

DISCHARGE OF NONCIVIL SERVICE PUBLIC EMPLOYEES FOR POLITICAL ACTIVITY: THE SEARCH FOR A MORE EQUITABLE TEST

A large percentage of the 15.7 million government workers¹ in the United States are noncivil service public employees.² Thus, they lack statutory³ protection of their first amendment⁴ rights of political affilia-

1. See Bureau of Labor Statistics, *U.S. Dep't of Labor Employment and Earnings* 45 table B-1 (Feb. 1984). Of this number, 2,760,000 people worked for the federal government, and state and local governments employed 12,947,000. *Id.*

2. A noncivil service employee is not hired through an established civil service program at the federal or state level. This Note focuses on state and local noncivil service public employees, including teachers, deputy sheriffs, public defenders, road workers, and nonelected public officials. See *infra* note 3 (description of the Hatch Act). Examination of the statutory regulation of public employees is beyond the scope of this Note.

3. The Hatch Act, 5 U.S.C. § 7324 (1982), proscribes federal civil service employees' political activities. The Hatch Act prohibits covered employees from actively participating in political management or political campaigns, 5 U.S.C. § 7324(a)(2) (1982). The Act also bars employees from using official authority or influence to interfere with or affect the results of an election. 5 U.S.C. § 7324(a)(1) (1982). For a brief discussion of the Hatch Act, see *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1651-60 (1984) [hereinafter cited as *Developments*].

The Hatch Act survived a first amendment challenge in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973). See also *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding a state version of the Hatch Act); *Wachsmann v. City of Dallas*, 704 F.2d 160 (5th Cir.), *cert. denied*, 464 U.S. 1012 (1983) (upholding restrictions on municipal employees).

4. The first amendment reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. The first amendment was made applicable to the states through the fourteenth amendment in *Fiske v. Kansas*, 274 U.S. 380 (1931). See generally Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) (general discussion on freedom of expression and the first amendment).

tion,⁵ political speech,⁶ and political participation.⁷ As an employer, the state often limits the political activities⁸ of public employees⁹ to operate without unnecessary disruption¹⁰ and to be more responsive to the electorate.¹¹ Public employees who engage in political activity may hinder the state's ability to fulfill these objectives. A serious disruption may result in dismissal.¹² However, discharging¹³ a public employee for political activity raises serious constitutional questions.¹⁴

5. Political affiliation is the act of belonging to or identifying with a political party or candidate. *See* *Elrod v. Burns*, 427 U.S. 347, 350 (1976).

6. Political speech is speech about public issues, including criticism of the means or methods by which the state carries out its duties and policies. *See, e.g., Connick v. Myers*, 461 U.S. 138, 146 (1983).

7. Political participation is activity in a political campaign or election. *See, e.g., McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984) (en banc).

8. For the purposes of this Note, the term "political activities" encompasses affiliation, speech, and participation. These areas are treated as separate and distinct categories.

9. *See infra* notes 10-12 and accompanying text.

10. *See* *Pickering v. Board of Education*, 391 U.S. 563, 568-73 (1968) (disciplinary action may be necessary to preserve the efficiency of the services performed by the agency); *Connick v. Myers*, 461 U.S. 138, 150 (1983) (government's interest lies in the effective and efficient fulfillment of its responsibilities to the public).

11. *See* *Elrod v. Burns*, 427 U.S. 347, 367 (1976) (plurality opinion) (the state may discharge employees to prevent obstruction of policies presumably sanctioned by the electorate).

12. *See supra* notes 10-11 and accompanying text; *Meehan v. Macy*, 392 F.2d 822, 833 (D.C. Cir. 1968) (uninhibited speech by government employees often has an inefficient, disharmonic, or chaotic effect upon a government office).

13. For the purposes of this Note, the terms "discharge" or "dismissal" refer to any adverse employment action, including refusal to hire, failure to promote, and termination of employment. *See, e.g., MacFarlane v. Grasso*, 696 F.2d 217, 223 (2d Cir. 1982) (refusal to hire); *Walters v. Chaffin*, 684 F.2d 833, 836, 837 n.9 (11th Cir. 1982) (demotion and transfer); *Bickel v. Burkhart*, 632 F.2d 1251, 1255-56 (5th Cir. 1980) (refusal to promote); *Swilley v. Alexander*, 629 F.2d 1018, 1021 n.3 (5th Cir. 1980) (letters of reprimand); Note, *First Amendment Limitations on Patronage Employment Practices*, 49 U. CHI. L. REV. 181 (1982) (arguing that "all adverse personnel actions taken because of an employee's political affiliation are unconstitutional"). *But see* *DeLong v. United States*, 621 F.2d 618, 624 (4th Cir. 1980) (holding that adverse employment action must be "tantamount to outright dismissal" before employee has cause of action).

14. *See* *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). The *Perry* court held that an individual has no right to a valuable public benefit such as government employment. Although the government may deny the benefit for virtually any reason, it cannot infringe on the individual's constitutionally protected interests. *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1978 §§ 12-5, 12-23; Note, *Public Employees and the First Amendment: Connick v. Myers*, 15 LOY. U. CHI. L.J. 293 (1984); Note, *Constitutional Law—Civil Rights—A Question of Free Speech for Public Employees*, 30

The Supreme Court follows two approaches to determine if the dismissal of a public employee for engaging in political activity violates the first amendment.¹⁵ If a public employee's discharge is based on political affiliation, the Court applies a categorical test to distinguish between protected and unprotected activities.¹⁶ For a dismissal due to the exercise of political speech, the Court applies an ad hoc balancing test to weigh and evaluate the competing interests involved.¹⁷ So far, the Supreme Court has not articulated a standard to apply to cases involving discharge for political participation. Since participation has attributes of both political affiliation and political speech,¹⁸ lower courts disagree regarding which test should apply to political participation discharge cases.¹⁹

In general, the categorical approach favors the employee,²⁰ while the

WAYNE L. REV. 1309 (1984); Note, *First Amendment Limitations on Patronage Employment Practices*, 49 U. CHI. L. REV. 181 (1982).

15. See *Elrod v. Burns*, 427 U.S. 347 (1975) (use of a categorical test when discharge involves political affiliation); *Connick v. Myers*, 461 U.S. 138 (1983) (use of balancing test when discharge involves political speech).

16. A categorical test involves the articulation of a definitive standard separating protected from unprotected activity. For discussions of the formulation of categorical standards, see Ely, *Flag Desecration: A Case Study in the roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1500-02 (1975); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1434-35 (1962); Nimmer, *The Right to Speak from Time to Time: First Amendment Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942-48 (1968).

The Supreme Court first articulated a categorical approach to analyzing political affiliation dismissal in *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion) and later affirmed the categorical standard in *Branti v. Finkel*, 445 U.S. 507 (1980). See *infra* notes 133-135 and accompanying text (discussion of categorical analysis).

17. See *supra* note 16 (articles comparing categorical and ad hoc balancing tests). See generally *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983). See *infra* notes 113-116 and accompanying text (discussion of ad hoc balancing).

18. Political participation, like political speech, involves overt acts by the employee which have the capacity to disrupt the smooth operation of government. Political participation also involves a clash of opposing political beliefs similar to affiliation cases.

19. See, e.g., *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984) (en banc); *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984) (cases using ad hoc balancing when employee is discharged for political participation). But see *Shakman v. Democratic Org. of Cook County*, 722 F.2d 1307 (7th Cir.), cert. denied sub. nom., *Lindsey v. Kelly*, 464 U.S. 916 (1983); *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982) (political participation discharge analyzed under the categorical standards developed for political affiliation discharge in *Elrod* and *Branti*).

