The Constitutional Right of a Police Officer to Make Political Contributions

Introduction

In *Reeder v. Kansas City Board of Police Commissioners*,[1] and *Pollard v. Board of Police Commissioners*,[2] both the United States Court of Appeals for the Eighth Circuit and the Missouri Supreme Court upheld a Missouri statute that forbids officers or employees of the Kansas City Police Department from making any political contribution[3] against a first amendment challenge.[4] In reaching their decisions, these courts balanced the first amendment right of police officers to make political contributions[5] against Missouri's interests in preventing municipal corruption.[6] Construing the United States Supreme Court's precedents regarding governmental restrictions on the first amendment rights of public employees, both courts held that the legitimate interests of the state justified Missouri's ban on political contributions by Kansas City Police Department employees.[7] Both courts summarily dismissed the possibility that Missouri's total prohibition on political contributions is

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1. 733 F.2d 543 (8th Cir. 1984).

2. 665 S.W.2d 333 (Mo. 1984) (en banc).

3. *Id.* at 335 (citing MO. REV. STAT. § 84.830(1) (1978)). The statute provides:

> No officer or employee in the service of said police department shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party, political club, or any political purpose whatever.

In *Pollard,* the Missouri Supreme Court described this statute as designed to prevent municipal political corruption in Kansas City. 665 S.W.2d at 336. *See infra* note 21 and accompanying text.

4. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech . . . ." As the Eighth Circuit Court of Appeals pointed out, the United States Supreme Court has never spoken directly on the subject of whether public employers can prevent their employees from making campaign contributions. *Reeder,* 733 F.2d at 548.

5. In Buckley v. Valeo, 424 U.S. 1 (1976), the United States Supreme Court made it clear that political contributions are protected as a part of the first amendment rights of each citizen. The Court characterized the campaign contribution as a form of political speech that "serves as a general expression of support for the candidate and his views." *Id.* at 21. Political expression is a "most fundamental First Amendment activit[y]." *Id.* at 14. *But see* Wright, *Politics and the Constitution: Is Money Speech?,* 85 YALE L.J. 1001 (1976).

6. *Reeder,* 733 F.2d at 545. The Eighth Circuit adopted the basic balancing test used in *Pollard,* 665 S.W.2d at 339, and mandated by Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

7. *Reeder,* 733 F.2d at 548; *Pollard,* 665 S.W.2d at 342.

overbroad.[8]

The United States Supreme Court decisions regarding restraints on the first amendment rights of public employees require a balancing of the individual's and the state's interests in order to determine the scope and nature of permissible governmental restrictions.[9] In the public employee cases, the Court's balancing analysis in effect consisted of finding that one interest was of serious import and that the other was not.[10] Either the state or the individual interests prevailed, depending on which interest was found to have substantial merit. Yet courts face situations in which both the state's and the individual's interests are important, and the Supreme Court's public employee cases do not address circumstances in which the competing interests are of roughly equal importance.

In other cases involving first amendment rights of expression and association and in cases stressing the legitimacy of restrictions aimed at promoting an efficient and politically neutral civil service, the Court has cautioned against overbroad restrictions on first amendment rights.[11] These cases require that given the importance of the first amendment rights of political expression and association, even justifiable governmental restrictions be carefully and narrowly tailored.[12] In other words, the state must achieve its legitimate aims by methods which impose the least restrictions on the first amendment rights in question.

The *Reeder* and *Pollard* courts nominally employed the balancing approach required by the Supreme Court's public employee cases.[13] However, the facts of *Reeder* and *Pollard* present a conflict of interests that cannot be resolved as easily as the conflicts settled by the Supreme Court in the public employee cases. In *Reeder* and *Pollard*, both the state's interests in preventing municipal corruption and the first amend-

8. *Reeder,* 733 F.2d at 546-48; *Pollard,* 665 S.W.2d at 340-41.

9. *See* Connick v. Myers, 461 U.S. 138, 142 (1983); *Pickering,* 391 U.S. at 568. For an analysis of the problems with the ad hoc balancing approach to the first amendment rights of public employees, see Note, *Politics And The Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection,* 85 COLUM. L. REV. 558 (1985). In general, this Note divides the analysis of the first amendment rights of public employees into two categories: first, the ad hoc balancing test required by *Pickering,* 391 U.S. at 568, and *Connick,* 461 U.S. at 141, which weighs the individual's right against the relevant government interests; and second, the categorical approach of Elrod v. Burns, 427 U.S. 347, 372-73 (1976) in which the Supreme Court has balanced the interests and prescribes a per se rule with more predictable results. *See generally* Cover, *The Supreme Court, 1982 Term,* 97 HARV. L. REV. 4 (1983); *Developments in the Law—Public Employment: The Constitutional Rights of Public Employees,* 97 HARV. L. REV. 1738 (1984).

10. For example, in *Connick,* the Court found that a public employee's exercise of first amendment expression did not significantly involve matters of public concern and thus could not compare to the weighty state interests in promoting an efficient government agency. *Connick,* 461 U.S. at 146. *See infra* notes 87-96 and accompanying text.

11. *See infra* notes 97-126 and accompanying text.

