Free Speech and Election Law

Public Employees and Governmental Expression

*By Randy J. Kozel**

My argument is that the modern jurisprudence of public employee speech neglects an important factor: the government's interest in expressing itself.

The existing doctrine for defining the First Amendment rights of public employees is predicated upon balancing two competing sets of considerations. On the one hand, there is the employee's interest in speaking (and, correspondingly, society's interest in listening). On the other hand, there is the government's interest in providing public services efficiently (and, correspondingly, society's interest in reaping the benefits). These considerations are undoubtedly significant. Yet the doctrine has not taken proper account of the fact that government agencies are concerned with more than just operational efficiency; they are also concerned with conveying messages and values of their own. And though the First Amendment restricts the government's ability to prohibit disfavored viewpoints when it acts as a sovereign regulating the conduct of its citizens, the government should not necessarily face similar restrictions when it acts in the distinct role of employer. There is something to be said for allowing government agencies to prohibit certain employee speech simply because the speech contradicts the agencies' values.

I. The Doctrine

Over the last five decades, the Supreme Court has decided numerous cases involving the First Amendment rights of government employees. Two of those cases stand out as particularly significant.

The first is *Pickering v. Board of Education*, in which a teacher was fired because of a letter he submitted for publication in a local newspaper. The letter asserted, among other things, that the teacher's school board had mishandled "past proposals to raise new revenue for the schools."[1] The Supreme Court held the firing to be unconstitutional.[2] It rejected the notion that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."[3] The Court then articulated a balancing test for evaluating First Amendment claims asserted by government employees: "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."[4]

The other foundational case came fifteen years later. In *Connick v. Myers*, an assistant district attorney was fired for circulating a questionnaire to her coworkers that addressed issues including "the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[5] The Supreme Court began by considering whether the employee had expressed herself as a citizen on a matter of public concern. It explained that this is a critical threshold inquiry, for "[w]hen 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."[6] Finding that one of the items on the questionnaire did indeed bear on a matter of public concern, the Court proceeded to apply the *Pickering* balancing test, which it struck in favor of the employer. The "limited First Amendment interest involved" in the case did not require the speaker's supervisor to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[7]

Putting together *Pickering* and *Connick*, a government employer generally cannot discipline an employee based on his speech if (1) the employee spoke as a citizen on a matter of public concern, and (2) the balance of interests described in *Pickering* weighs in the employee's favor. There are nuances and exceptions to this overarching framework (for example, affording greater discretion over the removal of high-ranking officials),[8] but it is the framework that is most important for present purposes.

II. The Problem

The modern doctrine does an admirable job of recognizing that although government employees do not relinquish all of their free speech rights by reason of their employment their employers nevertheless need the flexibility to make routine operational decisions. What the doctrine fails to acknowledge is that it is not just *employees* whose expressive interests are at stake. Governments have expressive interests, too.

There are at least three immediate objections to this point. The first is that the problem is illusory, because the modern doctrine protects the government's expressive interests by recognizing its need to "promot[e] the efficiency of the public services it performs through its employees."[9] The second is that the government has no legitimate expressive interests to protect, even when it acts in its role as employer. And the third is that if the government wishes to indicate its disapproval of statements made by its employees, it should be required to rely on counterspeech.

A. First Objection: The Modern Doctrine Already Protects the Government's Expressive Interests

When the leading Supreme Court cases describe the governmental interests that are relevant to disputes over employee speech, they do so predominantly in terms of operational efficiency. To be sure, the Court has broadly stated that "[t]he *Pickering* balance requires full consideration of the

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government's interest in the effective and efficient fulfillment of its responsibilities to the public."[10] But this has been taken to mean something much narrower—essentially, that an employer may "remove employees whose conduct hinders efficient operation."[11]

For an illustration, consider the 1987 case of *Rankin v. McPherson*.[12] That case arose from statements made by a clerical employee in a county constable's office. Upon learning that there had been an assassination attempt against President Reagan, the employee told a coworker, "If they go for him again, I hope they get him."[13] News of the statement made its way to the constable, who subsequently fired the employee.[14] The Supreme Court held that the firing violated the employee's constitutional rights. The Court noted that "there is no evidence that [the employee's statement] interfered with the efficient functioning of the office."[15] To the contrary, the firing was "based on the *content* of [the employee's] speech."[16] The Court explained that this justification is impermissible, at least when applied to employees who serve "no confidential, policymaking, or public contact role."[17]