20. See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). See also Note, *McBee v. Jim Hogg County: On Balance a Risky Business*, 45 LA. L. REV. 1095, 1099 (1985) ("[T]he Supreme Court's assertion that 'political belief

ad hoc test benefits the state.²¹ Thus, the test chosen by the court essentially determines the outcome of each case.²² Courts favor the ad hoc balancing test in political activity discharge cases because of its flexibility.²³

This Note considers what standard courts should use to determine whether a state's discharge of a public employee for political participation violates the first amendment. Part I summarizes the historical development of public employees' first amendment rights through the landmark *Pickering* decision. Part II focuses on the emergence of the categorical and ad hoc balancing tests after *Pickering* and courts' preference for ad hoc balancing. Part III explores the strengths and weaknesses of the ad hoc balancing test currently applied, scrutinizing the test's pro-state bias. Part IV examines possible alternatives and refinements to the ad hoc approach, engendering a more equitable balance between the needs and concerns of both the employee and the state.²⁴

I. THE HISTORICAL DEVELOPMENT OF PUBLIC EMPLOYEES' FIRST AMENDMENT RIGHTS

The first amendment is based on the premise that state suppression of political thought, speech, and activity conflicts with the democratic system of government.²⁵ The last century witnessed an ebb and flow in

and association constitute the core of those activities protected by the First Amendment' results in the scales being tipped overwhelmingly in the employee's favor, unless the State can meet the narrow *Elrod-Branti* exception.") (footnote omitted) [hereinafter cited as *Risky Business*].

21. See *Connick v. Myers*, 461 U.S. 138 (1983); *Boals v. Gray*, 775 F.2d 686 (6th Cir. 1985); *Wachsman v. City of Dallas*, 704 F.2d 160 (5th Cir.), cert. denied, 464 U.S. 1012 (1983); *Wagner v. Hawkins*, 634 F. Supp. 751 (W.D. Ark. 1986).

22. See *supra* note 21 and accompanying text (application of balancing test favoring interest of the state); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976) (application of categorical standard favoring employee).

23. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983) (balancing test applied in instance of political speech); *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984) (en banc) (balancing test applied in instance of political participation); *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984) (same). See also Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 447 ("[T]he balancing test has come to represent the routine approach of the Burger Court to first amendment issues.").

24. Another factor courts consider are the concerns and needs of the public. See *Developments, supra* note 3, at 1739. When weighing the employer's and employee's competing concerns, the court implicitly considers the public interest.

25. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (political speech is "at the heart of the First Amendment's protection"); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (political expression is a "most fundamental First

the constitutional protection of public employees' political activity.²⁶ Courts thus examine the extent to which the government regulates political activity by using its power to hire and fire employees.²⁷ Absent their status as public employees, the first amendment would protect these individuals from government sanction for political participation.²⁸

More than thirty years ago, the Supreme Court upheld the traditional view that public employment is a privilege, not a right.²⁹ Therefore, a state employer could impose any condition on employment, even demanding that the employee relinquish his constitutional rights.³⁰ Courts rationalized this by holding that dissatisfied public employees could work elsewhere.³¹

Amendment activity"); *Speiser v. Randall*, 357 U.S. 513, 531 (1958) (Black, J., concurring); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis and Holmes, concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes and Brandeis, dissenting). See also A. MEIKELJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (contending that the general purpose of the first amendment is democratic self-government).

26. One commentator distinguishes three eras of Supreme Court analysis regarding public employee first amendment rights: the "private sector" era, the "individual rights" era, and the "public service" era. Each falls within a certain time frame and contains one or more seminal cases which categorize the Court's attitude toward public employees during that time. See *Developments*, *supra* note 3, at 1739.

27. See Finck, *Non Partisan Speech in the Police Department: The Aftermath of Pickering*, 7 HASTINGS CONST. L.Q. 1001 (Summer 1980) [hereinafter cited as *Police Department*].

28. See *supra* note 3 and accompanying text (reach of the first amendment).

29. *Adler v. Board of Educ.*, 342 U.S. 485 (1952) (upholding New York laws prohibiting members of certain subversive groups from teaching in public schools). The *Adler* Court compared public employment to private employment, holding that public employees should not be able to claim any extra rights or protection merely because they worked for the government. Moreover, the Court viewed public workers as at-will employees. Therefore, the state had the same prerogatives as a private employer to hire or fire for almost any reason.

30. *Id.* at 492.

31. The most famous case demonstrating the state's power to set conditions of employment under the traditional view is *McAulliffe v. Mayor of New Bradford*, 155 Mass. 216, 29 N.E. 517 (1892). Justice Holmes articulated the power of the states in his oft-quoted holding:

[A citizen] may have a constitutional right to talk politics, but he has no constitutional right to be a [state] employee. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech, as well as idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

Id. at 220, 29 N.E. at 517-18.

During the 1950's, however, the Supreme Court began expanding the rights of public employees by restricting the state's power to limit their political activities.³² This new "doctrine of unconstitutional conditions" meant that even in the absence of a right to public employment, the government may not force an individual to choose between her job and her constitutional rights, unless the intended government action would be constitutional against nonpublic employees.³³

The Court's expansion of public employee first amendment protection culminated in the 1968 landmark decision of *Pickering v. Board of Education*.³⁴ In *Pickering* the Supreme Court prohibited the government from compelling its employees to surrender the first amendment rights they would otherwise enjoy as citizens.³⁵ Recognizing public employees' unique position to observe and comment on how government functions, the Court found the ability of public employees to speak freely on matters of government, without fear of retaliatory discharge, essential to the democratic system.³⁶ The Court reasoned that the threat of dismissal has a chilling effect on employees releasing perti-

32. See, e.g., *Keyishan v. Board of Regents*, 385 U.S. 589, 605 (1967) (rejecting the premise that "public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action"); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (invalidating a state statute which required public employees to take a loyalty oath denying past affiliation with Communists).

33. The Supreme Court first articulated the doctrine of unconstitutional conditions in *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926). Though *Frost* was not a public employment case, the doctrine's potential of encompassing all areas of state activity is evident:

It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.

Id. at 593-94. For further discussion see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-49 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

34. 391 U.S. 563 (1968). *Pickering* involved the dismissal of an Illinois teacher for writing a letter to a local newspaper in which he criticized the local school board's revenue raising proposals and the allocation of funds between the educational and athletic programs of the schools. The school board dismissed *Pickering* because it viewed the letter as disruptive and detrimental to the operation of the school district. *Id.* at 564.

35. *Id.* at 568. The first amendment does not apply to private employers, only to the state and federal governments. See *supra* note 4 (first amendment).

36. 391 U.S. at 572.

ment information to the public.³⁷

The Court recognized, however, the state's special interest in regulating the political activity of its employees³⁸ because of the need to promote efficiency and cohesiveness.³⁹ Certain political activities by employees may disrupt the work environment, impede the distribution of government services, and hinder formulation of government policy.⁴⁰ The *Pickering* Court used a balancing test⁴¹ to weigh the employee's interests in communicating issues of public concern against the state's interest in maintaining an efficient and cohesive work environment.⁴² The use of such an open-ended test, however, created confusion and debate over: (1) reconciling the rights and concerns of the public employee with those of the state; and (2) the weight given to the parties' interests in varying political activity.⁴³

37. *Id.* at 574 (stating that "threat of dismissal from public employment is nonetheless a potent means of inhibiting speech").

38. 391 U.S. at 568. The Court found it essential, however, that public employees "be able to speak out freely on such questions without fears of retaliatory dismissal." *Id.* at 572. The Court, therefore, implied that a public employee must be willing to inform the public of deficiencies in government departments only when he is free from the threat of dismissal or sanction.

39. 391 U.S. at 568.

40. *Id.*

41. *Id.*

42. *Id.* The *Pickering* Court refused to delineate a generally applicable standard to judge future conflicts. Noting the varied factual circumstances in which free speech conflicts arise, the Court found it futile to create a rigid standard. Cases involving political speech, therefore, depend on identifying and weighing competing interests on a case-by-case basis. 391 U.S. at 569. In the *Pickering* case, the employer's interests included maintaining discipline by immediate superiors, keeping harmony among co-workers, fostering personal loyalty and confidence, promoting efficiency in government operations, and the ability to rebut false statements made by governmental employees without undue difficulty. *Id.* at 569-74. On the employee's side, the Court examined whether the statement involves a matter of legitimate public concern, whether the speech was made in a public context, and whether the employee would have an informed opinion on the subject. *Id.* at 569-73. Notably, most of the interests considered by the *Pickering* Court protect the public as a whole, rather than the individual employee. See *infra* notes 163-68 and accompanying text (interest of the public considered in the ad hoc balance).

