

Public Employee Speech and The Heckler's Veto: Is There a Way Around It?

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The law that governs public employee speech has engendered some serious criticism. Public employers can impose adverse employment actions (suspensions, firings, denying raises or promotions) for much speech that would be protected by the First Amendment from any action the government might take as a sovereign (fines, jail, etc.). Most conspicuously, if an employer reasonably predicts “disruption” as a result of the speech – which, in this day and age, can be caused by the simple disagreement of an intended or entirely unintended audience – it can impose an adverse employment consequence on its employee. This problem, sometimes referred to as the “heckler’s veto” because it elevates the views of opponents of the speech, lurks over the area of public employee speech.¹

This problem has vexed scholars because it seems so inconsistent with the principle of free speech that controversial and unpopular speech is entitled to just as much protection as popular speech – more so, perhaps, since popular speech usually needs no protection. And the vexing is on the rise. As scholars have noted, the increase in information’s availability (and preservation) due to the Internet, the ability to organize opposition with social media, and the widely-accepted belief that partisanship has increased have all led to an increase in the ability and willingness of hecklers

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In the interest of full disclosure, I represent and have represented, in my role at CIR, public employee clients who have challenged adverse employment actions as violations of the First Amendment. The opinions expressed here should not be attributed to either those clients or CIR.

¹ Patrick Schmidt, *Heckler's Veto*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/968/heckler-s-veto>.

to use their veto.² Accordingly, they have devised inventive means of circumventing the problem and bringing the law governing public employee speech more in line with traditional First Amendment principles. For example, The Journal of Free Speech Law has recently published an article by Randy Kozel, a Notre Dame Law School professor, that tries to reimagine the First Amendment jurisprudence governing the speech of public employees and at least tries to eliminate the problem of the “heckler’s veto” from the jurisprudence.³ Professor Kozel argues that the jurisprudence in this area can achieve this goal and could be more easily reconciled with the rest of First Amendment law if familiar forum analysis – particularly, considering public employment as a nonpublic forum – were used instead of the current analysis.⁴

Professor Kozel also identifies (although he does not completely develop in his most recent article) a second (or, perhaps, subsidiary) theory: that speech can be used to assess competence and ability to perform, and that outside speech unrelated to an employee’s job duties should not be the sole, or even a significant, determinant of whether an employee is competent.⁵ Professor Keith Whittington makes a similar argument, more forcefully, on behalf of university professors. He

² E.g., Randy J. Kozel, *Government Employee Speech And Forum Analysis*, 1 J. OF FREE SPEECH L. 579, 604 (2022) (“Using listener reaction to justify restrictions on employee speech was fraught from the beginning. The attendant concerns have become more salient in the internet age. Innovative communication technologies and the modern social media environment make it remarkably easy and inexpensive to cultivate disapproval in an instant.”); Keith E. Whittington, *What Can Professors Say In Public? Extramural Speech And The First Amendment*, p. 3 (2022) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4251803). (“The combination of polarization and the Internet has created a particular minefield for professors in the form of self-appointed campus watchdogs.”).

³ Kozel, *supra* note 2.

⁴ *Id.* It deserves mention that this is not Professor Kozel’s first effort to reconceptualize the law governing public employee speech. See Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NORTHWESTERN L. REV. 1007 (2005) (proposing an “internal/external” model to replace current doctrine).

⁵ Kozel, *supra* note 2, at 604 (2022). Professor Kozel’s earlier effort to reimagine First Amendment principles governing public employee speech, published when he was a law clerk, made a similar proposal. Kozel, *supra* note 4, at 1044-51 (proposing that most public employee speech outside the workplace would be protected by the First Amendment).

argues that such outside speech, if not related to the professor's area of expertise, is entirely irrelevant in determining a professor's competence and ability to perform.⁶

I like these ideas, but I remain a pessimist on the likelihood of entirely exorcising the specter of the heckler's veto for public employees, even (or maybe especially) for university professors. I also have doubts as to whether a wholesale switch to nonpublic forum law, or any other relevant First Amendment doctrine, will significantly improve matters for public employees. For one, the Supreme Court already has given robust protection to public employee speech in certain contexts (dealing with broad prophylactic rules) that seems more protective of the First Amendment. In that context, a switch to nonpublic forum law might be a step backwards. Second, it is not clear at all that the prohibition on "viewpoint discrimination" in nonpublic forum law actually precludes government employers from relying on anticipated audience reaction to speech (a less tendentious description of the heckler's veto). Finally, I remain unconvinced that university professors hold such a unique place in our society that they should be entitled to special First Amendment protections in their nonprofessional speech.

I give voice to this Eeyore-like outlook in this brief article. Part I of this article lays out the gist of current doctrine and the suggested move to nonpublic forum analysis. In Part II, I consider the court cases that examine broad prophylactic rules that govern public employee speech and how those cases relate to the more familiar doctrines set forth in Part I. In Part III, I examine some problems in applying nonpublic forum analysis and make some observations of my own as to how it would apply to certain challenges. In Part IV, I discuss in greater detail the possibility that we can ignore, or greatly reduce, the consideration of outside speech in general.

⁶ Whittington, *supra* note 2, at 32.

I.

I largely agree with Professor Kozel's description of the law as it relates to the consideration of adverse employment actions taken against public employees because of their speech.⁷ There is a three-part test for determining whether such speech is protected by the First Amendment. The first inquiry is whether the speech was a part of the employee's official duties. This requirement, which the Court first elaborated upon in *Garcetti v. Ceballos*,⁸ holds that speech that is essentially part of an employee's job, is not protected at all by the First Amendment against adverse employment actions. This threshold requirement exists because the government has the right to shape its own communications.⁹

The second inquiry is whether the speech itself bears on a matter of public concern.¹⁰ While this category has not been delineated by the Court with great clarity (as I will describe in more detail in the next section), one thing apparently does not qualify: the average public employee's complaints about his or her own employment situation. Thus, speech by a run-of-the-mill government employee about how much she is being paid or what kind of office she has do not qualify for any First Amendment protection against adverse employment actions. And this is so even if it could somehow be related to the topic of the efficiency and management of a government agency, a topic that may very well be one of public concern in ordinary parlance.¹¹ As Professor

⁷ Kozel, *supra* note 2, at 582-83.

⁸ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

⁹ *Id.* at 422. ("Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity.").

¹⁰ *Id.* at 418.

