Constitutional Values in the Workplace

Pauline T. Kim

Abstract

Observing the changing law of work twenty years ago, Joseph Grodin argued that its evolution could be understood “as a bringing of constitutional values to the private sector workplace.” At the time, public employees clearly enjoyed the protection of certain basic rights because the Constitution was understood to restrain the actions of government employers. With unions in decline, the situation of workers in the private sector was more tenuous, but statutory and common law developments suggested that lawmakers were beginning to bring constitutional values to bear in the private workplace. Grodin’s argument was both a descriptive and a normative one—he predicted that constitutional values would increasingly become relevant in private sector employment and he argued that such a transplanting of values was appropriate and desirable. This paper revisits Grodin’s arguments. It concludes that his predictive claim proved not to be true. Not only has the process of bringing constitutional values to the private workplace slowed or even halted, but a strange sort of reversal is occurring. Instead of constitutional protections extending into the private sector, the analogy between public and private workplaces is now being used to justify cutting back the constitutional rights of public employees. This trend is most apparent in the Supreme Court’s recent privacy cases, Quon and Nelson, but can be seen in other areas in which the Court has addressed public employees’ constitutional rights as well. This paper also addresses the normative aspect of Grodin’s argument, asking whether the initial analogy drawn between public and private workplaces was mistaken, and what is the proper relationship between work and the constitution.