43. See, e.g., *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984) (en banc) (complexity of classifying activity leads to development of activity "spectrum"); *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984) (rejecting the *McBee* spectrum and proposing a two part activity test); *Hughes v. Whitmer*, 714 F.2d 1407, 1419-23 (8th Cir. 1983) (applying *Connick* to police officers); *Egger v. Phillips*, 710 F.2d 292, 314 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983) (conflicts between court decisions leads to confusion); *Shaw v. Board of Trustees*, 549 F.2d 929, 932-34 (4th Cir. 1976) (difficulty in distin-

The Court has since retreated from *Pickering's* expansion of public employee rights.⁴⁴ In recent years, the Court's focus has changed from protecting the employee⁴⁵ to enhancing the state's rights as employer.⁴⁶ Moreover, the Court's concern lies with the state's ability to provide essential public services in an efficient, cost-effective manner.⁴⁷ This new emphasis favors the claims of the state as the administrator of such services.⁴⁸

II. AFTER PICKERING—DIVISION AND UNCERTAINTY

Political speech concerns public issues, including criticism of the state's methods of carrying out its duties and policies.⁴⁹ Political participation is the participation in a political campaign.⁵⁰ Political affiliation is simply the act of belonging to or identifying with a political party or candidate.⁵¹ Uncertainty about which test, categorical or ad

guishing "pure speech" from other political activity); *Police Department, supra* note 27, at 1026 (failure by courts to complete balancing test diminishes the test's value).

44. See *Developments, supra* note 3, at 1748. The Court has refined the *Pickering* test considerably over the past 20 years. In *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), the Court held that if a plaintiff demonstrates that her conduct was constitutionally protected, and if the conduct was a substantial factor behind an employer's disciplinary action, the employer can escape liability by showing that it would have taken the same action even in absence of the plaintiff's protected activity. *Id.* at 287. Also, in *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979) the Court held that when a government employee personally confronts his immediate supervisor, the time, place, and manner in which the employee spoke are relevant to the *Pickering* ad hoc balance. *Id.* at 415 n.4.

45. *Developments, supra* note 3, at 1739 (Supreme Court now places a "heavy emphasis on the importance of protecting the public interest in the efficient provision of governmental services").

46. *Id.*

47. See, e.g., *Connick*, 461 U.S. at 151 (state has a prerogative to remove employee whose conduct hinders efficient operation of office) (citing *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974)).

48. See, e.g., *Connick*, 461 U.S. at 151-52 (observing that "when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate"); *Arnett*, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (government, as an employer, must be afforded wide discretion over management of personnel and internal affairs). See also *supra* note 21 (cases where ad hoc balancing favors state interests).

49. *Connick*, 461 U.S. at 146.

50. See Note, *Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 COLUM. L. REV. 558, 568 n.72 (1985) [hereinafter cited as Note].

51. See, e.g., *Elrod*, 427 U.S. at 350.

hoc balancing, to apply following the discharge of a public employee for engaging in one of these activities has led to extensive litigation.⁵² During the twenty years since *Pickering*, courts continue to struggle with this problem.⁵³

While the Supreme Court decided the applicable tests for two categories, the standard for political participation remains undecided.⁵⁴ Moreover, commentators and lower courts criticize the vagueness and inconsistencies in the standards regarding discharge for political speech and political affiliation.⁵⁵

A. Discharge for Political Affiliation

A patronage is the termination of a public employee because of the employee's political affiliation.⁵⁶ In this type of dismissal, the Supreme Court applies the categorical⁵⁷ rather than the ad hoc balancing test.⁵⁸ In *Elrod v. Burns*,⁵⁹ the Court first announced this standard, holding that the government may dismiss a public employee solely for political affiliation only if the employee holds a position of confidence and policy making within the administration.⁶⁰ The Court reasoned that the state

52. See TRIBE, *supra* note 14, § 12-2 at 583; Note, *supra* note 50, at 566.

53. See, e.g., *Wagner v. Hawkins*, 634 F. Supp. 751 (W.D. Ark. 1986) (court used both the categorical *Elrod/Branti* test and the ad hoc *Pickering/Connick* test). *Id.* at 755. See also *supra* note 19 and accompanying text (different tests applied to same political activity).

54. A categorical test applies when discharge results from political affiliation. See *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). An ad hoc balancing approach applies when the discharge is due to political speech. See *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

55. See, e.g., *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984) (applying a two-pronged analysis to political activity); *Wagner v. Hawkins*, 634 F. Supp. 751 (W.D. Ark. 1986) (application of either categorical or ad hoc test leads "to the same" answer). See generally Emerson, *supra* note 4; *Risky Business*, *supra* note 20; Note, *supra* note 50; *Police Department*, *supra* note 27.

56. See, e.g., *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

57. See *Branti*, 445 U.S. 507 (1980); *Elrod*, 427 U.S. 347 (1976).

58. See *Pickering*, 391 U.S. at 569.

59. 427 U.S. 347 (1976) (plurality opinion). *Elrod* held unconstitutional the dismissal of noncivil service employees from the sheriff's office of Cook County, Illinois, solely because they were not affiliated with or sponsored by the Democratic Party. *Id.* at 349. See generally *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 186 (1976); Note, *Patronage and the First Amendment After Elrod v. Burns*, 78 COLUM. L. REV. 468 (1978); Note, *Will the Victor be Denied the Spoils? Constitutional Challenges to Patronage Dismissals*, 4 HASTINGS CONST. L.Q. 165 (1977).

60. 427 U.S. at 367.

can justify such discharges only where the employee is in a position to obstruct the implementation of administration policies.⁶¹

In *Branti v. Finkel*⁶² the Court affirmed the categorical approach to patronage discharge. In addition, the Court narrowed the policy-making exception to those instances where the state can prove that political affiliation is required for the employee to effectively perform his job.⁶³ In order to establish the constitutionality of a dismissal based on a public employee's political affiliation, the state must show that the employee's political affiliation would interfere with her ability to perform her job effectively.⁶⁴

61. *Id.* at 367. The Court in *Elrod* focused on the established practice of political patronage. This practice involves the hiring of government employees based on whether the individual belongs to the party in power. A brief account of the history of political patronage appears in *Elrod*, 427 U.S. at 378-80 (Powell, J., dissenting). See also D. ROSENBLUM, *FEDERAL SERVICE AND THE CONSTITUTION 70-74* (1971) (tracing the history of patronage practices in America).

The *Elrod* plurality stated that political patronage restricts the freedom and association of the employee and impedes the electoral process. 427 U.S. at 355-56. The state, however, argued that patronage provides three benefits: (1) it furthers government efficiency; (2) it promotes representative government; and (3) it preserves the democratic process. *Id.* at 356-58. The plurality rejected the first and third arguments and concluded that the second argument is resolved by limiting patronage dismissals to policy-making employees. *Id.* at 364-68.

62. 445 U.S. 507 (1980). *Branti* involved two assistant public defenders dismissed by a Democrat because they were Republicans.