¹¹ *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."). In *Connick*, the Court held that a questionnaire distributed by an assistant district attorney in New Orleans, to the extent it posed questions about office transfer policy and morale, the need for a grievance committee, and the level of confidence in supervisors, was not on a matter of public concern. *Id.* The Court has not elaborated upon what the "most unusual circumstances" might be, but one could imagine that the salary negotiations for the football coach of a state

Kozel points out, this prerequisite for speech protection is “both distinctive and remarkable.”¹² That is, while there are other areas of First Amendment jurisprudence that may consider whether speech was on a matter of “public concern” as a factor, there is no other area of free speech law that uses it as a barrier to any protection at all.¹³ He also points out that the significance of the “public concern” test has diminished since the adoption of the first test, whether the speech was a part of the employees’ official duties.¹⁴

The third area of inquiry is a “balancing” test.¹⁵ In this inquiry, the Court balances the interests of the employee (and his audience) in the speech and the interests of the public employer in a smooth-running operation. This test was first identified in *Pickering v. Bd. of Educ.*,¹⁶ wherein the Court concluded that a school board’s firing of a teacher who wrote a letter to the editor concerning a bond issue (related to school funding) coming before the voters of the community violated the teacher’s First Amendment rights.¹⁷ Like many “balancing” tests employed in the law, the *Pickering* balancing test has many factors and can be difficult to describe. The degree to which the speech clears the “public concern” threshold is a consideration weighing in the employee’s favor.¹⁸ The kind of position that the employee has may matter; the speech of higher-level

university might be of great interest to the public at large (or, at least, the fans of the team) and quite newsworthy, and that the coach’s discussion of those negotiations might qualify as speech on a matter of public concern. *See also* *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472-73 (2018) (stating that an individual employee’s discussion of a 5% raise would likely constitute a matter of only private concern but that a public sector union’s demand for a 5% raise for many thousands of employees would likely be a matter of public concern given the serious impact it would have on the budget of the government unit in question).

¹² Kozel, *supra* note 2, at 587. *See also id.* (“a First Amendment anomaly”).

¹³ That is, any protection from an adverse employment action. As the Court noted in *Connick*, such speech would still be protected from adverse actions by the government as sovereign (*e.g.*, civil or criminal liability). *Connick*, 461 U.S. at 147.

¹⁴ Kozel, *supra* note 2, at 611. Professor Kozel points out that the “public concern” test was adopted some 23 years before the “official speech” exclusion. *Id.* n.137.

¹⁵ *Garcetti*, 547 U.S. at 418, 423.

¹⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

¹⁷ *Id.* at 574-75.

¹⁸ *E.g.*, *Jackler v. Byrne*, 658 F.3d 225, 237 (2d Cir. 2011) (“The more the employee’s speech touches on matters of significant public concern, the greater the level of disruption to the government that must be shown.”).

employees may have less protection because it is more likely to be associated with the employer. Finally, the *Pickering* balancing inquiry often depends upon how potentially “disruptive” the speech is. Unfortunately, the “disruptive” potential of speech may often depend upon whether people agree with it. Controversial speech or speech by controversial speakers will tend to foment dissension within the employee ranks and detract from the public agency’s mission. Relying on “disruptiveness,” Professor Kozel points out, is contrary to the basic First Amendment principle that speech cannot be restricted simply because it is offensive.¹⁹ It would give a speaker’s audience a “heckler’s veto.”²⁰

Thus, between the “public concern” test and the existence of a “heckler’s veto,” Professor Kozel concludes that “the law of employee speech is a doctrinal island.”²¹ These problems of the heckler’s veto and sui generis doctrine seems to animate a good deal of Professor Kozel’s search for an alternative First Amendment home for public employee speech, finally alighting upon nonpublic forum analysis.²² Nonpublic forums include places set aside for voting or a courthouse: places not set aside necessarily for speech, but for some other purpose. Professor Kozel suggests that public employment could be considered a metaphysical equivalent of such places.²³

There are two key features of the law governing nonpublic forums. First, any restrictions on speech within a nonpublic forum must be viewpoint neutral.²⁴ While he believes that current

¹⁹ Kozel, *supra* note 2, at 589-90.

²⁰ *Id.* at 590.

²¹ *Id.* at 599. He views this as an exemplar of the generally disjointed analytical frameworks that govern various doctrines falling under the rubric of “free speech law.” *Id.* & *id.* 599-600 n.91.

²² In his most recent article, Professor Kozel considers (and rejects) other possibilities: government employment as a form of government subsidy or as a limited public forum. *Id.* at 591-97. Professor Kozel uses the phrase “limited public forum” as a type of nonpublic forum; a “limited public forum” is a nonpublic forum that has a speech-related objective, but one that is limited by speakers or topic. For his alternative to current public employee speech doctrine, Professor Kozel is using a different kind of nonpublic forum, one with no speech-related objective at all. *Id.* at 598. This, he says, could be called a “nonexpressive nonpublic forum,” but, for the sake of linguistic ease, he drops the first word. He notes that nothing in his analysis depends upon these categorization or nomenclature issues. *Id.*

²³ *Id.* at 599.

²⁴ *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 392-93 (1993).

doctrine governing employee speech “reflects a powerful commitment to viewpoint neutrality,”²⁵ Professor Kozel also believes that a formal commitment to that principle would require the rejection of the “heckler’s veto” and the idea that the “disruptiveness” of speech can be used to justify its suppression.²⁶ At the same time, Professor Kozel asserts that an employee’s speech can be used to determine if that employee is qualified or suitable for the position in question.²⁷

Second, government rules regarding nonpublic forums must be reasonable in light of the forum’s purpose.²⁸ Illustrating this requirement, Professor Kozel points out that the Court has upheld restrictions on public employees’ political activities (like the Hatch Act), but suggests that a law precluding the expression of all political opinion might go too far.²⁹ The reasonableness requirement might be used to justify punishing employees who make statements disparaging members of a particular religion, race, or political party since, according to Professor Kozel, it would be reasonable to conclude that employees who deal with others may not treat them fairly.³⁰

Thus, in a switch from current doctrine to nonpublic forum doctrine, the “viewpoint neutral” and “reasonable” requirements would replace the “public concern” and “balancing” tests that currently govern cases regarding public employee speech.³¹

II.