12. *Id.*

13. *See supra* note 6.

ment rights of police department employees to make political contributions are substantial. Unlike the Supreme Court's public employee cases, neither interest in *Reeder* and *Pollard* could be dismissed as markedly inferior to the other. Yet both courts, in effect, made just this error; they dismissed the police officers' first amendment rights to make political contributions as significantly less important than the state's interests in preventing municipal corruption.[14] On this basis, the courts justified Missouri's total ban on the political contributions of police department employees.

This Note contends that the *Reeder* and *Pollard* courts failed to balance the interests of the state and individual properly because they mischaracterized these interests as being of unequal importance. This Note suggests that when, as in *Reeder* and *Pollard*, a court faces competing interests of approximately equal value, it should seek a compromise by requiring that the state use the least restrictive method of serving its interest. By insisting on the least restrictive method of achieving the state's aim, a court protects, as far as possible, the important first amendment rights of public employees to make political contributions and, simultaneously, promotes the legitimate interests of the state in preventing municipal political corruption.

This Note analyzes the facts and reasoning of *Reeder* and *Pollard* in detail. It then describes the development of judicial approaches to restrictions on the first amendment rights of public employees, which culminates in the balancing approach. Next, the Note explores the basic conflict of interests by examining both cases which stress the importance of the first amendment rights of political expression and association as well as cases which describe legitimate aims of government in restricting certain political activities of public employees. Finally, the Note critically examines the balancing judgment employed in *Reeder* and *Pollard*, concluding that they incorrectly balanced the interests at issue and upheld an overbroad restriction on the first amendment right of Kansas City police officers to make political contributions.

I. *Pollard v. Board of Police Commissioners*

Pollard, a Kansas City police officer, made a monetary contribution to the campaign of John Carnes, a candidate for the Democratic nomination for the United States House of Representatives seat in Missouri's Fifth Congressional District.[15] The candidate reported the source of the contribution to the Missouri Secretary of State as required by Missouri law,[16] and a newspaper reported the candidate's disclosure.[17] Because

14. *See supra* note 7.
15. *Pollard*, 665 S.W.2d at 335.
16. *Id.* at 335 n.1 (citing MO. REV. STAT. § 130.086 (1978)).
17. *Pollard*, 665 S.W.2d at 335.

Pollard's contribution violated a Missouri law forbidding officers or employees of the Kansas City Police Department from making political contributions,[18] he was discharged from the department.[19]

In *Pollard*, the Missouri Supreme Court set forth the history and purpose of the Missouri prohibition on political contributions by Kansas City police employees. The court described the problem which prompted passage of the statute:

> Policemen who belonged to the party out of power were discharged. Those who remained, and those newly hired, were obliged to profess adherence to and to contribute a portion of their salaries to the support of the dominant political party. There followed substantial discoveries of corruption touching not only the police department but the entire governmental structure of Kansas City.[20]

The aim of the statute was threefold: to protect police from political pressure to contribute to the party in power, to protect the public from a politicized police department, and to protect against a general growth of municipal political corruption.[21]

The Missouri Supreme Court began its first amendment analysis by distinguishing between the restrictions permissible with respect to a private citizen and those permissible with respect to a public employee. It asserted that a public employee's first amendment rights may be subjected to greater restrictions than those of a private citizen.[22] To support this proposition, the *Pollard* court relied on *McAuliffe v. Mayor of New Bedford*,[23] quoting the famous language of Justice Holmes' opinion for the Massachusetts Supreme Court:

> The petitioner may 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 of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control.[24]

The *Pollard* court acknowledged that political contributions involve substantial first amendment rights of free expression and association.[25] But it reasoned that these rights can be subject to governmental regulation when, as in the case of public employees, the government's interest is

18. *Id.* (citing MO. REV. STAT. § 84.830(1) (1978)); *see supra* note 3.

19. *Pollard*, 665 S.W.2d at 335.

20. *Id.*

21. *Id.* at 336.

22. *Id.* at 338-39.

23. 155 Mass. 216, 29 N.E. 517 (1892).

24. *Pollard*, 665 S.W.2d at 339 (quoting McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892)).

25. *Pollard*, 665 S.W.2d at 339 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).

sufficiently great.[26] The court measured the constitutionality of restrictions on the political conduct of employees by balancing the validity and importance of the state interests served against the first amendment interests of the public employee as citizen.[27] In *Pollard*, the court concluded that the governmental interests justified a total ban on political contributions by Kansas City Police Department employees.[28]

The *Pollard* court conceded that the First Amendment requires the state to show that the means chosen to achieve the state's interests are the least restrictive and most appropriate to the task.[29] However, the Missouri Supreme Court concluded simply that a total ban on political contributions by the Kansas City police was the only means by which the state could achieve its significant ends.[30] In reaching this determination, the court responded to the argument that the statutory ban should be limited to municipal or state campaigns by asserting that there is a close connection among local, state and federal politics.[31] If the proscription were limited to local campaigns, the court feared that the state goals would be thwarted because a contribution to a candidate for federal office could benefit local politicians in the same party.[32] Thus the *Pollard* court held that all political contributions by Kansas City police officers have potential for engendering corruption in Kansas City, regardless of whether the campaign is local or national.