Justice Scalia dissented, agreeing with counsel's statement at oral argument that "no law enforcement agency is required by the First Amendment to permit one of its employees to 'ride with the cops and cheer for the robbers.'"[18] He also criticized the majority's narrow conception of the implicated governmental interests, reasoning that "the Constable obviously has a strong interest in preventing statements by any of his employees approving, or expressing a desire for, serious, violent crimes—regardless of whether the statements actually interfere with office operations at the time they are made or demonstrate character traits that make the speaker unsuitable for law enforcement work."[19] But the majority was not persuaded. It left no doubt about which governmental interests it viewed as relevant to the constitutional inquiry: "[T]he state interest element of the [*Pickering* balancing] test focuses on the effective functioning of the public employer's enterprise."[20] And it made clear that "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."[21]

Whatever one makes of *Rankin*'s outcome, the case highlights the distinction between governmental *efficiency* interests, which play some role in the modern First Amendment calculus, and governmental *expressive* interests, which play no role at all. Indeed, the *Rankin* Court was unmistakable in its disapproval of employment decisions that are based on the employer's "disagree[ment] with the content of employees' speech." The takeaway is this: It is incorrect to assume that *Pickering*'s concern for operational efficiency will indirectly protect the expressive interests of government agencies. If governments really do possess legitimate expressive interests when they act in their roles as employers, then the existing doctrine needs to change to reflect that fact.

B. Second Objection: The Government's Expressive Interests Do Not Implicate the First Amendment

When a government acts in its ordinary role as a sovereign, the First Amendment places significant limits on its ability to express itself by restricting the speech of private citizens. While the government may enact criminal prohibitions against certain speech, it generally cannot do so based purely on the judgment that the speech is misguided, or even offensive. There must be other considerations in play—for example, the speech in question must be so worthless (like "false statements of fact") as to warrant no First Amendment protection at all,[22] or the government's interest must be heightened by factors such as the probable repercussions of the speech (like "fighting" words).[23] Nor does the government have a free hand to compel its citizens to disseminate a given message. As the Supreme Court remarked last Term, "Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."[24]

This does not mean that government agencies may never express themselves. We expect our public institutions to convey all sorts of messages and values. "It is the very business of government," Justice Scalia has noted, "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."[25] Indeed, governments may even require taxpayers to fund programs that "involve, or entirely consist of, advocating a position."[26] Some values prized by government agencies can be generalized across institutions—for instance, a belief in fairness and equality. Other values are most obviously associated with certain types of agencies, such as the Environmental Protection Agency's promotion of land conservation. These values are important because they are, in a very real sense, *our* values.[27] And they remain important even when they run counter to speech made by a government employee. This does not make the employee's speech any less significant. It simply means there is another interest at stake.

Recall the example of *Rankin v. McPherson*, where the constable encountered an employee who announced her hope for a presidential assassination. The constable had an interest in expressing views that were inconsistent with those of the employee—views such as belief in law and order, desire to prevent violent crime, and respect for elected officials. He promoted those views by firing an employee who announced that she did not share them, at least not fully. But in deciding whether that dismissal violated the Constitution, the Supreme Court did not ascribe any significance to the constable's interest in expressing and preserving his office's values. To the contrary, the Court noted that "the state interest element of the [*Pickering* balancing] test focuses on the effective functioning of the public employer's enterprise."[28]

I would like to suggest that this approach is incomplete. Government employees may not, as a condition of their employment, be forced to relinquish the entirety of their First Amendment protections.[29] This rule reflects the underlying notion that although the creation of an employment relationship brings about certain changes to the parties' legitimate expectations and rights, it does not erase all of the expectations and rights that previously existed. Why, then, should the government's interests be treated so differently?

If the government has an important interest in expressing itself through the actions and statements of its agencies, why should that interest cease to matter in any dispute between a government agency and one of its employees?