The type of cases that public employee speech cases and nonpublic forum cases address are different in one significant respect. Most (but not all) public employee speech cases involve an adverse employment action already taken against the employee where the courts apply the tests on

²⁵ Kozel, *supra* note 2, at 602.

²⁶ *Id.* at 603 (“A commitment to viewpoint neutrality . . . entails rejection of the idea that audience reaction to speech is a legitimate basis for suppression.”).

²⁷ *Id.* at 604-05.

²⁸ *Lamb’s Chapel*, 508 U.S. at 392-93.

²⁹ Kozel, *supra* note 2, at 606. The Hatch Act, prohibiting various kinds of political activity by federal employees, was upheld by the Supreme Court in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

³⁰ *Id.* at 607.

³¹ *Id.* at 601-13.

a case-by-case basis with careful attention to the specifics.³² In contrast, most (but, again, not all) nonpublic forum cases involve a challenge to a rule or regulation. In the Supreme Court, these have included a state statute precluding the wearing of political apparel at or about polling places,³³ a local school district rule (authorized by state statute) precluding the use of school premises for religious purposes,³⁴ a regulation of the Port Authority of New York and New Jersey prohibiting the sale or distribution of any merchandise or printed material within an airport terminal,³⁵ a federal regulation prohibiting solicitation or campaigning on post office property,³⁶ and an Executive Order limiting the charities that could participate in the Combined Federal Campaign, a charity drive in which federal employees contribute money to participating charities.³⁷

There are exceptions. Thus, in *Arkansas Educational Television Commission v. Forbes*, the Court upheld a decision by a state-owned public television station to exclude an independent candidate for Congress from a televised debate it was sponsoring.³⁸ The debate was considered a nonpublic forum, but the Court held that a journalistic decision to limit the debate to those with significant public support was reasonable and not viewpoint-based.³⁹

³² *E.g.*, *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (“in all *Pickering* cases, the particular facts would be very important”); *Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cty.*, 39 F.4th 95, 104 (3d Cir. 2022) (The *Pickering* “balancing test is a ‘fact-intensive inquiry that requires consideration of the entire record, and must yield different results depending on the relative strengths of the issue of public concern and the employer's interest.”) (quoting *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 472 (3d Cir. 2015)); *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 729 (9th Cir. 2022) (“Not surprisingly, there will rarely be a case that clearly establishes that the plaintiff is entitled to prevail under the fact-sensitive, context-specific balancing required by *Pickering*.”); *Lalowski v. City of Des Plaines*, 789 F.3d 784, 791 (7th Cir. 2015) (“The *Pickering* balancing test contemplates a fact-intensive inquiry into a number of interrelated factors,” listing seven factors).

³³ *See Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (challenge to Minn. Stat. § 211B.11(1)).

³⁴ *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. District*, 508 U.S. 384 (1993).

³⁵ *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

³⁶ *See United States v. Kokinda*, 497 U.S. 720 (1990).

³⁷ *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985).

³⁸ *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. 666 (1998).

³⁹ *Id.* at 682-83. The dissent in *Forbes* did not dispute the general proposition that the state-owned station could limit the number of candidates in a sponsored debate, but argued that the station's decision there violated the First Amendment because it was *ad hoc* and lacked objective standards to guide any decision to exclude. *Id.* at 683 (Stevens, J., dissenting).

On the public employee speech side of things, there are a few cases that address general rules, perhaps the most well-known of which is *United States v. Nat'l Treasury Employees Union* (“*NTEU*”).⁴⁰ In *NTEU*, the Court addressed a federal law that prohibited federal employees from accepting any compensation for making speeches or writing articles. The Court’s analysis there seemed to differ somewhat from standard *Pickering* analysis. First, with little discussion, it held that the respondents’ expressive activities were on matters of public concern. That is, even talks on topics that might not make the top of the news – the Quaker religion, for example⁴¹ -- were of public concern because they had nothing to do with the employees’ position. It was sufficient (although perhaps not necessary) that their speech would be addressed to a public audience outside the workplace, and “involved content largely unrelated to their Government employment.”⁴²

⁴⁰ See *United States v. Nat'l Treasury Emples. Union*, 513 U.S. 454 (1995). Two earlier cases addressed the constitutionality of the Hatch Act, which precludes federal employees from engaging in certain kinds of specific political activity like running for office. *United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). *Mitchell*, of course, was decided long before *Pickering*. *Nat'l Ass'n of Letter Carriers* relied heavily on *Mitchell* and mentioned *Pickering* only in passing for the proposition that the government’s interest when it comes to its own employees is different from its interest as sovereign and the Constitution requires a balance between its interests and those of its employees. *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 564. The dissent argued that “*Mitchell* is of a different vintage” and noted the cases, including *Pickering*, that had upheld the free speech rights of public employees since *Mitchell*. *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 598 (Douglas, J., dissenting). Other cases prior to *Pickering* addressed employment requirements that would require an oath denying membership in the Communist Party or other “subversive” organizations; they, too, did not involve any sort of *Pickering* balancing test. See *Connick v. Myers*, 461 U.S. 138, 144 (1983). In *NTEU*, the Court said that the discussion in *Nat'l Ass'n of Letter Carriers* “established that the Government must be able to satisfy a balancing test of the *Pickering* form to maintain a statutory restriction on employee speech” and that “the discussion in that case essentially restated in balancing terms our approval of the Hatch Act in *Mitchell*.” *United States v. Nat'l Treasury Emples. Union*, 513 U.S. at 467. Accordingly, the Court said, “we did not determine how the components of the *Pickering* balance should be analyzed in the context of a sweeping statutory impediment to speech.” *Id.*

⁴¹ *United States v. Nat'l Treasury Emples. Union*, 513 U.S. at 461.