The Missouri court further reasoned that another less restrictive alternative, a monetary limit on contributions in lieu of a total ban, similarly would frustrate the state's interests. It concluded that even a modest contribution is a public demonstration of support, and "the legislature could properly conclude that this is the very demonstration a police officer should not make."[33]

Finally, the *Pollard* court asserted that similar restrictions on the first amendment rights of police department employees have been upheld in other instances. The court equated the Missouri statute's ban on political contributions with statutes prohibiting police officers from serving on political committees, working at polls, raising political funds, and running for office.[34] By prohibiting political contributions, the *Pollard* court

26. *Pollard,* 665 S.W.2d at 339.

27. *Id.* (citing Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).

28. *Pollard,* 665 S.W.2d at 341.

29. *Id.* at 340 (citing Shelton v. Tucker, 364 U.S. 479, 488 (1960) and NAACP v. Alabama, 377 U.S. 288, 307-08 (1964)).

30. *Pollard,* 665 S.W.2d at 341.

31. *Id.* at 340.

32. *Id.*

33. *Id.* at 341.

34. *Id.* This analogy was to activities which may legitimately be limited in order to serve significant state interests. *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); Broadrick v. Oklahoma, 413 U.S. 601 (1973). *See infra* notes 112-126 and accompanying text.

determined that Missouri simply placed an additional valid restriction on the active political involvement of employees of the Kansas City Police Department.

II. *Reeder v. Kansas City Board of Police Commissioners*

Sergeant Mark Reeder challenged the validity of the Missouri statute in an action in federal district court.[35] The underlying facts were identical to those in *Pollard*.[36] The district court found the statute unconstitutional on two grounds: (1) it was preempted by the Federal Election Campaign Act Amendments of 1974,[37] and (2) it unconstitutionally abridged Reeder's freedom of speech. The Eighth Circuit reversed both of these rulings and remanded the case for consideration of Reeder's equal protection claim.[38]

The Eighth Circuit panel in *Reeder* adopted the opinion in *Pollard*[39] and responded to additional arguments raised by Reeder. First, Reeder claimed that his contribution to the campaign of a candidate running for a seat in the United States Congress representing Independence, Missouri could not influence Kansas City politics or the Kansas City Police Department.[40] The court responded that a contribution by Reeder to the federal congressional campaign might well benefit a Kansas City politician who has " 'made common cause with [the federal] candidate.' "[41] The court acknowledged that the dangers of local corruption are more obvious when a public employee contributes to a local campaign, but concluded that the difference was not great enough to require that the state forbid contributions only to local political campaigns.[42]

The Eighth Circuit panel asserted that public employees generally are subject to more severe restrictions than the public at large.[43] The court described public employment as being conditioned on the surrender of certain rights, especially in the case of police officers.[44] To illus-

35. *Reeder*, 733 F.2d at 545.

36. *Id.*

37. The Eighth Circuit rejected the preemption argument in *Reeder*. 733 F.2d at 546. The court quoted from the legislative history in order to show that state laws regulating political activities of public employees were expressly excluded from the scope of 2 U.S.C. § 453 (1982). *Id.* at 545-46. This Note does not address the preemption issue because it has only tangential relevance to the first amendment issue at hand.

38. *Reeder*, 733 F.2d at 548. The equal protection argument is based on the fact that the Missouri law in question applies only to Kansas City and not to other cities in Missouri. *Id.* This issue is beyond the scope of this work.

39. *Id.* at 545.

40. *Id.* at 546-47.

41. *Id.* (quoting Pollard v. Board of Police Comm'rs, 665 S.W.2d 333, 340 (Mo. 1984)).

42. *Reeder*, 733 F.2d at 546-47.

43. *Id.*

44. *Id.* The court said, "People who become public employees receive certain benefits and undertake certain duties. One of those duties may require the surrender of rights that would

trate, the court pointed to an Eighth Circuit decision upholding a St. Louis regulation forbidding any St. Louis police officer from running for office in the Missouri Senate.[45] By contrast, the court asserted that the state would never be allowed to enact a similar restriction in regard to private citizens.[46]

As support for Missouri's right to forbid political contributions by Kansas City police officers, the *Reeder* court cited *Broadrick v. Oklahoma*[47] and *United States Civil Service Commission v. National Association of Letter Carriers.*[48] According to the court, these Supreme Court decisions stand for the proposition that both state and federal legislatures may substantially restrict the active political behavior of public employees: "The same power that may prevent a public employee from making a political speech or conducting a political meeting (even on the employee's own time) may also forbid compaign contributions."[49]

Officer Reeder claimed that *Buckley v. Valeo*,[50] decided after *Broadrick* and *Letter Carriers*, overruled those cases to the extent that they permitted restrictions on political contributions by public employees.[51] The court disagreed, reasoning that *Buckley* involved the first amendment rights of the public at large rather than those of a special class of public employees.[52] In response to Reeder's contention that the patronage dismissal case, *Elrod v. Burns*,[53] also decided after *Broadrick* and *Letter Carriers*, prohibited the discharge of public employees for their political associations, the court reasoned that *Elrod* involved a balancing of different interests than those in *Reeder*.[54] Whereas *Reeder* involved legitimate interests of the state, *Elrod* considered only the illegitimate interests of a newly elected government official in "purg[ing] the ranks"[55] of employees with differing political views.[56] Finally, the

otherwise be beyond the reach of governmental power." *Id.* This language echoes the words of Justice Holmes in *McAuliffe*, 155 Mass. at 220, 29 N.E. at 517-18. *See supra* note 24 and accompanying text.

