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Jonathan Epstein
Jonathan.Epstein@chicagounbound.edu

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You Have No Right to Remain Silent: The Strange Case of Elected Officials and Coerced Campaigning

Jonathan Epstein†

Some people call politics fun, and maybe it is when you're winning. But even then it's a mean kind of fun, and more like the rising edge of a speed trip than anything peaceful or pleasant. Real happiness, in politics, is a wide-open hammer shot on some poor bastard who knows he's been trapped, but can't flee.¹

Dr. Hunter S. Thompson

Can elected officials compel active campaign support from public employees? With increasing concern about political responsibility and corruption in public office,² such a proposition seems dubious at best. However, the Seventh Circuit has consistently held that the First Amendment does not prevent elected officials from firing public employees who refuse to campaign on their employers’ behalf.³ Applying the Seventh Circuit's rationale,

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† B.A. 1992, University of Illinois; J.D. Candidate 1996, University of Chicago.
² See John Kass, Politics, A Labor of Lust, Chi Trib C1 (Sept 10, 1995); Two Men, Two Lives; The Dual Dramas of Cal Ripken, Jr. and Bob Packwood Give us Clues to Our National Character and a Guide for Conduct, SF Examiner A-22 (Sept 8, 1995); Howie Carr, Why Stop Now When So Many Others are Deserving?, Boston Herald 4 (Sept 8, 1995); House Post Office Called Den of Sloth; Workers Say Staff Helped Rostenkowski, Chi Trib 4 (July 8, 1994); Rostenkowski Pleads Not Guilty, Defiantly Says He'll be Absolved; Lawmaker From Illinois Faces 17 Count Federal Corruption Indictment, Rocky Mountain News 42A (June 11, 1994).
³ See Mitchell v Thompson, 18 F3d 425 (7th Cir 1994), cert denied, 115 S Ct 191 (1994)(granting qualified immunity to a sheriff in an action brought by a former chief deputy sheriff alleging that he was demoted in retaliation for his failure to support the sheriff's re-election bid); Dimmig v Wahl, 983 F2d 86 (7th Cir 1993), cert denied, 114 S Ct 176 (1993)(affirming dismissal of a probationary deputy sheriff's complaint alleging that he was fired for refusing to campaign for the sheriff's re-election); Diamond v Chulay, 811 F Supp 1321 (N D Ill 1993)(granting summary judgment in favor of the Mayor and Village of Lincolnwood against the village's former director of public works, who alleged he was fired in retaliation for his decision to remain neutral in the mayoral election).
elected officials are not only able to further entrench themselves in office by exploiting the resources incident to their public office, but they do so clothed in the protection of the United States Constitution.

The Seventh Circuit's conclusion relies on an assumption about whether campaign neutrality should be conceptualized as First Amendment freedom of speech or association. Although similar, these freedoms implicate two distinct lines of Supreme Court jurisprudence: the first, a speech line, balances a public employees' right to speak on matters of public concern against the government's interest in restricting such speech; the other, a patronage line, categorically separates those positions of public employment where restrictions on employees' freedom of associa-

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4 The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." US Const, Amend I. The First Amendment protects freedom of speech. See Abrams v United States:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death . . . .

250 US 616, 630 (1919)(Holmes dissenting).

The First Amendment similarly protects the complementary freedom to remain silent. See Wooley v Maynard, 430 US 705, 713-17 (1977)(upholding an injunction to restrain enforcement of a state statute that prohibited the obscuring of the words "Live Free or Die" on state license plates); West Virginia State Board of Education v Barnette, 319 US 624, 642 (1943)(affirming issuance of an injunction preventing enforcement of a state statute requiring children in public schools to salute the flag).

The First Amendment also protects the freedom of association. See NAACP v Alabama ex rel Patterson, 357 US 449, 460 (1958)(holding that compulsory disclosure of membership lists of the National Association for the Advancement of Colored People ("NAACP") violated the association rights of the listed members).

5 See Pickering v Board of Education of Township High School District 205, Will County, Illinois, 391 US 563 (1968)(firing of a high school teacher for remarks made in a local newspaper criticizing the school board's handling of financial matters violated the teacher's First Amendment freedom of speech); Connick v Myers, 461 US 138 (1983)(holding that the discharge of an assistant district attorney for circulating a questionnaire that disrupted the operation of the district attorney's office did not unconstitutionally infringe her right to free speech); Rankin v McPherson, 483 US 378 (1987)(affirming reversal of summary judgment against a county constable's office employee who alleged violation of her First Amendment freedom of speech when she was fired for stating to a coworker that if another attempt was made on President Reagan's life, she hoped it would be successful).
tion are permissible from those where they are not. The courts that have acquiesced in the dismissal of neutral employees have done so by unifying these distinct lines of First Amendment analysis, thereby equating public employees' freedom of speech with their freedom of association.

In order to understand the scope of public employees' First Amendment rights, it is critical to distinguish the Supreme Court's speech and patronage lines of jurisprudence as separate paradigms. Given that distinction, the political neutrality of public employees should be conceptualized as speech and judged according to the Court's standard for determining whether such speech is protected by the First Amendment. Such an approach not only maintains the coherence of the Court's First Amendment analysis, but also addresses fundamental concerns central to that analysis. Conversely, conceptualizing political neutrality as association confuses that analysis and disserves important underlying concerns.

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6 See *Elrod v Burns*, 427 US 347 (1976)(holding that non-civil-service employees of the Cook County, Illinois, Sheriff's office, who alleged that they were fired or threatened with dismissal because they were neither affiliated with, nor sponsored by the sheriff's political party, stated a valid cause of action); *Branti v Finkel*, 445 US 507 (1980)(upholding an injunction barring the termination of two county assistant public defenders and finding that their continued employment could not constitutionally be conditioned on allegiance to a particular political party); *Rutan v Republican Party of Illinois*, 497 US 62 (1990)(extending the rule of *Elrod* and *Branti* to instances of promotion, transfer, recall, and hiring).

