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J. Kendall Rathburn

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MCBEE v. JIM HOGG COUNTY: ON BALANCE A RISKY BUSINESS

There are fewer than 6,000 people in Jim Hogg County, Texas. Five years ago, newly elected Sheriff Gilbert Ybanez decided not to rehire Deputies Contreras, Hinojosa, Serna, Spencer, and McBee. Deputies Contreras, Hinojosa, and Serna had openly supported the previous sheriff during the election by attending *pachangas* (local political rallies), placing bumper stickers on their automobiles, and publicly endorsing the incumbent. Deputy Spencer had supported the losing incumbent by placing a bumper sticker on her automobile. Ybanez offered Deputy McBee a lower position than she had previously held; the offer was withdrawn after McBee privately complained to county officials about Ybanez's treatment of the other four deputies. The five deputies filed suit in Federal District Court¹ claiming that Sheriff Ybanez's failure to reappoint them violated their First Amendment rights.² The United States Fifth Circuit, sitting *en banc*, held that both the district court decision and the original Fifth Circuit panel decision applied the wrong test. The court held that the proper test was a particularized balancing of the deputies' interest as public employees in freedom of expression, and the sheriff's interest as governmental employer in operating an efficient office. The court vacated and remanded, instructing the district court to apply this new test to the facts of each deputy's case. *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984).

This casenote will first briefly survey the United States Supreme Court decisions in the areas of speech and political patronage. Next the three opinions in the *McBee en banc* decision will be compared, followed by a brief discussion of the standards adopted by other Federal Circuits. Finally a suggested approach to political patronage cases is presented.

Relevant Supreme Court Cases

The last century has seen an ebb and flow in the Constitutional protection given to public employees' activities and even to their beliefs.

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1. Deputies Contreras, Hinojosa, Serna, Spencer, and McBee filed suit under 42 U.S.C. § 1983 (Supp. V 1979). The First Amendment, applicable to the States through the Fourteenth Amendment, protects political association and expression. *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S. Ct. 612, 632-33 (1976). However, under Texas law, deputy sheriffs are closely linked to the sheriff, serving at his pleasure and leaving with him when his term ends. Tex. Civ. Stat. Ann. art. 6869 (Vernon 1960).

2. See *Perry v. Sindermann*, 408 U.S. 593, 587, 92 S. Ct. 2694, 2697 (1972) (An individual has no "right" to a valuable public benefit; although he or she may be denied the benefit for virtually any reason, the government may not deny the benefit for a reason that infringes the individual's constitutionally protected interests).

Just over thirty years ago the United States Supreme Court upheld the traditional view that public employees could "go elsewhere" if they decided that their First Amendment rights were more important than their present employment³—a view first articulated in 1892 by then Judge Oliver Wendell Holmes, who said that a policeman might have "a constitutional right to talk politics, but he has no constitutional right to be a policeman. 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."⁴

However, starting in 1952 the Court began to restrict the States' power to curb public employees' freedom to associate.⁵ These cases, spanning fifteen years, charted a new course toward greater protection of public employees, particularly with respect to mandatory loyalty oaths.

Close on the heels of these new-found protections for public employees the Court addressed restrictions on the freedom of speech of public employees.

Pickering v. Board of Education,⁶ a benchmark case, saw the Court's initial steps in defining workable boundaries for public employees' rights of freedom of expression. While a local tax proposal was pending, Mr. Pickering, a high school teacher in Will County, Illinois, wrote a letter to a local newspaper critical of the Board of Education's handling of past tax proposals. For writing the letter, the Board fired Mr. Pickering. Justice Marshall, writing for the Court, stated that the proper analysis must "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁷ The *Pickering* Court purposely formulated its balancing test in broad terms, so that it would be applicable in a large number of cases.⁸ The Court identified several factors to be considered in balancing the conflicting interests: the closeness of the parties' working relationship, the detrimental effect of the speech on the employer, the relevancy of the employee's speech to the particular

3. *Adler v. Board of Educ.*, 342 U.S. 485, 492, 72 S. Ct. 380, 385 (1952) (upholding New York laws prohibiting members of certain subversive groups from teaching in public schools).

4. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

5. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 605, 87 S. Ct. 675, 685 (1967) (holding unconstitutionally vague New York statutes requiring that teachers sign anti-communist oath); *Wieman v. Updegraff*, 344 U.S. 183, 192, 73 S. Ct. 215, 219 (1952) (holding constitutional protection extends to public employees "whose exclusion pursuant to a statute is patently arbitrary or discriminatory").

6. 391 U.S. 563, 88 S. Ct. 1731 (1968).

7. *Id.* at 568, 88 S. Ct. at 1734-35.