63. *Id.* at 518. The *Branti* Court explained that while a governor of a state might demand that his assistants "who help him write speeches, explain his views to the press, or communicate with the legislature" share his party commitments, such a demand would be inappropriate for state university football coaches "since no one could seriously claim that Republicans make better football coaches than Democrats," or for assistant public defenders who help individual indigent clients prosecuted by the government. *Id.*

64. Some courts use the *Elrod/Branti* rationale to create a "small county" exception that allows for patronage discharge when the government office operates in an area of limited population. See *Ramey v. Harber*, 589 F.2d 753, 756 (4th Cir. 1978), cert. denied, 442 U.S. 910 (1979). The small county exception is based on the *Branti* holding that party affiliation is an appropriate requirement if it affects performance of the public office involved. *Branti*, 445 U.S. at 518. The *Ramey* court took notice of the "intimate relationship that undoubtedly exists between the sheriff and his deputies in a small county like Lee County, Virginia." *Ramey*, 589 F.2d at 756. The court in *Ramey* reasoned that such a relationship can affect the employee's job performance. *Id.* While the *Ramey* court did not cite the small county exception in its holding, *id.* at 757, the exception has been noted in other courts. See, e.g., *McBee*, 730 F.2d at 1026 (Tate, J., concurring) (concurrency based on the "small county" exception to the *Elrod/Branti* doctrine as expressed in *Ramey*). But see *Jones*, 727 F.2d at 1338 n.14:

Aside from the fact that the small-size distinction in *Ramey* was entirely by way of dictum, *Branti*, which followed *Ramey*, held that raw patronage discharges in a

B. *Discharge for Political Speech*

Political speech is speech by a public employee regarding matters of public concern.⁶⁵ Unlike situations of dismissal for political affiliation, the Supreme Court applies the *Pickering* ad hoc balancing test to political speech discharge cases.⁶⁶ The ad hoc approach requires that the court weigh the employee's interest in criticizing the state against the employer's desire to maintain interoffice harmony and efficiently distribute public services.⁶⁷

A public employee who exposes the inner-workings of the state can wreak havoc in the employer's office or administration.⁶⁸ Allowing political speech may threaten workplace discipline⁶⁹ and impede the implementation of governmental policies and initiatives.⁷⁰ Because of these dangers, and the vast number of situations in which political speech can arise,⁷¹ the Supreme Court refuses to articulate a categorical standard, choosing instead to use the more flexible ad hoc balancing approach.⁷²

The most important recent development regarding political speech discharge is the Court's 1983 decision in *Connick v. Myers*.⁷³ In *Con-*

nine-person public defender's office were not justified under the *Elrod* test as therein modified. To the extent, therefore, that the *Ramey* small-size distinction may have had any vitality when decided under *Elrod*, we believe it has since been completely undercut by *Branti*'s refinement of the *Elrod* principle.
Id.

65. *Connick*, 461 U.S. at 146. See also *infra* note 78 (definition of "public concern").

66. See *supra* note 42 and accompanying text.

67. See, e.g., *Connick*, 461 U.S. at 150 (stating that "courts must reach the most appropriate possible balance of the competing interests"). *Id.*

68. "It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal." *Pickering*, 391 U.S. at 570 n.3. See also *Connick*, 461 U.S. at 151-52 (Supreme Court agreeing with state's assessment that employee's exercise of speech created a "mini-insurrection" within the office).

69. See *Elrod*, 427 U.S. at 367 (discharge is allowed to prevent obstruction of policies presumably sanctioned by the electorate); *Pickering*, 391 U.S. at 568-73 (disciplinary action may be necessary to preserve the efficiency of the services performed by the agency); *Meehan v. Macy*, 392 F.2d 822, 833 (uninhibited speech by government employees often has an inefficient, disharmonic, or even chaotic effect upon a government office).

70. See *supra* note 42 and accompanying text.

71. *Pickering*, 391 U.S. at 569.

72. *Id.*

73. 461 U.S. 138 (1983).

nick, the plaintiff was fired for circulating a questionnaire about office procedure and morale to her fellow co-workers.⁷⁴ The Supreme Court upheld the dismissal, utilizing the *Pickering* ad hoc test.⁷⁵

The Court held that before protecting a public employee's political speech, *Pickering* requires the Court to find, as a threshold matter, that the content of the speech was "of public concern."⁷⁶ The majority held

74. *Id.* at 141. The questionnaire was in response to Assistant District Attorney Myers' proposed transfer to another division of the criminal court. *Id.* at 140. The questionnaire concerned office morale and transfer policy, the level of confidence in supervisors, and pressure on employees to work on political campaigns; it was distributed to fifteen assistant district attorneys in the office. *Id.* at 141. The questionnaire consisted of the following:

Please take the few minutes it will require to fill this out. You can freely express your opinion WITH ANONYMITY GUARANTEED.

1. How long have you been in the Office?
 2. Were you moved as a result of the recent transfers?
 3. Were the transfers as they effected [sic] you discussed with you by any superior prior to the notice of them being posted?
 4. Do you think as a matter of policy, they should have been?
 5. From your experience, do you feel office procedure regarding transfers has been fair?
 6. Do you believe there is a rumor mill active in the office?
 7. If so, how do you think it effects [sic] overall working of A.D.A. personnel?
 8. If so, how do you think effects [sic] office morale?
 9. Do you generally first learn of office changes and developments through rumor?
 10. Do you have confidence in and would rely on the word of: [other office employees].
 11. Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?
 12. Do you feel a grievance committee would be a worthwhile addition to the office structure?
 13. How would you rate office morale?
 14. Please feel free to express any comments or feelings you have.
- THANK YOU FOR YOUR COOPERATION IN THIS SURVEY.

461 U.S. at 155-56, Appendix A.

75. 461 U.S. at 150.

76. The Court's past decisions clearly defined certain aspects of the ad hoc balancing test, such as the factors to be weighed and the burden of proof to be met by the parties. Until *Connick*, however, the Court never directly addressed the issue of what a "matter of public concern" is for free speech purposes. Past cases held that such matters included: the allocation of school funds, *Pickering*, 391 U.S. at 566; the structure of a state university system, *Perry*, 408 U.S. at 594-95; the establishment of a faculty dress code, *Mount Healthy*, 429 U.S. at 282; and whether school policies were discriminatory, *Givhan*, 439 U.S. at 413.

In *Connick*, the Court constructed a continuum delineating political speech by a public employee. At one end was speech having so little value that the state could prohibit it, and on the other was speech on matters of vital interest to the electorate. 461 U.S.

that most of the *Connick* plaintiff's "speech" was not a matter of public concern and, therefore, was unprotected.⁷⁷ Rather, the Court noted⁷⁸ that the "speech" was merely a public employee complaining about a problem of purely personal interest.⁷⁹ Thus, the balancing test was inapplicable, since the state's interest in serving the public outweighs an employee's personal interest.⁸⁰ Even applying the *Pickering* balance to *Connick*, the slight element of public concern contained in the speech did not outweigh the state's interests in suppression.⁸¹

Connick sharply curtails the political speech protection available to public employees.⁸² The case essentially shifts the focus of the ad hoc test from the weighing process to ascertaining whether to use the balancing test at all. If the employee speech is not of public concern, the Court will not perform a balancing, thus permitting the state to prohibit speech and retaliate against the employee.⁸³ Employee speech is further burdened by the Court's narrow definition of what constitutes "public concern."⁸⁴ Although previous cases presented issues and ele-

147. The Court reasoned that merely characterizing speech as falling generally within the realm of a matter of public concern is not enough to find it protected. Instead, what is a matter of public concern "must be determined by the content, form and context of a given statement, as revealed by the whole record." *Id.* at 147.

77. The Court held:

[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, . . . 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.

Id.

78. *Id.* at 146.

79. *Id.*

80. *Id.* at 154.

81. *Id.* at 148. The only issue the Court felt was of public concern was the pressure on employees to work on political campaigns. *Id.* at 149.

In dissent, Justice Brennan found three errors with the majority's reasoning: (1) the Court should have restricted its consideration of the activity to the effect of the speech on the office; (2) the decision "impermissibly narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal"; and (3) the Court should have required a more substantial showing of actual disruption of the office. *Id.* at 156-58.

82. *Connick* sets a dangerous precedent because the holding exaggerates the limited importance of the employer's judgment with regard to the constitutional right to free speech. Most disturbing is that the *Connick* Court permits the public employer to justify dismissal by showing merely a reasonable belief that the expression would cause disruption. *Id.* at 154. The trial court, on the other hand, required a showing of actual disruption. *Id.* at 142.

83. *Id.* at 154.

