Discharge of Noncivil Service Public Employees for Political Activity: The Search for a More Equitable Test

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A large percentage of the 15.7 million government workers in the United States are noncivil service public employees. Thus, they lack statutory protection of their first amendment rights of political affiliation.

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.


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, political speech, and political participation. As an employer, the state often limits the political activities of public employees to operate without unnecessary disruption and to be more responsive to the electorate. Public employees who engage in political activity may hinder the state's ability to fulfill these objectives. A serious disruption may result in dismissal. However, discharging a public employee for political activity raises serious constitutional questions.

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

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The Supreme Court follows two approaches to determine if the dismissal of a public employee for engaging in political activity violates the first amendment. If a public employee's discharge is based on political affiliation, the Court applies a categorical test to distinguish between protected and unprotected activities. 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. 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, lower courts disagree regarding which test should apply to political participation discharge cases.

In general, the categorical approach favors the employee, while the...
ad hoc test benefits the state. Thus, the test chosen by the court essentially determines the outcome of each case. Courts favor the ad hoc balancing test in political activity discharge cases because of its flexibility.

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.

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. 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].


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.) (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.\textsuperscript{26} Courts thus examine the extent to which the government regulates political activity by using its power to hire and fire employees.\textsuperscript{27} Absent their status as public employees, the first amendment would protect these individuals from government sanction for political participation.\textsuperscript{28}

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

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Amendment activity\textsuperscript{”}); 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.

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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. 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.

The Court's expansion of public employee first amendment protection culminated in the 1968 landmark decision of *Pickering v. Board of Education*. In *Pickering* the Supreme Court prohibited the government from compelling its employees to surrender the first amendment rights they would otherwise enjoy as citizens. 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. The Court reasoned that the threat of dismissal has a chilling effect on employees releasing perti-

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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.


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.
nent 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. In recent years, the Court’s focus has changed from protecting the employee to enhancing the state’s rights as employer. Moreover, the Court’s concern lies with the state’s ability to provide essential public services in an efficient, cost-effective manner. This new emphasis favors the claims of the state as the administrator of such services.

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. Political participation is the participation in a political campaign. Political affiliation is simply the act of belonging to or identifying with a political party or candidate. Uncertainty about which test, categorical or ad

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.


51. See, e.g., *Eilrod*, 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.\(^5^2\) During the twenty years since *Pickering*, courts continue to struggle with this problem.\(^5^3\)

While the Supreme Court decided the applicable tests for two categories, the standard for political participation remains undecided.\(^5^4\) Moreover, commentators and lower courts criticize the vagueness and inconsistencies in the standards regarding discharge for political speech and political affiliation.\(^5^5\)

A. Discharge for Political Affiliation

A patronage is the termination of a public employee because of the employee's political affiliation.\(^5^6\) In this type of dismissal, the Supreme Court applies the categorical\(^5^7\) rather than the ad hoc balancing test.\(^5^8\) In *Elrod v. Burns*,\(^5^9\) 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.\(^6^0\) The Court reasoned that the state

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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).


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.


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


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.\textsuperscript{61}

In \textit{Branti v. Finkel}\textsuperscript{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.\textsuperscript{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.\textsuperscript{64}

\begin{quote}
\textsuperscript{61.} \textit{Id.} at 367. The Court in \textit{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 \textit{Elrod}, 427 U.S. at 378-80 (Powell, J., dissenting). See also D. ROSENBLUM, \textit{FEDERAL SERVICE AND THE CONSTITUTION} 70-74 (1971) (tracing the history of patronage practices in America).

The \textit{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. \textit{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. \textit{Id.} at 364-68.

\textsuperscript{62.} 445 U.S. 507 (1980). \textit{Branti} involved two assistant public defenders dismissed by a Democrat because they were Republicans.