⁴² *Id.* at 466. I suggest that the non-employment subject matter may not be necessary to First Amendment protection because the Court has said that employee speech related to whether attorneys in a District Attorney’s office were under pressure from their supervisors to support political campaigns (*Connick v. Myers*, 461 U.S. 138, 149 (1983)) or whether a hospital’s policy of “cross-training” nurses to work in different departments (*Waters v. Churchill*, 511 U.S. 661, 680 (1994) (plurality op.)) either is (*Myers*) or might be (*Waters*) speech on a matter of public concern. In both instances, it would be hard to argue that the speech was not about the workplace. See also *Craig v. Rich Township High School District 227*, 736 F.3d 1110, 1116 n.2 (7th Cir. 2013) (“The [public concern] test was designed to help courts distinguish between protected and unprotected speech when a public employee speaks out about her employer’s policies, conduct, or other issues more directly related to her public employment.”). But see *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2495 (2018) (Kagan, J., dissenting) (claiming that “public concern” test “is not . . . whether the public is, or should be interested in a government employee’s speech, [but rather] whether that speech is about and directed to the workplace . . .”). In my

Although it is far from clear, one lesson from *NTEU* might be that speech unrelated to one's place of work either (a) need not meet the public concern test or (b) meets it automatically. In her separate concurrence in *NTEU*, Justice O'Connor hinted as much when she stated that the case presented no question of whether the speech was of private or public concern.⁴³ Of course, if that is a teaching from *NTEU*, then the definition of speech "unrelated" to work might require some additional clarification.⁴⁴

Second, the Court said that the Government's burden was greater than in the normal *Pickering* situation because of the "widespread impact" of the honoraria ban and because the ban chilled speech before it happens.⁴⁵ The Court ultimately concluded that the Government could not meet its burden.⁴⁶

view, Justice Kagan's position is hard to reconcile with *Myers* and *Waters*. See also *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("The [employee's] memo concerned the subject matter of [his] employment, but this . . . is nondispositive. The First Amendment protects some expressions related to the speaker's job.").

⁴³ *United States v. Nat'l Treasury Emples. Union*, 513 U.S. at 480 (O'Connor, J., concurring and dissenting) ("In contrast to some of our prior decisions, this case presents no threshold question whether the speech is of public, or merely private, concern. Respondents challenge the ban as it applies to off-hour speech bearing no nexus to Government employment -- speech that by definition does not relate to 'internal office affairs' or the employee's status as an employee."). See also, e.g., *Dible v. City of Chandler*, 515 F.3d 918, 927 (9th Cir. 2008) ("it is not entirely clear whether the public concern concept would be a necessary threshold to . . . balancing" if the speech was unrelated to work). But see *Amalgamated Transit Union Local 85 v. Port Authority of Allegheny County*, 39 F.4th 95, 103 (3d Cir. 2022) (holding that the "public concern" test is a threshold requirement that must be met to qualify for interest balancing under either *Pickering* or *NTEU*).

⁴⁴ *City of San Diego v. Roe*, 543 U.S. 77, 81 (2004) (holding that firing of police officer who made and sold sexually explicit tapes was not unrelated to his employment, and governed by *Pickering* rather than *NTEU*, both because the police department "demonstrated legitimate and substantial interests of its own that were compromised by [the officer's] speech" and because the officer had used his uniform in the tapes and referred to his "law enforcement" role on his website selling them). See also *Dible*, 515 F.3d at 926 ("it can be seriously questioned whether a police officer can ever disassociate himself from his powerful public position sufficiently to make his speech (and other activities) entirely unrelated to that position in the eyes of the public and his superiors. . . . That said, the Court has never explicitly defined what is or is not related . . .").

⁴⁵ *United States v. Nat'l Treasury Emples. Union*, 513 U.S. at 468. The Court also concluded that the fact that the statute singled out expressive activities, as opposed to other means by which a federal employee could earn outside income, "heightens the Government's burden of justification." *Id.* at 475. If these factors heightened the burden over the burden the Government had to meet to defend the Hatch Act, the Court has never clearly explained why the ban in *NTEU* was deemed broader. The statute in *NTEU* did not actually prohibit any speech at all, although it did deter speech by precluding federal employees from being paid. The Hatch Act also focused on First Amendment activity and completely prohibited certain kinds of political activity by federal employees. One can only surmise that perhaps the limited nature of the prohibitions in the Hatch Act made it narrower in the Court's eyes.

⁴⁶ *Id.* at 477.

This second distinction suggested a dichotomy – the *Pickering* balancing test was for analysis of an individual adverse employment decision after it was made, *NTEU* was to weigh the propriety of broad rules. *Pickering* was for *ex post* analysis, *NTEU* for *ex ante*. While the Court has not been crystal clear on this,⁴⁷ it reiterated this dichotomy (over a strenuous dissent) in assessing the propriety of mandatory union fees in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.⁴⁸ The Court there noted that it had “sometimes looked to *Pickering* in considering general rules that affect broad categories of employees” but that “the standard *Pickering* analysis requires modification in that situation.”⁴⁹ The end product of the *NTEU* adjustments “is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis.”⁵⁰

⁴⁷ *City of San Diego v. Roe*, 543 U.S. 77 (2004), *see supra* note 44, involved a San Diego police officer who made sex tapes and sold them on eBay, and was terminated because the activity violated various specific policies and because the police officer continued to sell them after being ordered to stop. *Id.* at 78-79. (Among the policies that the officer was charged with were conduct unbecoming of an officer, outside employment and immoral conduct. *Id.* at 79.) The Ninth Circuit, relying on *NTEU*, had held that the termination violated the First Amendment because the speech was unrelated to the officer’s employment, but the Court said that that reliance was “seriously misplaced.” *Id.* at 81. But rather than simply point out that *NTEU* was for *ex ante* assessment of rules, while the case before the Court was an *ex post* review of a termination, the Court instead focused on whether the speech was detrimental to the police force. *Id.* It is unclear why this consideration was needed to take the case out of *NTEU* analysis. And if any speech that has the potential for being “detrimental” to the police force (or any other public employer) is “related” to the employment, the “unrelated / related” categorization probably has little usefulness.

⁴⁸ *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

⁴⁹ *Id.* at 2472.

⁵⁰ *Id.* In contrast, the dissent claimed that “this Court has applied the same basic approach whether a public employee challenges a general policy or an individualized decision.” *Id.* at 2494 (Kagan, J., dissenting). It further claimed that “[n]othing in [*NTEU*] suggests that the Court defers only to ad hoc actions, and not to general rules, about public employee speech” and that it “would wager a small fortune” that the Court would “dust off *Pickering*” for the next case involving a general rule governing public employee speech. *Id.* For whatever it might be worth, though, several courts of appeals before *Janus* had concluded that *NTEU* set a different standard than *Pickering*, and applied to broad general rules. *Wolfe v. Barnhart*, 446 F.3d 1096, 1006 (10th Cir. 2006) (applying “*NTEU*’s modification of *Pickering*” to a federal regulation prohibiting federal employees from receiving compensation from any outside source for teaching, speaking, or writing that relates to official duties) (citing other circuit court authorities); *Crue v. Aiken*, 370 F.3d 668, 678 (7th Cir. 2004) (posing the question whether the *Pickering* or *NTEU* standard applied in the case before the court, concerning a prohibition on contacting prospective student athletes; “To oversimplify, *Pickering* applies to speech which has already taken place, for which the public employer seeks to punish the speaker. *NTEU* applies when a prior restraint is placed on employee speech.”).

