Political Patronage and North Carolina Law: Is Political Conformity with the Sheriff a Permissible Job Requirement for Deputies

Michael Patrick Burke

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol79/iss6/8
Political Patronage and North Carolina Law: Is Political Conformity with the Sheriff a Permissible Job Requirement for Deputies?

INTRODUCTION

Soon after his election as Sheriff of Buncombe County, North Carolina, Bobby Lee Medford terminated the employment of several deputy sheriffs who failed to support his election campaign. The deputies, who had been performing their duties in a satisfactory manner, claimed that three factors prompted their dismissals: their failure to support Medford’s election; their support of his opponents; and their failure to associate politically with Medford’s campaign. The deputies sued in federal court, arguing that by dismissing them for those reasons, Medford violated their rights of political belief, speech, and association under the First and Fourteenth Amendments to the United States Constitution. In Jenkins v. Medford, the Fourth Circuit disagreed with the deputies’ contention and, relying on precedent from the United States Supreme Court, held that, under federal law, North Carolina deputy sheriffs may be terminated on political grounds when either campaign activity or party affiliation forms the basis for the dismissal.

The facts of Jenkins describe a system of political patronage, where partisan politics often collide with individual freedoms. After

3. Jenkins, 119 F.3d at 1158.
6. 119 F.3d at 1164. The holding was limited to deputies who are sworn law enforcement officers. Id. at 1165. However, this limitation has little significance, because all deputy sheriffs in North Carolina are sworn law enforcement officers. N.C. ADMIN. CODE tit. 12, r. 10B.0103(14) (June 2000).
7. Jenkins, 119 F.3d at 1164.
8. In its most general sense, political patronage, or the “spoils” system, constitutes the exchange of discretionary governmental favors for political support. See CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE 79 (2d ed. 1920); MARTIN & SUSAN TOLCHIN, TO THE VICTOR . . . 324–26 (1971). Patronage often is associated with government employment. E.g., Rutan v. Republican Party of Ill., 497 U.S. 62, 65 (1990)
Jenkins, deputy sheriffs in North Carolina who are dismissed solely for their party affiliation or campaign activity have no remedy under federal law in federal court. The Fourth Circuit left little to implication in this regard. Deputies subjected to patronage dismissals must now find their relief, if any, in North Carolina state court. Whether or to what extent patronage dismissals of deputy sheriffs are permissible under North Carolina law remains an open question, but the issue is likely to be litigated soon. Eventually,  

9. Jenkins, 119 F.3d at 1165 (holding that deputies in North Carolina may be terminated for political reasons such as their party affiliation or campaign involvement). Deputies in other states within the Fourth Circuit will suffer a similar fate. E.g., Mills v. Meadows, 187 F.3d 630 (4th Cir. 1999) (per curiam) (applying Jenkins to a Maryland deputy sheriff). On the other hand, employees of North Carolina sheriffs who are not law enforcement officers are protected from patronage dismissals. See Knight v. Vernon, 214 F.3d 544, 548 (2000) (en banc) (holding that a North Carolina jailer cannot be dismissed for patronage reasons).  


11. No appellate opinions directly address this issue. Moreover, the only section of the North Carolina General Statutes that appears to speak to the issue is unclear both in its application to sheriffs or deputies, and the extent to which it prohibits patronage. See N.C. GEN. STAT. § 153A-99 (1999). For further discussion of this statute, see infra notes 133–86 and accompanying text.  

12. Sheriffs’ elections occur every four years in each of North Carolina’s 100 counties.
some sheriff will decide to terminate a deputy for political reasons, either in the belief that it is legally permissible, or under the guise of a permitted reason. This Comment discusses the extent to which North Carolina sheriffs may, consistent with North Carolina law, use political patronage as a basis for employment decisions regarding deputy sheriffs. This Comment proposes that, rather than a blanket exclusion of all deputies from the protections against patronage practices, North Carolina courts should examine the nature and scope of the individual deputy's duties and responsibilities and the character of the political activity in question to decide whether patronage, under those circumstances, is an appropriate job requirement.

Part I of this Comment examines United States Supreme Court decisions dealing with the constitutionality of patronage practices in public employment and freedom of speech in the public employee context. Part II analyzes the United States Courts of Appeals' disagreement in applying Supreme Court precedent to patronage practices in the employment of deputy sheriffs. Part III focuses on North Carolina statutory law, the common law at-will employment doctrine, and their application to deputy sheriffs. Specifically, part III analyzes a particular statutory provision and the possible out of changes in sheriffs' administrations.

13. See Stephen Allred, Employment Law: A Guide for North Carolina Public Employers 287 (3rd ed. 1999) (noting the likelihood that Jenkins will encourage patronage practices). Jenkins appears to approve of patronage practices. See 119 F.3d at 1156. Indeed, Jenkins overruled a prior decision that held the practice of terminating deputies because of political affiliation unconstitutional. Id. at 1164 (citing Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984)). The court explained that the prior decision had created an obstacle to effective law enforcement. 119 F.3d at 1164. Even after the Jones decision, patronage dismissals continued. See, e.g., Joyner v. Lancaster, 815 F.2d 20, 22 (4th Cir. 1987) (explaining that an incumbent sheriff allegedly fired a deputy for supporting the challenger); Harter v. Vernon, 953 F. Supp. 685, 689 (M.D.N.C. 1996) (stating that a sheriff allegedly fired several deputies who had failed to support his campaign actively), aff'd, 101 F.3d 334 (4th Cir. 1996). Jenkins is simply another example of the relative frequency of patronage discharges.

14. As discussed below, sheriffs have considerable leeway in making employment decisions. See infra notes 120–36 and accompanying text.

15. The term “deputy sheriff” is used throughout this Comment to describe personnel who are sworn law enforcement officers. This language is consistent with the Sheriff's Education and Standards Commission definition. See N.C. ADMIN. CODE tit. 12, r. 10B.0103(14) (June 2000). Other personnel, such as detention officers, are not included in the Jenkins rule. See Knight v. Vernon, 214 F.3d 544, 548 (2000) (en banc).


17. See infra notes 50–75 and accompanying text.

18. See infra notes 76–119 and accompanying text.

19. See infra notes 120–86 and accompanying text.
safeguards from patronage practices it affords deputy sheriffs.\textsuperscript{20} Part IV examines the North Carolina Constitution, pertinent appellate decisions, relevant history, and the nature of deputies’ jobs in order to determine what standards should apply to patronage employment of deputy sheriffs.\textsuperscript{21} Part IV proposes that, in light of the individualized focus of the North Carolina Declaration of Rights,\textsuperscript{22} deputies’ privilege against patronage practices should be examined on a case-by-case basis, rather than under a blanket rule.

I. UNITED STATES SUPREME COURT DECISIONS ON PATRONAGE

A. Freedom of Belief and Association: The Raw Patronage Decisions

The United States Supreme Court has decided four political patronage cases. \textit{Elrod v. Burns}\textsuperscript{23} first addressed the issue directly. In \textit{Elrod}, the newly elected Democratic sheriff terminated several employees of the Sheriff’s Office of Cook County, Illinois because they were not Democrats, did not support the Democratic Party, and were not sponsored by Democratic Party leaders.\textsuperscript{24} A plurality of the Court concluded that patronage dismissals are unconstitutional under the First and Fourteenth Amendments of the United States Constitution unless the dismissals are limited to employees in “policymaking positions.”\textsuperscript{25} Justice Stewart, in his concurrence, concluded that political beliefs cannot be the sole ground upon which to discharge a “nonpolicymaking, nonconfidential government employee” who is performing his job satisfactorily.\textsuperscript{26} He limited his concurrence to the facts in issue, and did not consider the broad practice of patronage dismissals.\textsuperscript{27}

In \textit{Branti v. Finkel},\textsuperscript{28} the Court elaborated upon when an employee’s position is confidential or policymaking, but nevertheless noted that occupying either of these types of positions is neither

\begin{itemize}
    \item 20. See infra notes 133–86 and accompanying text.
    \item 21. See infra notes 187–326 and accompanying text.
    \item 22. N.C. CONST. art. I. The Declaration of Rights resembles the federal Bill of Rights and the subsequent amendments to the United States Constitution. It enumerates state citizens’ rights under the North Carolina Constitution.
    \item 23. 427 U.S. 347 (1976).
    \item 24. \textit{Id.} at 351.
    \item 25. \textit{Id.} at 372–373. The plurality was concerned with the restraints that patronage practices placed on freedoms of political belief and association, which are part of the “core of those activities protected by the First Amendment.” \textit{Id.} at 356.
    \item 26. \textit{Id.} at 375 (Stewart, J., concurring).
    \item 27. \textit{Id.} at 374 (Stewart, J., concurring).
\end{itemize}
necessary nor sufficient to allow a patronage dismissal. Branti involved the termination of two assistant public defenders in Rockland County, New York. The complaint alleged that the new county public defender planned to discharge the assistants solely because of their Republican political beliefs. The Court held that governmental employers may not condition government employment on political beliefs. It reasoned that if employees cannot be terminated because of their speech, their beliefs are protected as well.

29. Id. at 517–19. The Court illustrated this aspect of the holding with a few hypothetical examples. The first example would arise in a state where the applicable law required two election judges in a particular precinct to be registered in different parties. Although such judges might not be policymakers or privy to confidential information, they would nonetheless be subject to dismissal if they changed parties. According to the Court, "party membership [would be] essential to the discharge of [these judges'] governmental responsibilities." Id. The Court's second example involved a hypothetical head football coach at a state university. The coach would certainly make team policy, but his politics would be irrelevant to his job performance, and thus, an inappropriate basis for dismissal. Indeed, the Court noted, "no one could seriously claim that Republicans make better coaches than Democrats." Id. In contrast, the Court explained that a state governor's speechwriter could not perform his duties effectively if his beliefs were not synchronized with the governor's. Id.

30. Id. at 508.

31. Id. Each plaintiff's job performance was satisfactory. Id. at 510. Apparently, theAssistant public defenders' beliefs were determined by reference to their party registration or lack thereof. Id. at 509 n.4. Although the Court spoke primarily of belief, one's political ideology is essentially hidden from the cognizance of another without some outward manifestation. See Immanuel Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right 25 (W. Hastie, trans., 1887) (1785).

32. Branti, 445 U.S. at 515–16. This is a classic example of an unconstitutional conditions case. Such cases illustrate the principle that although a person has no right to a governmental benefit such as public employment, the government may not condition the receipt of the benefit upon an unconstitutional condition. Perry v. Sindermann, 408 U.S. 593, 597–98 (1972). In other words, the government cannot infringe upon a constitutional right directly, or indirectly. Speiser v. Randall, 357 U.S. 513, 526 (1958). The modern cases are not completely consistent with the application of this principle. Compare Fed. Communications Comm'n v. League of Women Voters, 486 U.S. 364, 395 (1984) (holding that the government cannot condition funds on a requirement that public broadcasting stations not editorialize), with Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550 (1983) (holding that the government may condition tax-exempt status on a requirement that an organization refrain from lobbying). See generally Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1421–29 (1989) (describing the components of an unconstitutional conditions case).