84. *Id.* at 158 (Brennan, J., dissenting) (the Court's definition of public concern

ments similar to those of *Connick*,⁸⁵ no prior court dismissed an employee speech case for failing to reach issues of public concern.⁸⁶ The *Connick* Court ignored the fact that past speech cases concerned state policy decisions that personally affected the employee.⁸⁷ Thus, the *Connick* public concern test⁸⁸ causes confusion over what employee speech courts may actually consider a matter of public concern.⁸⁹

Most importantly, *Connick* tips the *Pickering* scales in the government's favor.⁹⁰ By emphasizing the public's right to efficient service, and narrowing an employee's right to publicize matters of public concern, the Court gives the state great discretion to judge the adverse effect of the employee's speech on its ability to function.⁹¹ Justice Brennan's dissent noted that *Connick* will result in public employees hesitating to publicly criticize their supervisors.⁹²

"impermissibly narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal").

85. See *supra* note 76 (list of pre-*Connick* cases dealing with matters of "public concern").

86. Compare *supra* note 76 (*Connick* questionnaire) with *supra* note 76 (list of pre-*Connick* cases dealing with matters of "public concern").

87. See *Pickering*, 391 U.S. at 582 (school funds allocation affects public employee through impact on salary); *Perry*, 408 U.S. at 594-95 (the elevation of junior college to four-year college would affect public employee as a professor at the institution); *Mount Healthy*, 429 U.S. at 282 (school board's dress code for employees included complaining public employee); *Givhan*, 439 U.S. at 413 (allegedly discriminatory policies of the school district affected public employee as a teacher in that district). Compare *Connick*, 461 U.S. at 143 (district attorney office transfer policy and internal operating procedures affecting public employee not a matter of "public concern").

88. *Connick*, 461 U.S. at 147-48.

89. See Comment, *Connick v. Myers*, 30 N.Y.L. SCH. L. REV. 471, 441 (1985). In a sharp departure from past decisions, the *Connick* majority deferred to the state's judgment and adopted the position that the speech's actual disruption of the state's operations is not required to justify the discharge of a public employee. *Id.*

90. The Court noted:

When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office.

Connick, 461 U.S. at 154.

91. See Note, *Public Employee's Free Speech Rights: Connick v. Meyers Upsets the Delicate Pickering Balance*, XIII REV. L. AND SOC. CHANGE 173 (1984) (explaining how the *Connick* decision departs from the Supreme Court's traditional position that only certain narrowly defined categories of speech are outside the protection of the first amendment) [hereinafter cited as *Free Speech Rights*].

92. *Connick*, 461 U.S. at 166 (Brennan, J., dissenting).

C. Discharge for Political Participation

Political participation is the participation of a public employee in a political campaign or election.⁹³ The Supreme Court has not decided whether the categorical or ad hoc balancing test applies in this situation. Therefore, various lower courts have applied different standards in political participation discharge cases.⁹⁴ Two federal courts of appeal, however, used the *Pickering* ad hoc balancing test,⁹⁵ comparing political participation to political speech cases.⁹⁶

In *McBee v. Jim Hogg County*,⁹⁷ the sheriff's department fired deputies for actively campaigning for the election of the sheriff's opponent.⁹⁸ The Fifth Circuit Court of Appeals held that *Connick* collapsed the differing analytical approaches set forth in *Pickering*⁹⁹ and *Elrod/Branti*¹⁰⁰ into a single ad hoc balancing inquiry.¹⁰¹ The

93. See, e.g., *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984) (en banc).

94. See, e.g., *id.*; *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984) (cases using ad hoc balancing when employee is discharged for political participation). But see *Shakman v. Democratic Org. of Cook County*, 722 F.2d 1307 (7th Cir.), cert. denied sub. nom., *Lindsey v. Kelly*, 464 U.S. 916 (1983); *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982) (political participation discharge analyzed under the categorical standards developed for political affiliation in *Elrod/Branti*). Notably, the Seventh Circuit cases predated *Connick*. Thus, the Seventh Circuit may conceivably apply a different test in light of *Connick*.

95. *McBee*, 730 F.2d 1009; *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984).

96. These courts find political participation similar to political speech because both involve overt action by the employee, while political affiliation is a passive act. See, e.g., *McBee*, 730 F.2d at 1014.

97. 730 F.2d 1009 (5th Cir. 1984) (en banc).

98. The plaintiffs in *McBee* openly supported the previous sheriff during the election by attending political rallies, placing bumper stickers on their cars, and publicly endorsing the candidate. *Id.* at 1018.

99. See *supra* notes 34-43 and accompanying text.

100. See *supra* notes 59-64 and accompanying text.

101. *McBee*, 730 F.2d at 1014. The court stated:

Such cases might reasonably be expected to locate themselves on a spectrum; we conclude that they do.

Elrod and Branti, we think, lie at the extreme of the employee's side, where little, if any weighing is called for. There employees who were, it appears, both loyal and effective were discharged on the sole ground of their private and—for employment purposes—all but abstract political views. They did not campaign, they did not even speak: they merely thought. No countervailing considerations appear; they suffered discharge for pure political beliefs, a circumstance that explains the comparative absence of "weighing" terminology in these opinions.

Id. (footnotes omitted).

In dissent, Judge Rubin attacked the majority's rule of categorical protection of abstract belief only. *Id.* at 1025. Furthermore, he pointed out that *Connick*, on which the

Fifth Circuit found political affiliation and political speech to be on opposite ends of the political activity "spectrum,"¹⁰² with political participation somewhere in-between.¹⁰³ Where the court places political participation on the spectrum determines the weight of various factors in the balancing process.¹⁰⁴

In *Jones v. Dodson*¹⁰⁵ the Fourth Circuit specifically rejected *McBee*'s collapse of the *Pickering* and *Elrod/Branti* distinctions.¹⁰⁶ Instead, the *Jones* court imposed a rigid, two-step analysis. First, the court must determine whether the discharge resulted from party affiliation or overt speech activity.¹⁰⁷ In political affiliation cases, the Court should apply the *Elrod/Branti* categorical analysis.¹⁰⁸ If the discharge results from any overt form of political speech or political participation, the *Pickering/Connick* ad hoc balancing approach applies.¹⁰⁹

Although *Jones* rejects the *McBee* spectrum, the result is identical. Both circuits analyze discharge for political participation using the ad hoc balancing test.¹¹⁰ Applying the *Pickering* balancing test to political participation, discharge results in the same problems that arise in political speech cases.¹¹¹ *Jones* is most important for rejecting the *McBee* spectrum and attempting to combine the categorical and ad hoc balancing tests into a single weighing process.¹¹² Equally significant is

majority relies in creating the spectrum, "does not take one whit from *Elrod* or *Branti*." *Id.* at 1021.

102. *See id.* at 1014.

103. *Id.*

104. *Id.* at 1016-17. The majority criticized the "categorical approaches of the district court and the panel," and held that *Connick* directed them to "tailor the analysis to the particular facts of each case." *Id.* at 1016. On remand, the trial court, using the *Connick* test described by the appellate court, still found in favor of the plaintiffs. *McBee v. Jim Hogg County*, Civil Action No. L-81-3 (S.D. Tex. 1985).

105. 727 F.2d 1329 (4th Cir. 1984). *Jones* involved the discharge of a deputy for meeting with a political opponent of the incumbent sheriff of a rural county. *Id.* at 1330-35.

106. *Id.* at 1334-35 n.6.

107. *Id.* at 1336.

108. *Id.*

109. *Id.*

110. *McBee*, 730 F.2d 1009; *Jones*, 727 F.2d 1329. *See Risky Business*, *supra* note 20, at 1100.

111. *See infra* notes 119-129 and accompanying text (weaknesses of the ad hoc balance).

112. *See supra* note 106 and accompanying text (*Jones* rejection of the *McBee* spectrum analysis).

the court's recognition that a categorical analysis is relevant to political activity discharge actions. The problem explored in the next section is how to correct the imbalances in the *Pickering/Connick* test and how to extend the categorical standard to encompass more political activity cases.