8. *Id.* at 569, 88 S. Ct. at 1735.

job, and the public's concern with freedom of the given type of speech.⁹ The Court concluded that unless the teacher had knowingly made false or reckless statements, "his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."¹⁰ Although *Pickering* marked the high tide of constitutional protection extended to public employees in their exercise of free speech, the Court noted an important limitation:

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. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.¹¹

Since *Pickering*, there have been two important eras of refinement of *Pickering's* balancing test. During the first era, lasting from *Pickering* in 1968 until *Connick v. Myers*¹² in 1983, the Court concerned itself with fine-tuning the test. At first the Court simply reiterated the *Pickering* test.¹³ After firmly establishing that it was critical that public employees be permitted to criticize their superiors publicly on matters of public concern,¹⁴ the Court outlined the burdens of proof to be carried by the parties. In *Mt. Healthy City School Dist. v. Doyle*,¹⁵ the Court made the *Pickering* protection more difficult to obtain by requiring the public employee to show that: (1) his conduct was constitutionally protected under *Pickering*, and (2) this conduct was a substantial or motivating factor in the employer's decision to terminate the employee. Even if the employee carried this burden, the termination would be upheld if the employer could show by a preponderance of evidence that the termination would have occurred anyway, regardless of the protected

9. *Id.* at 569-72, 88 S. Ct. at 1735-36.

10. *Id.* at 574, 88 S. Ct. at 1738.

11. *Id.* at 569 n.3, 88 S. Ct. at 1735 n.3.

12. 461 U.S. 138, 103 S. Ct. 1684 (1983) (overturning the Fifth Circuit's decision that an assistant district attorney's right to free speech had been infringed when she was fired for circulating an intra-office questionnaire critical of her superior; the Court held that only public employees' speech on matters of general public concern is protected).

13. *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972) (holding that the failure to renew a college professor's employment contract presented a *bona fide* constitutional claim, where the school's action was allegedly in retaliation for his expressing a view not consonant with his employer's before the state legislature).

14. *Id.* at 597-98, 92 S. Ct. at 2698 (citing *Pickering v. Board of Educ.*, 391 U.S. at 568, 88 S. Ct. at 1734).

15. 429 U.S. 274, 97 S. Ct. 568 (1977).

conduct.¹⁶ The final adjustment to the *Pickering* scales during this first era extended the public employee's protection to criticism of his or her superior in private communications.¹⁷ Additional factors to be considered in a private setting were the time, manner, and place of the confrontation between the employee and the superior.¹⁸ At the close of this first post-*Pickering* era the Court had reached a logical compromise between the competing interests by gradual steps.

The second era of post-*Pickering* refinement began with *Connick v. Myers*.¹⁹ The Supreme Court's latest statement on public employees' right to speak on matters of public concern represented a sharp retraction of the protection previously accorded them.²⁰ The Burger Court's skewing of the *Pickering* balance to favor governmental interests bodes ill for public employees. In the future, such employees should carefully contemplate the possible consequences of publicly or privately criticizing their superiors, regardless the validity of the criticism.

*Elrod v. Burns*²¹ was the Supreme Court's first post-*Pickering* case dealing specifically with patronage dismissals. Shortly after assuming office, Sheriff Elrod, a Democrat, discharged a group of deputies who were not members of the Democratic Party and who had failed to obtain sponsorship from one of the party leaders. Justice Brennan, writing for the plurality, used language closely resembling that of *Pickering*.²² The fundamental difference between the two analyses is that *Elrod* struck a balance between the competing interests in much more absolute terms than did *Pickering*: "[P]atronage dismissals severely restrict political belief and association. Though there is a vital need for government efficiency and effectiveness, such dismissals are on balance not the least restrictive means for fostering that end."²³ In couching the *Elrod* analysis

16. *Id.* at 287, 97 S. Ct. at 576.

17. *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16, 99 S. Ct. 693, 696-97 (1979).

18. *Id.* at 415 n.4, 99 S. Ct. at 696 n.4.

19. 461 U.S. 138, 103 S. Ct. 1684 (1983).

20. See generally *Developments in the Law—Public Employment: The Constitutional Rights of Public Employees*, 97 *Harv. L. Rev.* 1738 (1984) "The current Court's scale tips in favor of promoting the efficient provision of public services instead of protecting unrestricted discourse by public employees on matters of public concern." *Id.* at 1748-49 (footnotes omitted). See also *The Supreme Court, 1982 Term*, 97 *Harv. L. Rev.* 4 (1983) ("But the 'content, form, and context' standard is so vague and manipulable that *Connick* may severely limit all criticism by public employees.") (footnotes omitted); Note, *Connick v. Myers: Narrowing The Free Speech Right of Public Employees*, 33 *Cath. U.L. Rev.* 429, 432 (1984) ("[A]n examination of *Connick* in the context of previous applications of the balancing test will reveal a significant narrowing of the rights of public employees.") (footnotes omitted); Note, *Constitutional Law - Supreme Court Restricts First Amendment Rights of Public Employees - Connick v. Myers*, 58 *Tul. L. Rev.* 831 (1984) ("The *Connick* Court is demonstrably less tolerant of employee speech than were earlier Courts.").

