102. *Id.* at 220–36 (Alito, J., dissenting).

103. *Id.* at 234.

104. *Id.* at 222.

105. *Id.* at 235–36.

106. *See id*.

107. *See id.* at 223–27.

fiction in treating everything on a license plate as speech by the government.[108] The confederate flag is the speech of the Sons of the Confederate Veterans.[109]

The Court could have applied the First Amendment and still ruled in favor of Texas. The Justices could have said that the State has a compelling interest in not putting symbols of hate on its license plates. This would have been a much more intellectually honest way of dealing with the issue, and it is what really explains the holding in the case. Or the Court could have ruled against Texas with the hope that the State then would have stopped the practice of putting messages from private groups on license plates.

But what the Court did in these cases is create a First Amendment dead zone. If the Court deems that the government is the speaker, then there can be no challenge that the government's actions violate freedom of speech.[110] In theory, this provides the government a way to avoid even the most central tenets of First Amendment law. The government can engage in viewpoint discrimination simply by declaring that it adopts the private speech as its own, and then no one can bring a constitutional challenge.[111]

## IV. PLACES WHERE FREE SPEECH DOES NOT EXIST: THE MILITARY

One more example of a free speech dead zone: the military. No Supreme Court decision ever has provided protection for the speech of those in military service. Actually, this precedes the Roberts Court. In *Parker v. Levy*, the Court upheld a court martial of an officer for making several statements to enlisted personnel that were critical of the Vietnam War and said that African-American soldiers should consider refusing to go to Vietnam because of how they were given the most hazardous duty there.[112] The Court said that "the military is, by necessity, a specialized society separate from civilian society."[113] The Court said that the speech of the officer in this case, "that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment."[114] Yet, it should be noted that in any other context, criticism of government policy and even advocacy of illegal disobedience would be allowed, unless the constitutional test for incitement was met.[115]

108. *See id.* at 219–20.

109. *See id.* at 235–36 (Alito, J., dissenting).

110. *See id.* at 219–20.

111. *See* Barry P. McDonald, *The Emerging Oversimplifications of the Government Speech Doctrine: From Substantive Content to a "Jurisprudence of Labels,"* 2010 BYU L. REV. 2071, 2071 (noting that, under the government speech doctrine, the Supreme Court permits "the imposition of normally prohibited viewpoint restrictions on private speakers"); Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1197 (2016) *(*"*Walker*'s expensive view of the government speech doctrine grants state actors broad authority to restrict private speech.").

112. 417 U.S. 733, 736–37, 761 (1974).

113. *Id.* at 743.

114. *Id*. at 761.

115. *See id.* at 749.

In *Brown v. Glines*, the Court went even further in exempting the military from the application of the First Amendment.[116] *Brown* involved an Air Force regulation prohibiting members of the Air Force from posting or distributing printed materials at an Air Force installation without the permission of the commander.[117] This, of course, is the most blatant form of prior restraint: a government licensing system for speech.[118] Unlike *Parker v. Levy*, this was not punishment for specific speech that threatened the military's operation.[119] Yet the Court upheld the prior restraint and concluded that "since a commander is charged with maintaining morale, discipline, and readiness, he must have authority over the distribution of materials that could affect adversely these essential attributes of an effective military."[120] This allows a system of prior restraint that would be permitted in virtually no other situation.

Indeed, the extent of the Court's deference to regulation of speech related to the military is reflected in its very troubling, and unanimous, decision in *Rumsfeld v. Forum for Academic and Institutional Rights*. [121] The Court rejected a claim that requiring universities to allow military recruiters equal access to campus interviewing as a condition for receipt of federal funds was impermissible compelled speech.[122] Most law schools refused to allow the United States military to use campus facilities for recruiting because of the military's policy of excluding gays and lesbians.[123] The Solomon Amendment denied federal funding to universities that denied the military equal access to campus facilities.[124]