III. AD HOC BALANCING—STRENGTHS AND WEAKNESSES

In its purest form, the ad hoc balancing test affords courts wide discretion to identify and to weigh competing interests on a case-by-case basis and to generate fact-specific results.¹¹³ Because of the test's flexibility, courts try to apply ad hoc balancing to first amendment issues.¹¹⁴ When a court identifies the controlling factors, it balances the interests and decides which party has a more compelling argument.¹¹⁵ Cases which list the significance and weight attached to each element guide future courts confronted with similar situations.¹¹⁶

The ad hoc balancing analysis works well in political speech and participation discharges because these cases are fact-specific.¹¹⁷ Since this method is sensitive to factual nuances, it often provides more accurate results and greater protection than a rigid categorical standard.¹¹⁸

Yet the flexibility of ad hoc balancing creates disadvantages. Because the process allows courts to choose and weigh¹¹⁹ various factors,

113. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (balancing used to invalidate restraint on publication of news regarding trial); Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 300-02 (1981) (describing the amount of discretion afforded judges by different forms of first amendment analysis); Henkin, *Infallibility Under the Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1048 (1978) (balancing requires "judges to find, define, articulate, and justify . . . out of very few straws"). See also *supra* note 16 (list of sources describing ad hoc balancing).

114. See *Developments, supra* note 3, at 1757-58 (suggesting that ad hoc balancing may be the only method by which to analyze free speech problems).

115. See *supra* note 16 (list of sources describing ad hoc balancing method); Emerson, *supra* note 4, at 912-14 (describing ad hoc balancing).

116. See *McBee v. Jim Hogg County*, 730 F.2d at 1016 n.20 (holding that the balancing test in *Pickering* and its progeny fails to prescribe a fixed set of factors and provides only guidance to a court as to which factors might be important).

117. See *supra* note 42 and accompanying text (Court refused to delineate categorical standard due to impossibility of creating such a standard in the speech context).

118. See *Nimmer, supra* note 16, at 945 ("[S]peech which might be protected if the particular interests involved in a particular case were subject to the precision of the ad hoc scalpel might lose protection by the cutting of the blunter definitional [categorical] knife.").

119. See, e.g., *supra* notes 101 and 116 and accompanying text. See also *Connick*,

the results¹²⁰ are inconsistent.¹²¹ Thus, appellate review is often merely a re-evaluation of the competing interests using a different set of personal preferences,¹²² resulting in inconsistent review.¹²³

Another problem with ad hoc balancing is that courts defer to states' interests,¹²⁴ creating an inherent bias toward the state in the weighing process.¹²⁵

Most importantly, the ad hoc approach leaves uncertain what employee speech or participation is actually permissible.¹²⁶ The absence of a reliable standard may prevent a public employee from exercising her first amendment rights to the greatest extent possible.¹²⁷ The lack of clear standards also affects the state's judgment about when it may discharge a public employee and avoid liability.¹²⁸

These factors demonstrate the need for reform in applying the ad hoc balancing test. Specifically, the Supreme Court should enumerate the weight courts should place on certain factors and policy considerations. Since courts currently analyze political speech and participation

461 U.S. at 147-48 (legal weight of speech "must be determined by the content, form, and context of the given statement, as revealed by the whole record") (footnotes omitted); *id.* at 156 (Brennan, J., dissenting) (criticizing majority's subjective conclusion that the expression was not a matter of public concern).

120. See Emerson, *supra* note 4, at 912-14 (balancing as a legal doctrine for affording judicial protection to a system of free expression is not tenable).

121. See Emerson, *supra* note 4, at 912 (ad hoc balancing is so broad and undefined that it can hardly be described as a rule).

122. See Henkin, *supra* note 113, at 1048.

123. *Id.*

124. See, e.g., *Connick*, 461 U.S. at 151-52 (noting that "when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate"); *Developments*, *supra* note 3, at 1767 (noting that "[b]y uncritically accepting proffered rationales for restrictions on public employee speech and by failing to examine employee's legitimate interests in such expression, courts have placed a heavy thumb on the employer's side of the *Pickering* balance").

125. See Emerson, *supra* note 4, at 913 (finding that, to date, the test gives almost conclusive weight to the state's judgment).

126. "[W]hen one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone.'" *Keyishian*, 385 U.S. at 604 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). See also Schauer, *supra* note 113, at 299.

127. Schauer, *supra* note 113, at 299.

128. See, e.g., *DeLaCruz v. Pruitt*, 590 F. Supp. 1296, 1307-08 (N.D. Ind. 1984) (upholding personal liability of supervisor for patronage discharge); Emerson, *supra* note 4, at 913 (ad hoc test affords government officials inadequate notice of the protected rights).

discharge cases under the ad hoc standard,¹²⁹ replacing or improving the test will greatly affect first amendment protection of public employee political activities. The next section explores possible improvements, especially in the area of employer/state bias, either by refining or replacing the ad hoc method.

IV. ALTERNATIVES AND IMPROVEMENTS TO THE AD HOC BALANCING TEST

A. *Limiting the Application of the Ad Hoc Approach: The Categorical Method*

The most direct way to prevent the problems created by the ad hoc balancing test is to limit its application to certain activities. Rather than using the ad hoc test in political speech and participation cases¹³⁰ and the categorical test for political affiliation,¹³¹ courts should apply the categorical analysis to all three types of political activities.¹³²

Courts using the categorical approach articulate definitive standards to separate protected from unprotected activity.¹³³ Once a court announces a standard for a specific activity, courts decide future cases by applying the applicable rule to the enumerated facts.¹³⁴ Thus, when a court classifies a case, it need only apply a rule of law to the facts—without utilizing a balancing test.¹³⁵

The categorical approach provides beneficial results. First, the analysis shields the parties from judicial caprice arising from subjective evaluations inherent in the ad hoc balancing test.¹³⁶ Second, the cate-

129. See *supra* notes 42 and 94 and accompanying text.

130. *Id.*

131. See *supra* notes 59-64 and accompanying text.

132. But see *Pickering*, 391 U.S. at 569 (the infinite varieties of political speech make a categorical standard virtually impossible).

133. See *supra* note 16 (sources discussing distinctions between categorical analysis and ad hoc balancing). See also Schauer, *supra* note 113, at 296-305 (comparing ad hoc balancing and categorical analysis).

134. See *id.* at 296-305 (formulation and use of categorical standards). In particular, categorical rules relieve courts of the responsibility of assigning first amendment value to any particular form of expression.

135. Ad hoc balancing "sets the court to doing . . . not what 'is emphatically the province and duty of the judicial department'—to say what the law is—but what would seem emphatically to be the province or competence of the political branches—the weighing of competing societal interests and values." Henkin, *supra* note 113, at 1048 (footnote omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

136. See Nimmer, *supra* note 16, at 945.

gorical analysis would simplify appellate review by supplying tangible rules of law.¹³⁷ Finally, a clear standard would provide all parties with a clearer understanding of what conduct is protected.¹³⁸

Categorical analysis, however, is imperfect. It is, for example, difficult to create a standard for measuring all future activity.¹³⁹ In addition, the test's rigidity may occasionally allow unjust results by categorizing all actions as either protected or unprotected.¹⁴⁰ This standard is less fact-sensitive than ad hoc balancing and fails to account for hidden factors.¹⁴¹ Still, the benefits derived from the certainty and predictability of the categorical test outweigh occasionally harsh results. The infrequent unjust outcome is a small price to pay for the clear standards provided by a categorical approach.¹⁴²

Although in the abstract, categorical analysis is superior to ad hoc balancing, in reality, the categorical test is inapplicable to all public employee political activities.¹⁴³ Because of this flaw, courts apply categorical analysis only to political affiliation discharges.¹⁴⁴ A closer examination indicates that courts should also review political participation discharges under the categorical standard instead of the unpredictable ad hoc approach.¹⁴⁵ Since "participation" is more akin to political affiliation than to political speech,¹⁴⁶ the categorical test

137. See Schauer, *supra* note 113, at 294.

138. See *id.* at 299 (discussing chilling effect of flexible legal standards); Emerson, *supra* note 4, at 913 (suggesting that lack of advance notice under ad hoc approach will prompt parties to move cautiously in their expressions and reactions).

139. See *Pickering*, 391 U.S. at 569 (difficulty of creating categorical standard for speech problems). See also Schauer, *supra* note 113, at 267-69 (problems associated with categorization of first amendment rights). Professor Schauer also notes, however, that categories and balancing, in the first amendment context, are not mutually exclusive. *Id.* at 266.