21. 427 U.S. 347, 96 S. Ct. 2673 (1976).

22. *Id.* at 372, 96 S. Ct. at 2689.

23. *Id.*

in *Pickering* terminology, the Court clearly indicated that unless a given public employee engaged in policymaking, the scales were overwhelmingly tipped in the employee's favor in cases of patronage dismissal. The Court's reason for such favoritism was its "concern with the impact of political patronage or political believe [sic] and association [which do] not occur in the abstract, for political belief and association constitute the core of those activities protected by the First Amendment."²⁴

Four years later, the Court refined *Elrod* in *Branti v. Finkel*.²⁵ In *Branti* Justice Stevens, writing for the majority, narrowed the policy-making exception to *Elrod*. The Court held that the exception applied only when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."²⁶ The Court concluded that the assistant public defenders in *Branti* were not within the "policymaking/confidentiality"²⁷ exception to the *Elrod* rule. Assistant public defenders' responsibilities were to serve individuals, not the controlling political party. "To make his position dependant on political allegiance would undermine rather than aid his effectiveness."²⁸ Therefore, *Branti*'s narrowing of the *Elrod* exception represented an extention of the *Elrod* rule against patronage dismissals.

As in *Elrod*, Justice Powell, joined by Justice Rehnquist, dissented.²⁹ He reiterated his belief that patronage practices served substantial government interests by carrying out the will of the electorate.³⁰

In summary, it is evident that the freedom of speech cases and the political patronage cases are closely related. Both *Elrod* and its progeny, and the line of cases culminating in *Connick* find their roots in *Pickering*. There exist, however, significant differences between these two branches. In *Connick*-type cases involving freedom of speech, the substantial interests of both parties results in a delicate balance of the relevant factors. In *Elrod*-type cases involving patronage dismissals, the Supreme Court's assertion that "political belief and association constitute the core of those activities protected by the First Amendment"³¹ results in the scales being tipped overwhelmingly in the employee's favor, unless the State can meet the narrow *Elrod-Branti* exception.

24. *Id.* at 356, 96 S. Ct. at 2681.

25. 445 U.S. 507, 100 S. Ct. 1287 (1980).

26. *Id.* at 518, 100 S. Ct. at 1295.

27. For lack of a better description, the term "policymaking-confidentiality" is used throughout the paper; note, however, *Branti*'s important narrowing of this exception to the *Elrod* doctrine.

28. 445 U.S. at 519-20, 100 S. Ct. at 1295.

29. *Id.* at 521, 100 S. Ct. at 1296 (Powell, J., dissenting).

30. *Id.* at 522-34, 100 S. Ct. at 1296-1303 (Powell, J., dissenting).

31. *Elrod*, 427 U.S. at 356, 96 S. Ct. at 2681.

The McBee Opinions

In *McBee*, the district court had held that *Elrod v. Burns* protected plaintiffs Contreras, Hinojosa, Serna, and Spencer from dismissal; Sheriff Ybanez therefore could not replace them with his political supporters.³² The court additionally held that plaintiff McBee's private complaint to county officials was protected speech under the First Amendment.³³

On appeal, the original Fifth Circuit panel reversed.³⁴ Judge Garza, writing for the three judge panel, noted that a "small county" exception to the *Elrod* doctrine applied to the four patronage plaintiffs.³⁵ Due to the small size of the sheriff's office, the court found that political loyalty was indispensable to the office's effectiveness. This "small county" exception is a subpart to the "policymaking/confidentiality" exception established in *Elrod* and *Branti*.³⁶ Turning to plaintiff McBee, Judge Garza wrote that her actions had seriously injured the close working relationship in the sheriff's office, and that her actions were therefore unprotected by the First Amendment.³⁷

After originally denying rehearing, the Fifth Circuit in an unusual move reconsidered and granted rehearing *en banc*.³⁸ The majority, eleven of the fifteen judges, vacated and remanded to the district court for reconsideration in light of *Connick v. Myers*.³⁹

Judge Gee, writing for the *en banc* majority, so smoothly coalesced the *Elrod* patronage dismissal cases and the freedom of speech cases that their factual and legal distinctions are easily missed. The majority merged *Elrod* and *Connick* in three basic steps.

Surveying the Supreme Court cases discussed above, Judge Gee said that "the standard to be applied by us in resolving such public employee discharge or nonrenewal cases as this is the *Pickering* balancing test."⁴⁰ The danger in this assertion is that it is simultaneously correct and incorrect. *Pickering* is arguably the origin of both the *Elrod*-type and the *Connick*-type cases. Judge Gee's statement implies a homogeneity to "public employee discharge or nonrenewal cases" which does not exist. It is important to distinguish at the outset the situation of the four patronage employees from that of Deputy McBee; the majority failed to do so.