45. Otten v. Schicker, 655 F.2d 142 (8th Cir. 1981).

46. *Reeder*, 733 F.2d at 547.

47. 413 U.S. 601 (1973).

48. 413 U.S. 548 (1973).

49. *Reeder*, 733 F.2d at 547.

50. 424 U.S. 1 (1976).

51. *Reeder*, 733 F.2d at 547.

52. *Id.*

53. 427 U.S. 347 (1976).

54. *Reeder*, 733 F.2d at 547.

55. *Id.* at 548.

56. *Id.* at 547-48. The *Reeder* court's analysis of *Elrod* is misleading. The court stated that in *Elrod* there was no legitimate governmental interest at stake. That this mischaracterizes *Elrod* becomes clear when examining *Elrod*'s progeny, Branti v. Finkel, 445 U.S. 507, 518 (1980), where the *Elrod* test was restated: "[T]he ultimate inquiry [in patronage dismissal cases] is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Thus the state in

court referred to dicta in *Kelley v. Johnson*[57] stating that the campaign contribution of a police officer is just one of many activities a state may legitimately regulate in regard to its police force.[58]

III. The Development of Public Employees' First Amendment Rights

A. Genesis of the Balancing Analysis

In *McAuliffe v. Mayor of New Bedford*, Justice Holmes expressed the nineteenth century view that government or public employment is a privilege and not a right: "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[59] The government could insist on substantial restrictions of an employee's first amendment rights as a condition of employment as long as the restrictions were "reasonable."[60] Thus the employee accepted restrictions on his first amendment rights when he accepted public employment. This reasoning discounted the public employee's interests in exercising his first amendment rights as insubstantial.

The right-privilege distinction embodied in Justice Holmes' opinion guided courts practically unchallenged until *United Public Workers v. Mitchell*[61] presented the United States Supreme Court with the first major challenge to the power of the government to restrict the first amendment rights of public employees. The Court responded by upholding the constitutionality of the Hatch Act's broad restrictions on the political activities of government employees.[62] The Court's opinion reflected Justice Holmes' view in *McAuliffe* that as long as Congress' regulation of the

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Elrod had a legitimate interest to be weighed: effective performance of public office. *Elrod*'s rule is that political affiliation does not have a significant impact on the job performance of lower level and nonpolicy-making employees. *Elrod*, 427 U.S. at 375. However, the *Reeder* court was correct in noting that as a patronage dismissal case, *Elrod* is distinguishable from *Reeder*.

57. 425 U.S. 238 (1976). *Kelley* held that the state as employer may regulate the hair length of its policemen. In passing, Justice Rehnquist compared the legitimacy of a hair length regulation with one forbidding a policeman to "take an active role in local political affairs . . . or contributing." *Id.* at 246.

58. *Reeder*, 733 F.2d at 548. The *Reeder* court found in the *Kelley* dicta "an implication that restraints on campaign contributions [sh]ould not be treated differently from other" permissible restrictions. *Id.* The court acknowledged that the *Kelley* reference is dicta but failed to acknowledge the fact that the *Kelley* holding is based on the Fourteenth Amendment's general guarantee of personal liberty, rather than the First Amendment. *Kelley*, 425 U.S. at 245. The *Kelley* decision is based on a rational basis test, *id.* at 247, not on the more demanding scrutiny required in first amendment cases.

59. *McAuliffe*, 155 Mass. at 220, 29 N.E. at 517.

60. *Id.*

61. 330 U.S. 75 (1947).

62. *Id.* at 78 n.2 (citing The Hatch Act § 9(a), 18 U.S.C. § 61h (1940), which prohibited federal employees of the executive branch from "tak[ing] any active part in political manage-

first amendment rights of public employees was within "reasonable limits," the regulation is constitutional "even though [it] trenches to some extent upon unfettered political action."[63]

In a 1952 decision, *Adler v. Board of Education*,[64] the Court reiterated the traditional point of view taken by Justice Holmes in *McAuliffe*. The Court upheld a provision of the Feinberg Law[65] which disqualified from public employment any person who joined a group advocating the forceful overthrow of the government of the United States or of any state.[66] Justice Minton, writing for the Court, repeated Justice Holmes' right-privilege distinction:

> It is clear that [employees of the state] have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State . . . on their own terms. They may work for the [State] upon the reasonable terms laid down by the proper authorities. . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.[67]

This reasoning was followed in a series of similar cases in the 1950's dealing with anticommunist legislation.[68]

However, the 1960's heralded a change in the viewpoint of the Court. Rejecting the view that the state had virtually unlimited power to place conditions upon the "privilege" of public employment,[69] the Court

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ment or in political campaigns"); *id.* at 79 n.3 (citing The Hatch Act § 15, 18 U.S.C. § 61e (1940), which prohibited political activities by federal civil service employees).

63. *Mitchell,* 330 U.S. at 102. In *Mitchell,* the Court acknowledged that other constitutional provisions may also limit governmental restrictions on speech. For instance, "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' " *Id.* at 100.