Branti does not protect political belief absolutely, however. Branti does not protect political belief absolutely, however. Branti does not protect political belief absolutely, however. 34 Once a plaintiff has proved that she was discharged because of failure to affiliate with or to be sponsored by a particular party, 35 a governmental employer may still prevail if it demonstrates a compelling state interest, 36 specifically, that in order for the employee to perform effectively, her political beliefs must conform to the government actor's beliefs. 37 When an employee's beliefs interfere with his duties, his employment may be terminated based solely on his party affiliation. 38

The Court extended the Elrod-Branti rule to several additional types of patronage practices in Rutan v. Republican Party of Illinois. 39 In Rutan, the Governor of Illinois exercised nearly absolute control over decisions respecting state employment. 40 The Governor based his employment decisions on whether potential employees voted in Republican primaries, provided monetary or other support to Republican candidates and the Party, agreed to join and work for the Republican Party, and were supported by Republican officials. 41 The Court held that employment decisions related not only to discharge but also to "promotion, transfer, recall, and hiring" based on party support and affiliation are subject to the Elrod-Branti rule. 42 Indeed,


34. Branti, 445 U.S. at 517.
35. Id. (explaining that plaintiffs state a prima facie case of unconstitutional state action by showing that their political beliefs were the sole reason for their discharge).
36. This means a governmental interest, not a partisan interest. Id. at 517 n.12.
37. Id. at 515-16, 18. Whether the position is both the policymaking and confidential type may be relevant, but it is no longer the basis for the inquiry. See infra note 29.
38. Branti, 445 U.S. at 517. Because public defenders bear responsibility for representing indigent criminal defendants, party affiliation is not an appropriate requirement for the position. Id. at 519.
40. Id. at 66.
41. Id.
42. Id. at 79. The Court was not concerned with whether the exception to Elrod-Branti (that party affiliation is an appropriate requirement for the job) applied to the particular plaintiffs because it conceded that it would not. Id. at 71 n.5. The types of employment that the plaintiffs were either seeking or attempting to retain were a
as the Court stated, “[t]o the victor belong only those spoils that may be constitutionally obtained.”

Lastly, in *O’Hare Truck Service, Inc. v. City of Northlake*, the City removed a tow truck company from its rotation list of available towing contractors in retaliation for the owner’s position in the campaign to re-elect the mayor. *O’Hare* extended the protections afforded governmental employees in the *Elrod, Branti,* and *Rutan* decisions to government contractors as well. In holding that neither political association nor political patronage may form the basis for the extension of public benefits such as government contracts, the Court modified the scope of protection from political patronage. A majority of the Court now recognizes that not only political belief, but political association as well, can form the basis for impermissible patronage practices. As long as either political belief or association forms the sole basis for the patronage conduct in question, the *Elrod-Branti* line of cases will apply, and the patronage may be unconstitutional.

The significance of the *O’Hare* decision for North Carolina deputy sheriffs is not that it extended increased protection from political patronage to contractors, but that it recognized that in certain cases the *Elrod-Branti* analysis is not the sole inquiry. Rather,
the holding may require a balancing approach similar to the Court’s public employee free speech cases.49

B. Freedom of Speech: The Public Employee Speech Decisions

The Court noted in O’Hare that when a public employment decision is based upon a political affiliation requirement “intermixed” with an employee’s expression, the Court’s public employee free speech decisions mandate a balancing test.50 This section briefly examines the Supreme Court’s public employee free speech jurisprudence and the nature of the balancing test it requires.

**Pickering v. Board of Education**51 laid the foundation for public employee free speech rights. In *Pickering*, a teacher sent a letter to a newspaper, criticizing certain actions taken by the local Board of Education.52 In retaliation for the letter, the board dismissed the teacher from his employment.53 In holding that a teacher cannot be dismissed from public employment for exercising his right to speak on matters of public significance,54 the Court recognized that in certain circumstances the government could regulate its employees’ speech more heavily than the speech of the general public.55 The determination of whether a public employee’s speech is protected entails a balancing approach. On one side of the scale is the public employee’s interest as a citizen in speaking on “matters of public concern.”56 On the other side is the State’s interest as an employer “in promoting the efficiency of the public services it performs through its employees.”57 In *Pickering*, the balance favored the teacher.58

In *Connick v. Myers*,59 the Court refined the inquiry into the types of expression constituting speech on matters of public concern.
The "content, form, and context of a given statement"\textsuperscript{60} determines whether the expression refers to a matter of public concern. In \textit{Connick}, the discharged employee circulated a questionnaire regarding the District Attorney's internal office policy.\textsuperscript{61} Although one particular question touched on a matter of public concern, the questionnaire as a whole did so only in a limited sense, so the District Attorney was justified in dismissing the assistant who circulated it.\textsuperscript{62}

\textbf{C. Speech and Patronage Intermixed}

\textit{O'Hare} recognized that in certain patronage cases, the freedom of speech rights governed by the \textit{Pickering-Connick} balance, and the freedom of political belief and association governed by the \textit{Elrod-Branti} line will be "intermixed."\textsuperscript{63} Such intermixed cases inevitably will require the \textit{Pickering-Connick} balance.\textsuperscript{64}

\textit{O'Hare} encompassed three intermixed facts. First, the petitioner refused to contribute to the mayor's political campaign.\textsuperscript{65} This would seem to fall under the raw political patronage line.\textsuperscript{66} Second, the petitioner supported the opposing candidate.\textsuperscript{67} Such support would likely fall under the patronage line of cases as well.\textsuperscript{68} Finally, the petitioner displayed the opponent's campaign posters at his business.\textsuperscript{69} This activity is a form of expression that the Court has protected as "speech."\textsuperscript{70} Quite possibly, this scenario would implicate

\textsuperscript{60} \textit{Id.} at 147–48.
\textsuperscript{61} \textit{Id.} at 148.
\textsuperscript{62} \textit{Id.} at 150. The Court emphasized the fact that the questionnaire was designed to provide further fuel for the controversy. \textit{Id.} at 148. Also, an assistant prosecutor's duties mandate close employee relationships. \textit{Id.} at 151–52.
\textsuperscript{63} \textit{O'Hare Truck Serv., Inc. v. City of Northlake}, 518 U.S. 712, 719 (1996).
\textsuperscript{64} \textit{Id.} The \textit{O'Hare} Court did not state whether the case in question was such a mixture or whether it should be governed by \textit{Elrod-Branti} or by \textit{Pickering}. The Court only stated that either line of cases might govern the decision. \textit{Id.}
\textsuperscript{65} \textit{Id.} at 715.
\textsuperscript{67} \textit{O'Hare}, 518 U.S. at 715. The nature of the petitioner's campaign support is unclear, but it appears to have been monetary. \textit{See id.} at 715. The facts state that the mayor's "campaign committee asked [petitioner] for a contribution, which [he] refused to make. [Petitioner] instead supported the campaign of the [mayor's] opponent." \textit{Id.}
\textsuperscript{68} The Court noted that the patronage cases "involved instances where the raw test of political affiliation sufficed to show a constitutional violation." \textit{Id.} at 719. The mayor likely was unhappy about the petitioner's affiliation with the opposite party, rather than any expression he made on matters of public concern.
\textsuperscript{69} \textit{Id.} at 715.
the \textit{Pickering-Connick} balance. Political expression surely involves matters of public concern,\textsuperscript{71} which brings the \textit{Pickering} line into play,\textsuperscript{72} but the Court did not provide an answer. It remanded the case for the lower court to decide which line of cases would apply.\textsuperscript{73} The Court did not make clear whether the \textit{Elrod-Branti} analysis (belief and association) and the \textit{Pickering-Connick} balance (expression) are mutually exclusive, or whether they could be applied conjunctively,\textsuperscript{74} but it indicated that the \textit{Elrod-Branti} line should afford more protection to ideology than that afforded to political speech.\textsuperscript{75}

\section*{II. THE CIRCUIT SPLIT ON DEPUTY SHERIFFS AND PATRONAGE}

The Supreme Court's patronage and public employee free speech jurisprudence has created considerable disagreement in the United States Courts of Appeals when applied to the employment of deputy sheriffs. Courts of appeals apply the \textit{Elrod-Branti} inquiry in nearly all cases, even those resembling free speech discharges rather than raw patronage discharges.\textsuperscript{76} Yet, the Court of Appeals for the
Fifth Circuit generally applies the *Pickering-Connick* balance.⁷⁷ Adding to the confusion, the Circuits applying the *Elrod-Branti* rule disagree as to whether party affiliation is a reasonably appropriate requirement for employment as a deputy sheriff.⁷⁸ This conflict may result from disagreement about the proper scope of the *Elrod-Branti* rule, variance in the nature of deputies’ jobs in different localities, or some combination of these factors. The cases discussed below demonstrate the different approaches several courts of appeals take in assessing patronage claims, as well as the various forms of patronage practices present in sheriffs’ offices throughout the country.

A. Circuits Invalidating Patronage Practices in the Employment of Deputies

Some circuits welcome deputies’ patronage claims. The Third Circuit, in a case in which deputies were dismissed for supporting other candidates rather than the incumbent, held that party affiliation was an inappropriate requirement for the employment of the deputies in question.⁷⁹ After examining the duties of deputy sheriffs in the particular county, the court determined that the deputies’ limited tasks were not relevant to party affiliation.⁸⁰

---

⁷⁷. See *Brady v. Fort Bend County*, 145 F.3d 691, 703 (5th Cir. 1998); *McBee v. Jim Hogg County*, 730 F.2d 1009, 1014 (5th Cir. 1984) (en banc).

⁷⁸. *Compare Jenkins*, 119 F.3d at 1164 (holding that North Carolina deputies can be dismissed on patronage grounds); *Upton*, 930 F.2d at 1218 (holding that Illinois sheriffs may use political considerations when hiring and firing deputies), and *Terry*, 866 F.2d at 377 (holding that Alabama deputies’ political loyalty to the sheriff is an appropriate job requirement), with *Diruzza*, 206 F.3d at 1311 (holding that summary judgment was improper where scant evidence supported the conclusion that the California deputy was a policymaker subject to patronage discharge); *Hall*, 128 F.3d at 429 (holding that the defendant failed to show that political affiliation is an appropriate job requirement for a deputy in a particular Tennessee county); and *Burns*, 971 F.2d at 1022–23 (holding that party affiliation does not further the effective performance of the tasks required by deputies in a particular Pennsylvania county).


⁸⁰. *Id.* at 1022. The deputies in Cambria County served process, transported prisoners, and provided courtroom security. *Id.* at 1022–23. Apparently, they exercised no law enforcement powers. The Court mentioned the *Pickering-Connick* line of cases, but did not apply it. *Id.* at 1021 n.5.
In *Hall v. Tollett*, a Tennessee sheriff fired a deputy because he “hauled around the wrong bumper sticker.” The Sixth Circuit applied *Elrod* and *Branti*, and held that a front-line deputy whose duty was to enforce state law throughout the county could not be dismissed because of his political affiliation. Notably, the Court analyzed the duties of this particular Cumberland County deputy sheriff, rather than all Tennessee deputy sheriffs.