The United States Court of Appeals for the Third Circuit found that the Solomon Amendment impermissibly forced colleges and universities to express support for a policy of which they disapproved.[125] The Supreme Court unanimously rejected this argument and found no violation of the First Amendment.[126] The Court stressed the need for deference to Congress:

> The Constitution grants Congress the power to "provide for the common Defence," "[t]o raise and support Armies," and "[t]o provide and maintain a Navy." Congress' power in this area "is broad and sweeping," and there is no dispute in this case that it includes the authority to require campus access for military recruiters.[127]

Chief Justice Roberts, writing for the Court, explained:

116. 444 U.S. 348, 352–53 (1980).
117. *Id.* at 349.
118. *See id.*
119. *Id.* at 354; *see generally Levy*, 417 U.S. 733.
120. *Brown*, 444 U.S. at 356.
121. *See generally* 547 U.S. 47 (2006). I should disclose that I was one of the plaintiffs in this lawsuit.
122. *Id.* at 64.
123. *Id.* at 51.
124. *Id.*
125. *Id.* at 54.
126. *Id.* at 70.
127. *Id.* at 58 (internal citations omitted).

> Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power. The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds. Congress' decision to proceed indirectly does not reduce the deference given to Congress in the area of military affairs. Congress' choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on universities.[128]

There is no way to understand this case except as part of the Court's hands-off approach to speech claims involving the military. The Court was allowing the government to force law schools to provide space for military recruiters and to not be able to express their opposition to the military's discrimination by excluding them.[129]

## V. AGAINST FIRST AMENDMENT DEAD ZONES

My argument against free speech dead zones is straightforward: they are harmful in terms of the protection of speech and unnecessary to accommodate the government's interests. A free speech dead zone is at odds with the very core of the First Amendment's protection of expression. All of the benefits of free speech—for the speaker, for the audience that would hear the message, and for society[130]—are lost. Government employees, lacking First Amendment protection for their on-the-job speech, will refrain from exposing wrongdoing within the government.[131] Their speech rights are taken away, and all who would benefit from it lose as well.[132] Likewise, speech loses all constitutional protection if the Court labels it "government speech."[133] And once the military is involved, freedom of speech protections vanish.[134]

The assumption of all these cases is that the government's interests require the complete absence of any First Amendment protections. But never does the Court justify this premise, and it is wrong. There is no reason why the traditional *Pickering* test for the employment context[135] does not provide an adequate balance of speech interests and the government's interests. Nor is there any reason why all speech protections should disappear once speech is deemed government speech, or at the very least why it would not be much preferable to put a strong presumption in favor of finding the government created a forum for private

128. *Id.* at 58–59.
129. *Id.* at 64–65.
130. *See* Lane v. Franks, 573 U.S. 228, 235–36 (2014).
131. *See* Garcetti v. Ceballos, 547 U.S. 410, 428 (2006) (Souter, J., dissenting).
132. *See id.* at 434.
133. *See* discussion *supra* Part II.
134. *See* discussion *supra* Part III.
135. *See* discussion *supra* Part I.

speech and applying First Amendment tests. In the context of the military, there can be deference to the government without complete abdication.[136]

The response to all of this might be to say that it does not matter: if the Court wants to rule in favor of the government, it will do so regardless of the test applied. The Court could have used the *Pickering* balancing test to rule against Richard Ceballos, or forum analysis to rule against the Sons of Confederate Veterans, or rational basis review to rule against speech of those in the military and FAIR. Of course, this is true, but it ignores that legal tests can matter, especially in the lower courts that apply the Supreme Court's precedents. To take one example, many government employees might have won in the lower courts if the *Pickering* balancing test were applied but would automatically lose under *Garcetti v. Ceballos*.[137]

## VI. CONCLUSION

My purpose in this Article was to identify this concept of First Amendment dead zones and to argue against them. There should not be areas like the ones identified where First Amendment analysis does not apply at all.

136. *See* discussion *supra* Part III.

137. *See* discussion *supra* Part I (explaining the *Pickering* and *Garcetti v. Ceballos* cases).