32. *McBee v. Jim Hogg County*, 703 F.2d 834, 837 (5th Cir. 1983).

33. *Id.*

34. *Id.* at 846.

35. *Id.* at 842.

36. *Id.*

37. *Id.* at 844-45.

38. For a lively discussion of the "heavy judicial armtwisting" that probably accompanied these events, see Baier, *Constitutional Law*, 31 *Loy. L. Rev.* 1, 12-14 (1985).

39. *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984).

40. *Id.* at 1014.

Connick and *Elrod* were merged further by the citing of *Connick* as indicative of the type of factors to be considered in striking a proper balance.⁴¹ This approach suggests that the weight given each factor should be the same in both *Elrod* and *Connick* situations. As the above analysis of recent Supreme Court decisions demonstrates, this conclusion is incorrect.

Aware that *Elrod* and *Connick* are irreconcilable under a single "particularized inquiry" test, the majority ingeniously modified its previous overstatements by reasoning:

Such cases [both associational and speech] might reasonably be expected to locate themselves on a spectrum; we conclude 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.⁴²

The majority cited cases in which teachers provoked student disturbances as representing the extreme of the employer's side of the "spectrum."⁴³

The majority's narrow view of *Elrod* and *Branti* is unsupported by either opinion's language. Nor is its view that *Branti* narrowed the *Elrod* rule shared by the many commentaries which appeared after *Branti*.⁴⁴

41. *Id.*

42. *Id.* (footnotes omitted).

43. *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970); *Duke v. North Tex. State Univ.*, 469 F.2d 829 (5th Cir. 1972).

44. See, e.g., Note, Constitutional Law—First Amendment Protects Public Employees' Political Beliefs, 55 Tul. L. Rev. 576, 582 (1981) ("Although the Court in [*Branti*] purported to rely upon the holding of *Elrod*, the test employed to determine whether public employees could be dismissed on the basis of political affiliation was substantially broader than the *Elrod* rule.... By placing an affirmative duty on officials to show that party affiliation was a necessary requirement for the effective performance of a public office, the Court narrowly construed the policymaking and confidential employee exceptions of *Elrod*, and reinforced the Court's recent proscription against patronage firings.") (footnotes omitted); Note, Constitutional Limitations on Patronage Practice: *Branti v. Finkel*, 42 La. L. Rev. 310, 319 (1981) ("Arguably, the redefined test broadens the class of protected employees in that the class of persons whose jobs are realistically related to partisan interests is smaller than the class of *all* policymakers."); Note, First Amendment Limitations on Patronage Employment Practices, 49 U. Chi. L. Rev. 181, 186 (1982) (In *Branti v. Finkel* the "Court reaffirmed the unconstitutionality of patronage dismissals, clarified the principles underlying its decision in *Elrod*, and narrowed *Elrod's* policy maker exception to the general proscription against patronage firings.").

The *piece de resistance* of the majority's "spectrum" is the placement of *Connick* and *McBee* in the same area: "The facts of *Connick*, which locate Ms. Myers' situation more centrally on the spectrum, called forth a reiteration and application by the [Supreme] Court of the *Pickering* balance; and so it is with today's case."⁴⁵ The majority chose not to emphasize that the *Connick* and *Pickering* plaintiffs were allegedly exercising their freedom to speak on matters of public concern, whereas the *McBee* plaintiffs, except *McBee*, were allegedly exercising their freedom to associate politically. Instead, Judge Gee factually distinguished the four *McBee* patronage plaintiffs from the *Elrod* plaintiffs by noting first that Deputies Spencer and Contreras did not request rehiring, thus Sheriff Ybanez' failure to consider them for reinstatement did not violate the First Amendment, and second that Deputies Contreras, Hinojosa, and Serna had put their political beliefs into action by placing bumper stickers on their automobiles, and by attending *pachangas* in support of Ybanez's predecessor.⁴⁶

The failure of Deputies Spencer and Contreras to request rehiring fairly precluded them from *Elrod's* protection. The dissent claimed that the two did not request rehiring because "[a]pplication would have been futile."⁴⁷ Nonetheless the majority's holding on this point is the better solution. Otherwise, an employee who quit for any reason could later assert he or she did not seek reappointment because "[t]he handwriting was on the wall . . ."⁴⁸ If the employee must affirmatively seek reinstatement, both his position and his employer's position are clarified.