7 A substantial body of judicial opinions and academic literature substantiates the claim that the patronage and speech issues constitute separate, if related, lines of inquiry. See notes 47-61, 78-91, 111-23, and accompanying text. See also *Burns v County of Cambria, Pennsylvania*, 971 F2d 1015 (3rd Cir 1992), cert denied as *Roberts v Mutsko*, 113 S Ct 1049 (1993)(affirming denial of sheriff's motion for summary judgment on grounds of qualified immunity in the retaliatory firing of employees who supported the sheriff's political opponents); *O'Leary v Shipley*, 313 Md 189, 545 A2d 17 (Md App 1988)(holding that the lower court improperly applied a patronage, rather than a free speech, analysis to a case involving a deputy clerk who had unsuccessfully run against the incumbent clerk); *Jones v Dodson*, 727 F2d 1329 (4th Cir 1984)(vacating and remanding a decision that held in favor of a dispatcher, but which granted judgment notwithstanding the verdict against a deputy sheriff, both of whom alleged that they had been wrongfully discharged based on their political affiliations and expressions); *Comment, Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U Chi L Rev 897 (1992)(distinguishing the *Elrod-Branti* patronage standard from the *Pickering* free speech standard and proposing a causation test for determining which test to apply in ambiguous cases); *Note, Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 Colum L Rev 558 (1985)(comparing distinct lines of Supreme Court precedent governing public employees' freedom of association and freedom of speech, and suggesting a categorical approach for analyzing each).
In a number of related cases, public employees have been dismissed for actively campaigning, or even running, against their employer. This Comment concedes that a public official may prohibit employees from such activities. However, this concession does not lead logically, nor should it lead jurisprudentially, to the conclusion that public employers can compel speech in support of their candidacy from their neutral employees.

This Comment examines the nature of the First Amendment issues raised by the dismissal of public employees who choose to remain neutral in their elected bosses' campaigns. Part I reviews the Supreme Court's creation and development of distinct lines of speech and association jurisprudence with respect to public employees. Part II describes the case law recognizing and applying the constitutional standards for speech and association as separate lines of inquiry. Part III discusses lower federal courts' decisions that have unified these lines and upheld elected officials' decisions to discharge or demote politically neutral public employees. Finally, part IV argues that the unification of the speech and association lines is inherently flawed, that the lines should remain clearly distinguished, and that the speech standard should be applied to cases of discharged politically neutral public employees.

I. THE FIRST AMENDMENT FREEDOMS OF PUBLIC EMPLOYEES

Over a quarter of a century ago, in *Pickering v Board of Education of Township High School District 205, Will County, Illinois*, the Supreme Court first addressed the government's ability to restrict public employees' freedom of speech. The Court balanced the right of public employees to speak on issues of "public concern" against the government's interest in promoting the efficient operation of public offices. More recently, the Supreme Court reiterated the validity of the *Pickering* test as the standard for determining the level of constitutional protection afforded speech by public employees in *Rankin v McPherson*, elaborating on the public concern requirement that triggers the *Pickering* balancing test.

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8 See *Joyner v Lancaster*, 815 F2d 20 (4th Cir 1987)(affirming judgment in favor of county and sheriff who fired plaintiff, a captain in the sheriff's department, for his vocal support of an opposing candidate); *Jones*, 727 F2d at 1329.
10 Id at 571.
11 Id at 568.
Concurrent with the development of the speech line, the Supreme Court addressed public employees' First Amendment freedom of association. In *Elrod v Burns*, a Supreme Court plurality held that patronage firings unconstitutionally restrict public employees' First Amendment freedoms of belief and association. However, the *Elrod* Court carved out an exception for policy-making or confidential employees, who can be fired because of their political affiliation. Although the Court reexamined this policy-making exception in *Branti v Finkel*, it retained the *Elrod* rule. The Supreme Court subsequently extended the *Elrod-Branti* analysis to other employment practices, such as hiring, promotion, and transfer decisions.

A. Freedom of Expression—The Speech Cases

In *Pickering*, a high school teacher who had been fired for his comments in a local newspaper criticizing the district superintendent's handling of certain financial matters sued for reinstatement. The defendants claimed that Pickering's statements were false and would "tend to foment 'controversy, conflict and dissension' among teachers, administrators, the Board of Education, and the residents of the district." Recognizing the tension between Pickering's right of free speech and the school board's responsibility to maintain orderly and effective public service, the Court adopted a balancing test to determine when the government may restrict a public employee's freedom of speech.

The *Pickering* Court held that the government may restrict a public employee's speech if: (1) the speech affects the government's ability to maintain discipline by superiors or har-
mony among coworkers; (2) the employment relationship between the speaker and her employer involves "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning"; (3) the speech hinders the employee's ability to perform his job; or (4) the speech affects the employer's ability to provide government services in an effective manner. On the facts before it, the Pickering Court answered all four steps of the inquiry in the negative and found that Pickering's right to speak on an issue of public concern outweighed the school board's interest in maintaining the efficient operation of its school system. The Court concluded that the actions of the school board unconstitutionally infringed Pickering's First Amendment right to free speech.

In Connick v Myers, the Supreme Court returned to the Pickering balancing test and clarified the scope of permissible restrictions on public employees' speech. The Connick Court reiterated the requirement that the speech involve a matter of public concern; restrictions on speech that is not on a matter of public concern are justiciable only under "the most unusual circumstances." To determine if speech involves a matter of public concern, courts must look to the "content, form, and context of [the employees'] statement . . . ." More recently, in Rankin v McPherson, the Court noted an additional criterion to be weighed in the Pickering balance—the level of responsibility accorded the employee. A job that re-

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22 Pickering, 391 US at 570, 570-73.
23 Id at 565, 574-75.
25 Id at 147. More specifically, the Court wrote that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Id at 146.
26 Id at 147-48. Sheila Myers, an Assistant District Attorney, objected to her pending transfer and responded by distributing a questionnaire soliciting the views of her fellow employees on such issues as: transfer policy, office morale, the need for a grievance committee, employee confidence in the supervisors, and the pressure to work in political campaigns. Connick, 461 US at 141, 155-56. Although the Court determined that the general content of Myers's questionnaire comprised issues of personal interest, the Court found that the question regarding participation in political campaigns addressed an issue of public concern and thus required application of the Pickering balancing test. Id at 149-50. After examining the context and circumstances surrounding Myers's speech, the Court concluded that the government's interest in the efficient operation of a public service outweighed Myers's free speech interest. Id at 150-54.
28 "[I]n weighing the State's interest in discharging an employee based on any claim
quires extensive contact with the public or a high degree of policy-making or confidentiality is more likely to be subject to restrictions on speech.  

The Pickering line of cases demonstrates the Supreme Court’s understanding that a public employee’s freedom to speak is not absolute. Such speech can be limited either if the speech does not address a matter of public concern or, even if the speech involves an issue of public concern, if the government’s interest in providing public services in an efficient manner outweighs the employee’s right to free speech.

B. Freedom of Association—The Patronage Cases

Elrod v Burns was the Supreme Court’s first foray into the bramblebush of patronage employment. Following the election of a new Sheriff of Cook County, Illinois, non-civil-service employees in the sheriff’s office were fired or threatened with dismissal unless they were affiliated with, or sponsored by, the political party of the newly elected sheriff. Writing for a plurality, Justice William Brennan, Jr. recognized that while patronage

that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee’s role entails.” Id at 390. The Rankin Court held that a deputy constable spoke on a matter of public concern when she stated, “If they go for him again, I hope they get him,” in response to receiving news of an assassination attempt on President Reagan. Id at 381, 386-87. Having determined that the speech involved a matter of public concern, the Court employed the Pickering balancing test and struck the balance in favor of protecting the deputy constable’s freedom of speech. Id at 388-92.