64. 342 U.S. 485 (1952).

65. *Id.* at 487 n.2 (citing the Feinberg Law, 1949 N.Y. Laws, ch. 361).

66. The Feinberg Law implemented section 12-a of the Civil Service Law, which permitted the discharge of any employee who "becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means." *Adler,* 342 U.S. at 487 n.3.

67. *Id.* at 492.

68. *See, e.g.,* Lerner v. Casey, 357 U.S. 468 (1958) (discharge of a New York subway conductor who refused to answer questions by his superiors pertaining to membership in the Communist Party); Beilan v. Board of Pub. Educ., 357 U.S. 399 (1958) (a discharge similar to that in *Lerner* involving a Pennsylvania school teacher); Garner v. Board of Pub. Works, 341 U.S. 716 (1951) (dismissal for refusal to execute a "loyalty" oath).

69. The Court's change in position became clear in Sherbert v. Verner, 374 U.S. 398 (1963). In *Sherbert,* the Court held unconstitutional the application of a South Carolina statute that denied unemployment compensation to those who were unemployed due to a refusal, for religious reasons, to work at certain times. A Seventh Day Adventist who was unemployed because she refused to work on Saturday, which was her Sabbath, was denied unemployment compensation. The Court stated, "[i]t is too late in the day to doubt that the liberties of

struck down a number of state loyalty oaths on vagueness and overbreadth grounds.[70]

Ultimately, Holmes' right-privilege distinction met its demise in *Keyishian v. Board of Regents*.[71] In *Keyishian*, the Court struck down the Feinberg Law, which it had previously upheld in *Adler*.[72] Justice Brennan stated the Court's new point of view: "[C]onstitutional doctrine which has emerged since [*Adler*] has rejected [*Adler*'s] major premise. That premise was that public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct governmental action."[73] In *Keyishian*, the Court enunciated the "doctrine of substantial interest,"[74] which requires a court to balance the interests of the employer against the constitutional rights of the employee.[75] Even when the government has a legitimate aim, that end cannot be achieved at the expense of the public employee's first amendment rights if the government's objective can be accomplished by more narrow means.[76]

The Court's decision in *Pickering v. Board of Education*[77] expanded this doctrine. In *Pickering*, a teacher was fired for publishing a letter in a local newspaper that criticized the manner in which his employer, the local school board, had handled bond issue proposals and had allocated funds between the school's athletic and educational programs.[78] The Court held that an employee's "right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[79]

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religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* at 404.

70. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); *cf.* Garrity v. New Jersey, 385 U.S. 493 (1967).

71. 385 U.S. 589 (1967). *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-46 (1968), which elaborates the "doctrine of unconstitutional conditions." This doctrine states that the government cannot do indirectly, through manipulating public employment, for example, what it may not do directly. *Id.*

72. *See supra* note 64 and accompanying text.

73. *Keyishian*, 385 U.S. at 605.

74. *See generally* Rosenbloom & Gille, *The Current Constitutional Approach to Public Employment*, 23 U. KAN. L. REV. 249, 259 (1975).

75. *Keyishian*, 385 U.S. at 605-06.

76. " '[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental [rights] when the end can be more narrowly achieved.' " *Id.* at 602 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

77. 391 U.S. 563 (1968).

78. *Id.* at 566.

79. *Id.* at 574.

In *Pickering*, the Court described the appropriate test as a balancing of the employee's interest as a citizen to comment upon "matters of public concern" against the state's interest as an employer in promoting and providing efficient public services through its employees.[80] The Court viewed this balancing approach as the most comprehensive means for courts to approach "the enormous variety of fact situations" which present conflicts between public employees and employers.[81] Because Pickering's public criticisms of his employer were based upon issues of genuine public concern and did not affect his performance at work or interfere with the efficient operation of the school, the Court concluded that his right to speak freely on issues of public concern outweighed the school board's interest in limiting his contribution to public debate.[82] Thus, the Court's balancing resulted in a finding that the state had no interest at stake as important as that of the public employee in exercising his first amendment rights.[83]

The Court further refined its approach to the public employee's exercise of first amendment rights in *Givhan v. Western Line Consolidated School District*,[84] expanding the scope of first amendment protection to include private expression on issues of public concern. In *Givhan*, a public school teacher was discharged after criticizing school policies in a private conversation with the school principal. The Court held that a public employee does not forfeit her first amendment right of free speech by communicating privately with her employer rather than disseminating her views to the public.[85] However, the Court speculated that on different facts a confrontation between a public employee and her immediate superior could implicate legitimate state interests; the efficient function of the government workplace might be threatened "not only by the content of the employee's message but also by the manner, time, and place in which it is delivered."[86]

Recently, in *Connick v. Myers*,[87] the Court applied the *Pickering* balancing test to the question of whether the First Amendment precludes a public employer from discharging an employee who had circulated within the office a questionnaire predominantly concerning internal office

80. *Id.* at 568.

81. *Id.* at 569.

82. *Id.* at 572-73.

83. The Court concluded that under the circumstances of the case "the interest of the school administration in limiting teachers' opportunities to contribute to public debate [was] not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573.

84. 439 U.S. 410 (1979).