Similarly, the Ninth Circuit recently rejected the assertion that California deputies, by virtue of their position, categorically were subject to patronage discharge. The deputy in that case publicly supported the candidate opposing the incumbent sheriff. Relying on *Elrod, Branti, Rutan*, and *O’Hare*, the court remanded the case to the district court but noted that the record did not seem to support the conclusion that the deputy was a policymaker.

**B. The Fifth Circuit’s Spectrum of Patronage and Free Speech**

In the Fifth Circuit, raw patronage cases, free speech cases, and intermixed cases are analyzed along a spectrum. Raw patronage cases, analyzed according to the *Elrod-Branti* rule, are on one end. Pure free speech cases fall at the other end, and are analyzed

---

81. 128 F.3d 418 (6th Cir. 1997).
82. Id. at 427. Seemingly, the sticker supported the sheriff’s opponent. See id. The court of appeals remanded the case to the district court for proof of the sheriff’s motivation. See id. at 430.
83. Id. at 427–29. The opinion omitted *Connick* and *Pickering*. See id.
84. Id. at 429. A chief deputy in the same case was not so fortunate. Political affiliation was relevant to his position because it entailed a significant level of policymaking authority and discretion. Id. at 425–26.
85. See id. at 429. The Court did not foreclose the possibility that other deputies, perhaps in other counties or with more responsibilities than the plaintiff deputy, could be properly subject to patronage discharge. See id.
86. See Diruzza v. County of Tehama, 206 F.3d 1304, 1309 (9th Cir. 2000), cert. denied, 121 S.Ct. 624 (2000).
87. Id. at 1307. The deputy even appeared in a television commercial in support of the opposing candidate’s campaign. Id.
88. Id. at 1311. Most of the deputy’s duties related to the custody of inmates in the county jail. Id.
89. Brady v. Fort Bend County, 145 F.3d 691, 704 (5th Cir. 1998) (quoting McBee v. Jim Hogg County, 730 F.2d 1009, 1014 (5th Cir. 1984) (en banc)).
90. For a discussion of the raw patronage cases, see *supra* notes 23–49 and accompanying text.
91. Brady, 145 F.3d at 704–05. There is little room for a *Pickering-Connick* balance, because in raw political patronage cases the employees do “not campaign, they [do] not even speak: they merely [think].” McBee v. Jim Hogg County, 730 F.3d 1009, 1014 (5th Cir. 1984).
according to the *Pickering-Connick* balance.\footnote{92} In intermixed cases, those involving both political affiliation and free speech, the Fifth Circuit applies the *Pickering-Connick* balancing test.\footnote{93}

For example, in *Brady v. Fort Bend County*, the incumbent sheriff discharged several deputies who supported the other candidate “by attending rallies, posting signs, and campaigning door-to-door.”\footnote{94} Applying the *Pickering-Connick* balance, the court of appeals first concluded that the deputies’ support of the campaign for sheriff related to a matter of public concern.\footnote{95} The court then weighed the respective rights of the deputies and the sheriff, concluding that the balance weighed in favor of the deputies.\footnote{96}

**C. Circuits Barring Patronage Claims By Deputies**

In *Terry v. Cook*,\footnote{97} a newly elected sheriff in Alabama fulfilled his campaign promise to replace the former sheriff’s employees, and appoint individuals who had supported his campaign.\footnote{98} The Eleventh Circuit applied the *Elrod-Branti* rule as opposed to the *Pickering-Connick* balance to this blanket dismissal of employees.\footnote{99} After discussing the role of deputy sheriffs under Alabama law,\footnote{100} the court held that for these deputies, effective job performance required allegiance to the sheriff’s policies and goals.\footnote{101} Thus, the sheriff was justified in dismissing them.\footnote{102}

\begin{footnotes}
92. See *Brady*, 145 F.3d at 704–05. Pure free speech cases do not implicate a person’s political beliefs necessarily. See, e.g., *Ferguson v. Thomas*, 430 F.2d 852, 859 (5th Cir. 1970) (holding that when the employee’s exercise of his constitutional privileges clearly outweighed his value as an employee, the government could dismiss him).

93. See *Brady*, 145 F.3d at 705; *McBee*, 730 F.2d at 1014. The Fifth Circuit noted that the Supreme Court approved of its formulation in *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996). *Brady*, 145 F.3d at 705.

94. 145 F.3d at 697.

95. *Id.* at 707. Fifth Circuit precedent recognizes campaign activity as unquestionably relating to matters of public concern. See *Vojvodich v. Lopez*, 48 F.3d 879, 885 (5th Cir. 1995).

96. *Brady*, 145 F.3d at 710.

97. 866 F.2d 373 (11th Cir. 1989).

98. *Id.* at 374.

99. *Id.* at 377. The Eleventh Circuit devoted several pages of its opinion to determining whether *Pickering-Connick* or *Elrod-Branti* would apply. See *id.* at 375–77.

100. The court explained that deputies are agents or alter egos of the sheriff and can bind the sheriff civilly for all actions within the scope of their duties. *Id.* at 377.

101. *Id.* at 377. The remaining employees (clerks, investigators, jailers, and process servers) were not subject to the exception, and the court reversed summary judgment for their claims. *Id.* at 378.

102. *Id.* at 377.
\end{footnotes}
Although *Terry* dealt with raw political patronage, a year later the Seventh Circuit decided *Upton v. Thompson*, a case that implicates some aspects of freedom of speech. Two newly elected sheriffs in Illinois dismissed their predecessors' deputies for having supported their opponents. One deputy displayed a bumper sticker in favor of the incumbent candidate and headed an organization that endorsed him. The other deputy put up signs, attended fundraising events, and vocally supported the incumbent sheriff. In deciding the case, the court ignored the *Pickering-Connick* balance. It held that under the *Elrod-Branti* rule, Illinois deputies are subject to patronage dismissals because they implement the policies of the sheriff, who owes his political survival to their performance.

As the approaches described above demonstrate, courts have created various mechanisms for evaluating the variety of patronage claims they confront. With respect to the rights of deputies in North Carolina, however, *Jenkins v. Medford* represents the most salient decision.

According to the briefly stated facts, the deputies claimed they were dismissed for not supporting Medford's election, supporting his opponents, and not associating politically with his campaign. Pursuant to an *Elrod, Branti*, and *Rutan* analysis, the court held that prevailing sheriffs in an election may dismiss deputies because of their campaign activity or party affiliation. This holding applies to North Carolina deputies and sheriffs universally, not just to those in the county in controversy.

---


104. 930 F.2d 1209 (7th Cir. 1991).

105. *Id.* at 1210–11.

106. *Id.*

107. *Id.* at 1211. The deputy also happened to be the incumbent sheriff's brother. *Id.*

108. *Id.* at 1213–15. The Court made no distinction between the two deputies, one of whom was a chief deputy (second in command to the former sheriff) for thirteen years. *Id.* at 1210–11. The other was a probationary deputy with only three months on the job. *Id.*

109. 119 F.3d 1156 (4th Cir. 1997) (en banc). *See also supra* notes 1–14 (discussing *Jenkins'* facts and impact on North Carolina deputy sheriffs).

110. *Jenkins*, 119 F.3d at 1158.

111. *Id.* at 1164. The court only mentioned *Pickering* and *Connick* in passing. *See id.* at 1162 n.20 (noting that “[w]hen public employees are subjected to discipline for the content of their speech, courts analyze those claims under the *Connick-Pickering* line of cases”).

112. *Id.* at 1164.
Judge Motz criticized the majority's opinion on two grounds. First, the majority completely ignored the deputies' free speech claim under Pickering and Connick. Second, the majority's holding was too sweeping, in Judge Motz's view. Rather than making a wholesale pronouncement on the status of all North Carolina deputies, the majority should have examined the duties of the particular deputies in question.

Although it represents the law in federal courts within the Fourth Circuit, Jenkins does not signal the reemergence of patronage in North Carolina sheriffs' offices. The case merely compels the inquiry into state law protection. Because the North Carolina State Constitution seems to demand a more particularized inquiry, the blanket rule that Jenkins mandated under the federal Constitution appears inappropriate at the state level. Rather, the state constitution would require an individual analysis similar to the kind Judge Motz advocated in Jenkins. Several factors support this difference. Most significantly, the North Carolina Supreme Court has stressed the personal nature of the state constitution's freedom of speech provision. Also, North Carolina common and statutory law may afford more protection to deputies than the Jenkins rule. Because constitutional claims are available to deputies only if no statutory or common law remedies exist, the analysis of deputies' rights in North Carolina begins with common and statutory law.

113. Id. at 1168–69 (Motz, J., dissenting).
114. Id. (Motz, J., dissenting). Judge Motz pointed out that the deputies “[u]questionably” stated a claim under Pickering and Connick. Indeed, in the majority's own words: “[w]e can think of no clearer way for a deputy to demonstrate opposition to a candidate for sheriff... than to actively campaign for the candidate's opponent.” Id. at 1164–65. Although the discharges could have been permissible under Pickering and Connick, Judge Motz argued that they should not be dismissed for failure to state a claim. Id. at 1170–71 (Motz, J., dissenting).
115. Id. at 1169 (Motz, J., dissenting). Although Judge Motz conceded that discharging some North Carolina deputies for patronage reasons may be proper, she explained that to hold that every one of the state's more than 4,500 deputies is a policymaking employee allows the narrowly drawn exception to swallow the rule. Id. at 1170–71.
116. Id. at 1168–69 (Motz, J., dissenting).
118. See infra notes 120–86.
III. RELEVANT NORTH CAROLINA COMMON LAW AND STATUTORY LAW

A. The At-Will Employment Doctrine and the Public Policy Exception

Under North Carolina common law, employment for an indefinite period of time is terminable at will by either party. In addition, the North Carolina General Statutes specifically declare that North Carolina deputies are at-will employees. Deputies literally "serve at the pleasure of the Sheriff." Under this statute and the common law, a sheriff may discharge a deputy for almost any reason, even an arbitrary or irrational reason, or for no reason at all. No one, including the county commissioners, may interfere with a sheriff's decision to terminate a deputy's employment. Because a sheriff's discretion is nearly unfettered, deputies enjoy little job protection compared to civil service employees or employees working under an employment contract.

An important exception to North Carolina's at-will employment doctrine is that an at-will employee may not be discharged for a reason contravening public policy. If such a termination occurs, the employee may recover in a civil action for wrongful discharge.

122. Id.
123. See Kurtzman, 347 N.C. at 331, 493 S.E.2d at 422; Burgess, 326 N.C. at 209, 388 S.E.2d at 137; Still, 279 N.C. at 259, 182 S.E.2d at 406. There are limits, of course. The public policy exception, the North Carolina Constitution, and the United States Constitution in conjunction with federal statutes, e.g., 42 U.S.C. § 1983 (1994 & Supp. V 1999), all place limits on a sheriff's exercise of employment decisions. See also infra notes 127-32 (discussing the public policy exception); infra notes 187-291 (discussing the state constitution).
124. See N.C. GEN. STAT. § 153A-103(1) (1999) (providing the sheriff with the "exclusive right" to make employment decisions).
125. Civil service employees, such as state personnel, can be terminated only for cause. N.C. GEN. STAT. § 126-35 (1999).
128. See Sides, 74 N.C. App. at 343, 328 S.E.2d at 826.
public policy exception relies on the premise that no one should be permitted to act in a way that injures the public. An example of a public policy violation occurs when an employee’s termination contravenes a stated statutory policy. The mere fact that an employer has violated public policy will not give rise to a claim of wrongful termination, however. The discharged employee carries the burden of showing the employer’s actual intent to violate the policy.