See generally Pickering, 391 US at 563; Connick, 461 US at 138; Rankin, 483 US at 378. See also Wilbur v Mahan, 3 F3d 214 (7th Cir 1993)(affirming summary judgment in favor of a sheriff in an action brought by a deputy sheriff, who was placed on unpaid leave after announcing his intention to run against the sheriff in an upcoming election). The Wilbur court wrote: “It is true that public employees do not have as broad a right of free speech as they would if they were merely critics and not also employees of government.” Id at 216.

See Pickering, 391 US at 568-73; Connick, 483 US at 147-50; Rankin, 483 US at 388-91.

427 US 347 (1976). In Elrod, a Democrat succeeded a Republican as the Sheriff of Cook County, Illinois, and fired a number of non-civil-service employees. Several discharged employees alleged that they were dismissed “solely for the reason that they were not affiliated with or sponsored by the Democratic Party.” Id at 350.
practices may promote a governmental interest in efficiency, they also severely restrict public employees’ First Amendment freedoms of belief and association and, therefore, “on balance [are] not the least restrictive means for fostering that end.”

The *Elrod* plurality found that conditioning public employment on an employee’s political affiliation survives constitutional challenge only when it furthers a vital governmental end and there is no less restrictive alternative available. Even then such restrictions of an employees’ freedom of association are permissible only when the government’s interest outweighs the harm to the employee’s constitutional rights. Applying this test to the case at bar, the *Elrod* Court rejected as untenable most of the government’s justifications for patronage employment.

However, the *Elrod* plurality conceded that under some circumstances the government’s interest in having politically loyal employees to implement policy might justify patronage firings. Thus, the Court refused to grant blanket protection against all patronage-based firings. Although the plurality recognized the difficulty of distinguishing those positions that should be subject to the requirements of political loyalty from those that should not, it nevertheless concluded that “[l]imiting patronage dismiss-

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53 Id at 372.
54 Id at 363.
56 The government offered three justifications for patronage employment. First, the government cited the need for effective governance of the workplace and efficient employees. Id at 364. The Court rejected that justification, finding that the “wholesale replacement of large numbers of public employees every time political office changes hands” created inefficiencies equal to or greater than those caused by retention of employees who do not share political affiliation with the governing party. Id. In addition, the Court expressed doubts that patronage appointments necessarily result in more qualified employees and rejected the contention that “the mere difference of political persuasion motivates poor performance.” Id at 364-65. Second, the government advanced the need for political loyalty to ensure that employees would not undermine the implementation of new policies sanctioned by the electorate. *Elrod*, 427 US at 367. The Court recognized the force of this argument, but found that it did not validate the need for patronage in all cases; limiting patronage to policy-making positions was sufficient to achieve the government’s ends. Id. Third, the government argued that patronage was vital to the democratic process. Id at 368. The Court gave this contention short shrift, doubting that the elimination of patronage would “bring about the demise of party politics.” Id at 369. For contrasting views on the role of patronage in the democratic process, see *Elrod*, 427 US at 376-87 (Powell dissenting); *Branti*, 445 US at 527-32 (Powell dissenting); *Rutan*, 497 US at 92-97, 104-10 (Scalia dissenting); Comment, *Do Not Go Gentle Into That Good Night: The Unquiet Death of Political Patronage*, 1992 Wis L Rev 511, 514-22 (examining the history and constitutionality of political patronage in light of Supreme Court precedent and suggesting a method for properly applying that precedent to patronage cases).
COERCED CAMPAIGNING

als to policymaking positions is sufficient to achieve [the] governmental end of political loyalty.”\(^{38}\) In determining which public offices are subject to patronage dismissal as policy-making positions, “[t]he nature of the responsibilities of the office is critical.”\(^{39}\)

The test announced in *Elrod* provided a general framework for adjudicating patronage dismissals, but gave little guidance as to how that framework should be applied in specific cases. Four years later in *Branti v Finkel*,\(^{40}\) the Supreme Court preserved *Elrod’s* categorical approach, but rejected strict adherence to the policymaker label as the means of determining whether a patronage firing was justified.\(^{41}\) The Court repudiated the government’s contention that a public employee could be fired merely because he was classified as a “policymaker”:

> The ultimate inquiry is not whether the label “policymaker” or “confidential” fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.\(^{42}\)

Thus, the *Branti* Court refined the *Elrod* standard to accommodate a more critical examination of the interests involved.\(^{43}\)

Finally, in *Rutan v Republican Party of Illinois*,\(^{44}\) the Supreme Court extended the “rule of *Elrod* and *Branti*”\(^ {45}\) to in-

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38 Id at 367.
39 Id.
41 Id at 518.
42 Id. By way of example the majority explained: “The coach of a state university’s football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of the state government.” Id.
43 The extent to which the *Branti* Court truly refined the *Elrod* standard is debatable. The failure of *Branti* to enunciate a clear alternative to *Elrod’s* standard of analysis left lower courts in a quandary. Although *Branti* purported to abandon *Elrod’s* categorical approach, its failure to propose a workable standard left courts in the unenviable position of having to decide whether to apply *Branti’s* open-ended analysis or *Elrod’s* clear-cut policymaking distinction. Most courts chose the latter and thus the rumors of the demise of the *Elrod* policymaking exception have been greatly exaggerated.
45 Id at 79.
stances of “promotion, transfer, recall, and hiring decisions based on party affiliation and support . . . .” Thus, the Elrod-Branti analysis continues to be the standard by which the constitutionality of patronage-based employment decisions are measured.

II. THE COURTS DISTINGUISH FREEDOM OF SPEECH CASES FROM PATRONAGE CASES

A number of courts have distinguished the Elrod-Branti line of cases, which implicates public employees' freedom of association, from the Pickering line of cases, which involves those employees' free speech interests.

In Stough v Gallagher, the Eleventh Circuit rejected a sheriff's claim of qualified immunity in a civil-rights action brought by a deputy sheriff who had been demoted for supporting the sheriff's political opponent. Because the law clearly prohibited such employment practices at the time of the demotion, the sheriff's qualified immunity claim was denied. The Stough court's analysis turned on its conclusion that the Supreme Court had developed two methods for analyzing the political expression of public employees. The court explained that “[t]hese two methods make a distinction between cases involving employee political patronage and cases involving employee speech.” After highlighting this doctrinal distinction, the court invoked the free speech line of cases, with particular reference to Pickering v Board of Education of Township High School District 205, Will

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46 Id. As the case came to the Court on appeal from the lower court's dismissal for failure to state a claim upon which relief could be granted, the Court was not able to elucidate the “rule” to which it referred with such certainty. Id at 65 n 1, 67.