85. *Id.* at 415-16. Writing for the Court, Justice Rehnquist stated that "the rule to be derived from [*Pickering*] is not dependent on that largely coincidental fact." *Id.*

86. *Id.* at 415 n.4.

87. 461 U.S. 138 (1983).

affairs.[88] The Court first inquired as to whether the employee's speech contained matters of public concern; if not, then the *Pickering* balancing test would not apply and the First Amendment would not protect the employee from discharge.[89] The majority found only one question on Myers' questionnaire that concerned matters of public interest sufficiently substantial to trigger the *Pickering* balancing test.[90]

The Court then applied the balancing test to determine the constitutionality of Myers' discharge. Balancing the government's interests as an employer and the employee's first amendment rights required "full consideration" of the government employer's interest in effective and efficient operation.[91] The Court ruled that the government's interest in preserving close working relationships outweighed Myers' interest in circulating a questionnaire which contained matter of only the most limited public concern.[92] The Court warned, however, that a stronger government interest might have been necessary if Myers' communication had "more substantially involved matters of public concern."[93]

The Court also acknowledged that the government had not shown that Myers' questionnaire had caused any actual disruption in the office, but reasoned that the government employer's reasonable belief that disruption would occur was sufficient to justify the restriction: " '[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation.' "[94] The fact that Myers had communicated largely personal complaints to co-workers lent additional support to the employer's conclusion that efficient operation of the office was threatened.[95]

In *Connick*, as in the other public employee cases, the scales of the Court's balancing test tipped easily to one side. The government's interest in *Connick* was great while the employee's exercise of first amendment rights only insignificantly involved matters of public concern.[96]

88. *Id.* at 141.

89. *Id.* at 146.

90. The Court stated, "One question in Myers' questionnaire . . . touch[es] upon a matter of public concern. Question 11 inquires if assistant district attorneys 'ever feel pressured to work in political campaigns on behalf of office supported candidates.' " *Id.* at 149. Clearly political coercion within a government agency is a matter of public concern. *Id.* However the Court thought that the question was not particularly significant when seen as part of what "is most accurately characterized as an employee grievance" with limited first amendment value. *Id.* at 154.

91. *Id.* at 150.

92. The *Connick* Court found that the question "touched upon matters of public concern only in a most limited sense." *Id.* at 154.

93. *Id.* at 152.

94. *Id.* at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974)).

95. *Connick*, 461 U.S. at 153.

96. *See supra* note 92.

The *Reeder* and *Pollard* Courts had to look to *Connick*, *Pickering* and to the history of the first amendment rights of public employees in order to find the appropriate judicial test with which to judge Missouri's ban on political contributions. Yet the *Reeder* and *Pollard* courts could not find an exact factual analogy in these cases. In *Connick*, as in the other cases, the Court was able to dismiss one of the competing interests without much difficulty. In *Reeder* and *Pollard* this could not be done; the state had a legitimate goal and the employee's political contribution clearly involved a substantial matter of public concern.

IV. The Conflict in Principle: What is at Stake for the Individual and the State

A. The First Amendment Interests: Least Restrictive Alternative

Freedom of political belief, association and expression are central to our constitutional scheme: "The First Amendment protects political association as well as political expression."[97] Political association as a vehicle for effecting political beliefs "is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."[98]

Political contributions are a part of an individual's right to association and expression; accordingly, contributing to a political campaign is a protected first amendment activity.[99] Political contributions, like other first amendment activities, are protected because as a democratic society we have a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open."[100] This commitment reflects our belief that open competition in ideas, policies and philosophies of government constitutes the very essence of our democratic process.[101]

Because first amendment rights have a preferred status in our constitutional scheme, any significant impairment of these rights, such as the right to make political contributions, must survive exacting scrutiny.[102] The state's abridgement of first amendment rights "cannot be justified upon a mere showing of a legitimate state interest."[103] The state's interest must be "paramount, one of vital importance, and the burden is on the government to show the existence of such an interest."[104] In addi-

97. Buckley v. Valeo, 424 U.S. 1, 15 (1976).
98. Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973).
99. *Buckley*, 424 U.S. 1 (1976).
100. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
101. Elrod v. Burns, 427 U.S. 347, 357 (1976).
102. *Buckley*, 424 U.S. at 64-65.
103. *Kusper*, 414 U.S. at 58.
104. *Elrod*, 427 U.S. at 362.

tion, the state's interests served by the abridgement of first amendment rights must outweigh the resulting loss of those protected rights.[105] Moreover, the state must employ "means closely drawn to avoid unnecessary abridgment."[106] In *Kusper v. Pontikes*,[107] the Court insisted that the state use the least restrictive means appropriate to achieving its aim:

> [A] State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interest, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.[108]

If conditioning the retention of public employment on the employee's obeying a total ban on political contributions is to survive constitutional challenge, the condition must serve a vital governmental end by a means that imposes the least restriction on the freedom of expression and association represented in political contributions, and the benefit gained must outweigh the loss of constitutionally protected rights.[109] Unlike the questionnaire in *Connick*,[110] Reeder's and Pollard's contributions to the campaign of an individual running for Congress are fully protected by the First Amendment[111] and clearly involved a matter of public concern. The relative merit of Missouri's interests must be weighed against the first amendment rights of these policemen. The gain to Missouri must outweigh their right to contribute to the political candidacy of their choice, and the state must show that it has chosen the least restrictive means to accomplish its aim.