B. Section 153A-99 of the North Carolina General Statutes: Protection from Patronage Practices

If terminating a deputy sheriff for patronage reasons contravenes the public policy of North Carolina, the public policy exception to the at-will employment rule will preclude sheriffs from doing so. Similarly, if a statute speaks to the patronage issue, a deputy would be required to seek a remedy under the statute, making constitutional interpretation unnecessary. At first glance, section 153A-99 of the North Carolina General Statutes appears to confront the question directly, and persuasive authority supports the proposition that the statute applies to elected county officials, including sheriffs. But


130. Amos, 331 N.C. at 353, 416 S.E.2d at 169.


132. Id. In Garner, for example, the defendant employer required an employee to take a drug test that was not administered by a state-approved laboratory, which was a violation of public policy. Id. But firing the employee because of his failure to take the test did not violate public policy. Id.

133. This is not to say that a plaintiff should rely solely on the statutory provision and ignore a potential constitutional argument. The best course is to argue alternatively. See, e.g., Brief for Plaintiffs-Appellants at 24, Harter v. Vernon, 139 N.C. App. 85, 532 S.E.2d 836 (2000) (arguing in the alternative that the state constitution applied if the statute did not), appeal dismissed, 353 N.C. 263, 546 S.E.2d 97 (2000), cert. denied, 121 S.Ct. 1962 (2001).

134. The statute, entitled “County employee political activity,” includes in its purpose the prevention of “political or partisan coercion.” N.C. GEN. STAT. § 153A-99(a) (1999). See also Vereen v. Holden, 121 N.C. App. 779, 784, 468 S.E.2d 471, 474 (1996) (holding that if a county employee proved she was dismissed due to her political affiliation the discharge would contravene the public policy in section 153A-99).

135. See Definition of City and County Employee as Including Elected Officials; Political Activities of Local Gov't Elected Officials and Employees, Op. Att’y Gen. (1998), 1998 WL 121653, at *2 [hereinafter Attorney General Opinion]. Advisory opinions written by attorneys general are not binding authority, but are respectfully
as discussed below, the statute’s gaps potentially allow certain forms of patronage to fall through.\textsuperscript{137}

The statute begins with a statement of purpose,\textsuperscript{138} and contains provisions seeking to carry out that purpose.\textsuperscript{139} Subsection (d) prohibits persons from requiring their employees to contribute funds for political or partisan purposes as a condition of employment.\textsuperscript{140} The implication is obvious here: A county employee cannot be discharged for failing to give monetary support to the sheriff’s campaign.\textsuperscript{141} Nevertheless, this inference applies to deputy sheriffs if, and only if, deputy sheriffs are “[c]ounty employees”\textsuperscript{142} within the meaning of the statute.

Under section 153A-99 a “[c]ounty employee” is “any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds.”\textsuperscript{143} Using this definition, subsection (d) would not apply to persons seeking employment in a sheriff’s office, as for example, in Rutan,\textsuperscript{144} because such persons are not yet “employed” within the meaning of the statute. Subsection (d) appears inapplicable to initial employment considered. Hannah v. Bd. of Comm’rs, 176 N.C. 395, 396, 97 S.E. 160, 161 (1918); Williams v. Alexander County Bd. of Educ., 128 N.C. App. 599, 602, 495 S.E.2d 406, 408 (1998).


\textsuperscript{137} \textit{See infra} notes 134–86 and accompanying text.

\textsuperscript{138} \textit{See} N.C. GEN. STAT. § 153A-99(a) (1999). The purposes include ensuring that employees are not politically coerced while on the job and that their off-the-job political associations are not hindered. \textit{Id.}

\textsuperscript{139} § 153A-99(c)–(f).

\textsuperscript{140} § 153A-99(d).

\textsuperscript{141} Compulsory campaign support is a common patronage practice. \textit{See}, e.g., Harter v. Vernon, 953 F. Supp. 685, 689 (M.D.N.C. 1996) (“[O]fficers were told ‘Remember who you’re working for.’”), aff’d, 101 F.3d 334 (4th Cir. 1996).

\textsuperscript{142} § 153A-99 (b)(1).

\textsuperscript{143} \textit{Id.} The definition in this section is absolutely controlling, whether or not it comports with the common understanding of the term “county employee.” \textit{See} State v. Lucas, 302 N.C. 342, 346, 275 S.E.2d 433, 436 (1981); 82 C.J.S. \textit{Statutes} § 309 (1999).

\textsuperscript{144} Rutan v. Republican Party of Ill., 497 U.S. 62, 79 (1990) (holding that the constitutional prohibition on patronage practices extends to hirings).
decisions. Furthermore, a reasonable argument exists that it does not apply to deputy sheriffs at all.

The definition's first prong, which encompasses "any person employed by a county," does not apply to deputy sheriffs. In fact, North Carolina law specifically rejects the proposition that counties employ deputies. For example, counties are not liable for negligent acts or omissions of on-duty deputies, yet sheriffs are.

The second prong applies to "any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds." Inclusion of the term "thereof"

---

145. N.C. GEN. STAT. § 153A-99(d) (stating that "[n]o employee may be required as a duty or condition of employment, promotion, or tenure to office to contribute funds for political or partisan purposes.") One could argue that "condition of employment" refers to all employment decisions, including hiring, but this would not be *ejusdem generis* with the terms "promotion" and "tenure," which relate to decisions regarding employment that has already commenced. See, e.g., Nance v. S. Ry. Co., 149 N.C. 366, 371, 63 S.E. 116, 118 (1908) (noting that "when words of general import are used, and immediately following and relating to the same subject, words of a particular or restricted import are found, the latter shall operate to limit and restrict the former"). *But see* N.C. Ins. Guar. Ass'n v. Century Indem. Co., 115 N.C. App. 175, 191, 444 S.E.2d 464, 473-74 (1994) (noting that the canon of *ejusdem generis* applies where general words follow specific words).


147. Clark v. Burke County, 117 N.C. App. 85, 89, 450 S.E.2d 747, 749 (1994) (holding that a "deputy is an employee of the sheriff, not the county"); see Hubbard v. County of Cumberland, 143 N.C. App. 149, 152, 544 S.E.2d 587, 589 (2001) (noting that "it is the Sheriff, and not the County, who directly hires law enforcement officers, [and therefore deputies] do not enjoy all of the protections of County employees"); *see also* N.C. GEN. STAT. § 153A-103(1) (1999) (granting sheriffs the "exclusive right" to employ or discharge deputies). *But cf.* Borders v. Cline, 212 N.C. 472, 477, 193 S.E. 826, 830 (1937) (holding that a deputy is not an employee of the sheriff under the workers' compensation statute). *Borders* does nothing to support the proposition that a deputy sheriff is employed by a county, and relates only to how the term "employment" is defined in the workers' compensation statute. *Id.* at 475, 193 S.E. at 828. The case generally points to an even closer relationship than employer/employee between sheriffs and deputies. *See id.* at 476, 193 S.E. at 829.


149. Clark, 117 N.C. App. at 89, 450 S.E.2d at 749.

150. N.C. GEN. STAT. § 153A-99(b). The quotation includes the definition's first prong, but both are included to illustrate that the term "thereof" refers to the term "county."

151. *Id.* (emphasis added).
renders the definition's second prong ambiguous. Deputies are, of course, employees of the sheriff's department or sheriff's office, and all sheriff's offices or departments are supported in part by county funds. This logical progression, however, does not decide the issue. Whether a sheriff's department would be considered a department of the county for purposes of the statute remains open to debate. Reasonable arguments support both conclusions, depending on which formulation of the term of is used, and how formalistically one chooses to construe the statute.

Using the term of “as a function word to indicate a quality or possession characterizing or distinguishing a subject,” it appears the definitional section does not apply to deputy sheriffs. Wherever the North Carolina General Statutes reference law enforcement agencies, they include “sheriff's department” in the possessive form on the list. This language implies that the “sheriff's department” is a department of the sheriff not a department of the county. Further, a chapter dealing with the “North Carolina Sheriffs’ Education and Training Standards Commission” defines the department or office as: “the sheriff of a county, his deputies, his employees,” and the physical facilities they use. Use of the possessive pronoun further


154. The formulation of the county derives from the definition in subsection (b)(1). The definition refers to “a county or any department or program thereof . . . .” § 153A-99(b)(1) (1999). “Therof” is defined as “of it.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2372 (3d ed. 1993) [hereinafter WEBSTER'S]. If one conceives of “it” as the county, the term becomes: any department or program of the county.

155. WEBSTER'S, supra note 154, at 1565.

156. See N.C. GEN. STAT. § 14-399(i)(3); Id. § 17E-7(b); Id. § 18B-501(f); Id. § 58-32-1; Id. § 90-95.2(b)(2); Id. § 114-18.1(b)(3); Id. § 132-1.4(a)(3); Id. § 143B-216.34; Id. § 160A-288(b)(2); Id. § 160A-288.2(b)(2). Each of these statutes uses the possessive form, that is to say, with an apostrophe between the “f” and “s” of the word “sheriff's.”

157. N.C. GEN STAT. § 17E-2(2) (1999) (emphasis added). Although the definitions contained in this section only apply to chapter 17E, definitions in one statute are illustrative in construing the terms of another if they are related in subject. 82 C.J.S. Statutes § 309 (1999).
demonstrates that the General Assembly considers the sheriff's department a department of the sheriff, not the county.158

Alternatively, the statute might support the assertion that the sheriff's department comes under the county's umbrella. Because the term of also means "relating to,"159 a deputy sheriff may fall within the definition of "[c]ounty employee."160 The sheriff is the county's chief law enforcement officer.161 The county also makes appropriations to the sheriff's department.162 The conclusion here is that the sheriff's department clearly "relates to" the county, and is thus "a department or program thereof."163 Furthermore, the formulations may not be exclusive per se; the sheriff's office may be a department of the sheriff and of the county. In either case, deputy sheriffs are employees of the sheriff's department.164 Thus, they should be considered "[c]ounty employees,"165 and therefore protected from being required to contribute to the sheriff's campaign.166 Additionally, to avoid the issue of patronage under the state constitution, courts may construe subsection (d) to cover deputy sheriffs.167 Thus, statutory construction more likely supports the assertion that deputies cannot be forced to contribute to sheriffs' campaigns.168

Subsection (c) offers county employees additional protection. This subsection prohibits "employee[s]" from using their "official authority or influence for the purpose of interfering with or affecting the result of an election or nomination to political office."169 Employees may not "[c]oerce, solicit, or compel contributions for political or partisan purposes" from other employees.170 Once again,

---


159. WEBSTER'S, supra note 154, at 1565.

160. § 153A-99(b)(1).


162. See INST. OF GOV'T, MUNICIPAL GOVERNMENT IN NORTH CAROLINA 384, 496 (David M. Lawrence & Warren J. Wicker eds., 1982).