47 In addition to the decisions of the Third, Fourth, and Eleventh Circuits, which are discussed more fully in notes 48-61 and accompanying text, the Court of Appeals of Maryland has also recognized the distinction between the speech and patronage lines. In O'Leary v Shipley, 313 Md 189, 204, 545 A2d 17 (Md App 1988), the court examined the leading cases in the speech and patronage lines and concluded: “The test enunciated in Elrod and Branti was responsive to the question whether a discharge for political patronage reasons alone could ever constitute a First Amendment violation . . . [In contrast] Pickering addressed the question of the circumstances under which overt expressive conduct of public employees could be considered by their employers as grounds for discharge and it developed a balancing test.”

48 967 F2d 1523 (11th Cir 1992)(affirming denial of summary judgment to a sheriff who allegedly demoted a deputy in retaliation for supporting the sheriff's political opponent).

49 Id at 1527.
County, Illinois, Connick v Myers, and Rankin v McPherson, and concluded that the district court properly denied summary judgment in favor of the sheriff.\footnote{Id at 1527-29.}

The Stough court’s analysis relied heavily on the reasoning employed by the Eleventh Circuit in Terry v Cook.\footnote{866 F2d 373 (11th Cir 1989)(affirming the lower court’s decision that a sheriff may refuse to reappoint a deputy sheriff who did not support his campaign, but reversing the decision with respect to clerks, investigators, dispatchers, jailers, and process servers, who had also been replaced for failing to support their employer’s campaign, and holding that those employees did state a claim for violation of their civil rights).} The Terry court found that a newly elected sheriff’s mass discharge of all employees who had opposed his election was constitutional with respect to deputy sheriffs, but unconstitutional with respect to clerks, investigators, dispatchers, jailers, and process servers.\footnote{Id at 377-78.} However, it is the court’s reasoning, not its disposition of these particular issues, that is important to the present inquiry.\footnote{Indeed, the Terry court’s decision to uphold the constitutionality of the sheriff’s dismissal of deputy sheriffs who did not support the sheriff’s candidacy relied, in large part, on an Alabama law which imposed civil liability on the sheriff for the actions of his deputies. Id at 377.} In Terry, the Eleventh Circuit explicitly distinguished the Elrod-Branti patronage cases from the Pickering free speech cases: “Although the cases may overlap in some areas, it is important to retain the distinction between actions that assert employees’ right of expression and actions that challenge discharge decisions based on political patronage.”\footnote{Id. The Terry court specifically rejected the district court’s “synthesis of the Elrod-Branti and Connick analyses and the resulting equation of patronage cases with employee speech cases not involving patronage practices . . .” Terry, 866 F2d at 376. While several courts in the Seventh Circuit purported to rely on Terry, they refused to acknowledge the distinction between the speech and patronage lines of cases. See Upton v Thompson, 930 F2d 1209, 1217 (7th Cir 1991), cert denied, 503 US 906 (1992); Dimmig v Wahl, 983 F2d 86, 87 (7th Cir 1993), cert denied, 114 S Ct 176 (1993). See also Wilbur v Mahan, 3 F3d 214, 219 (7th Cir 1993). In Wilbur, the Seventh Circuit appeared ready to recognize the distinction of the speech and patronage lines. The court referred to the separate “gravitational field[s]” of the patronage and speech cases and discussed the intersection of those lines, implying that they represent separate lines of inquiry that may intersect, but are not unified. Id at 215, 218. Nevertheless, in the final analysis, the Wilbur court rejected the distinction between the speech and patronage lines, opting instead for a unification of the two lines of cases. Id at 219. Rather than address the Eleventh Circuit’s understanding that the patronage and speech lines are separate, the Wilbur court chose to distinguish Stough and Terry. Wilbur, 3 F3d at 219.}

Only after establishing the two distinct lines of analysis did the court decide on the facts before it that the Elrod-Branti patronage cases provided the appropriate standard for review.\footnote{The newly elected defendant sheriff dismissed plaintiffs due to their association with the opposition party.}
In *Jones v Dodson*\(^{56}\) the Fourth Circuit also distinguished the two lines of cases. The court vacated and remanded a decision that held in favor of a dispatcher, but against a deputy sheriff, both of whom alleged they had been discharged due to their political affiliations and expressions.\(^{57}\) The *Jones* court premised its conclusion on the distinction of the *Elrod-Branti* patronage line from the *Pickering* speech line:

[Raw patronage discharges of the *Elrod-Branti* type are properly treated as a narrow, special case . . . . Only in this narrow circumstance may the requisite balancing of governmental and individual interests appropriately be accomplished by the essentially rigid *Branti* inquiry . . . . Where the protected activity involves overt "expression of ideas," the more open-ended inquiry prescribed by *Pickering* . . . [is] required to accomplish the necessary balancing.\(^{58}\)]

The Third Circuit reached a similar conclusion in *Burns v County of Cambria, Pennsylvania*.\(^{59}\) In *Burns*, deputy sheriffs and a paramedic alleged that they had been improperly dismissed because of their support for the sheriff's political opponents.\(^{60}\) The *Burns* court rejected the defendant sheriff's claim of

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\(^{56}\) 727 F2d 1329, 1333-37 (4th Cir 1984).

\(^{57}\) Id at 1330.

\(^{58}\) Id at 1335 n 6. The court also stated that "[r]aw patronage discharges of the *Elrod-Branti* type and overt expressive conduct discharges of the *Pickering-Giulian-Connick* type may be justified on different bases that are not necessarily congruent." *Jones*, 727 F2d at 1336. See also Comment, *Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U Chi L Rev 897, 905 n 57 (1992)(cited in note 7), quoting *Jones*, 727 F2d at 1336: "[I]f the motivation of the employer in firing the employee was purely one of political affiliation, then the *Elrod-Branti* test is the appropriate one, but if the employer was motivated 'to any significant degree by overt speech activity by the public employee,' then the *Pickering* test applies instead."

\(^{59}\) 971 F2d 1015 (3rd Cir 1992), cert denied as *Roberts v Mutsko*, 113 S Ct 1049 (1993).

\(^{60}\) The Court of Appeals did not explain whether the employees were fired for actively supporting opposition candidates or for failing to support the candidacy of the newly elected sheriff. Id at 1017. However, the district court indicated that plaintiffs' active support of rival candidates, not their failure to support the newly elected sheriff, was the motivation for the dismissals. *Burns v County of Cambria, Pennsylvania*, 764 F Supp 1031, 1035 (W D Pa 1992), aff'd in part, dismissed in part, 971 F2d 1015 (3rd Cir 1992), cert denied, 113 S Ct 1049 (1993).
qualified immunity. The court distinguished the Pickering line of free speech cases from the Elrod-Branti line of patronage cases, noting that Pickering and Connick represent "a somewhat distinct line of First Amendment cases arising out of the public employee's right to comment on matters of public interest." The court thereafter employed the Elrod-Branti test in its analysis of a handful of patronage-based dismissals without further mention of Pickering and its progeny.