Lower court cases since *Janus* have followed the *ex ante* / *ex post* dichotomy.⁵¹ Two aspects of this division deserve our attention. First, the more stringent *NTEU* standard is usually applied when a fairly specific prohibition regarding core First Amendment expression is involved outside of the workplace, *e.g.*, no involvement in political campaigns.⁵² Rules that apply more common-sense standards, such as “don’t be rude” or “don’t bring discredit to the organization,” tend not to be involved. (The former might prohibit speech outside the scope of First Amendment protection under *Garcetti*.) Indeed, in her *NTEU* concurrence, Justice O’Connor said that she found the *ex post* / *ex ante* distinction useful but that it was no “substitute” for the “case-by-case application of *Pickering*.”⁵³ She saw “little constitutional difference, for example, between a rule prohibiting employees from being ‘rude to customers,’ . . . and the upbraiding or sanctioning of an employee *post hoc* for isolated acts of impudence.”⁵⁴

Second, the Court has never said that the *Pickering* and *NTEU* standards are mutually exclusive. That is, even if a rule violates the First Amendment because it is too broad and sweeping in its derogation of employees’ free speech rights, that does not preclude the employer from disciplining an employee who engaged in conduct that would have violated the improperly promulgated rule. In a recent Third Circuit case involving a rule precluding the wearing of face

⁵¹ See, *e.g.*, *Amalgamated Transit Union Local 85 v. Port Authority of Allegheny County*, 39 F.4th 95, 104 (3d Cir. 2022) (“How we weigh these considerations [*viz.*, the interests of the employee as a citizen and the interest of the state employer in promoting efficient service] depends on whether the employer imposed a prior restraint on speech or disciplined an employee after the fact.”).

⁵² See, *e.g.*, *Guffey v. Mauskopf*, 45 F.4th 442 (D.C. Cir. 2022) (holding that the code of conduct for the Administrative Office of the United States Courts, which prohibited nine different kinds of partisan political expression by the 1100 employees there, including publicly expressing opinions about partisan candidates or political parties or attending a partisan candidate’s campaign event, violated the First Amendment).

⁵³ *United States v. Nat’l Treasury Emples. Union*, 513 U.S. at 481 (O’Connor, J., concurring and dissenting).

⁵⁴ *Id.* See also *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality op.) (noting that a government employer can adopt a rule prohibiting employees from being rude to customers despite the fact that the rule would be too vague if applied to citizenry at large); *id.* at 676 (government agency managers can rely on hearsay to discipline employees for being rude).

masks with political or social messages, and discipline imposed on two employees for breaking the rule, the Court said it would apply both *NTEU* to the rule, and *Pickering* to the discipline.⁵⁵

III.

This section compares current law with the proposed adoption of nonpublic forum analysis.

First, as we saw in the last section, nonpublic forum analysis might be *less* protective of employee speech insofar as that speech is regulated by *ex ante* rules. The Court in *Janus* suggests that the *NTEU* standard is akin to “exacting scrutiny.”⁵⁶ One reasonably could debate whether the Hatch Act has ever been subjected to such exacting scrutiny, or whether such scrutiny even would apply to a broad, general rule like “don’t be rude to the public,” but it certainly seems to be the case that the viewpoint neutrality / reasonableness standard of nonpublic forums is something less than “exacting.” Professor Kozel suggests that a rule precluding any non-work related speech during working hours would fail the reasonableness test, but it does not even seem like a close case under “exacting scrutiny.”⁵⁷

Second, it would not appear that the treatment of “government speech” would change much.⁵⁸ The government can control its own speech whether traditional public employee speech principles or nonpublic forum principles are applied. In the former case, *Garcetti* applies to preclude any application of the First Amendment. In the latter case, expression that is part of the forum’s operation can be controlled by the government.

⁵⁵ *Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cty.*, 39 F.4th 95, 104 (3d Cir. 2022). *See also Guffey*, 45 F.4th at 451 (finding rules prohibiting political participation by employees of the Administrative Office of the United States Courts unconstitutional, but only as applied to the two plaintiffs before the Court; the employer “may believe that employees who do different jobs . . . should be subject to different restrictions.”).

⁵⁶ *Janus*, 138 S. Ct. at 2472.

⁵⁷ Kozel, *supra* note 2, at 606. Professor Kozel suggests that the hypothetical rule would fail the *Pickering* balancing test as well “due to its excessive costs,” *id.*, but it is not clear why he thinks that the *Pickering* balancing test, rather than the *NTEU* standard, would be applicable.

⁵⁸ *Id.* at 600-01.

So, too, speech “entirely unrelated” to the government employment of the speaker should be treated more or less the same under the two analyses. *NTEU* suggests that such unrelated speech is highly protected, and Professor Kozel asserts that such speech “arises outside the employment forum, leaving the government powerless to impose restrictions.”⁵⁹ Unfortunately, though, the cases since *NTEU* have not clarified what speech is “entirely unrelated” to an employee’s job and there does not seem to be anything in nonpublic forum analysis that would help in this regard. If speech that would reflect badly on a government agency (if it were known that the speaker was an employee of that agency) is “related” to the employment – say, speech on the legalization of heroin or polygamy, for example – neither the category itself, nor the move to nonpublic forum analysis, is very helpful.

Finally, there is “viewpoint neutrality.” Professor Kozel believes that there is already an element of “viewpoint neutrality” in the *Pickering* line of cases, and he is correct in that regard.⁶⁰ In *Waters*, the Court specifically held that there was an issue of fact as to whether the employer relied on potentially disruptive speech or other speech.⁶¹ Lower courts have concluded that government agencies motivated by the content of the speech, rather than the likelihood of disruption, have violated the First Amendment.⁶²

That being said, though, “viewpoint neutrality” is definitely limited under current public employee speech doctrine. Employees who hold special positions of trust and confidence may be fired simply for speech based entirely on its viewpoint – a viewpoint different from the viewpoint

⁵⁹ *Id.* at 599.