163. § 153A-99(b)(1).


165. § 153A-99(b)(1).

166. § 153A-99(d).


168. § 153A-99(c).

169. § 153A-99(c)(1).

170. § 153A-99(c)(2). As if subsection (d) were not confusing enough, subsection
the applicability of the subsection depends on who is an “employee.” This time, the crucial question is whether the sheriff is an employee within the meaning of the definitional subsection. Although available authority suggests that sheriffs are employees within the meaning of the statute, the ambiguities that remain prevent a firm conclusion.

Once again, a “person employed by a county” is considered a “[c]ounty employee” or “employee” within the meaning of the statute. Whether the sheriff is such a person might be governed by the common law test, which focuses on the party that has control over the worker. Factors such as the power to assign hours and duties, and to control how those duties are discharged impact the existence of control. The counties maintain no such control over the sheriffs, who use their own judgment to discharge their duties. Further, the election process renders the sheriff accountable to the county’s citizens, rather than the county itself. Thus, the common law employer-employee relationship does not seem to exist between the sheriff and the county, and subsection (c) would not restrict sheriffs’ behavior.

Additionally, the common law of contracts supports the assertion that counties do not employ sheriffs. Employment is essentially contractual and is governed by contract law. Although sheriffs

---

(c)(2) requires analysis of whether two different persons are “employee[s].” See id.


172. § 153A-99(b)(1). The drafters likely included this cautious tautology to ensure that the most common meaning of the word “employee” was not excluded. See Hollowell v. N.C. Dept. of Conservation and Devel., 206 N.C. 206, 208–09, 173 S.E.2d 603, 604 (1934).


175. See Sutton, 92 N.C. App. at 217, 374 S.E.2d at 279; Barrington, 55 N.C. App. at 642, 286 S.E.2d at 579.


177. N.C. CONST. art. VII, § 2 (prescribing the method for electing sheriffs).

178. Alliance Co. v. State Hosp., 241 N.C. 329, 332, 85 S.E.2d 386, 389 (1955) (“The relation of employer and employee is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied.”).

---
occupy each county’s chief law enforcement post, they are independent, constitutionally elected officials. Sheriffs’ employment arises not out of a contract between themselves and the counties they serve, but by virtue of an election. As a result of this lack of contractual status, sheriffs may not be county “employees” for purposes of subsection (c).

Nevertheless, the argument that sheriffs are not contracted employees was rejected in a different context. In Durham Herald Co. v. County of Durham, the North Carolina Supreme Court held that an applicant for the office of sheriff was covered by the county personnel records statute because he was an “applicant for employment” within the meaning of the statute. The court stated that the fact that a sheriff is an officer rather than an employee was not material to the case, although it might be significant to others. The distinction may be material in the context of section 153A-99, however, making it likely that most sheriffs would fall outside subsection (c)’s coverage.

IV. THE NORTH CAROLINA STATE CONSTITUTION: PROTECTION OF POLITICAL RIGHTS

Although section 153A-99, in conjunction with the public policy exception to the at-will employment doctrine, might marginally safeguard deputies from political patronage practices, the inquiry is not over. North Carolina employees may not be discharged in contravention of the rights protected by the state constitution. These protections are enumerated in the Declaration of Rights.

---

180. N.C. CONST. art. VII, § 2; Borders, 212 N.C. at 476, 193 S.E. at 828–29 (stating that a sheriff “takes office, not by contract, but by commission”).
184. 334 N.C. at 679, 435 S.E.2d at 319.
185. Id. The court failed to explain when the distinction would be material. Id.
187. See supra notes 120–86 and accompanying text.
189. N.C. CONST. art. I. The Declaration of Rights is not an exhaustive list of rights.
perhaps the most essential article of the North Carolina Constitution. The courts have ascertained both the procedural and substantive aspects of state constitutional claims.

A. Direct Constitutional Claims Against State Officials

In Corum v. University of North Carolina, the Supreme Court of North Carolina outlined the basis for proceeding directly under the state constitution for a violation of state constitutional rights. Initially, to proceed with such a claim, no alternative remedy under state law may exist. The defendant will always be a state official, but the doctrine of sovereign immunity cannot be raised as an affirmative defense to a state constitutional claim. Although well established in North Carolina, sovereign immunity remains a common law doctrine, and must bow to the supreme law of the state,


190. See Corum, 330 N.C. at 782, 413 S.E.2d at 289. Indeed, the enumeration of rights in a state constitution is even more essential than that in the Constitution of the United States. The federal government can act only pursuant to specific grants of power included in the federal Constitution. See U.S. CONST. amend X; James Madison, Federalist 45: Powers and Continuing Advantages of the States, in THE FEDERALIST 328 (Benjamin Fletcher Wright ed., 1961) (noting that the powers the Constitution delegates to the federal government are “few and defined”); see, e.g., United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that a provision of the Gun Free School Zones Act, 18 U.S.C. § 922(q)(1)(A) (1994), exceeded Congress’s power under the Commerce Clause). On the other hand, the states’ police power is unlimited except when it conflicts with the United States Constitution, valid federal laws and treaties, and, most importantly, states’ constitutions. See U.S. CONST. art. VI, cl. 2 (supremacy clause); U.S. CONST. amend X (reserving to the states the powers not delegated to the federal government); State v. Whitaker, 228 N.C. 352, 362–63, 45 S.E.2d 860, 868 (1947) (describing the nature of the states’ police power).


192. Id.

193. Id. at 782, 413 S.E.2d at 289. Because constitutional claims are extraordinary exercises of jurisdiction, if a common law or statutory claim is available, a plaintiff cannot proceed directly under the state constitution. Id.; Lorbacher, 127 N.C. App. at 675, 493 S.E.2d at 81 (1997) (holding that the plaintiff’s constitutional claim was unwarranted because she could, and did, assert a claim for wrongful discharge).

194. Only state officials may be made parties to constitutional claims, and only in their official capacity. Corum, 330 N.C. at 788, 413 S.E.2d at 293.

195. Id. at 785–86, 413 S.E.2d at 291.

the Declaration of Rights. Further, the Declaration of Rights would be a mere nullity if those rights could not be enforced against state officials. Indeed, the Constitution was intended to protect the people’s liberty from restraint by state officials.

Corum breathed life into the Declaration of Rights by providing a means for redressing unconstitutional actions by the State and the individuals who carry out State authority. It follows from Corum that sheriffs are subject to the limitations of the state constitution in their capacity as constitutionally elected officials. Sheriffs’ authority to appoint deputies is a grant from the government nearly as ancient as the office of sheriff itself. The General Statutes expressly provide for the appointment authority, in addition to its common law roots. Because a sheriff acts under state authority when employing deputies, if his actions interfere with deputies’ rights under the state constitution, the deputies may have a claim under Corum. The question of what rights deputy sheriffs may take action

198. See Corum, 330 N.C. at 786, 413 S.E.2d at 291. Although several passages in the Corum opinion speak in terms of the rights of “North Carolina citizens,” the Declaration of Rights must protect all persons regardless of their citizenship. See U.S. CONST. art. IV, § 2, cl. 1; Hague v. Comm. for Indus. Org., 307 U.S. 496, 511 (1939) (noting that the Privileges and Immunities Clause prohibits states from favoring their own citizens at the expense of other states’ citizens); State v. Manuel, 20 N.C. (3 & 4 Dev. & Bat.) 144, 150 (1838) (holding that the state constitution protects “all amongst us who are recognized as persons entitled to liberty”).
199. The decision is not unique. Thirty years ago, the Supreme Court of the United States recognized a direct claim for constitutional violations by federal officials. See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971). Other state courts have followed this lead as well. See Sharon N. Humble, Annotation, Implied Cause of Action for Damages for Violation of Provisions of State Constitutions, 75 A.L.R. 5th 619 (1990) (collecting cases using reasoning analogous to Bivens to recognize an implied cause of action for monetary damages for state constitutional violations). For an exhaustive treatment on the subject of using civil actions to enforce state constitutional rights, see generally 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES, § 7-7(a), at 7-19 to 7-37 (3d ed. 2000).
200. N.C. CONST. art. VII, § 2 (providing for the sheriff to be elected in each county).
201. See Gowens v. Alamance County, 216 N.C. 107, 109, 3 S.E.2d 339, 340 (1939) (noting that deputies have been affiliated with sheriffs since “antiquity”) (quoting Lanier v. Greenville, 174 N.C. 311, 316, 93 S.E. 850, 853 (1919)); 1 WILLIAM BLACKSTONE, COMMENTARIES, *333–34 (describing the duties of the undersheriff); see also Lanier, 174 N.C. at 316, 93 S.E. at 853 (noting that general deputies are the equivalents of undersheriffs).
202. N.C. GEN. STAT. § 154A-103(b) (1999). The statute provides for at least two deputies, and the counties’ funding subsidizes any additional deputies. Id.
upon in response to political patronage practices remains to be examined.

B. The Rights Implicated by Patronage Practices

In general, political patronage practices implicate three liberties: freedom of speech, freedom of association, and freedom of belief. Patronage comes in many forms and can implicate these interests to differing degrees in any particular case. For example, if a deputy runs negative campaign ads against his current boss, a retaliatory termination implicates the deputy's free speech right.  

On the other hand, if a Republican sheriff fires a deputy who is an open, but not vocally supportive, member of the Democratic party, this implicates the deputy's free association rights. In yet another scenario, a deputy who exhibits Republican views but is not affiliated with the party suffers a deprivation of freedom of belief upon being terminated.

In theory, these hypothetical scenarios are helpful to illustrate the ways in which patronage practice can impact an individual's rights, but in reality the lines are blurred. Most cases involve each of the three rights to some degree. Because an individual who has exercised freedom of speech generally has exercised freedom of belief as well, an appropriate inquiry is whether expression or ideology motivated the dismissal. For example, if a sheriff dismisses a deputy for having placed an opposing candidate's propaganda on his

---

204. Cf. Brady v. Fort Bend County, 145 F.3d 691, 706–08 (5th Cir. 1998) (applying the Pickering-Connick balance to deputies terminated for supporting the candidate opposing the incumbent sheriff). This does not mean that the deputy would prevail. Although Justice Holmes's statement that a person "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" is no longer absolutely correct, it still captures the essence of a case where a public employee's speech is outweighed by the state's interest. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892). See, e.g., Connick v. Myers, 461 U.S. 138, 150 (1983) (upholding the termination of a public employee who circulated a questionnaire that partially touched matters of public concern). But see O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 716–17 (1996) (explaining that a government employee's job cannot be conditioned upon the employee's exercise of her First Amendment rights).

205. See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (explaining that free public discussion is essential to an effective democracy); THOMAS HOBBES, LEVIATHAN 23 (Everymans' Library ed. 1950) (1651) (noting that the general use of speech is to express one's thoughts). Hobbes's suggestion may not always be the case. For example, when a person advocates an idea in which that person does not actually believe, this would not express the person's true thoughts.