The majority's distinction between Deputies Hinojosa and Serna, on the one hand, and the *Elrod* plaintiffs on the other, for putting political beliefs into action is untenable. Both political beliefs and associations were protected in *Elrod*, not mere abstract beliefs.⁴⁹ Judge Rubin, dissenting in *McBee*, stated:

A rule that protects *only* abstract beliefs is almost meaningless. Abstract beliefs need little protection. They threaten only those who cannot tolerate heresy. Words unspoken win no converts. Political beliefs cherished only in the mind win no elections. The right at stake in this case is the freedom to *associate* with the political party or the politician of one's choice, as well as the freedom to hold the beliefs of one's intellect. The first amendment does not protect only freedom of belief or the use of words. It safeguards conduct that is part of freedom of expression.⁵⁰

45. 730 F.2d at 1014.

46. *Id.* at 1015.

47. *Id.* at 1023 (Rubin, J., dissenting).

48. *Id.* (Rubin, J., dissenting).

49. *Elrod*, 427 U.S. at 357, 96 S. Ct. at 2681.

50. 730 F.2d at 1025 (Rubin, J., dissenting).

Despite the fine distinction the *en banc* majority drew, *McBee*, like *Elrod*, remains a patronage dismissal case involving the freedom to associate. *Connick*, like *Pickering*, remains an employee criticism case involving the freedom to speak.

Plaintiff *McBee*'s situation should have been subject to *Pickering-Connick* balancing; she "was effectively terminated for her complaints to the county authorities."⁵¹ Deputy *McBee*'s private complaints to local officials make her the only plaintiff in *McBee* whose situation is analogous to that of Ms. Myers, who distributed the questionnaire in *Connick*.

By casting *Elrod* and *Branti* as "pure political belief" cases, the Fifth Circuit has fused most patronage cases into the government-favored⁵² "particularized balancing" espoused by Justice White in *Connick*.⁵³

After holding *Connick*'s "particularized balancing" applicable to all the *McBee* plaintiffs, the majority's next section was titled "Adjusting The Earlier Tests."⁵⁴ Without the benefit of *Connick*, the majority stated, the district court and the original panel had applied dated analyses. The *Connick* "guidepost" was the Supreme Court's "'effort to avoid formulaic response' in public employee First Amendment cases."⁵⁵

Until *McBee*, the Fifth Circuit's approach in patronage dismissal cases where mixed motives for the dismissal were alleged, established in *Tanner v. McCall*,⁵⁶ was to ask whether: (1) the employer's conduct had impermissibly abridged the employee's first amendment rights, (2) the employee had met the burden of showing a constitutional infringement, and (3) the employer had effectively rebutted by showing the decision to dismiss would have occurred absent the protected conduct.⁵⁷

According to *McBee*, *Connick* did not overrule *Tanner*, but rather required a more "expansive and particularistic approach"⁵⁸ in the first step of the analysis. In other words, by failing to mention the *Tanner* court's use of *Elrod*'s employee-favored balancing test in the first and most crucial step of the *Tanner* analysis,⁵⁹ the *McBee* court took another opportunity to shift patronage cases into *Connick*'s employer-favored test.

In the final section of the opinion, "*Pickering* Applied,"⁶⁰ the *McBee* majority reiterated the necessity for a "particularized inquiry" into each plaintiff's case.⁶¹ Although the majority said "*Pickering* and its progeny do

51. *Id.* at 1015 (Footnotes omitted).

52. See *supra* note 19 and accompanying text.

53. 461 U.S. at 150, 103 S. Ct. at 1692.

54. 730 F.2d at 1015.

55. *Id.* at 1016 (quoting *Gonzalez v. Benavides*, 712 F.2d 142, 147 (5th Cir. 1983)).

56. 625 F.2d 1183 (5th Cir. 1980) (concluding dismissed deputies had not proved patronage was a motivating or substantial factor in defendant's decision).

57. *Id.* at 1190.

58. *McBee*, 730 F.2d at 1016.

59. 625 F.2d at 1189.

60. 730 F.2d at 1016.

61. *Id.*

not prescribe a fixed set of factors,"⁶² it listed several "relevant" factors to be weighed in the balance, only one of which favors employees.⁶³ In vacating and remanding to the district court the majority concluded: "To conduct the particularized inquiry mandated by *Connick* in this case will require evaluation of the record with these considerations in mind and may require further development of the facts."⁶⁴ Ironically, by instructing the district court to keep "these considerations in mind" the majority perhaps implied that its list of relevant factors was an exclusive one. This would contradict the majority's description of *Connick's* rationale: "'to avoid formulaic response' in public employee First Amendment cases."⁶⁵

Judge Rubin, joined by Judges Randall and Higginbotham, opened the dissent by restating the *Elrod* doctrine: "Political belief, association, and activity are at the core of the activities protected by the first amendment."⁶⁶ Judge Rubin chided the majority for vacating findings of fact made by the district court without determining that those findings were "clearly erroneous."⁶⁷

The dissent distinguished *Elrod's* patronage doctrine from *Connick*. Judge Rubin stated that the majority had mischaracterized *Branti v. Finkel* as a narrowing of *Elrod*,⁶⁸ when in fact "the *Branti* Court did not limit but extended *Elrod* to prohibit dismissal 'of a public employee solely because of his private political beliefs.'"⁶⁹ In finding *Elrod* and not *Connick* applicable to the four *McBee* patronage employees, Judge Rubin wrote:

We do not need to guess at [*Connick's*] holding, the [Supreme] Court stated it:

"We hold *only* that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."⁷⁰

62. *Id.*

63. *Id.* at 1016-17.