Of course, the fact that a given interest is important does not mean the interest has any relevance to the Constitution. That is, even if one acknowledges both that government employers have significant interests in expressing their values and that those interests do not disappear in disputes between government employers and their employees, it does not follow that the interests have any *constitutional* dimension. The response, I think, is this: The modern doctrine is founded on the idea that a citizen who accepts a government job retains his right to free speech, but only to a point. Identifying that point requires weighing the employee's interest in free speech against the agency's interest in fulfilling its obligations to the public. And while the existing doctrine limits the relevant governmental interest to the pursuit of operational efficiency, there does not seem to be any constitutional basis for distinguishing between a government agency's interest in efficiency and its interest in promoting the values that lie at the core of its organizational mission.

Here is what I am getting at: If the Constitution permits the restriction of a government employee's speech when the speech interferes with his employer's efficient operations, then it is difficult to see why the Constitution does not also permit the restriction of speech that contradicts the employer's fundamental values.

C. Third Objection: The Government May Protect Its Expressive Interests Through Counterspeech

Belief in the power of counterspeech is a critical component of our First Amendment jurisprudence. As noted above, when a private citizen expresses herself in a way that is controversial or offensive, the government ordinarily may not criminalize the citizen's speech. To the contrary, the First Amendment generally requires the government to rely on counterspeech, either from other citizens or from the government itself.[30] If counterspeech is the government's remedy for dealing with private citizens, then why should the same not be true when the government deals with its employees?

The difference, I think, is that counterspeech from a government agency's top policymakers is not likely to be an effective response to undesirable employee speech. A government agency has a legitimate interest in demonstrating both to the public and to its own employees that the agency, *as an entity*, does not accept the views of an employee who contradicts its values. It is therefore reasonable for the agency's policymakers to conclude that it would be insufficient simply to disagree with the employee by issuing an internal or external statement, and then to go on holding out the employee as the agency's representative. To do so would be to accept that while certain values may be embraced by the agency's policymakers, those values are not necessarily shared—and, indeed, may be explicitly rejected—by the other employees who make up the agency. This is particularly problematic given that it will often be non-policymaking employees who have the closest contact with the public and the greatest likelihood of affecting the way in which a given agency is perceived externally. If an agency's employees were free to contradict the values established by its policymakers, the result would be to subvert the agency's ability to communicate its values—as integral components of its organizational mission.

III. Some Possible Solutions

Let us assume—(perhaps charitably)—that at least some of what I have said so far makes sense. The next question is how to put it into practice. Accepting that the existing doctrine reflects an incomplete method of applying the First Amendment to disputes between government employers and their employees, what adjustments could be made to afford proper significance to the government's interest in expressing itself?

The initial step would be to recognize the government's expressive interests as an additional component of the *Pickering* balancing test. That only gets us so far, though, because we still need an idea of how much weight this factor should be given. The following sections offer preliminary discussions of three possible approaches, all of which assume that the existing doctrine's basic framework remains intact.

A. First Option: Excessive Deference to Employers

One possibility is that the government's expressive interests should receive a great deal of weight, meaning that a government employer generally will be prohibited from restricting employee speech only when the values asserted by the employer are exceptionally weak. For example, the constable in *Rankin* would be permitted to fire an employee that wished for a presidential assassination, because the firing would be in furtherance of core values such as order and lawfulness. But where a public employee was disciplined for being an outspoken fan of the Chicago Bears, the employer probably could not justify its decision based on a claimed expressive interest in cheering for the Green Bay Packers.

The most serious problem with this approach is that it unduly privileges employer values over employee speech. It is one thing to say that employers' values deserve some consideration in the First Amendment calculus; it is quite another thing to say that those values should carry the day in all but the exceptional cases. Accordingly, it may be more appropriate to focus on cases in which the government's expressive interests are likely to be particularly resonant. That leads us to a second possible solution.

B. Second Option: Widely-Shared Values

A second approach would be to treat the government's expressive interests as dispositive only where the governmental values in question are widely shared among Americans. The idea would be to ascribe heightened significance to the government's values when they are clearly in accord with the values of its citizens—which is to say, in those situations where we can be most confident that a given agency is speaking on the country's behalf. This approach essentially would permit government agencies to restrict or punish employee speech that is so extreme or outrageous as to contradict our widely shared beliefs. To illustrate, recall the facts of *Pickering*, in which a

teacher published a letter criticizing his school board for the way it handled revenue-raising proposals.[31] Under this second approach, the teacher could not be punished for his speech solely in light of the school board's expressive interests. The reason is that there is no widely-shared belief that school boards should be immune from criticism based on their handling of such proposals. But if the facts were changed so the teacher's letter urged that the board members' homes be vandalized, his firing would be permitted; our society shares a widely held belief that we should not promote illegal activity.