\textsuperscript{63.} \textit{Id.} at 518. The \textit{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. \textit{Id.}

\textsuperscript{64.} Some courts use the \textit{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 \textit{Ramey} v. \textit{Harber}, 589 F.2d 753, 756 (4th Cir. 1978), cert. denied, 442 U.S. 910 (1979). The small county exception is based on the \textit{Branti} holding that party affiliation is an appropriate requirement if it affects performance of the public office involved. \textit{Branti}, 445 U.S. at 518. The \textit{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.” \textit{Ramey}, 589 F.2d at 756. The court in \textit{Ramey} reasoned that such a relationship can affect the employee's job performance. \textit{Id.} While the \textit{Ramey} court did not cite the small county exception in its holding, \textit{id.} at 757, the exception has been noted in other courts. See, e.g., McBee, 730 F.2d at 1026 (Tate, J., concurring) (concurrence based on the “small county” exception to the \textit{Elrod/Branti} doctrine as expressed in \textit{Ramey}). But see \textit{Jones}, 727 F.2d at 1338 n.14:

Aside from the fact that the small-size distinction in \textit{Ramey} was entirely by way of dictum, \textit{Branti}, which followed \textit{Ramey}, held that raw patronage discharges in a
\end{quote}
B. Discharge for Political Speech

Political speech is speech by a public employee regarding matters of public concern. Unlike situations of dismissal for political affiliation, the Supreme Court applies the Pickering ad hoc balancing test to political speech discharge cases. 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.

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

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

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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.

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

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." 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. Rather, the Court noted that the “speech” was merely a public employee complaining about a problem of purely personal interest. Thus, the balancing test was inapplicable, since the state’s interest in serving the public outweighs an employee’s personal interest. 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.

Connick sharply curtails the political speech protection available to public employees. 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.

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. The trial court, on the other hand, required a showing of actual disruption.

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:

[When 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, no prior court dismissed an employee speech case for failing to reach issues of public concern. The Connick Court ignored the fact that past speech cases concerned state policy decisions that personally affected the employee. Thus, the Connick public concern test causes confusion over what employee speech courts may actually consider a matter of public concern.

Most importantly, Connick tips the Pickering scales in the government's favor. 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. Justice Brennan's dissent noted that Connick will result in public employees hesitating to publicly criticize their supervisors.

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").


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 Pickering99 and Elrod/Branti100 into a single ad hoc balancing inquiry.101

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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,"\textsuperscript{102} with political participation somewhere in-between.\textsuperscript{103} Where the court places political participation on the spectrum determines the weight of various factors in the balancing process.\textsuperscript{104}

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

Although \textit{Jones} rejects the McBee spectrum, the result is identical. Both circuits analyze discharge for political participation using the ad hoc balancing test.\textsuperscript{110} Applying the Pickering balancing test to political participation, discharge results in the same problems that arise in political speech cases.\textsuperscript{111} \textit{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.\textsuperscript{112}

\begin{flushleft}majority relies in creating the spectrum, "does not take one whit from Elrod or Branti." \\
\textit{Id.} at 1021.
\end{flushleft}

\textsuperscript{102} See \textit{id.} at 1014.

\textsuperscript{103} \textit{id.}

\textsuperscript{104} \textit{id.} at 1016-17. The majority criticized the "categorical approaches of the district court and the panel," and held that \textit{Connick} directed them to "tailor the analysis to the particular facts of each case." \textit{Id.} at 1016. On remand, the trial court, using the \textit{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).

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

\textsuperscript{106} \textit{id.} at 1334-35 n.6.

\textsuperscript{107} \textit{id.} at 1336.

\textsuperscript{108} \textit{id.}

\textsuperscript{109} \textit{id.}

\textsuperscript{110} McBee, 730 F.2d 1009; \textit{Jones}, 727 F.2d 1329. See Risky Business, supra note 20, at 1100.

\textsuperscript{111} See infra notes 119-129 and accompanying text (weaknesses of the ad hoc balance).

\textsuperscript{112} See supra note 106 and accompanying text (\textit{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. Because of the test’s flexibility, courts try to apply ad hoc balancing to first amendment issues. When a court identifies the controlling factors, it balances the interests and decides which party has a more compelling argument. Cases which list the significance and weight attached to each element guide future courts confronted with similar situations.