III. POLITICAL NEUTRALITY AS A BASIS FOR TERMINATING PUBLIC EMPLOYMENT

Despite the development of these two distinct lines of jurisprudence for determining when political employment practices unconstitutionally infringe a public employee's First Amendment rights, some lower federal courts have ignored the distinction and affirmed dismissals and demotions of neutral public employees. The Seventh Circuit has adopted such an approach, acquiescing in the dismissal and demotion of public employees who have maintained their political neutrality.

In Dimmig v Wahl, the Seventh Circuit upheld the firing of a probationary deputy sheriff who refused to campaign for the sheriff's reelection, even though it accepted as fact that the firing was in retaliation for the deputy's choice to remain neutral. In dissent, Judge Jesse Eschbach argued that public employers would be able to invoke the majority's reasoning "as a tool to compel speech in the form of political activity" from employees. Judge Eschbach's concerns notwithstanding, the Dimmig majority found that a deputy sheriff's political neutrality constituted an appropriate factor for discharge, and concluded that the Constitution permitted the sheriff to fire the deputy for refusing to campaign for him. However, the Dimmig court's decision relied on a contestable reading of an earlier Seventh Circuit case.

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61 Burns, 971 F2d at 1021 n 5.
62 See notes 54, 63-77, and accompanying text.
63 983 F2d 86 (7th Cir 1993), cert denied, 114 S Ct 176 (1993).
64 Id at 86-87.
65 Id at 88 (Eschbach dissenting).
66 Id at 87.
67 Dimmig, 983 F2d at 87.
68 The decision in Dimmig relied, in large part, on Upton v Thompson, 930 F2d 1209 (7th Cir 1991), cert denied 503 US 906 (1992)(holding that sheriffs were entitled to qualified immunity for discharging deputy sheriffs due to their political affiliations, because at the time of the dismissals the law did not clearly prohibit such firings). Upton's holding, however, was much more narrow than Dimmig's analysis suggests. The
Less than three weeks after Dimmig, a district court in the Seventh Circuit adopted both Dimmig's logic and its result. In Diamond v Chulay, the court granted summary judgment in favor of defendant mayor and village in an action brought by the plaintiff, Diamond, the village's former director of public works. Diamond alleged that he was fired in retaliation for his refusal to endorse the mayor's candidacy; indeed, throughout the campaign he remained neutral, refusing to support any candidate. Although the court conceded that "[a] refusal to campaign for an employer . . . could conceivably be an improper ground for termination," it relied on Dimmig and the patronage line of cases, rather than understanding Diamond's silence as First Amendment speech and applying the more appropriate Pickering standard. Ultimately, the Diamond court concluded that summary judgment in favor of the defendants was appropriate because Diamond's position as director of public works fell within the Elrod-Branti policy-making exception.

The Seventh Circuit revisited the issue of neutrality dismissals in Mitchell v Thompson. The Mitchell court granted qualified immunity to a sheriff in an action brought by the former chief deputy sheriff, who alleged that he was demoted due to his refusal to campaign for the sheriff's reelection. Although the

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811 F Supp 1321 (N D Ill 1993).
70 Although Diamond refused to endorse the mayor or any other candidate, he did inform the mayor that he would "support the position of mayor." Id at 1326. However Diamond did make "various comments regarding the manner in which projects were handled under [Mayor] Chulay's administration. He commented on matters relating to the inefficiency with which certain projects were being handled and also questioned whether some projects were satisfying certain local and state environmental requirements." Id.
71 Id.
72 Diamond, 811 F Supp at 1328.
73 Id at 1328-31. The court's application of Dimmig and the patronage line of Supreme Court cases indicates a problematic interpretation of Upton. See notes 68, 103-10, and accompanying text.
74 Diamond, 811 F Supp at 1332.
75 18 F3d 425 (7th Cir 1994), cert denied, 115 S Ct 191 (1994).
76 Id at 425-26. After refusing the sheriff's requests for active campaign support, Mitchell was demoted from Kankakee County Chief Deputy to Third-Watch Supervisor. Id at 426.
court determined that the demotion was in retaliation for the chief deputy's professed neutrality, it nevertheless held that at the time of the demotion "the law did not clearly forbid . . . [the sheriff] from either firing a deputy, or taking the lesser step of demoting one, for political purposes." Because the law did not clearly prohibit such actions, the court found that the sheriff was entitled to qualified immunity.

IV. SPEECH IS SPEECH AND PATRONAGE IS PATRONAGE, BUT SPEECH IS NOT PATRONAGE

Contrary to the decisions discussed in part III and consistent with the decisions discussed in part II, there is substantial evidence that the Elrod-Branti patronage line and the Pickering free speech line were intended to, and do in fact, address distinct constitutional concerns. The neutrality cases demonstrate the importance of this distinction.

A. Supreme Court Support for Distinguishing the Lines

The courts that have upheld neutrality-based firings have relied on an analysis which unifies distinct lines of Supreme Court precedent. Such unification contradicts both the Supreme Court's reasoning that the free speech line of cases is distinct from the patronage line and the Court's intention that the distinction be maintained. The Court's objective is evident in the structure and reasoning underlying both the speech and patronage cases.78

77 Id at 427.
78 The evolution of the Court's patronage jurisprudence is indicative of its view of patronage case law as distinct from the prior ten years of developing free speech case law. If the Court intended a union of the two lines of cases, then it is peculiar that the Elrod plurality's only reference to Pickering v Board of Education of Township High School District 205, Will County, Illinois, 391 US 563 (1968), came in a footnote in which the majority described the protections generally afforded public employees' First Amendment rights. Elrod v Burns, 427 US 347, 358 n 11 (1976). The Elrod dissent similarly noted Pickering only in passing as an example that public employees may still express themselves on some political issues, regardless of their political affiliation. Id at 388 (Scalia dissenting). The concurring Justices did not mention Pickering at all. Such structural evidence is not dispositive; however, if the Court had intended a unification of the Elrod-Branti patronage standard and the Pickering speech standard, the absence of any cross-referencing between the lines is curious. See Comment, Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation, 59 U Chi L Rev 897, 907 (1992)(cited in note 7).
1. Distinct interests protected.

The Supreme Court understood the nature of the government interest implicated in the speech cases as completely different from the interest protected in the patronage cases. In striking the Pickering balance, the government's interest in the efficient distribution of public services is weighed against the employee's freedom of speech. The greater the impact of a public employee's speech upon that efficiency, the more likely it is that restrictions limiting the speech will be upheld.