⁶⁰ *Id.* at 602.

⁶¹ *Waters v. Churchill*, 511 U.S. 661, 681-82 (1994) (plurality op.); *Id.* at 686 (Scalia, J., concurring in the judgment).

⁶² *Locurto v. Giuliani*, 447 F.3d 159, 176 (2d Cir. 2006) (holding that the burden is on the government to show “that the Government acted in response to that likely interference and not in retaliation for the content of the speech.”).

of the employer.⁶³ Professor Kozel recognizes this.⁶⁴ Further, he states that it is reasonable to expect the White House press secretary not to criticize the President.⁶⁵ It may indeed be reasonable, but it is not viewpoint neutral. Professor Kozel does not suggest otherwise or explain how the rule in nonpublic forum doctrine against viewpoint discrimination would apply to the press secretary. One suspects it would not save him from an adverse employment action.⁶⁶

Moreover, it is not entirely clear that a requirement of “viewpoint neutrality” would preclude reliance on audience reaction. In *Forsyth County v. Nationalist Movement*,⁶⁷ the Court concluded that a county ordinance that granted the county administrator discretion to adjust the fee amounts for permits to assemble on public grounds, depending on the expense needed to maintain public order, was unconstitutional. But the Court never said that the ordinance was viewpoint discriminatory. Rather, it said that the “[l]istener’s reaction to speech is not a content-neutral basis for regulation.”⁶⁸ Of course, the Court there did not need to distinguish between content and viewpoint discrimination, given the permits were for assemblies on public grounds (a traditional public forum), where both content and viewpoint discrimination are prohibited. But the Court has not revisited this question in the context of a nonpublic forum.

To be sure, in a different context – the registration of trademarks – the Court has suggested that audience reaction can be equated with viewpoint discrimination. In *Matal v. Tam*,⁶⁹ two four-person pluralities both concluded that a provision of the Lanham Act that

⁶³ Elrod v. Burns, 427 U.S. 347 (1976).

⁶⁴ Kozel, *supra* note 2, at 608 (“officials at the highest levels of government receive weaker constitutional protection than other public employees.”).

⁶⁵ *Id.*

⁶⁶ In his earlier article, Professor Kozel made a specific exception to his general rule (that a public employer should be precluded from using an employee’s “outside speech” as a basis for an adverse employment action) for policymaking employees. Kozel, *supra* note 4, at 1048-49.

⁶⁷ Forsyth Cty v. Nationalist Movement, 505 U.S. 123 (1992).

⁶⁸ *Id.* at 134.

⁶⁹ *Matal v. Tam*, 582 U.S. 218 (2017) (holding that rejecting registration of “The Slants” for the name of a rock band pursuant to a provision of the Lanham Act violated the First Amendment).

precluded registration for marks that disparage persons was viewpoint discriminatory and thus violated the First Amendment.⁷⁰ Justice Alito's opinion asserted that Court's cases "use the term 'viewpoint' discrimination in a broad sense," and that "[g]iving offense is a viewpoint."⁷¹ Justice Kennedy's opinion more explicitly noted that the provision authorized rejecting registration of a mark was "based on the expected reaction of the applicant's audience."⁷² Two years later, in *Iancu v. Brunetti*,⁷³ the Court held that a similar provision of the Lanham Act, prohibiting registration for "immoral or scandalous matter," also violated the First Amendment.⁷⁴ The Court noted that, in determining the applicability of the prohibition, the patent office asked "whether the public would view the mark as 'shocking to the sense of truth, decency, or propriety.'"⁷⁵

So, in the trademark context, reliance on expected audience reaction can be viewpoint discriminatory. Arguably, that context is distinguishable from the limited public forum context or the public employee context because the audience reaction does not have an obvious effect on a government program.

What about the nonpublic forum context, as Professor Kozel has defined it? The suggested move from current doctrine to nonpublic forum analysis appears to be significantly motivated by the elimination of the heckler's veto.⁷⁶ Does the rule against viewpoint discrimination really eliminate audience reaction from the equation in nonpublic fora?

⁷⁰ *Id.* at 247.

⁷¹ *Id.* at 243 (Alito, J., plurality op.). The Alito opinion specifically characterized limited public forum cases as "[p]otentially more analogous" than subsidized speech cases, but noted that the limited public forum context still prohibited viewpoint discrimination. *Id.*

⁷² *Id.* at 249 (Kennedy, J., concurring). *See also id.* at 250 ("The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience."); *id.* ("a speech burden based on audience reactions is simply government hostility and intervention in a different guise").

⁷³ *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (holding that refusal to register FUCT as the name of a clothing line pursuant to a Lanham Act provision precluding registration of scandalous or immoral marks violated the First Amendment).

⁷⁴ *Id.* at 2302.

⁷⁵ *Id.* at 2300.

⁷⁶ Kozel, *supra* note 2, at 603 ("A commitment to viewpoint neutrality . . . entails rejection of the idea that audience reaction to speech is a legitimate basis for suppression.").

Perhaps not. The Court has held that a political candidate with little public support can be kept out of a debate sponsored by a state-owned public television station.⁷⁷ Thus, a widely-despised reactionary candidate with only 1% support in the polls can be precluded from the debate (the nonpublic forum), and it would appear that her exclusion is based upon a heckler's veto or the "audience" (*i.e.*, general public) reaction to her views. Nor would that conclusion change if the public were merely indifferent to the candidate rather than actively opposed. We might not call the indifferent public "hecklers," but their indifference is surely a "reaction" (or its absence).

Similarly, the Court has held that a "political" charity can be kept out of the Combined Federal Campaign that the federal government organizes to facilitate charitable contributions from federal employees.⁷⁸ In examining whether the program was, in fact, engaging in "viewpoint-based discrimination," the Court noted that the federal government "contends that controversial groups must be eliminated from the CFC to avoid disruption and ensure the success of the Campaign," and "agree[d] that these are facially neutral and valid justifications for exclusion from the nonpublic forum created by the CFC."⁷⁹ It did note, however, that the concern about controversy and disruption had to be genuine and could not be a pretext for hostility to the excluded groups' viewpoint.⁸⁰ Sound familiar? In both public employee speech doctrine and nonpublic forum doctrine, "viewpoint discrimination" appears to be only hostility towards a

⁷⁷ *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998) ("It is . . . beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest.").

⁷⁸ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 813 (1985).

