When Big Brother Is Your Boss

Author : Matt Bodie

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Pauline T. Kim, Market Norms and Constitutional Values in the Government Workplace, 94 **N.C. L. Rev.** 601 (2016).

How should we apply constitutional protections to public employees? The state action doctrine exempts private employers from constitutional scrutiny. However, public employers are bound to abide by the Constitution in their exercise of power. Governments must protect the free speech and privacy rights of not only ordinary citizens but their own employees as well. The difficulties in matching up these rights with the employment relationship have long bedeviled courts. If a worker's speech in the workplace had the same protections as a citizen's in the square, or an office had the same protections against searches as a home, governments' workforce management could quite easily break down. As a result, courts have increasingly turned to private sector norms to guide their application of these rights in the public sector.

In her article *Market Norms and Constitutional Values in the Government Workplace*, Pauline Kim critically evaluates this trend toward the "privatization" of constitutional norms. Kim argues that the Constitution is designed to provide important protections to governmental employees—protections that are justified by the differences between private and public employers. Focusing on First and Fourth Amendment protections, the article explains why speech and privacy rights are particularly important to public employees. Although Kim does not reach hard and fast doctrinal solutions, she does provide specific theoretical contributions to the literature for courts and academics to use in developing a deeper approach.

Kim first sets the scene by describing the academic and judicial forces that are bringing the regulation of public and private workplaces together. On one side, supporters of privacy and autonomy rights for private sector employees attempt to elide the differences so as to give private workers more protections. On the other side, critics of public sector employment rights seek to bring more market discipline to government agencies by importing private sector rules. Both sides have pushed the notion that public sector and private sector employment regulation should not be so different after all. Courts have turned to this approach themselves in order to deal with tricky issues of employee speech rights and privacy expectations. Recent Supreme Court decisions have held that if a particular employer action would have been reasonable in the private sector, it should be considered reasonable in the public sector, too—even in the face of constitutional protections.

The article turns to theory to show why this shouldn't be the case. Kim leans on notions from law and economics in arguing that private sector employers are different than their public sector counterparts in critical respects. She notes that private employers have property rights in their business, and that capitalism provides a significant degree of economic liberty. Although these rights and liberties are justifiably limited, governmental employers have no such claim to private rights. The First Amendment, according to the general consensus, provides no speech rights to governments themselves. And while governments have interests in managing their workplaces and controlling their message, these interests do not have the same constitutional import as those of either public employees or private employers. In addition, government employers have a level of power and control that private employers do not have. While both public and private employers may compete against each other in subsets of the labor market, private companies must compete for customers and capital in a way that government agencies do not. If a private employer is too draconian in its speech or privacy policies, various markets can punish this employer and drive it out of business. Not so for government agencies. Elected officials can step in to correct bad practices, but improved speech and privacy protections for public workers make such corrections more likely by opening the channels of communication to these officials and the electorate that empowers them. Illustrating this principle, the article's opening anecdote explains how

FDA scientists were punished by their managers for publicizing allegations of misconduct and corruption at the agency. In retaliation, these employees were secretly surveilled and monitored to such a degree that sensitive family and health information was surreptitiously collected. Employee whistleblowing ultimately facilitated public oversight of the agency, but only after the employees suffered reputational attacks and serious invasions of their personal privacy.

It is this last point that Kim could, in fact, expand upon in making her case that the government is different as an employer. Although companies like Amazon and Facebook have tremendous resources and can wield significant power, they do not have the legal authority that government possesses. Leslie Knope may seem like a less intimidating employer than Jeffrey Bezos, but Jeffrey Bezos can't have you arrested. Kim plays down the ultimate power of the government by focusing simply on the public employer's power over employment. But as her initial example shows, it is the government's power to go beyond the employment relationship, and into our personal lives and personal liberty, that seems most frightening. Constitutional restraints are appropriate for government because of government's power. And although the average citizen stands in a different place than a government employee, both are ultimately vulnerable to state action and state power.

The article also raised another question for me that Kim did not directly address: should public employees be treated differently than private ones as to their collective bargaining rights? Right-to-work proponents have long argued that mandatory agency fees violate the First Amendment rights of dissenting employees. Proponents of public sector unions have argued for exclusive representation and fair-share fees by analogizing to the private sector model. Is this analogy also inappropriate? Should public employees have greater rights not only against their employer, but their union as well? Given the First Amendment ramifications, it would be interesting to explore the rights of employees in this context as well.

Pauline Kim's dissection of speech and privacy rights for public employees shows that there are important reasons for protecting these employees with a strong constitutional framework. Her article makes a compelling case for reconsidering the trend towards fuzzing the line between public and private workers. Public employees are different. The Constitution protects individual citizens against the depredations of unconstrained government power. Because public employees can bear the brunt of the exercise of such power, they need the Constitution on their side.

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