206. See, e.g., Largo v. Vacco, 977 F. Supp. 268, 271 (S.D.N.Y. 1997) (noting that the plaintiff medical fraud investigators were never questioned about their political ideologies before being hired); Ortiz Pinero v. Rivera Acevedo, 900 F. Supp. 574, 578 (D.P.R. 1995) (explaining that the plaintiff has the burden of proving that political affiliation motivated plaintiff's dismissal).
lawn, such dismissal may involve the deputy’s rights of free speech, association, and belief equally. But the analysis should focus on the sheriff’s motivation, whether it was the disruption caused by the display, the deputy’s belief that the opposing candidate would make a better sheriff, or the deputy’s political support of the other candidate. Nevertheless, determining the permissibility of patronage practices involving deputy sheriffs under the North Carolina State Constitution, requires an examination of the scope of these rights. Freedom of speech heads the inquiry because, as discussed below, it leads to freedom of belief.

C. The Substance of the Declaration of Right’s Freedom of Speech Clause

Among other things, section fourteen of the Declaration of Rights prohibits state officials from restraining public employees’ freedom of speech. Deputies who allege they were fired because of their expression may state a claim for relief. Claims of this sort do not necessarily fall into the category of patronage, however. The deputy’s termination may have nothing to do with politics or party affiliation. In such cases in which patronage is not an issue, North Carolina courts will likely apply the Pickering-Connick balancing approach to decide public employee freedom of speech rights.

---

200. Corum, 330 N.C. at 782, 413 S.E.2d at 289; Evans v. Cowan, 132 N.C. App. 1, 8, 510 S.E.2d 170, 175 (1999). Describing the scope of freedom of speech rights in public employee cases is conceptually complex. Generally, all persons have the right to be free from penal sanctions or monetary damages based on the content of their speech. See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). But a few exceptions exist. See, e.g., Roth v. United States, 354 U.S. 476, 485 (1957) (holding that the Constitution does not shield obscenity); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (noting that libelous statements are not protected); Chaplinsky v. New Hampshire, 315 U.S. 568, 57–72 (1942) (noting that the Constitution does not protect “‘fighting’ words”). However, public employees have the right to be free from adverse employment action based on their expression on matters of public concern, if this right is not outweighed by a government interest. See Connick v. Myers, 461 U.S. 138, 150 (1983); Evans, 132 N.C. App at 9, 510 S.E.2d at 175.

210. See, e.g., Evans, 132 N.C. App. at 9, 510 S.E.2d at 175–76. Several factors might inspire a court to apply the Pickering-Connick balance to decide a state constitutional claim. Limited judicial resources might prevent a court from attempting to invent a new test that protects free speech more under the state constitution than the federal Constitution. Further, in Evans, the only case applying the state constitution to public employee free speech, the court was forced to address the issue. The appellant’s federal free speech claims were res judicata following a grant of summary judgment. See Evans v.
the other hand, courts have not addressed in any substantive manner those situations in which expression is not an issue, and thus, the Pickering-Connick approach is inapplicable.\textsuperscript{211}

Because state courts have not addressed patronage claims under the Declaration of Rights, relevant case law might indicate how such claims would or should be decided. In Vereen \textit{v.} Holden,\textsuperscript{212} the North Carolina Court of Appeals indicated that firing a public employee based on political activity and affiliation would violate the state constitution.\textsuperscript{213} The court did not mention which provision of the state constitution this activity contravened,\textsuperscript{214} but it likely derives, at least in part, from the free speech guarantee of article one, section fourteen of the state constitution.\textsuperscript{215} Because in a raw patronage case, Cowan, 122 N.C. App. 181, 182, 468 S.E.2d 575, 576 (1996).

\textsuperscript{211} The state appellate courts have ruled on a few patronage cases. In Powell \textit{v.} N.C. Dept. of Trans., 347 N.C. 614, 499 S.E.2d 180 (1998), the supreme court upheld the dismissal of the Director of the State Highway Beautification Council. Governor Hunt wanted a political confidant to serve in the post, so he requested the official's termination. \textit{Id.} at 619, 499 S.E.2d at 182. The director was designated "policymaking exempt" from the State Personnel Act because of the political nature of her job. \textit{Id.} at 619–20, 499 S.E.2d at 182–83. The director contested the decision of the State Personnel Commission and raised an alternative claim under \textit{Elrod} and \textit{Branti}. \textit{Id.} at 625, 499 S.E.2d at 186. The supreme court upheld the dismissal because the director was essentially the "eyes and ears" of the governor's administration and public spokesperson for the program. \textit{Id.}

\textsuperscript{212} 121 N.C. App. 779, 468 S.E.2d 471 (1996).

\textsuperscript{213} See \textit{id.} at 784, 468 S.E.2d at 474 (citing State \textit{v.} Ballance, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949)).

\textsuperscript{214} \textit{See Vereen,} 121 N.C. App. at 784, 468 S.E.2d at 474 (citing State \textit{v.} Ballance, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949)). \textit{Ballance} considered whether the legislature could constitutionally require that photographers obtain a license. \textit{Ballance}, 229 N.C. at 766, 51 S.E.2d at 732. The case is illustrative even though it did not involve freedom of speech or patronage. It touched on the area of substantive due process, a theory which the United States Supreme Court essentially had abandoned more than a decade earlier. \textit{See United States v. Carolene Products,} 304 U.S. 144, 152–53 n.4 (1938); \textit{West Coast Hotel v. Parrish,} 300 U.S. 379, 391 (1937). The \textit{Ballance} court applied three provisions of the state constitution to invalidate the photography licensing law. 229 N.C. at 768–69, 51 S.E.2d at 733. One of these provisions appears to be an express textual basis for economic substantive due process. \textit{See N.C. CONST.} art. I, § 1; ORTH, \textit{supra} note 189, at 38–39. The court noted that another provision was intended to require the government to respect individual freedom. \textit{Ballance,} 229 N.C. at 768, 51 S.E.2d at 733–34 (citing N.C. \textit{CONST.} of 1868 art. I, § 29). If anything, \textit{Ballance} illustrates North Carolina courts' traditional willingness to protect individual rights where the federal Constitution does not.

\textsuperscript{215} N.C. \textit{CONST.} art I, § 14. \textit{Cf. Branti v. Finkel,} 445 U.S. 507, 515 (1980) (holding that the First Amendment's free speech clause protects public employees from discharge due to their beliefs). Deputies cannot rely on the "Law of the Land" clause of the Declaration of Rights in any employment context, including patronage. N.C. \textit{CONST.} art. I, § 19 (stating that "[n]o person shall be... in any manner deprived of his... life, liberty, or property, but by the law of the land"). In at-will employment cases, which include employment of deputies, the claim will fail because an at-will employee has no property interest in his employment. Evans \textit{v. Cowan,} 132 N.C. App. 1, 8, 510 S.E.2d 170, 175
the deputy does not utter a single word\textsuperscript{216} or otherwise express his thoughts;\textsuperscript{217} the termination does not, strictly speaking, implicate "speech," it implicates belief.\textsuperscript{218} Freedom of speech, however, necessarily entails freedom of belief.\textsuperscript{219} An alternative to this proposition would permit the state to declare that a person has the right to speak what he thinks, but he dare not believe it. But if citizens are free to speak their minds, the obvious assumption is that they may believe what they state as well. Further, speech is afforded protection, in part, as a means to the end of freedom of belief.\textsuperscript{220}

Rather than being incidental, belief is incident to freedom of speech. This assertion mandates a thorough examination of the Declaration of Right's free speech clause.

Relative to federal law, North Carolina law has not delineated the boundaries and contours of freedom of speech in any comprehensive fashion. A number of factors explain the lack of


continuity in the freedom of speech arena. Constitutional adjudication was relatively rare before the middle of the nineteenth century.\textsuperscript{221} Prior to 1971, the state constitution did not enumerate freedom of speech.\textsuperscript{222} Further, little need existed to determine whether the right to freedom of speech was an unenumerated right, because, since 1925, the free speech clause of the First Amendment to the United States Constitution has applied to the states through the Fourteenth Amendment.\textsuperscript{224} Furthermore, between the 1971 amendment’s enactment and the Corum decision, whether a civil remedy for restraints on freedom of speech was available under section fourteen was unclear.\textsuperscript{225} Plaintiffs, therefore, have relied more heavily on federal free speech rights than state constitutional rights.\textsuperscript{226} Such reliance seems fruitless for deputy sheriffs considering that Jenkins’ holding would bar their federal patronage claims in United States courts.\textsuperscript{227} Thus, following Jenkins, deputies’ primary protection in the patronage context must come from the state constitution.

In construing the state constitution, especially when a parallel provision exists in the federal Constitution,\textsuperscript{228} North Carolina courts

\begin{itemize}
\item \textsuperscript{221} ORTH, \textit{supra} note 189, at 7.
\item \textsuperscript{222} \textit{Id.} at 51.
\item \textsuperscript{223} N.C. CONST. art. I, § 36 (asserting that the enumerated rights “shall not be construed to impair or deny others retained by the people”); \textit{see also} N.C. CONST. of 1868 art. I, § 37 (containing a similar provision).
\item \textsuperscript{224} \textit{See} Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Gitlow v. New York, 268 U.S. 652, 664 (1925). Prior to Gitlow, the First Amendment was not applicable to the states. In fact, prior to the Fourteenth Amendment, no Bill of Rights provision was applicable to the states. \textit{See} Barron v. Balt., 32 U.S. (7 Pet.) 243, 247 (1833) (Marshall, C.J.); \textit{see also} Akhil Reed Amar, \textit{The Bill of Rights and the Fourteenth Amendment,} 101 YALE L.J. 1193, 1198-1218 (1992) (describing the incorporation debate prior to the Fourteenth Amendment’s adoption).
\item \textsuperscript{225} \textit{See} Corum v. Univ. of N.C., 97 N.C. App. 527, 537, 389 S.E.2d 596, 601 (1990) (holding that sovereign immunity barred a suit for restraint to freedom of speech against a state university and its officials), rev’d, 330 N.C. 761, 789, 413 S.E.2d 276, 293 (1992) (establishing that the state constitution provides a remedy for violations of the freedom of speech clause).
\item \textsuperscript{227} Jenkins v. Medford, 119 F.3d. 1156, 1160 (4th Cir. 1997) (en banc).
\item \textsuperscript{228} A Declaration of Rights provision may be parallel, yet not necessarily identical to a federal Constitutional provision. \textit{Compare, e.g.,} U.S. CONST. art. I, § 10, cl. 2 (prohibiting states from passing “any Bill of Attainder or ex post facto law”) \textit{with} N.C. CONST. art. I, § 16 (providing that “[r]etrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted”). Both provisions address the same evil, and state courts would likely interpret the provision similarly to how the Supreme Court interprets the federal provision. \textit{See, e.g.,} United States v. Lovett, 328 U.S. 303, 315 (1946) (describing a bill of attainder as a legislatively inflicted
POLITICAL PATRONAGE

2001] 1773

can take two different approaches. First, courts can construe the
federal and state provisions in precisely the same way, that is, in exact
accordance with the United States Supreme Court’s interpretation.229
Second, because Supreme Court precedent is merely persuasive
authority and does not bind North Carolina courts to a particular
construction,230 state courts may construe the state constitution to
afford more protection than the federal Constitution.231 In any event,
with respect to patronage discharges of deputy sheriffs, North
Carolina state courts may take either of these approaches.
Regardless of the method of construction they choose, though, state
courts should grant deputies an individualized inquiry under the state
constitution by examining the individual deputy’s duties and the
nature of the political rights exercised that prompted the dismissal,
notwithstanding Jenkins v. Medford.