In contrast, the Elrod v Burns plurality expressly rejected the notion that a governmental interest in efficiency could justify patronage dismissals. Rather, the impetus behind allowing the dismissal of public employees for reasons of political affiliation in Elrod, Branti v Finkel, and the patronage line generally, was a concern for political loyalty among policy-making employees.

The speech standard thus implicates a government interest rejected by, and wholly distinct from, the interest protected by the patronage standard. Indeed, the Elrod plurality explicitly noted the difference between the loyalty and efficiency interests:

A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate.

The fact that the Elrod-Branti and Pickering tests protect separate governmental interests suggests that they were intended to, and do, remedy distinct problems by distinct means.

2. Different tests employed.

Comparing the standard developed by the Supreme Court in the speech cases with the patronage standard provides another

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79 Pickering, 391 US at 568.
80 Id at 572-73.
83 See note 37 and accompanying text.
84 Elrod, 427 US at 367.
85 Id (emphasis added).
reason to question their unification. To analyze restrictions on public employees' speech, the Pickering Court adopted an ad hoc balancing test, weighing the interest of the public employee in commenting on matters of public concern against the interest of the State in efficiently performing public services.88

While the Elrod Court did incorporate an element of balancing into its analysis of employees' freedom of association,87 the resulting Elrod-Branti test is fundamentally categorical,88 turning on whether or not an employee is defined as a policymaker.89 If, and only if, such an employee is involved should a court inquire further to determine if a "vital government end" is served and whether the means used to achieve that end are the "least restrictive of freedom of belief and association."90

Elrod's rigid categorical approach for analyzing freedom of association claims in patronage cases bears little resemblance to the flexible ad hoc balancing test established in Pickering for reviewing free speech claims.91 The development of divergent methods of analysis further suggests that the Court recognizes these lines as distinct.

B. Applying the Patronage Standard in Neutrality Cases Leads to Questionable Results

Adjudicating neutrality dismissals under the patronage standard is problematic. Applying the speech standard in neutrality cases provides a more coherent approach that better addresses the concerns underlying both the patronage and the speech lines of cases.

86 Pickering, 391 US at 568.
87 "[T]he benefit gained must outweigh the loss of constitutionally protected rights." Elrod, 427 US at 363.
88 Id at 367-68. For further analysis of the Elrod test as categorical in contrast to the Pickering test as an ad hoc balancing test, see Comment, 59 U Chi L Rev at 897-904 (cited in note 7); Note, Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection, 85 Colum L Rev 558, 558-72 (1985)(cited in note 7). While some might argue that Branti recharacterized the Elrod policy-making distinction to incorporate a greater degree of flexibility, the extent to which the Branti Court truly refined Elrod's categorization is dubious. See note 43.
89 Elrod, 427 US at 367.
90 Id at 363.
91 On its face, the Pickering test may appear similar to the test proposed by the Elrod and Branti Courts. Compare Pickering, 391 US at 570, with Branti v Finkel, 445 US 507, 518 (1980), and Elrod, 427 US at 367. However, while Elrod gave dispositive weight to the nature of the public employee's job, Pickering contemplated the nature of the public employee's position as merely one element among several in the balancing test—relevant but not dispositive.
1. Undermining the government's interests.

Permitting the termination of neutral public employees advances neither political loyalty nor efficiency, the governmental interests that the Supreme Court sought to protect by means of the Elrod-Branti test and the Pickering standard, respectively. In fact, both efficiency and loyalty concerns militate against allowing such dismissals.

When a public employee remains politically neutral, there is little, if any, risk that her neutrality will disrupt the efficient distribution of public services. In fact, a politically neutral employee is likely to be more efficient than a politically committed employee because she will not devote any attention to extraneous campaign work while on the job. In addition, there is little risk that a neutral public employee will be disloyal and undermine policymaking. Such employees have not aligned themselves with persons opposing a particular policy, hence they are unlikely to have a vested interest in the failure of such a policy.

On the other hand, giving public employers the authority to fire neutral employees significantly increases the likelihood that employees will be compelled to campaign on behalf of their employers. Because some campaigning typically occurs during working hours, employees devoting time and energy to campaigning rather than working inevitably hinders the efficient distribution of public services. In addition, forcing otherwise nonpartisan employees to support their employer when they would prefer to remain neutral cannot help but breed animosity, and very possibly disloyalty, among those employees.

Therefore, by acquiescing in the firing of neutral public employees, courts actually undermine the efficiency and loyalty concerns underlying the Supreme Court's analysis in both the patronage and free speech lines of cases.

2. Contravening public policy.

Allowing elected officials to force partisanship on their employees by requiring them to campaign raises additional concerns. First, taxpayers, who pay the salary of public employees, essentially finance campaign workers for an elected official whom they may or may not support. Second, incumbent politicians may

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92 Courts have recognized the existence of such on-the-job campaigning by public employees. For instance, in Mitchell, the plaintiff alleged that the defendant urged him "to allow those under his supervision to participate in the campaign during office hours." Mitchell v Thompson, 18 F3d 425, 426 (7th Cir 1994), cert denied, 115 S Ct 191 (1994).
ensconce themselves in elected office by availing themselves of the incumbent advantage of having a campaign staff subsidized by tax dollars. Such results are highly suspect in light of recent movements to limit incumbency.\textsuperscript{93}

C. The Shaky Foundation of the Seventh Circuit Decisions

Nevertheless, the Seventh Circuit has upheld the firing of neutral public employees in several cases.\textsuperscript{94} These opinions rely on Seventh Circuit precedent and the Supreme Court's patronage cases.\textsuperscript{95} That reliance, however, is misplaced.

\textit{Upton v Thompson},\textsuperscript{96} a 1991 decision of the Seventh Circuit Court of Appeals, shoulders the heavy burden of \textit{Dimmig v Wahl},\textsuperscript{97} \textit{Mitchell v Thompson},\textsuperscript{98} and \textit{Diamond v Chulay}.\textsuperscript{99} In \textit{Upton} deputy sheriffs alleged that they had been fired in retaliation for their political activity.\textsuperscript{100} Recognizing that at the time of the firings the controlling law was not well-defined, and therefore the sheriff could not have had a clear understanding of the scope of legal employment practices, the court granted qualified immunity to the defendant sheriff.\textsuperscript{101} The \textit{Upton} court's decision was limited: "We conclude therefore that since the law was not clearly established in 1986 the sheriffs in these cases are protected by qualified immunity."\textsuperscript{102}