64. *Id.* at 1017.

65. *Id.* at 1016 (quoting *Gonzalez*, 712 F.2d at 147).

66. *Id.* at 1017 (Rubin, J., dissenting) (citing *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976)).

67. *Id.* at 1018.

68. *Id.* at 1020 (Rubin, J., dissenting). The majority stated that in *Branti* "Justice Stevens appeared to narrow the *Elrod* rule significantly." *Id.* at 1012. See also *supra* note 42 and accompanying text.

69. 730 F.2d at 1020 (Rubin, J., dissenting) (quoting *Branti*, 445 U.S. at 517, 100 S. Ct. at 1294).

70. 730 F.2d at 1021 (Rubin, J., dissenting) (quoting *Connick*, 461 U.S. at 147, 103 S. Ct. at 1690).

The critical distinction which the majority failed to recognize between *Elrod* and *McBee*, on the one hand, and *Connick* on the other is that:

Elrod and *Branti*, like this case, involved retaliation for political beliefs and associations—free expression that did not threaten the efficient conduct of public office unless the employees' position required political loyalty. *Pickering*, like *Connick* and similar pre-*Connick* cases, involved speech that arguably threatened the integrity of employer-employee relations, and therefore each case required the interests to be balanced anew.⁷¹

Although Judge Rubin's analysis did not find *Elrod's* roots in *Pickering*, it is not contrary to this article's basic theme—both advocate making a distinction between cases involving the freedom to speak and those dealing with the freedom to associate.

The dissent applied the *Elrod* test to the deputies other than Deputy McBee, concluding that their First Amendment rights had been abridged.⁷² Since McBee had protested to county officials, the dissent said that the *Pickering-Connick* balancing test should have governed.⁷³ McBee's complaint about the patronage dismissals of public employees was clearly a matter of public concern.⁷⁴ The complaint was appropriately made, and did not approach the "mini-insurrection" caused by Ms. Myers' questionnaire in *Connick*.⁷⁵ Judge Rubin concluded that McBee's speech was protected "not only because it was free speech, but also because it was manifestly a petition for the redress of a grievance from the only governmental body able to afford relief."⁷⁶

Judge Rubin's well-crafted dissent apparently did not find the majority's "spectrum" objectionable, only its failure to correctly distinguish an *Elrod* fact pattern (the four patronage plaintiffs) from a *Connick* fact pattern (Deputy McBee).

Although Judge Tate concurred in the majority's result, he noted that Judge Rubin's dissent was difficult to fault.⁷⁷ He concurred in the result only because he believed that the case fell within the "small county" exception to the *Elrod-Branti* doctrine as expressed by the original panel and the Fourth Circuit in *Ramey v. Harber*.⁷⁸

In *Ramey v. Harber*, the Fourth Circuit did "take notice of the intimate relationship that undoubtedly exists between the sheriff and his deputies in a small county like Lee County, Virginia."⁷⁹ However, the *Ramey*

71. 730 F.2d at 1022 (Rubin, J., dissenting)(footnotes omitted).

72. Id. at 1022.

73. Id. at 1024.

74. Id.

75. Id.

76. Id at 1025 (Rubin, J., dissenting).

77. Id. (Tate, J., concurring).

78. Id. at 1026 (citing *Ramey v. Harber*, 589 F.2d 753 (4th Cir. 1978)).

79. 589 F.2d at 756.

Court did not rely on this rationale to decide the case: “[F]or the purposes of disposing of this litigation, we assume without deciding that *Elrod* is applicable.”⁸⁰ *Ramey*, therefore, did not truly represent a “small county” exception to the *Elrod-Branti* doctrine.

If the “small county” exception is premised on the *Branti* requirement “that party affiliation is an appropriate requirement for the effective performance of the public office involved,”⁸¹ it is faithful to the *Elrod-Branti* doctrine. If it is instead based on the number of people in the office or county, nothing supports denying employees the benefit of *Elrod*’s protection. Mr. Pickering would not have been denied the right to speak on matters of public concern had he taught at a small school or in a small county. Historically, political beliefs and association have enjoyed greater protection than Mr. Pickering’s speech. Denying public employees *Elrod*’s protection because they work in a small office or county is inconsistent with this greater protection.

Other Circuits’ Approaches

All the federal circuits have applied the *Pickering* balance to free speech cases,⁸² and some have had at least one opportunity to apply the post-*Connick* balancing test.⁸³ However, fewer patronage cases have been reported.⁸⁴ The smaller number of cases probably results from the restricted fact patterns giving rise to patronage dismissals, coupled with the employee’s hurdle in proving employer motive.