B. The State's Interests

The starting point, from the state's perspective, is the Supreme Court's admonition that "[n]either the right to associate nor the right to participate in political activities is absolute in any event."[112] In *Letter Carriers*,[113] the Court reaffirmed its holding in *United Public Workers of America v. Mitchell*[114] that Congress has the power to prohibit certain classified federal employees from taking an active part in political party management or political campaigns. In *Letter Carriers*, the Court reasoned that the government's interest in regulating the conduct and

105. *Id.*
106. *Buckley*, 424 U.S. at 25.
107. 414 U.S. 51 (1973).
108. *Id.* at 59 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)) (citations omitted).
109. *Elrod*, 427 U.S. at 363.
110. *See supra* note 88.
111. *Buckley*, 424 U.S. at 25.
112. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973).
113. *Id.*
114. 330 U.S. 75 (1947).

> the speech of its employees . . . differ[s] significantly from [the interests] it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.[115]

Letter Carriers upheld section 9(a) of the Hatch Act, which prohibits federal employees from taking an "active part in political management or in political campaigns."[116] The government interests in *Letter Carriers* justified the interference with government employees' first amendment rights: "Partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government and employees themselves are to be sufficiently free from improper influences."[117]

Other significant factors in the Court's decision were the federal government's interests in (1) maintaining a civil service that is politically neutral in fact and in appearance, (2) preventing "the rapidly expanding Government work force [from being] employed to build a powerful, invincible and perhaps corrupt political machine,"[118] and (3) assuring that promotions are granted on the basis of merit rather than as a political favor.[119] The Court concluded that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees."[120]

In *Letter Carriers*, the Court applied the balancing test and found the government's interests to be so important as to outweigh the loss of first amendment rights suffered by the federal employees.[121] In addition, the Court found that the statutory means employed to achieve these important governmental objectives were sufficiently restricted in impact and scope as to avoid being fatally overbroad.[122]

In a companion case, *Broadrick v. Oklahoma*,[123] the Court held that a state can restrict the political activities of its civil servants in much the same way that the Hatch Act proscribes partisan political activities of federal employees. The state statute sustained in *Broadrick* prohibited certain employees from becoming actively involved in political

115. *Letter Carriers*, 413 U.S. at 564 (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).

116. 5 U.S.C. § 7324(a)(2) (1982).

117. *Letter Carriers*, 413 U.S. at 564.

118. *Id.* at 565.

119. *Id.* at 555-58.

120. *Id.* at 556.

121. *Id.* at 564.

122. *Id.* at 581.

123. 413 U.S. 601 (1973).

campaigning or management.[124] The Court reasoned:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.[125]

In *Broadrick*, as in *Letter Carriers*, the governmental interests in prohibiting state employees from becoming actively and publicly engaged in campaigning, soliciting funds and running for office justified certain restrictions on the employees' First Amendment rights. The Court, however, recognized that the restrictions must be narrowly drawn to achieve the legitimate aims of the government.[126]

V. Reanalyzing *Reeder* and *Pollard*

Reeder and *Pollard* present a direct clash between the state's power to regulate the behavior of its public employees and the employees' interests as citizens in exercising their first amendment rights. In *Reeder* and *Pollard*, both the interests of the individual and the state have substantial merit. The state must justify its discharge of an employee for making a political contribution by showing that termination is the least restrictive means available to achieve paramount interests.

Applying the *Pickering* balancing test in *Reeder* and *Pollard* would yield an obvious conclusion in favor of the state if Reeder and Pollard had actively participated in a political campaign. *Letter Carriers* and *Broadrick* clearly established the constitutionality of restrictions on active campaigning.[127] However, Reeder and Pollard did not solicit funds, votes or general political support for any political party or candidate; *Letter Carriers* and *Broadrick* did not control the issue. Thus, the courts in *Reeder* and *Pollard* were required to carefully ascertain and weigh for themselves the relevant interests of individual and state. Both courts accepted the legitimacy of Missouri's three asserted interests: (1) protecting police from political pressure to contribute to the party in power, (2) protecting the public from a politicized police force, and (3) protecting against a general growth of municipal political corruption.[128] The courts recognized that these interests must be weighed against the individual's loss of a first amendment right,[129] and that the state must show that the means it chose were the least restrictive ones necessary to achieving its

124. *Id.* at 606.
125. *Id.* at 611-12.
126. *Id.* at 612-13.
127. *See supra* notes 113 & 123.
128. *See supra* note 21 and accompanying text.
129. *See supra* notes 25-26 and accompanying text.

aims.[130] Both courts simply concluded that the state's aim of stymieing local corruption was so important as to justify this restriction and that a total ban was not broader than necessary.[131] By so concluding, these courts revealed that they viewed the state's interest as being of far greater importance than the individual's first amendment interest.