⁷⁹ *Id.* at 812. *See also id.* at 811 ("Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.").

⁸⁰ *Id.* at 812-13 (remanding for further review of that issue).

point of view *even without* an adverse audience reaction. Reacting to actual or anticipated controversy or adverse audience reaction seems to be viewpoint neutral.⁸¹

Thus, a mere rule against “viewpoint discrimination,” as it is understood in the context of nonpublic forums, may not be a sufficient barrier to eliminate reliance upon “audience reaction” as a justification for imposing adverse employment actions on public employee speech.

Does the “reasonableness” requirement of nonpublic forums pick up the slack? Professor Kozel suggests that speech might be used to determine if a person is qualified for a position or harbors bias against some of the individuals with whom she interacts.⁸² Further, he thinks the “reasonableness” inquiry can easily accommodate many of the considerations normally falling within the *Pickering* aegis: does the speech harm close working relationships or impede the regular operation of the enterprise?⁸³ Finally, he believes that the reasonableness inquiry requires some significant deference to the managers of government workplaces.⁸⁴

Can one give deference to a managers’ opinion about whether speech can harm close working relationships and still “reject[] listener reaction as a basis for restriction”?⁸⁵ Is it not precisely because of co-workers’ suspected reactions to the speech that a manager might draw the

⁸¹ See also *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 502 (9th Cir. 2012) (holding that the sides of buses used for advertisements is a nonpublic forum and that the county operating the buses could refuse to accept ads regarding the Middle East conflict due to the reaction that the ads could cause; “the ‘heckler’s veto’ concerns . . . would be troubling in a traditional or designated public forum, but they do not carry the same weight in a limited public forum. Excluding speech based on ‘an anticipated disorderly or violent reaction of the audience’ is a form of content discrimination, generally forbidden in a traditional or designated public forum. . . In a limited public forum, however what’s forbidden is viewpoint discrimination, not content discrimination.”). The county had initially accepted an anti-Israel ad, but a local TV station broadcast a story about the ad, a large number of emails were sent to the call center (some threatening violence, some expressing concern over others being violent), and a pro-Israeli group submitted its own ad. Thus, the county was able to assert more plausibly that it was engaged in “content” rather than “viewpoint” discrimination by precluding any ads about the Middle East from either side, but it is hard to argue that the decision was not motivated by concerns over audience reaction to the initial anti-Israel ad.

⁸² Kozel, *supra* note 2, at 607-08.

⁸³ *Id.* at 612.

⁸⁴ *Id.* at 613.

⁸⁵ *Id.*

conclusion that close working relationships would be harmed? An adverse employment decision based upon an opinion that racial minorities would “categorially distrust”⁸⁶ a government agency that employed a racist can be thought of as related to the employee’s ability to do the job in question. But if the employee has been doing his job without a problem for years, it is hard to get around the conclusion that this is just dressing up public concern and audience reaction in different clothing.⁸⁷

So, at the end of the day, a move to nonpublic forum analysis does not seem to accomplish the goal of eliminating audience reaction as a basis for employee discipline. Viewpoint neutrality does not eliminate reliance on audience reaction, and the reasonableness inquiry almost invites it. Are there any other options?

IV.

If it is reasonable for a public employer to assess whether an employee is qualified for the position, and if speech might be used to make that assessment, then a reasonableness requirement is not going to make much difference in protecting public employee speech. But we might want to take a step back and ask whether outside speech *should* be a consideration in determining qualifications. Professor Kozel acknowledges that an argument can be made that a teacher should be insulated from adverse employment action for offensive speech outside his employment

⁸⁶ *McMullen v. Carson*, 754 F.2d 936, 939 (11th Cir. 1985). *McMullen* upheld the firing of a temporary full-time clerical employee of the Sheriff’s office in Jacksonville, Florida who was identified publicly as a recruiter for the Klan. The case was cited, seemingly with approval, in the Supreme Court’s decision in *Rankin v. McPherson*, 483 U.S. 378, 391 n.18 (1987). The court in *McMullen* held that those who work in law enforcement “are subject to greater First Amendment restraints than most other citizens” (*McMullen*, 754 F.2d at 938), but police forces are not the only government agencies who deal with the public, much less make decisions that significantly affect the public.

⁸⁷ *Mr. McMullen* was apparently a model employee. *McMullen*, 754 F.2d at 937. (“Plaintiff performed his duties in exemplary fashion. He was courteous, conscientious, and got along well with his fellow records section employees.”).

provided that his job performance is satisfactory.⁸⁸ Professor Whittington, addressing only the free speech of academics, takes up that argument and asserts that “extramural speech unrelated to a professor’s area of scholarly expertise should be entirely irrelevant to their employment status.”⁸⁹

Professor Whittington is focused on academia, but it is not clear why the rest of us should be and one could make the more general argument set forth by Professor Kozel in his earlier article. It is more than passing strange that the competence and qualifications of a public employee who has been performing satisfactorily or better for years might be called into question by a tweet. Is that really “reasonable”? By all accounts, the Klan recruiter in *McMullen v. Carson* was doing a fine job in the Sheriff’s office.⁹⁰ Should his ability to keep his job have been different from the rights of a teacher at a university? Academic freedom includes the ability to speak freely about one’s area of expertise, but it is hardly clear that academics’ First Amendment right to speak outside their area of expertise should be any greater or smaller than other public employees.⁹¹

And yet, one suspects that it would not be so easy just to ignore outside speech.⁹² Consider a few cases involving City University of New York in the 1990s. In one, a philosophy professor (Michael Levin), in a book review published in an Australian periodical and in a letter to a professional periodical, asserted that “the average black is significantly less intelligent than the average white.”⁹³ Negative reaction naturally followed, and the CUNY administration created

⁸⁸ Kozel, *supra* note 2, at 604. Professor Kozel’s recent article states “we will also address” this argument (*id.*), but I confess that I am unable to determine where it does so. As noted previously, *supra* note 5, his earlier article develops this argument at length.

⁸⁹ Whittington, *supra* note 2, at 32. Professor Whittington defines “extramural speech” as “[p]ublic speech by university professors.” *Id.* at 2.

⁹⁰ *See McMullen*, 754 F.2d at 937.

⁹¹ More generally, public colleges are not the only public institutions interested in pursuing truth and that would benefit from the exchange of ideas. One would hope that most governmental agencies would benefit from hearing different points of view.