The Fourth Circuit recently held that non-confidential, non-policy-making public employees “enjoy the protection of the *Elrod-Branti* principle.”⁸⁵ This decision came after *McBee*, and did not cite *Connick*. Six years earlier, before *Connick* or *Branti*, the Fourth Circuit had noted a possible “small county” exception to *Elrod*.⁸⁶ Judge Tate’s concurrence⁸⁷ and the original *McBee* panel⁸⁸ adopted this exception. Judge Tate’s opinion implies a conflict between the Fourth Circuit’s “small county” exception and

80. *Id.* at 757.

81. *Branti*, 445 U.S. at 518, 100 S. Ct. at 1287.

82. See, e.g., *Martin v. Lauer*, 686 F.2d 24 (D.C. Cir. 1982); *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982); *Monsanto v. Quinn*, 674 F.2d 990 (3d Cir. 1982).

83. See, e.g., *Zook v. Brown*, 748 F.2d 1161 (7th Cir. 1984); *Anderson v. Central Point School Dist. No. 6*, 746 F.2d 505 (9th Cir. 1984); *Jurgensen v. Fairfax County*, 745 F.2d 868 (4th Cir. 1984).

84. Over 200 cases from the Federal Courts of Appeals specifically apply the *Pickering* free speech balance. But fewer than 50 cases specifically apply the *Elrod* patronage doctrine. See, e.g., *England v. Rockefeller*, 739 F.2d 140 (4th Cir. 1984); *Lasco v. Northern*, 733 F.2d 477 (7th Cir. 1984); *Laskaris v. Thornburgh*, 733 F.2d 260 (2d Cir. 1984).

85. *Bever v. Gilbertson*, 724 F.2d 1083, 1088 (4th Cir. 1984).

86. *Ramey*, 589 F.2d at 756-57.

87. 730 F.2d at 1026 (Tate, J., concurring).

88. 703 F.2d at 842.

the *McBee* majority's rejection of that concept.⁸⁹ Since *Ramey*'s "small county" exception was only dictum,⁹⁰ this conflict is more apparent than real. The conflict calling for Supreme Court intervention lies in *McBee*'s "particularized inquiry" approach, while the other circuits do not rely on *Connick* to analyze patronage dismissals.

The Seventh Circuit's novel approach to patronage cases combines two versions of the *Pickering* test.⁹¹ First, if the employee is unable to show that he was dismissed solely because of his political beliefs, the court applies the three-part *Mount Healthy* test to determine whether party affiliation was a motivating factor in the dismissal.⁹² If the answer is "yes," then the *Mount Healthy* test is again applied to determine whether the employer-defendant can effectively rebut the presumption thus established by showing that the dismissal would have occurred regardless of the protected conduct.⁹³ If the answer is "no," then the traditional *Pickering* balance is applied to determine whether the State's interests outweigh the infringement of the employee's freedom of political association.⁹⁴

Barnes v. Bosley,⁹⁵ a 1984 Eighth Circuit patronage dismissal case, explained *Pickering*'s inapplicability to patronage cases and the close relationship between *Pickering* and *Elrod*:

The *Pickering* balancing test need not be used in determining whether the first amendment protects political affiliation. In *Elrod*, the Supreme Court struck the balance between the government's interest in efficient management and the public employee's interest in free political association. The Court held that political affiliation is always protected unless the employee occupies a position that requires a political viewpoint which is in harmony with

89. 730 F.2d at 1026 (Tate, J., concurring). See also Baier, *supra* note 36, at 17 ("In defense of his isolated opinion, Judge Tate, undaunted, pointed his finger at the views of the Fourth Circuit [expressed in *Ramey*] which we all know is a flag to the Supreme Court.") (footnotes omitted).

90. See *Ramey*, 589 F.2d at 756-57. See also *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984).

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 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.

727 F.2d at 1338 n.14.

91. *Wren v. Jones*, 635 F.2d 1277 (7th Cir. 1980); *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983).

92. *Wren*, 635 F.2d at 1283.

93. *Id.*

94. *Id.* at 1286.