One might respond that there is danger in making judges responsible for determining which types of speech are inconsistent with our widely shared beliefs. But the existing First Amendment doctrine already requires judges to evaluate an employee's interest in the speech in question.[32] It also requires judges to determine whether the speech bears on a matter of public concern—an inquiry that controls whether the employee's claim even makes it to the balancing stage.[33] Reasonable minds may differ as to whether these types of content-based determinations should be featured so prominently in our public employee speech jurisprudence. But if we are serious about respecting public employers' interests in promoting their organizational values, then permitting some content-based determinations makes sense, for the simple reason that certain types of content are the most likely to implicate those values.

Moving to the methodological question of how judges would determine what constitutes a widely shared value, it is instructive to note that judges already undertake comparable tasks when, for example, they interpret the Eighth Amendment in light of "evolving standards of decency," or the Fourth Amendment in light of a citizen's "reasonable expectation of privacy." I suppose it might sometimes be more difficult to gauge our widely shared beliefs outside of discrete contexts such as these. Nevertheless, it seems to me that this is not an impracticable or inappropriate task for judges. In many cases—*Pickering* and *Rankin* come to mind—it appears to be fairly straightforward.

There is a related concern that is best illustrated through an example. Return to the facts of *Pickering*, and imagine that the school board sought to fire the teacher based on its asserted belief that public dissent by teachers is improper. Would the board's action be permissible? I think the answer is no. Once again, there is no widely held belief that teachers should not (for any reason) criticize school boards, or that public employees should not (for any reason) criticize their employers. Of course, such public dissent might create a severe disruption of employer operations and thereby justify the employer's restriction of the speech under the existing *Pickering* balancing test. And if the employee's speech was problematic for some additional reason, such as its dissemination of confidential information, there might be another independent basis for allowing the employer to prohibit or punish the speech. But viewed purely in terms of the government's expressive interests, an overarching governmental policy disfavoring any public criticism would not be sufficient.

As for the requisite parade of horribles, it is fairly unremarkable. Public employers could, without offending the Constitution, discipline or dismiss employees whose outrageous (which is to say, inconsistent with values that are widely shared among Americans) speech was out-of-step with the employer's views. Ah, but what is hidden behind the words "public employers"? Employment decisions are not made by governments. They are made by people who work for governments. This doctrinal revision thus would place significant power not into the hands of some abstract institution that dutifully represents the citizenry, but rather into the hands of ordinary people who have their own thoughts, feelings, and biases.

This is certainly a point worth noting. Still, we entrust the people who lead our public institutions with a host of responsibilities relating to the provision of public services. And we base our trust in significant part on the understanding that government officials are kept in check by superior ones, who in turn are kept in check by us at the polls. Governmental accountability is obviously not perfect. But if we are willing to accept our current system as adequate to handle countless critical functions, it seems reasonable to accept the system's ability to reign in those supervisors who would make employment decisions based on their personal values rather than the organizational values of the institutions they represent.

Finally, what about situations in which the purportedly "outrageous" speaker actually has it right, because the widely shared beliefs of the democratic majority are somehow flawed? This is a danger that should not be ignored. But as discussed above, if the government really does deserve respect for its expressive interests when it operates in its role as employer, then there is a strong case for providing government employers with the authority to prohibit their employees from contradicting those values.[34]

C. Third Option: Context-Based Approach

A third option would be to give significant deference to the government's expressive interests, but only where the employee's speech is closely related to his employment. The theory behind such a distinction is that a government institution has legitimate expressive interests in topics related to its functions, but not in topics that are remote.[35] To illustrate, imagine a teacher who devotes his spare time to writing and publishing poetry that has nothing to do with his teaching. Under this approach, the teacher could not be fired because of the views expressed in his poems, even if those views were antithetical to the values of his employer.