However accurate the *Reeder* and *Pollard* courts' characterization of the appropriate constitutional standard appeared initially, both courts made several errors in concluding that the Missouri law, as it stood, was constitutional. From the outset, both courts weakened the strength of their analyses by relying on Justice Holmes' statement in *McAuliffe v. Mayor of New Bedford* that a person "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[132] This suggests that behind the weighing of the relevant interests, these courts harbored the long discarded right-privilege distinction which would condition public employment on the surrender of constitutional rights. The United States Supreme Court has expressly rejected this idea.[133]

In addition, these courts are mistaken in characterizing a regulation which completely bans political contributions as exactly analogous to the restrictions on active campaign participation upheld in *Letter Carriers* and *Broadrick*.[134] Making a campaign contribution to a political candidate is essentially a private act with no publicity or fanfare. Contributions such as Reeder's and Pollard's generally would go completely unnoticed were it not for a Missouri law that requires the *candidate* to report contributions to the Missouri Secretary of State.[135] In contrast to the active solicitation of votes or funds forbidden by the laws upheld in *Letter Carriers* and *Broadrick*,[136] the private act of a police officer's writing and mailing a contribution check usually is unobserved by fellow employees. Thus Reeder's and Pollard's contributions could hardly be said to have swayed or influenced employees of the Kansas City Police Department. Nor could mailing a check be the dutiful signal of political allegiance to the political party supported by the department. Thus the state interest in preventing political corruption is not furthered by forbidding private acts which bear no resemblence to public statements of support for a political party.

130. *See supra* note 29 and accompanying text.

131. *See supra* note 7.

132. 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). *See supra* notes 23-24 and accompanying text. Although the *Reeder* court did not quote Justice Holmes' language, by expressly adopting the *Pollard* opinion, which quoted Justice Holmes, the *Reeder* court indirectly endorsed the right-privilege distinction. *Reeder* also includes language that echoes the right-privilege distinction. *See supra* note 44.

133. *See supra* note 73 and accompanying text.

134. *See supra* notes 48 & 127-128 and accompanying text.

135. *Pollard*, 665 S.W.2d at 335 n.1 (citing MO. REV. STAT. § 130.086 (1978)).

136. *See supra* notes 116 & 123 and accompanying text.

In addition, both courts assert without evidence or analysis that a contribution to a federal campaign can create the same problems that a contribution to a local or state campaign may engender.[137] A federal campaign contribution supposedly can contribute to local political corruption in Kansas City because, as both courts assert, "local politicians [may] have made common cause with [the federal] candidate."[138] This assertion seems to ignore the local nature of the problem of municipal corruption that gave rise to Missouri's statute. As the Missouri Supreme Court stated in *Pollard*, the ban on political contributions was in response to extensive municipal, not national or statewide, political corruption.[139] The intent behind the ban was to stop the political corruption which occurred when an officer's superiors could extort campaign contributions from him in return for job security.[140] Because the First Amendment is concerned, these courts should have had persuasive evidence that a contribution to a national political campaign contributes to local corruption before upholding the Missouri statute; the assumptions of an appellate court are not sufficient justification.

These errors in the *Reeder* and *Pollard* opinions, in part, arise from the assumption that there is no better way to achieve the legitimate goals of the state. Once the *Reeder* and *Pollard* courts found the state's interests to be worthwhile, the individual's first amendment interests received no future consideration. Neither court diligently considered the issue of whether there was a less restrictive means to achieve those goals.[141] Some alternative approaches are available. To prevent corruption in a municipal police force, a state may simply forbid contributions to municipal elections, at least until there is some showing in fact that national or state contributions foster corruption on the local level. An even more accurate approach to this problem would forbid the *solicitation* of contributions. This would prevent the extortion of political contributions in the workplace but would allow the individual as a citizen to exercise his first amendment right to contribute to the political cause of his choice. As the law presently stands, a Kansas City police officer could not contribute to a senatorial campaign in another state. Another possibility is presented by the Hatch Act,[142] which forbids certain federal employees from becoming *actively engaged* in campaigning. This is a more direct

137. *See supra* notes 31 & 41-42 and accompanying text.

138. *Pollard,* 665 S.W.2d at 340; *Reeder,* 733 F.2d at 547 (quoting Pollard v. Board of Police Comm'rs, 665 S.W.2d 333, 340 (Mo. 1984)).

139. *See supra* note 20 and accompanying text.

140. *See supra* note 21 and accompanying text.

141. Both courts acknowledged the "less drastic means" test but simply assumed that a total ban was the only way to achieve the state's aims. *See supra* note 29 and accompanying text.

142. *See supra* note 116.

way of achieving the aim behind the Missouri law, and it does not ban political campaign contributions.

Conclusion

The *Reeder* and *Pollard* courts used the appropriate constitutional balancing test. Yet in balancing the relevant interests, they erred. The error was twofold. First, they did not recognize that *Reeder* and *Pollard* presented conflicts between competing interests of roughly equal importance. Second, because they had mischaracterized the relative importance of the interests at stake, they did not diligently seek a less restrictive means of achieving the governmental aim.

In cases such as *Reeder* and *Pollard*, which present competing interests of the state as employer and public employee as citizen, courts must candidly weigh these interests, acknowledging the possibility that both may be worthwhile. If both interests are of relatively equal importance, then a court should make every effort to find a compromise; by insisting on the least restrictive means of securing the governmental interest, a court will provide the fullest protection to both competing interests.

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