140. See Note, *supra* note 50, at 570.

141. *Id.*

142. See Tribe, *supra* note 14, § 12-2, at 583-84. Professor Tribe comments that although ad hoc balancing might result in "some 'famous victories' for the cause of free expression," it leaves "no one very sure that any particular expressive act will find a constitutional shield." *Id.* (footnote omitted).

143. See *Pickering*, 391 U.S. at 569 (the infinite varieties of political speech make it futile to delineate a definite standard).

144. See *supra* note 16 and accompanying text (application of categorical analysis limited to political participation discharge).

145. See generally Note, *supra* note 50, at 559.

146. Political participation is closer to political affiliation than to political speech because both rely on some overt action of identifying with or working for a certain political candidate, party, or cause. The friction between the supervisor and the em-

should apply to political participation cases. Thus, the same rationale for using the categorical analysis in political affiliation cases is relevant to political participation discharges.

Courts premise the use of the categorical standard in political affiliation cases on the idea that nonpolicy-making, nonconfidential employees are unable to obstruct the state's ability to operate efficiently.¹⁴⁷ A similar rationale applies to employee participation in a political campaign or election. Nonpolicy-making, nonconfidential employees cannot seriously disrupt or obstruct the functions of government simply through political participation.¹⁴⁸ If the employee's behavior during the participation constitutes a dereliction of duty or insubordination, dismissal may be justified on other grounds.¹⁴⁹ The state must demonstrate that personal loyalty is necessary for "effective performance" of the employee's duties to support a discharge for political participation.¹⁵⁰

While categorical analysis can be easily applied to political participation discharge, this test does not readily adapt to political speech cases.¹⁵¹ Additionally, whether the Supreme Court will apply the cate-

ployee results from differing political preferences. Political speech, on the other hand, involves an employee's critical statements regarding how the office is being run or the efficacy of the supervisor. The friction between employee and supervisor goes to the heart of the operation and competency of the government. *See Note, supra* note 50, at 559.

147. *See supra* notes 59-64 and accompanying text (holdings in *Branti* and *Elrod*).

148. *See Note, supra* note 50, at 574-75. The argument rests on the assumption that the possible inefficiency resulting from conflicts between the employee and employer over the former's political participation presents no additional complications for implementing government policies than the mere partisan affiliation in *Elrod* and *Branti*. *Id.* at 574. *But see* *Jones v. Dodson*, 727 F.2d at 1334-35 n.6. The *Jones* court explicitly refused to analyze political participation under a categorical method, fearing that employees would cloak insubordination under a protective mantle provided to all professed "political" expressions.

149. *See Elrod*, 427 U.S. at 365-66 (stating that employees may always be dismissed for "good cause"); *Mt. Healthy*, 429 U.S. at 287 (if state can show the employee would be dismissed regardless of his political activity, the discharge stands); *Nathanson v. United States*, 702 F.2d 162 (8th Cir.), *cert. denied*, 464 U.S. 939 (1983) (discharge allowed when plaintiff refused to review applications); *Goldwasser v. Brown*, 417 F.2d 1169 (D.C. Cir.), *cert. denied sub. nom.*, *Goldwasser v. Seamans*, 397 U.S. 922 (1970) (army instructor dismissed for refusing to instruct class on assigned materials).

150. *Cf. Branti*, 445 U.S. at 518; *Gonzalez v. Benavides*, 712 F.2d 142 (5th Cir. 1983) (remanding case to district court to rule on whether the relationship between the employee and supervisor "fell into that narrow band of fragile relationships requiring job security loyalty at the expense of unfettered speech"). *Id.* at 150.

151. *See Pickering*, 391 U.S. at 569.

gorical analysis to political participation discharges is uncertain.¹⁵² Assuming the permanence of the ad hoc balancing test, courts must correct the test's current administrative imbalances.

B. *Redefining the Factors of the Ad Hoc Balance*

The assertion that "courts have placed a heavy thumb on the employer's side of the *Pickering* balance"¹⁵³ represents courts' current bias toward factors supporting the state's position.¹⁵⁴ Case law reveals that while courts thoroughly and exhaustively discuss state's interests, the employees' concerns receive little consideration.¹⁵⁵ To achieve an equitable result, however, the court must fully and equally weigh all of the interests of each party. Ignoring interests of one side while granting blind deference to the other destroys the purpose of the balancing method.¹⁵⁶

1. The State as Employer

Legitimate governmental interests are affected when an employee engages in political activity.¹⁵⁷ The courts' general deference to these interests,¹⁵⁸ unfortunately, has led to an inherent bias in favor of the state

152. Given the Court's restrictive holding in *Connick* and the seventh and fourth circuits' holdings in *McBee* and *Jones*, ad hoc balancing for most political activity seems firmly entrenched.

153. See *Developments, supra* note 3, at 1767.

154. See, e.g., *Connick*, 461 U.S. at 151-52 (wide degree of deference to the state is often required). See also *Boals*, 775 F.2d 686; *Wachsmann*, 704 F.2d 160; *Wagner*, 634 F. Supp. 751 (cases where ad hoc balancing favored state interests).

155. See, e.g., *Pickering*, 391 U.S. at 569-73 (in applying ad hoc test, Court limits discussion to the employer's negligible stake and the public's interest in having the information); *McBee v. Jim Hogg County*, 730 F.2d at 1016-17; *Hughes v. Whitmer*, 714 F.2d 1407, 1419-23 (8th Cir.), cert. denied sub. nom, *Hughes v. Hoffman*, 465 U.S. 1023 (1984). See also *Developments, supra* note 3, at 1757 (courts have neglected the employee's interest in expression); *Police Department, supra* note 27, at 1026 (courts fail to mention the substantial interests of the employees).

156. See *Pickering*, 391 U.S. at 568:

The problem in any case is to arrive at a balance between the interest of the [employee] 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.

Id.

157. These include, for example, the efficient delivery of government services, *Connick*, 461 U.S. at 150; *Pickering*, 391 U.S. at 568-73; the implementation of the policies of the elected administration, *Elrod*, 427 U.S. at 367; and the maintenance of interoffice harmony, *Meehany*, 392 F.2d at 833.

158. See, e.g., *Connick*, 461 U.S. at 151-52 (deference to state is appropriate); Emer-

under the ad hoc balance.¹⁵⁹ Greater judicial scrutiny of the state's asserted interests is needed to eliminate this bias and to ensure that courts identify a genuine governmental interest for each discharge.¹⁶⁰

Courts should only defer to the state when it can convincingly show that the particular workplace demands overriding cooperation and cohesion.¹⁶¹ Courts should carefully analyze the employer-employee relationship to determine if it requires such a degree of intimacy and agreement that the employee must surrender some first amendment protections to retain employment.¹⁶²

2. The Public

The public has two areas of concern regarding a state employee's political activity:¹⁶³ maintaining both the open discussion of government affairs and the inner-workings of our governmental institutions;¹⁶⁴ and the efficient delivery of government services.¹⁶⁵ Although these concerns are not mutually exclusive, courts currently emphasize the latter.¹⁶⁶ This preference is misplaced. The free exchange of ideas as to how government should function is vital to the democratic system.¹⁶⁷ Public employees are situated to supply insightful opinions

son, *supra* note 4, at 913 ("As applied to date, the [ad hoc balancing] test gives almost conclusive weight to the [state's] judgment [in the discharge].").

159. *See Developments, supra* note 3, at 1767 ("[B]y uncritically accepting proffered rationales for restrictions on public . . . employee's legitimate interests in such expression, courts have placed a heavy thumb on the employer's side of the *Pickering* balance.").

160. *Id.* (noting that courts have become lazy in scrutinizing the claims of the state employer and should become more involved) (footnote omitted).

161. *Id.* at 1768.

162. *Pickering*, 391 U.S. at 570 n.3.

163. In *Pickering*, the Court did not expressly address any general public interest. The factors the Court used to evaluate the employee's interest, however, included whether the speech was a matter of public concern and whether it was made in a public context. 391 U.S. at 569-73. Because the public has an implicit interest in the employee's speech, this concern figures in the ad hoc balance. *See also Arnett*, 416 U.S. at 168 (Powell, J., concurring in part) (stating that "the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline").