In light of the conflicting decisions in the United States Courts of
Appeals with regard to political patronage practices in the
employment of deputy sheriffs,232 and the fact that the blanket rule of
Jenkins is neither binding nor necessarily persuasive, North Carolina
courts have considerable latitude in applying the First Amendment of
the United States Constitution in those circumstances.233 Nonetheless, North Carolina courts and practitioners should rely on
the state rather than the federal Constitution. Reliance on the state
constitution will bring more finality to a particular case234 and provide

punishment without trial).

229. See State v. Petersilie, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993) (adopting the
United States Supreme Court’s First Amendment interpretation in a section fourteen
claim involving campaign propaganda); State v. Felmet, 302 N.C. 173, 178, 273 S.E.2d 708,
712 (1981) (declining to interpret section fourteen to grant greater protection than the
First Amendment in a trespassing case).

230. Petersilie, 334 N.C. at 184, 432 S.E.2d at 841.

231. See Felmet, 302 N.C. at 178, 273 S.E.2d at 713; see, e.g., State v. Carter, 322 N.C.
709, 724, 370 S.E.2d 553, 562 (1988) (holding that there is no good faith exception to the
exclusionary rule under the North Carolina Constitution even though there is under the
federal Constitution). See generally Harry C. Martin, The State as a “Font of Individual
(advocating the virtues of providing greater rights under the state constitution).

232. See supra notes 76-118 (discussing the circuit split).

233. North Carolina courts are bound only to decisions construing the federal
Constitution by the United States Supreme Court’s precedent. Although the federal
courts of appeals’ decisions (including the Fourth Circuit’s) are persuasive, state courts are
not obligated to follow them. See State v. Davis, 267 N.C. 429, 431, 148 S.E.2d 250, 251

234. Under Michigan v. Long, 463 U.S. 1032 (1983), if a state court’s decision rests on
adequate and independent state grounds, the United States Supreme Court will not have
jurisdiction to review the decision even if it relies on federal case law as persuasive
authority. Id. at 1041. To avoid review, however, the court should make it “clear by a
clear state precedent for future questionable patronage practices.\textsuperscript{235} Therefore, necessity demands an examination of the state constitution's substantive support for protection from patronage.

In construing section fourteen's freedom of speech provision, or any provision of the North Carolina Constitution for that matter, the courts are charged with determining the intent of the framers and voters who adopted it.\textsuperscript{236} Because ascribing a collective intent to a group of numerous individuals is a daunting enterprise, the text of,\textsuperscript{237} and historical background relating to freedom of speech under the state constitution are of primary importance.\textsuperscript{238}

Although a relatively recent addition to the state constitution, the free speech clause of the Declaration of Rights lends support to the assertion that patronage cases demand an individualized inquiry. North Carolina lawyers drafted the clause with laypersons' assistance,\textsuperscript{239} and the voters ratified it in 1971 as part of a substantial revision to the existing constitution.\textsuperscript{240} The constitution's Study Commission made little mention of the free speech clause in particular, but noted that the Declaration of Rights includes most of its new provisions to recognize rights already in existence.\textsuperscript{241} Federal free speech rights certainly were well established by this time, but the plain statement in its judgment or opinion that federal cases are being used only for the purpose of guidance, and do not themselves compel the result that court has reached." Id. \textsuperscript{235} See FRIESEN, supra note 199, at § 1-3(c) to 1-13.


\textsuperscript{238}Martin, 330 N.C. at 415-16, 410 S.E.2d at 476; Floyd, 71 N.C. App. at 677, 324 S.E.2d at 24; see also Corum, 330 N.C. at 787, 413 S.E.2d at 293 (discussing the history of the Declaration of Rights).

\textsuperscript{239}REPORT OF THE NORTH CAROLINA STATE STUDY COMMISSION TO THE NORTH CAROLINA STATE BAR AND THE NORTH CAROLINA BAR ASSOCIATION 2 (1968) [hereinafter STUDY COMMISSION REPORT].

\textsuperscript{240}ORTH, supra note 189, at 20, 51.

\textsuperscript{241}See STUDY COMMISSION REPORT, supra note 239, at 30.
extent to which state free speech rights enjoyed similar protection is unclear.\textsuperscript{242} Section fourteen provides that, “[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.”\textsuperscript{243} Prior constitutions contained this same general form, but omitted the words “freedom of speech.”\textsuperscript{244} It is illustrative, therefore to examine the history and nature of freedom of the press under the Declaration of Rights.

English common law protected freedom of the press, but only in a limited sense. Its protection was confined to freedom from prior restraints.\textsuperscript{245} Thus, a person could avoid the censor, but not the sheriff. Even Blackstone noted, however, that a person’s thoughts were not subject to restriction in this context.\textsuperscript{246} Freedom of the press under the Declaration of Rights constituted more than mere freedom from prior restraint, however; it prohibited the state from attempting to suppress public opinion or criticism of the government.\textsuperscript{247} Nevertheless, libelous publications were not protected. The language calling for responsibility for those who abused the freedom\textsuperscript{248} was meant to protect persons from defamation.\textsuperscript{249}

\begin{footnotesize}
\footnote{242. See Martin, Freedom of Speech, supra note 226, at 1756–57 (discussing freedom of speech in North Carolina prior to 1921).}
\footnote{243. N.C. CONST. art I, § 14.}
\footnote{244. See N.C. CONST. of 1776, Declaration of Rights § 15; N.C. CONST. of 1868 art. I, § 20 (adding the provision that “every individual shall be held responsible for [its] abuse”).}
\footnote{245. 4 BLACKSTONE, supra note 201, at *151–52.}
\footnote{246. Id. at *152. But cf. Statute of Treasons, 1315–52, 25 Edw. 3, stat. 5, c. 2 (providing that “when a Man doth compass or imagine the Death of... the King” he commits treason).}
\footnote{247. See Cowan v. Fairbrother, 118 N.C. 406, 417, 24 S.E. 212, 215 (1896). In the years preceding the Civil War, North Carolina was not so forgiving when it came to criticism of government policies. In 1860, a minister was convicted of circulating an incendiary publication pursuant to N.C. REV. STAT., ch. 34 § 16 (1854). See State v. Worth, 52 N.C. (7 Jones) 488, 493 (1860). The publication, HINTON ROWAN HELPER, THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT (1857), provided a general denouncement of slavery, and suggestions for implementing its abolition. For a general discussion of the Worth case, see MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE” STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 271–99 (2000).}
\footnote{248. N.C. CONST. art I, § 14 (noting that notwithstanding the freedoms, “every person shall be held responsible for their abuse”).}
\footnote{249. Osborn v. Leach, 135 N.C. 628, 629, 47 S.E. 811, 812 (1904) (holding that the legislature cannot impair the right to recover for defamation); cf. Wheeler v. Green, 593 P.2d 777, 778 (Or. 1979) (holding that the abuse clause of the Oregon constitution allows an action for defamation and recovery of compensatory damages).}
\end{footnotesize}
Freedom of the press has been enumerated specifically in the Declaration of Rights since 1776, but garnered little consideration from the Supreme Court prior to 1971, other than the few cases noted above. Although not enumerated, the free speech concept generated nearly as much attention. Indeed, certain cases point to free speech as being within the corpus of North Carolina common law, or within the state constitution, notwithstanding its absence from the Declaration of Rights. For example, in Seawell v. Carolina Central Railroad Co., the court explicitly stated that the state constitution and laws protect freedom of speech. Of particular significance in the patronage context was that the Seawell plaintiff expressed a political opinion. In State v. Wiggins, four years prior to enumeration of the freedom of speech right, the court noted that freedom of speech always has always enjoyed fundamental status, even before the adoption of the Fourteenth Amendment.

Even in light of the history of freedom of speech in North Carolina, the purpose behind the freedom of speech clause’s ratification remains unclear. It may have been simply a recognition of the importance of the freedom of speech that the federal Constitution

250. N.C. CONST. of 1776, Declaration of Rights § 15.
251. See Martin, Freedom of Speech, supra note 226, at 250.
253. 133 N.C. at 516, 45 S.E. at 851. This statement may seem odd because in 1903 freedom of speech was neither enumerated in the state constitution, see 1903 N.C. Sess. Laws 1–4, nor conferred in a state statute. See Martin, Freedom of Speech, supra note 226, at 268. It seems doubtful that Chief Justice Clark overlooked this contradiction. Although the court did not indicate the source of the principle it announced, a number of possibilities exist. First, the court may have relied on the North Carolina common law as a protector of free speech. Id. Second, the court may have considered freedom of speech so obviously a part of the law that stating its source would be unnecessary. Id. Finally, fundamental to the Declaration of Rights, even at that time, was the concept that the enumeration of rights is not exhaustive. See N.C. CONST. of 1886 art. I, § 37 (“This enumeration of rights shall not be construed to impair or deny others, retained by the people.”). Thus, freedom of speech may have been a residual right under the state constitution.
254. 133 N.C. at 515; 45 S.E. at 851. A crowd of people pelted a candidate for lieutenant governor with eggs simply because of his party affiliation. Id. According to the court, “nothing could be more unmanly than a mob assailing one man in such a manner for his difference from them in their political opinions.” Id. The defendant, as a quasi-public corporation, was held to a stricter duty than that of a private citizen. Id. at 516–17, 45 S.E. at 851. “Such attempted intimidation for political opinion’s sake cannot be safely permitted, especially by great public corporations holding their franchises, in trust, impartially, for the public.” Id. at 517, 45 S.E. at 851.
255. 272 N.C. at 157, 158 S.E.2d at 45 (1967). The court noted that freedom of speech is not absolute. Id.
already protects, or a reaction to the infamous "speaker ban law," which prohibited, among other things, speaking on state-supported campuses by known members of the Communist party. Alternatively, the drafters may have meant to give greater protection to free speech than the federal Constitution and prior North Carolina laws provided. The plain language, and a Study Commission Report on the free speech section both support the last possibility. Section fourteen offers a rationale for the protection given freedom of speech, calling it a "bulwark" of liberty. The First Amendment to the United States Constitution contains no such rationale. Further, section fourteen's text is not limited to laws passed by the legislature, unlike the First Amendment. Rather, it uses the imperative "shall never be restrained." One could argue, ignoring precedent and


259. See STUDY COMMISSION REPORT, supra note 239, at 1–2 ("[I]t is necessary that a state constitution be amended from time to time as problems arise that were not contemplated when the constitution was drafted, or as old solutions prove inadequate to governmental problems in their new manifestations."). The Constitution Study Commission explained its approach to the amendments to the Declaration of Rights by saying "[w]e have sought...to express [the ancient guarantees of liberty] in some instances in more direct and understandable language, and in a few instances, to augment them by adding similar guarantees of a more current character." Id. at 30.


261. See U.S. CONST. amend. I.

262. Id. Indeed the words, "Congress shall make no law" are given little significance, especially where non-legislative actions are in issue.