\begin{itemize}
\item \textsuperscript{93} See \textit{U.S. Term Limits, Inc. v Thornton}, 115 S Ct 1842 (1995) holding that an amendment to the Arkansas State Constitution, which limited officeholders to three terms in the United States House of Representatives and two terms in the United States Senate, was unconstitutional; Marty Trillhaase, \textit{Aggressive Term-Limits Plan Goes Before Idaho Voters}, Idaho Falls Post Register E4 (Nov 1, 1994); Jack Germond and Jules Witcover, \textit{Term-Limits Mania}, Sacramento Bee B6 (Oct 7, 1994); Patrick Buchanan, \textit{Term Limits-The Key to Revolution}, Denver Post B9 (July 8, 1994).
\item \textsuperscript{94} See \textit{Mitchell}, 18 F3d at 425; \textit{Dimmig v Wahl}, 983 F2d 86 (7th Cir 1993), cert denied, 114 S Ct 176 (1993); \textit{Diamond v Chulay}, 811 F Supp 1321 (N D Ill 1993).
\item \textsuperscript{95} \textit{Upton v Thompson}, 930 F2d 1209 (7th Cir 1991), cert denied, 503 US 906 (1992), as cited in: \textit{Mitchell}, 18 F3d at 426-27; \textit{Dimmig}, 983 F2d at 87; and \textit{Diamond}, 811 F Supp at 1329, 1331. The patronage cases are cited in: \textit{Mitchell}, 18 F3d at 426; \textit{Dimmig}, 983 F2d at 87; and \textit{Diamond}, 811 F Supp at 1328, 1331-32.
\item \textsuperscript{96} 930 F2d at 1209.
\item \textsuperscript{97} 983 F2d at 86.
\item \textsuperscript{98} 18 F3d at 426.
\item \textsuperscript{99} 811 F Supp at 1321.
\item \textsuperscript{100} Derrell Upton, a probationary deputy sheriff, alleged that he was discharged as a result of his personal support of the incumbent sheriff's candidacy. \textit{Upton}, 930 F2d at 1210. Jack Thulen, a deputy sheriff and brother of the sitting sheriff, alleged that he was fired for actively and openly supporting his brother's candidacy. Id at 1211.
\item \textsuperscript{101} Id at 1212-18.
\item \textsuperscript{102} Id at 1218.
\end{itemize}
There are fundamental problems with the Dimmig, Mitchell, and Diamond courts' reliance on Upton. To begin with, the issue in Upton was qualified immunity and the holding was substantively limited to the decision that the law regarding politically based firings was not clearly established at the time of the firings. The Upton court did not reach the constitutionality of neutrality dismissals, because its conclusion with respect to qualified immunity obviated the need for a decision on that issue. As a result, the justification for using political considerations in employment decisions in Dimmig, Mitchell, and Diamond, inasmuch as it relies on dicta from Upton, is questionable.

Furthermore, the Upton court allowed the firing of public employees based on their active campaigning. Thus, Upton permitted restrictions on employees' activities. In contrast, the Dimmig, Mitchell, and Diamond courts, by requiring that employees campaign for their bosses under threat of dismissal, created a positive duty for those employees to act. Whether the government can create an affirmative duty to campaign is a substantively different question than whether the government can impose restraints on campaign activity. The Supreme Court has long recognized that the difference between activities restricted by the State and activities compelled by the State is often the difference between constitutionality and unconstitutionality.

Finally, Upton involved an obvious case of political affiliation; the plaintiffs actively campaigned on behalf of a candidate, willfully associating themselves with that candidate. Given those facts, the Upton court properly invoked the Elrod-Branti line of patronage cases. In contrast, the plaintiffs in Dimmig, Mitchell, and Diamond were not actively involved in a campaign, but instead chose to remain silent and campaign for no one. The employer-candidate in those cases thus compelled speech, forcing

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103 Upton, 930 F2d at 1218.
104 Dimmig's application of Upton is illustrative of this dubious jurisprudential approach. See note 68.
105 Upton, 930 F2d at 1210-11.
107 Upton, 930 F2d at 1212-18. Whether the court applied the Elrod-Branti standard properly is a different question altogether. While the Elrod and Branti Courts emphasized policymaking employees, the Upton court wrote, "The facts of these present cases suggest that a deputy sheriff helps to implement his superior's policies . . . ." Id at 1215 (emphasis added). While one charged with implementing policy undoubtedly is vested with some discretion, it is not the same quantity or quality of discretion afforded the maker of policy.
employees onto the streets to endorse their employers' candidacy. That the State cannot compel speech is well recognized. Public employees are afforded no less protection in that regard, for State control of public employees' speech is limited by Pickering and its progeny.

D. Factual Basis for Classifying Neutrality as Speech and Not as Association

Both the facts of the neutrality cases and the nature of the campaign obligations that employer-candidates impose on employees illustrate that neutrality is best understood as speech.

1. Facts of those cases where dismissal has been upheld.

A closer examination of the facts of Dimmig, Diamond, and Mitchell demonstrates why neutrality is best understood as speech. Diamond, after serving as village director of public works for nearly three years, was terminated because he refused to endorse the mayor's candidacy, despite his promise that he would support the mayor's position. Similarly, Dimmig was fired for refusing to campaign for his boss's re-election. There were no allegations that Dimmig actively supported another candidate. He merely wanted to remain neutral. Chief Deputy Sheriff Mitchell had served Sheriff Thompson well enough to receive three promotions in as many years, but when he refused to support the sheriff's re-election campaign he was demoted to Third-Watch Supervisor; again, there were no allegations that Mitchell had supported another candidate.

In each case, the employer-candidate did not ask the employee merely to associate himself with a candidate or a political group as in Elrod, Branti, and Rutan, where the defendants required party affiliation. Quite the opposite, the employer-candidate in these situations required the employee's active, vocal support, using his position as a threat that a refusal would adversely affect the employee's job.

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108 Note that the employer-candidate also attempted to control the content of employees' speech by shifting employee speech from silence to political endorsement.
109 See Wooley, 430 US at 714; Barnette, 319 US at 642.
110 See notes 19-31 and accompanying text.
111 See notes 69-74 and accompanying text.
112 See notes 63-68 and accompanying text.
113 See notes 75-77 and accompanying text.
2. The nature of the required support.

The nature of the support that the employer-candidate seeks from a neutral employee is, in essence, speech. In this regard, *Diamond* is illustrative. The support offered by Diamond, namely, associating himself with the position of the mayor, was insufficient to prevent his discharge. Nor was Diamond's refusal to endorse any opposition candidate enough to save him from being fired. Similar fact patterns in *Dimmig* and *Mitchell* indicate that the support required of these neutral public employees goes beyond mere affiliation as in the patronage line of cases. If affiliation were sufficient, Diamond's statement that he would support the mayor's position would have been adequate to protect his job. Rather, the employee's decision to remain neutral and not to lend her voice to any campaign is First Amendment speech that should be analyzed under the *Pickering* standard.