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

Yet the flexibility of ad hoc balancing creates disadvantages. Because the process allows courts to choose and weigh various factors,
the results are inconsistent. Thus, appellate review is often merely a re-evaluation of the competing interests using a different set of personal preferences, resulting in inconsistent review.

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

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

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.


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, 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 cases and the categorical test for political affiliation, courts should apply the categorical analysis to all three types of political activities.

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

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. 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)).
Categorical analysis, however, is imperfect. It is, for example, difficult to create a standard for measuring all future activity. In addition, the test's rigidity may occasionally allow unjust results by categorizing all actions as either protected or unprotected. This standard is less fact-sensitive than ad hoc balancing and fails to account for hidden factors. 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.

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. Because of this flaw, courts apply categorical analysis only to political affiliation discharges. A closer examination indicates that courts should also review political participation discharges under the categorical standard instead of the unpredictable ad hoc approach. Since “participation” is more akin to political affiliation than to political speech, the categorical test

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. 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. If the employee’s behavior during the participation constitutes a dereliction of duty or insubordination, dismissal may be justified on other grounds. The state must demonstrate that personal loyalty is necessary for “effective performance” of the employee’s duties to support a discharge for political participation.

While categorical analysis can be easily applied to political participation discharge, this test does not readily adapt to political speech cases. Additionally, whether the Supreme Court will apply the employee 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; Wachsman, 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, Meehan, 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.\textsuperscript{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.\textsuperscript{160}

Courts should only defer to the state when it can convincingly show that the particular workplace demands overriding cooperation and cohesion.\textsuperscript{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.\textsuperscript{162}

2. The Public

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

\begin{itemize}
  \item \textsuperscript{159} See Developments, supra note 3, at 1767 ("By 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 \textit{Pickering} balance.").
  \item \textsuperscript{160} Id. (noting that courts have become lazy in scrutinizing the claims of the state employer and should become more involved) (footnote omitted).
  \item \textsuperscript{161} Id. at 1768.
  \item \textsuperscript{162} \textit{Pickering}, 391 U.S. at 570 n.3.
  \item \textsuperscript{163} In \textit{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 \textit{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").
  \item \textsuperscript{164} See Developments, supra note 3, at 1758 (Constitution places paramount value on robust discussion and criticism of government) (footnote omitted).
  \item \textsuperscript{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).
  \item \textsuperscript{166} Id.
  \item \textsuperscript{167} See supra note 25 and accompanying text.
\end{itemize}
about the inner-workings of government.\textsuperscript{168}

Although \textit{Connick} protected only a public employee's expression on matters of public concern under the first amendment,\textsuperscript{169} courts should remain flexible in applying \textit{Connick}.\textsuperscript{170} When in doubt, courts should tip the balance in favor of the free flow of information through political expression.\textsuperscript{171} Courts utilizing the ad hoc balancing test should consider the free flow of information as the dominant public interest.\textsuperscript{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.\textsuperscript{173} Only when the state can show that its delivery of services will be substantially impaired should efficiency outweigh information.

3. The Employee

Since \textit{Pickering}, courts discount the public employee's side of the ad hoc balance.\textsuperscript{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-

\textsuperscript{168}. \textit{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).

\textsuperscript{169}. \textit{See supra} note 76 (discussion of what is public concern).

\textsuperscript{170}. As an example of the harshness of the current \textit{Connick} standard, less than a month after the \textit{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 \textit{Connick} principles mandated the employee's dismissal because the speech was only tangentially related to a matter of public concern. \textit{Id.} at 12.

\textsuperscript{171}. \textit{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).

\textsuperscript{172}. \textit{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").

\textsuperscript{173}. \textit{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.''); \textit{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.").

\textsuperscript{174}. \textit{See supra} note 124 and accompanying text.
ployee's valid interests in the balance. Such interests include the employee's right to hold views different from the employer, the employee's interest in speaking from a professional perspective on workplace affairs without fear of reprisal by the state, the employee's right to fair working conditions, and the employee's right to participate in the political process.

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. Emphasizing individual choice reflects the true meaning and intent of the first amendment.

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.

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.
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.

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COMMENTS