⁹² Kozel, *supra* note 4, at 1051 (“I must confess that I am not sure the internal/external model is ready for adoption.”).

⁹³ *Levin v. Harleston*, 770 F. Supp. 895, 902-03 (S.D.N.Y. 1991), *aff’d in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992).

“shadow” classes (the same course taught by different instructors) to the introductory course that the professor taught and formed a committee to investigate the possible limits of academic freedom (which ultimately concluded that disciplinary action should not be taken against a professor for outside speech, including against the plaintiff).⁹⁴ Despite these seemingly modest adverse actions taken by CUNY, the courts there found that the professor’s First Amendment rights had been violated despite the controversy created by his remarks.⁹⁵

In the second matter, the Chair of the Black Studies Department (Leonard Jeffries) gave a speech in which he made various remarks interpreted as anti-Semitic, including “that ‘rich Jews’ had financed the slave trade,” and that Jews and Mafia figures were portraying blacks negatively in Hollywood films, and referred to one CUNY official as “the ‘head Jew at City College.’”⁹⁶ CUNY replaced Professor Jeffries as Chair of the Black Studies Department, and the lower courts, despite some reservations about the speech itself, initially found that this violated his First Amendment rights.⁹⁷ The Supreme Court vacated and remanded that judgment for further consideration in light of *Waters v. Churchill*.⁹⁸ On remand, the Second Circuit concluded that its prior decision had relied on a rule of law that an employer can punish speech on a matter of public concern only if the speech actually disrupted the employer’s operations, and that four Justices in *Waters* had concluded that courts should give deference to reasonable predictions of likely

⁹⁴ Levin v. Harleston, 966 F.2d 85, 89-90 (2d Cir. 1992). In addition, there were a number of efforts by activist students to disrupt plaintiff’s class, about which the administration basically did nothing. Although condemning this “appalling behavior,” *id.* at 90, the court of appeals ultimately concluded that the administration’s inaction was not itself a violation of the plaintiff’s constitutional rights.

⁹⁵ *Id.* at 90-91.

⁹⁶ Jeffries v. Harleston 21 F.3d 1238, 1242 (2d Cir. 1994), *vacated and remanded*, 513 U.S. 996 (1994); Jeffries v. Harleston, 828 F. Supp. 1066, 1091 (S.D.N.Y. 1993), *aff’d in part, vacated in part*, 21 F.3d 1238 (2d Cir. 1994), *vacated and remanded*, 513 U.S. 996 (1994).

⁹⁷ Jeffries, 21 F.3d at 1248. The district court stated that “a number of Dr. Jeffries remarks . . . were vulgar, repugnant, and reprehensible . . .” (Jeffries, 828 F. Supp. at 1090); the Second Circuit stated that “Jeffries made several comments about Jews that were hateful and repugnant” (Jeffries, 21 F.3d at 1242). *See also* Jeffries, 21 F.3d at 1245 (“the tenor of Jeffries’ speech was less than ingratiating and . . . its content affronted many who heard it, or at least heard about it.”).

⁹⁸ Harleston v. Jeffries, 513 U.S. 996 (1994).

disruption.⁹⁹ Because the jury had found that the defendants were motivated by a reasonable expectation that the speech would harm CUNY, the Second Circuit reversed its earlier position and found for the defendants.¹⁰⁰

In both cases, the courts found that the professors had been doing their jobs,¹⁰¹ just as the Eleventh Circuit in *McMullen v. Carson* had concluded that the Klan recruiter was a good employee. If speech, as Professor Kozel suggests, should be used only for the purpose of assessing qualifications, then should outside speech unrelated to the jobs in question really outweigh years of competent or even exceptional performance?¹⁰²

Moreover, a rule that outside speech, at least by an experienced employee, could not be the basis for any adverse employment action might have the salutary effect of disincentivizing efforts to undermine the employee. After all, if a Twitter storm will not get a public employee fired, perhaps it would not be worth doing.

And yet, one suspects that the horses already have escaped, and that public reaction would not be totally muted if the speech involved in the CUNY cases were repeated today, or if it were found that a Klan member was being employed in some governmental capacity.¹⁰³ At the very

⁹⁹ *Jeffries v. Harleston*, 52 F.3d 9, 12-13 (2d Cir. 1995).

¹⁰⁰ *Id.* at 15.

¹⁰¹ *Jeffries*, 21 F.3d at 1242 (describing various reports that Jeffries had been carrying out his duties as Chair of the department); *Levin*, 966 F.2d at 88 (“[N]one of Professor Levin’s students ever had complained of unfair treatment on the basis of race.”); *Levin*, 770 F. Supp. at 907 (Dean’s letter sent to students in Levin’s class upon creation of shadow classes states “that he was ‘aware of no evidence suggesting that Professor Levin’s views on controversial matters have compromised his performance as an able teacher of Philosophy who is fair in his treatment of students.’”).

¹⁰² Only one of the three writings at issue in *Levin*, a letter to The New York Times responding to an editorial, even touched upon philosophy (*Levin*, 770 F. Supp. at 901), and it seems unlikely that its discussion of John Rawls was particularly controversial. Professor Jeffries’ speech was generally about the New York public school curriculum’s treatment of minorities (*Jeffries*, 21 F.3d at 1241), and nothing in any of the opinions in the case suggested it was connected to what he taught at CUNY, much less his role as the Chair of the Black Studies Department.

¹⁰³ In Professor Kozel’s earlier article, he stated that adoption of his “internal/external model,” providing much greater protection for speech outside the workplace, would require a different outcome than the one actually reached in *Melzer v. Board of Education*, 336 F.3d 185 (2d Cir. 2003). Kozel, *supra* note 4, at 1045. Melzer was a schoolteacher who also a member, and advocate for the policies, of the North American Man/Boy Love Association. When this fact became known to the public, and parents demanded his removal, he was fired, and the courts upheld

least, such speech would create a distraction for the university or agency that it would have to devote resources to, and thus in some way diminish its ability to pursue its educational (in the case of the university) or other mission. In my view, that price should be paid, just as a public university or agency must pay the additional security costs needed to protect a controversial speaker. But until we are willing to pay that price, the prospects of eliminating “audience reaction” to public employee speech from employment decisions do not appear bright to me.

his firing. This may explain Professor Kozel’s ambivalence regarding the internal/external model. *See* Kozel, *supra* note 92.