In *Cron v Cheatham County*, the Sixth Circuit clearly defined public employee neutrality as speech. Though the *Cron* court ultimately affirmed the denial of a preliminary injunction requested by an administrative assistant who alleged that he had been fired for his "refusal to pledge allegiance" to the incumbent sheriff's campaign, the court based its decision on procedural grounds. Ultimately the *Cron* court remanded the case for a

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114 *Diamond*, 811 F Supp at 1326.

115 The *Diamond* court recognized Diamond's assertion that he would not actively support any candidate. Id. However, the *Dimmig* and *Mitchell* courts reached their decisions without any allegation that the employees had actively supported other candidates. The absence of such allegations leads to the assumption that no such active support had been rendered.

116 1994 WL 256704 (6th Cir)granting preliminary injunctions enjoining a sheriff from firing both a dispatch supervisor, who had not campaigned against the sheriff, and a deputy sheriff, who had made a single comment in favor of another candidate, but denying a preliminary injunction in favor of an administrative assistant who had remained neutral during the campaign due to insufficient evidence, and remanding all three cases for trial on the merits).

117 Id at *2.

118 The case came to the court on appeal from a lower court's denial of a preliminary injunction in the case of the administrative assistant. Id at *1. The appellate court found that the trial court's decision that the plaintiff failed to demonstrate a likelihood of success on the merits was not clearly erroneous, and thus affirmed the lower court's denial of a preliminary injunction. Id at *6. The *Cron* court did, however, affirm preliminary injunctions in favor of two other sheriff's department employees who had been fired. *Cron*, 1994 WL 256704 at *6. One of those employees, a deputy sheriff named Granville Ratcliff, was fired for making a single comment in support of a candidate opposing the incumbent sheriff. The other employee, a records and dispatch supervisor named Sara Hunter, was "not involved in any campaign activity." Id at *2. The only campaign activity even remotely attributable to Hunter was the fact that her daughter had actively campaigned for one of the opposing candidates and that one of Hunter's neighbors had placed
trial on the merits, with the recognition that "an employee's decision to remain uncommitted in a campaign is protected by the First Amendment." The court supported this proposition with specific reference to a pair of fundamental speech cases, *Wooley v Maynard* and *West Virginia State Board of Education v Barnette*, to make clear its understanding that the First Amendment protection for neutral employees of which it wrote was free speech protection.

It is well understood that the freedom not to speak, that is, the freedom to remain silent, is a complementary freedom to the First Amendment's freedom of speech. When an employer-candidate requires active political support from an employee who would prefer to remain neutral, she compels speech in violation of this complementary First Amendment freedom.

**CONCLUSION**

Several lower federal courts have granted constitutional protection to public employers' decisions to fire or demote employees who choose to remain politically neutral rather than support their employers' campaigns. This protection is as unwise as it is unwarranted.

The Supreme Court has developed two distinct lines of jurisprudence for protecting the First Amendment freedoms of public employees. One line analyzes the permissible restrictions on the freedom of speech of public employees according to *Pickering v Board of Education of Township High School District 205, Will County, Illinois* and its progeny. The other examines limitations on employees' freedom of association under the patronage standard of *Elrod-Branti*. While the Seventh Circuit has unified these distinct lines, several other circuits have recognized and applied the standards as distinct; such recognition is vital to the development of a coherent and consistent jurisprudence in this area.

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119 Id at *6.
121 319 US 624 (1943).
122 *Cron*, 1994 WL 256704 at *6 n 4. After referring to *Wooley*, 430 US at 714, and *Barnette*, 319 US at 642, the *Cron* court cited the former for the proposition that the First Amendment protects both the freedom to speak and the complementary freedom to not speak. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Cron*, 1994 WL 256704 at *6 n 4, quoting *Wooley*, 430 US at 714 (emphasis added).
123 See notes 4, 106, 122, and accompanying text.
Having recognized the distinction of the two lines of cases, it is further necessary to ensure that courts apply the proper line in cases of neutrality. The structure of the Supreme Court precedent establishing the speech and patronage paradigms, the nature of the governmental interests the Court intended those lines to protect, and related policy concerns all suggest that Pickering and the speech line provide the appropriate standard for analyzing the dismissals of neutral public employees.\(^\text{125}\)

This Comment does not propose that public employees are absolutely free to remain neutral in the political campaigns of their employers; such decisions are unquestionably subject to some restrictions.\(^\text{126}\) The contention here is more limited—in evaluating restrictions on public employees' neutrality in political campaigns, the free speech test stated in Pickering, as refined by Connick and Rankin, provides the proper analysis. The Pickering standard is better suited to the nature of political neutrality than the patronage standard, which presents critical jurisprudential problems and has resulted in a growing number of contentious decisions. Thus, analyzed according to Pickering and the free speech line, neutrality by public employees does not automatically constitute protected First Amendment free speech. Rather,

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\(^{125}\) There is some judicial support for recognition of a public employee's constitutional right to refuse to support his employer's campaign. See Crumbley v Swietyniowski, 1987 WL 44505 (6th Cir)(per curiam)(finding no error in jury instructions that certain activities of a public employee with respect to the candidacy of her boss were constitutionally protected). In Crumbley, the plaintiff, a city employee, alleged that her First Amendment rights were violated when she was fired for one of three reasons: (1) failure to support the mayor's reelection bid; (2) comments made by her husband denouncing the mayor; or (3) her affiliation with a political organization which refused to endorse the mayor. The trial court instructed the jury that each of those activities was constitutionally protected and the Sixth Circuit affirmed, finding "no error in the district court's instructions that, as a matter of law, these activities were constitutionally protected." Id at *2 (emphasis added). See also Brown v Reardon, 770 F2d 896 (10th Cir 1985)(granting qualified immunity to a county district attorney in a suit brought by a former assistant district attorney who alleged that he was fired for refusing to support his boss's candidacy). While the Brown court found that plaintiff employees had not sufficiently demonstrated that their refusal to contribute to their boss's campaign fund-raiser was the motivating factor in their dismissals, the court suggested that had they done so, they would have stated a valid constitutional claim. "It was incumbent upon plaintiffs to establish that their terminations were in reprisal for the exercise of their First Amendment right not to contribute or support any political causes . . . ." Id at 903 (emphasis added).

\(^{126}\) See notes 30-31 and accompanying text. The Supreme Court has long held that accepting public employment necessarily carries with it some restrictions, even with respect to constitutional rights.
such neutrality constitutes First Amendment speech and, as such, should be analyzed under the free speech line of Supreme Court precedent in order to determine whether or not it is protected.

The distinction of the free speech and patronage lines of jurisprudence and the application of the free speech line in instances of public employees' neutrality would not only protect public employees' constitutional right to free speech, but would do so in a manner that is consistent with Supreme Court precedent and principles, and which, ultimately, is coherent with the public interest.