This option has a certain amount of intuitive appeal: there is, it seems to me, a plausible argument that an employee's First Amendment interests are strongest when he speaks outside the workplace and on topics unrelated to his employment.[36] But it does not follow that his employer's expressive interests are correspondingly weak in those situations. A government employee who publicly contradicts his employer's values causes the employer harm. And the employer's interest in remedying that harm is no less legitimate because the employee addressed an issue unrelated to the subject matter of his employment.

Viewed purely in terms of the employer's expressive interests, the question of whether there is adequate justification for allowing the employer to discipline the employee should not be contingent on the topic of the employee's speech.

CONCLUSION

I should note in closing that the line of argument I have tried to develop—based on recognizing that employers can sometimes possess legitimate expressive interests in restricting or punishing employee speech—may appear to have ramifications not just for public employers, but also for private ones. *Pickering* presents a major obstacle to that analogy. By its very nature, the *Pickering* doctrine creates the need to recognize a government agency's interests in restricting employee speech. *Pickering*, however, has no application to the private-employer context. That means there is no built-in mechanism for assessing the employer's interests as part of the constitutional calculus. This is not necessarily to imply that private employers never have First Amendment interests in their personnel decisions. But if they do have any such interests, the source is something other than the balancing test that drives the *Pickering* doctrine.[37]

Returning to the context of public employers, here is one conclusion in which I am confident: there is a good argument for modifying the modern doctrine to take into account the expressive interests of our public agencies. Beyond that, things get more complicated. I have offered preliminary discussions of a few different options for revising the doctrine to recognize this set of interests. Deciding whether any of those options is a suitable starting point for revising the doctrine would require a more complete assessment. For now, the most important point is a basic one: the government's expressive interests deserve to play *some* role in the constitutional analysis.

Endnotes

1 391 U.S. 563, 564 (1968).

2 *Id.* at 565.

3 *Id.* at 568.

4 *Id.*

5 461 U.S. 138, 141 (1983).

6 *Id.* at 146.

7 *Id.* at 154.

8 *See* Rutan v. Republican Party of Illinois, 497 U.S. 62, 74 (1990).

9 *Pickering*, 391 U.S. at 568.

10 *Connick*, 461 U.S. at 150.

11 *Id.* at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (internal quotation marks omitted)).

12 483 U.S. 378 (1987).

13 *Id.* at 379–82.

14 *Id.* at 382.

15 *Id.* at 389.

16 *Id.* at 390.

17 *Id.* at 390-1.

18 *Id.* at 394 (Scalia, J., dissenting).

19 *Id.* at 399.

20 *Id.* at 388 (opinion of the Court).

21 *Id.* at 384.

22 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

23 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

24 Rumsfeld v. Forum for Academic & Inst'l Rights, Inc., 126 S. Ct. 1297, 1308 (2006).

25 Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment).

26 Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 559 (2005).

27 *See Finley*, 524 U.S. at 598 (Scalia, J., concurring in the judgment) ("And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (*and, in a democracy, our*) favored point of view by achieving it directly… or by advocating it officially… or by giving money to others who achieve or advocate it.") (emphasis added).

28 *Rankin*, 483 U.S. at 388.

29 *See Pickering*, 391 U.S. at 568.

30 *See, e.g.,* Texas v. Johnson, 491 U.S. 397, 419 (1989) ("The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.").

31 391 U.S. at 566.

32 *See id.,* at 568.

33 *See Connick,* 461 U.S. at 146.

34 *Cf.* Waters v. Churchill, 511 U.S. 661, 672 (1994) (plurality op.) ("[E]ven many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees.").

35 *Cf.* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465–66 (1995).

36 In a previous article, I discussed an alternative model of employee speech that would (more or less and with some significant exceptions) protect an employee from discipline based on statements he made outside the workplace on matters unrelated to his employment, but not statements he made within the workplace or on work-related topics. *See Reconceptualizing Public Employee Speech*, 99 Nw. U. L. Rev. 1007 (2005). Alas, though I found the alternative model useful as a foil to expose some problems with the existing doctrine, it nevertheless struck me as flawed in important respects of its own.

37 For one approach to this issue, *see generally* Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 Minn. L. Rev. 1669 (2001).