164. *See Developments, supra* note 3, at 1758 (Constitution places paramount value on robust discussion and criticism of government) (footnote omitted).

165. *Id.* at 1769 (grievances of public employees concern the public when they threaten the efficiency or competence of public employees to deliver government services).

166. *Id.*

167. *See supra* note 25 and accompanying text.

about the inner-workings of government.¹⁶⁸

Although *Connick* protected only a public employee's expression on matters of public concern under the first amendment,¹⁶⁹ courts should remain flexible in applying *Connick*.¹⁷⁰ When in doubt, courts should tip the balance in favor of the free flow of information through political expression.¹⁷¹ Courts utilizing the ad hoc balancing test should consider the free flow of information as the dominant public interest.¹⁷² The importance of the efficient delivery of services pales in comparison to the deleterious effects of suppressing political activity that informs the public about the government.¹⁷³ Only when the state can show that its delivery of services will be substantially impaired should efficiency outweigh information.

3. The Employee

Since *Pickering*, courts discount the public employee's side of the ad hoc balance.¹⁷⁴ If the goal is a fair and true assessment of the effect of the employee's political activity, then courts must include the em-

168. See *Pickering*, 391 U.S. at 571-72 (to allow the government to discharge its employees in retaliation for their criticism of workplace affairs would remove from public discussion the views and insights of a class of individuals especially knowledgeable about government).

169. See *supra* note 76 (discussion of what is public concern).

170. As an example of the harshness of the current *Connick* standard, less than a month after the *Connick* decision, the Merit Systems Protection Board upheld the firing of a nonstriking air traffic controller who told a group of striking controllers to "stay together" after they went out. MSPB Docket N. NYO75281F1457, slip op. (May 19, 1983) at 2. The Board held that the *Connick* principles mandated the employee's dismissal because the speech was only tangentially related to a matter of public concern. *Id.* at 12.

171. See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 866-67 (1982) (the Constitution protects the right to receive information and ideas); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (right to receive information and ideas, regardless of social worth, is fundamental to a free society).

172. See *Connick*, 461 U.S. at 165 (Brennan, J., dissenting) (arguing that the first amendment "protects the dissemination of such information so that the people, not the courts, may evaluate its usefulness").

173. See *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency. . . . [T]he Bill of Rights . . . [was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency."); *Free Speech Rights*, *supra* note 91, at 184 ("[T]he proper objective should be to determine whether the quality of public services offered by the public entity actually suffered as a result of the employee's speech.").

174. See *supra* note 124 and accompanying text.

ployee's valid interests in the balance.¹⁷⁵ Such interests include the employee's right to hold views different from the employer,¹⁷⁶ the employee's interest in speaking from a professional perspective on workplace affairs without fear of reprisal by the state,¹⁷⁷ the employee's right to fair working conditions,¹⁷⁸ and the employee's right to participate in the political process.¹⁷⁹

In addition to substantively considering these interests when applying the ad hoc test, courts should also adopt a more liberal approach toward the individual employee. Courts should focus on "individual dignity and choice" rather than viewing public employee political speech and participation as a disruption requiring state restriction.¹⁸⁰ Emphasizing individual choice reflects the true meaning and intent of the first amendment.¹⁸¹

The ad hoc balancing test can only benefit from the method of review suggested above. Not only must the interests in public employee political activity situations be clarified, but courts must also consistently and critically review all the interests involved in the balance.¹⁸²

175. See *supra* notes 67, 113-118 (application of ad hoc balance test).

176. See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (stating that the first amendment is meant to protect the right "to hold a point of view different from the majority").

177. *Pickering*, 391 U.S. at 571-72.

178. *Connick*, 461 U.S. at 165.

179. See *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (any attempt by government to silence those who engage in political participation can be justified only by a compelling state interest).

180. *Cohen v. California*, 403 U.S. 15, 24 (1971). The Court stated:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id.

181. See *Hughes v. Whitmer*, 714 F.2d 1407, 1435-36 (8th Cir. 1983), *cert. denied sub. nom.*, *Hughes v. Hoffman*, 465 U.S. 1023 (1984) (McMillian, J., dissenting) (arguing that majority elevated unexamined efficiency concern about the employee's interest in speech). See also *supra* note 25 and accompanying text (free political speech is at the heart of first amendment protection).

182. See generally *supra* notes 93, 124 and accompanying text; *Police Department*, *supra* note 27.

C. *The Compelling State Interest Test*

The categorical and ad hoc approaches are currently the only methods of analysis courts use to examine public employee political activity discharge cases. Yet, other analyses are available. A "compelling state interest" test is a plausible alternative.¹⁸³

Under a compelling state interest test, the state would have the burden of proving its paramount interest in limiting the employee's political activity.¹⁸⁴ The public employer must also show that the means used to limit that activity are narrowly drawn so as to avoid unnecessarily infringing on constitutional rights.¹⁸⁵ The test basically combines the categorical and ad hoc methods. The first step calls for a categorical standard whereby the state must define the areas in which its interest is paramount. The second step requires a balancing approach. At this stage, the court would weigh all relevant facts to determine whether the state's actions were the least restrictive means available. Such a test would provide a single, uniform method applicable to all three types of political activity.¹⁸⁶

Clearly, a test that applies to all three types of political activity would eliminate the confusion and conceptual difficulties that arise under the present inconsistent approaches.¹⁸⁷ Further, developing a categorical standard will enable both the employee and the state to know what types of activity and retaliation are permitted.¹⁸⁸

CONCLUSION

The current ad hoc balancing test requires reform. Courts using this

183. See *Free Speech Rights*, *supra* note 91, at 196 (advocating that ad hoc balancing be replaced with a compelling state interest test). This test is analogous to that set forth in *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), relating to state regulation of commercial speech. The author also notes that a compelling state interest test is similar, if not the same test the Court uses in cases of dismissal of political patronage. *Id.* at 196 (footnote omitted). See, e.g., *Branti v. Finkel*, 445 U.S. 507, 515-17 (1980); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976) (plurality opinion).

184. See *Elrod*, 427 U.S. at 362.

185. *Id.* at 363 (quoting *Buckley v. Valeo*, 424 U.S. at 25).

186. For example, in *Connick* the state would have to show that discharging Myers was the only remedy and that no less drastic alternatives to dismissal were available. Thus, had the Court applied a compelling state interest test, the outcome of *Connick* would probably be different.

187. See *supra* notes 17-19 and accompanying text.

188. See *supra* notes 126-128 and accompanying text.

test fail to adequately consider all of the interests of each affected party. Further, the courts' current emphasis on economic efficiency over free expression is misplaced. By analyzing all interests in greater detail, courts using the ad hoc method can achieve a more equitable result.

Even with equal consideration of all the interests, ad hoc balancing creates problems for courts, including difficulty in appellate review and lack of guidance as to the importance and weight attached to each factor. Additionally, ad hoc balancing results in a lack of notice to the parties as to what activities are protected. A categorical standard eliminates these problems by establishing a definite standard against which courts measure political activity. A categorical test, however, may have harsh results because it lacks flexibility. Finally, the infinite varieties of political speech make creating a rigid categorical standard impossible.

With these problems in mind, courts should: (1) analyze political participation discharge under a categorical test similar to the one used for political affiliation cases; and (2) give consistent and diligent consideration to all interests when applying the ad hoc balancing test in political speech cases. A third, but unlikely, alternative would be to discard the *Pickering* and *Elrod/Branti* tests and adopt a compelling state interests test for all three types of activity. The first two changes would place most public employee political participation cases under the more predictable categorical standard and would eliminate the current bias in favor of the state. The third change would combine the best attributes of the categorical and ad hoc methods, while providing a single test for political activity cases. Any of these changes give free speech and free political expression adequate first amendment protection, while allowing for the efficient and representative operation of the state. Deference to free political discussion and to the individual's right to participate in the political process will affirm the democratic principles inherent in the first amendment.

*Sterling L. Miller**

* J.D. 1988, Washington University.

COMMENTS