95. 745 F.2d 501 (8th Cir. 1984) (holding that public employees who supported their superior's predecessor were protected under *Elrod*, and that *Pickering* was inapplicable).

the viewpoint of his or her supervisor.⁹⁶

Barnes' resolution of *Pickering* and *Elrod* explains the similarities in the language of the two cases, and lends some credence to the *McBee* "spectrum" theory. Left unexplained is why the *McBee* majority placed the *McBee* patronage employees under *Connick* instead of under *Elrod*. The distinction between the *McBee* plaintiffs' political beliefs with limited political activities and the *Elrod* plaintiffs' "pure political beliefs"⁹⁷ is so fine as to border on invisibility. "A rule that protects *only* abstract beliefs is almost meaningless."⁹⁸

Conclusion

Barnes' logic is undeniable. It succinctly distinguishes *Pickering* from *Elrod*. It reconciles *McBee's* majority and dissent by keeping the "spectrum" intact, but moves patronage dismissals based on political beliefs and activities from *Connick's* balance to *Elrod's* analysis. The *Elrod-Branti* exception for certain persons in confidential and policymaking positions remains viable. Although both the majority and dissent rejected the "small county" exception to the *Elrod-Branti* analysis,⁹⁹ the size of an office or county may be relevant in considering the confidentiality/policymaking exception. It is unlikely that the Fifth Circuit will soon adopt *Barnes'* reasoning, as the very recent *McBee* majority numbered eleven strong.

Supreme Court intervention in the area of patronage dismissals appears likely due to the Circuits' increasingly different approaches. In light of *Connick's* favoring of governmental interests, the current Court might find *McBee's* reasoning persuasive. If so, a final caveat to the "spectrum" analysis would be appropriate. Placing individual cases with their myriad fact patterns on a single continuum is a risky business. Jurisprudence is fraught with factual distinctions of cases from prior precedent. Mention of this danger is made only to emphasize the fragility of any test adopted in so complex an area as Constitutional Law.

Supreme Court adoption of the *Barnes'* analysis would maintain a consistent line of patronage case law. *Barnes*, more than *McBee*, reflects the *Elrod* principle that "political belief and association constitute the core of those activities protected by the First Amendment."¹⁰⁰ Where patronage is not the "sole" reason for dismissal, *Tanner's* three-step analysis delegating the burden of proof to be carried by each party is appropriate.¹⁰¹ This approach would lessen the danger faced by plaintiffs who would be placed on the *Connick* balance under the *McBee* analysis once their case is found not

96. *Id.* at 506.

97. *McBee*, 730 F.2d at 1014.

98. *Id.* at 1025 (Rubin, J., dissenting).

99. *Id.* at 1016; *id.* at 1023 (Rubin, J., dissenting).

100. *Elrod*, 427 U.S. at 356, 96 S. Ct. at 2681 (footnote omitted).

101. *Tanner*, 625 F.2d at 1190.

to be on "all fours" with *Elrod*.

The *Barnes* court understood that nonpolicymaking, nonconfidential public employees' political beliefs and activities should be protected. To hold otherwise, the Court would lend credence to Justice Powell's dissent in both *Elrod* and *Branti* that patronage is a traditional practice that serves a substantial governmental interest by reflecting the will of the people.¹⁰² In *Gannon v. Daley*,¹⁰³ Judge Prentice Marshall recognized that there is another practice enjoying a richer history and serving a greater public purpose:

It is certainly true that a fundamental premise of American government is the rule of the majority. But that is not the fundamental premise of American constitutionalism. The Constitution exists not to protect majorities, which usually can take care of themselves, but to protect minorities from the excesses of the majority. The constitutional right to choose one's political associations and exercise one's political beliefs is a precious one, fully secured against majorities precisely to ensure that in the long run political institutions reflect the will of the people.¹⁰⁴

These words cannot be dismissed as simply the whistling of an ideologue in the dark. They represent an essential precept for preserving the core values of the First Amendment. Freedom to believe and associate politically as one chooses lies at the heart of the Constitution. *Elrod* and *Branti* are true to this concept; so too is *Barnes*.*

J. Kendall Rathburn

102. *Branti*, 445 U.S. at 522, 100 S. Ct. at 1296-1297 (Powell, J., dissenting); *Elrod*, 427 U.S. at 376-77, 96 S. Ct. at 2691 (Powell, J., dissenting).

103. 561 F. Supp. 1377 (N.D. Ill. 1983).

104. *Id.* at 1389.

* On April 29, 1985 United States District Judge Kazen's opinion was filed. *McBee v. Jim Hogg County*, Civil Action No. L-81-3 (S.D. Tex. 1985). The salient features of the opinion were as follows:

- (1) The court readopted its original findings and conclusions, and denied defendant's request to introduce further evidence.
- (2) Plaintiff Contreras's failure, as an ex-employee, to expressly apply for reappointment was fatal to his First Amendment claim; plaintiff Spencer was not an ex-employee and was not precluded from her claim.
- (3) Based on the requisite particularized inquiry plaintiffs Serna's, Hinojosa's and Spencer's "freedom of political belief and association is a matter of highest public concern." Defendants were unjustified in the reaction taken to the exercise of these freedoms.
- (4) Based on a similar balancing of all the *Connick-McBee* factors, Deputy McBee's freedom of speech was constitutionally protected.
- (5) As a result, four of the original five plaintiffs were reinstated retroactively to October 29, 1981, the date of the original judgment.