263. N.C. CONST art. I, § 14. Although the prior constitution used the words "ought" rather than "shall," courts construed the suggestive wording of the original Declaration of Rights as an imperative. See Smith v. Campbell, 10 N.C. (3 Hawks) 590, 597 (1825). The drafters changed the language from admonitions to commands in order to clarify this ambiguity. STUDY COMMISSION REPORT, supra note 239, at 30.
history, that the First Amendment conjoined with the Fourteenth merely prohibits legislative enactments that abridge freedom of speech. However, section fourteen’s text does not lend itself to such a limited interpretation. Instead, it facially limits any state action restraining freedom of speech. In this vein, section fourteen compels a particularized inquiry into the state action alleged to restrain an individual’s freedom of speech. As the court noted in Corum, the words guarantee a direct and personal freedom to each individual. Thus, whether protected coextensively or more broadly than freedom of speech under the First Amendment, section fourteen requires an individual inquiry.

Section fourteen is not merely limited to private individuals’ freedom from criminal prosecution or prior restraint. It also governs discharge from public employment in retaliation of speech. In one public employee free speech case, the North Carolina Court of Appeals applied a Pickering-Connick type balance, which provides an individualized inquiry into the speech at issue and the employment in question. The courts should, and likely will, continue to follow this case when confronted with state freedom of speech claims of a similar character. Public employee belief deserves similar protection. The point at which freedom of belief emerges from the North Carolina Constitution, however, should be identified first.

D. Freedom of Belief Under the North Carolina Constitution

As a matter of moral and political philosophy, freedom of belief or of opinion can be justified as an independent concept of liberty, as a basis for free government, and as a rationale for freedom of

264. This argument relies on the First Amendment’s reference to “Congress,” not its reference to “law.” The definition of “Congress” is easily ascertainable by reference to the body of the Constitution. See U.S. CONST. art. I, § 7 (providing that “Congress...shall consist of a Senate and House of Representatives”); id. § 2-3 (establishing in detail the makeup of the House and Senate). Similarly, it would seem to apply equally to state legislatures through incorporation by the Fourteenth Amendment. Nevertheless, the Constitution’s text does not clearly limit the definition of “law.” See, e.g., U.S. CONST. art. I, § 7 (providing that after a bill passes through the bicameralism and presentment hurdles, it “shall become a law,” but not clarifying whether the term “law” is exclusive to bills which pass these hurdles).


266. Evans v. Cowan, 132 N.C. App. 1, 8, 510 S.E.2d 170, 175 (1999); Corum, 330 N.C. at 783, 413 S.E.2d at 290.

267. See Evans, 132 N.C. App. at 9, 510 S.E.2d at 175.

268. See JOHN RAWLS, A THEORY OF JUSTICE § 33, at 207–08 (1971) (arguing that “equal liberty of conscience” is the only principle that persons in the original position can acknowledge).

269. See 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 8-12 (Alfred A.
At first glance, it would seem that the freedom to think what one wishes requires no justification. In part, people take freedom of belief for granted, because mankind has yet to fashion a device that can read minds. Because the text and history of the constitution probably have more influence on state court judges than the propositions of moral philosophers, however, a basis for freedom of belief must be found in the language and background of the Declaration of Rights.

Although section fourteen marks the most significant basis for freedom of belief, certain other provisions of the Declaration of Rights also deserve mention. The Declaration aims to establish liberty, and courts construe its provisions broadly where individual rights are in question. The primary inquiry is whether restraint of belief is a peculiar evil that the constitution's provisions sought to prevent. The Declaration of Rights employs the term "liberty" throughout, and in order to secure that liberty, it also requires a "frequent recurrence to fundamental principles." Because neither of these terms' meaning is plain, the state constitution's other provisions provide the best source for determining their meaning.

---

Knopf ed. 1994).

270. See MILL, supra note 33, at 18. Mill aptly described the domain of human liberty as encompassing both freedom of pure opinion, and the equally significant and practically inseparable concept of freedom to express one's opinions. Id.

271. One's private, unexpressed beliefs are essentially beyond the realm of another's cognizance.

272. Indeed, counsel would not likely meet with much success citing Mill, Rawls, and Tocqueville, to the exclusion of case law and constitutional provisions in a court brief.


277. See N.C. CONST. art. I, §§ 1 (liberty is an "inalienable" right), 13 (religious liberty), 14 (freedom of speech and press are "bulwarks of liberty"), 16 (ex post facto laws are "incompatible with liberty"), 19 (liberties shall not be disseized or "in any manner deprived"), 20 (general warrants are "dangerous to liberty"), 21 (persons restrained of their liberty are "entitled to a remedy to inquire into the lawfulness thereof"), 30 (standing armies are "dangerous to liberty"), 35 ("A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.").

278. See N.C. CONST. art. I, § 35.

The history behind section twenty-nine, which defines treason against the state, shows that it is one provision that protects liberty of belief and opinion.\textsuperscript{280} Although English common law punished a person for merely "imagining the death of . . . the King,"\textsuperscript{281} both the federal and North Carolina Constitutions limit their definitions of treason.\textsuperscript{282} This lays the groundwork for a freedom to imagine what one will.\textsuperscript{283}

Section thirteen, which promotes religious liberty, contains an explicit reference to freedom of belief.\textsuperscript{284} It provides that "no human authority shall, in any case whatever, control or interfere with the rights of conscience." Although section thirteen actually refers to belief in the Almighty,\textsuperscript{285} it nevertheless serves to illustrate the importance that people placed on liberty of inward belief.

Section fourteen lends the greatest support to free belief. The concept of freedom of belief or opinion, was well established as a core principle behind the First Amendment at the time section fourteen was ratified.\textsuperscript{286} This tends to support freedom of belief's inclusion in section fourteen, even if the 1971 amendments to the Declaration of Rights were intended merely to recognize previously established freedoms.\textsuperscript{287}

The text of section fourteen, in connection with the other Declaration of Rights provisions noted above, gives even greater support for the inclusion of freedom of belief, providing that the freedoms of speech and press "are two of the great bulwarks of

\begin{footnotes}

\footnote{N.C. CONST. art. I, § 29.}

\footnote{Statute of Treasons, 1315-52, 25 Edw. 3, stat. 5, c. 2. As Blackstone noted, because thoughts are essentially shrouded from outward recognition, proof of treason could only be proven by overt acts. 4 BLACKSTONE, supra note 201, at *79. One unfortunate fellow, the keeper of the Crown inn, was drawn and quartered under the statute for telling his son, "if thou behavest thyself well, I will make thee heir to the Crown." LORD CAMPBELL, 1 LIVES OF THE CHIEF JUSTICES OF ENGLAND 151-52 (rev. ed. 1874).}


\footnote{N.C. CONST. art. I, § 13.}

\footnote{Id.}


\footnote{SANDERS, supra note 256, at 6.}

\end{footnotes}
This language demonstrates that the speech and press provisions were intended as a prophylaxis for the concept of liberty. Belief's inclusion in the liberty concept is essentially self-evident, because if one is free to speak his opinion, one must necessarily be permitted to think it. Furthermore, inasmuch as freedom of belief is coterminous with freedom of speech, it requires an individualized inquiry.

Freedom of belief's protection is hardly controversial. In today's society, no right-thinking court or legislature would allow criminal conviction solely based on a person's Democratic or Republican beliefs. However, because "[a]ll rights tend to declare themselves absolute to their logical extreme," the inquiry into freedom of belief is not over. Threat of employment loss is significantly less coercive than the threat of penal sanctions. A person's political beliefs should have no relevance to his standing in society, but in many cases political belief is relevant to a particular occupation. Nevertheless, freedom of political belief enjoys such fundamental status under the state constitution that it should not be the subject of an employment qualification without a compelling justification; that is, it should only factor into an employment decision when the employee's effective performance requires conformity of political belief.

E. An Individualized Inquiry is the Only Appropriate Method for Ascertaining the Validity of Patronage Practices with Respect to Deputy Sheriffs Under the North Carolina Constitution

Patronage claims warrant an individual approach, rather than the blanket rule laid out in Jenkins v. Medford. Under the Jenkins rule, the inquiry into the validity of patronage practices in North Carolina sheriffs' offices is easy. One simply asks whether the sheriff's employee is a deputy sworn to enforce state law. If the answer is yes, then patronage raises no constitutional problem. If the employee is not a sworn law enforcement officer, such as a detention

289. Whitney, 274 U.S. at 375 (Brandeis, J., concurring).
292. 119 F.3d 1156 (4th Cir. 1997) (en banc).
293. Id. at 1165.
294. Id. at 1164.
officer, then patronage is inappropriate. So long as they know an employee’s position, lawyers and laypersons alike can undertake this uncomplicated analysis to determine the appropriateness of a sheriff’s actions in a variety of circumstances. Categorical rules offer obvious benefits to judges and lawyers in many areas of the law. But a flexible approach seems more appropriate in the patronage context, because patronage so heavily implicates freedom of belief, and because freedom of belief conjoins with freedom of speech in the North Carolina Constitution. As the analysis in this section demonstrates, courts employing this standard should consider the deputy’s specific position and the nature of the rights exercised.

In Jenkins, the Fourth Circuit stated that only a position-specific analysis is appropriate, and purported to apply this analysis to the plaintiff deputies. The court, however, conceptualized the position as that of a North Carolina deputy sheriff. This general category contrasts with the more specific and individual characterization that the court could have chosen as the appropriate category, namely a deputy in the same county with the same duties as the particular plaintiff deputy. The latter conception is more appropriate for purposes of the North Carolina Constitution, because the former over relies on a single common factor shared by all of the state’s more than 5,000 deputies: the ability to enforce the law. This single factor does not always dictate whether political conformity with the sheriff constitutes an appropriate job requirement.

Under Fourth Circuit law, a dichotomy exists in the patronage context between sworn deputies and other employees of the sheriff. Consequentially, the deputies’ law enforcement duties dictate whether claims against a sheriff will receive a categorical analysis, regardless of whether a deputy’s views affect her job performance. This factor’s relevance varies in different cases.

---

296. See supra notes 269–91 and accompanying text.
297. See supra notes 298–326 and accompanying text.
298. Jenkins, 119 F.3d at 1164.
299. Id.
300. Compare Jenkins, 119 F.3d at 1164 (holding that sworn deputies may be dismissed on patronage grounds), with Knight v. Vernon, 214 F.3d 544, 548 (2000) (en banc) (holding that North Carolina jailers cannot be dismissed for patronage reasons).
301. See Jenkins, 119 F.3d at 1165 (limiting its holding to sworn law enforcement officers).
302. In fact, one sheriff admitted on the witness stand in a patronage case against him
The state constitution presumes that sheriffs' political beliefs bear on the exercise of their law enforcement powers. Disregarding mere party preference, a sheriff's victory in an election indicates that county voters felt that his prior reputation or political platform was proper law enforcement policy for the county. In that sense, the sheriff may be entitled to rely on the deputies to whom he delegates his policymaking authority to be of conforming political character. Sheriffs, however, do not delegate to all deputies the discretion to make law enforcement policy. Some deputies only implement policy. Notwithstanding their ability to enforce the law, not all deputies may make law enforcement policy.

The distinction between these two levels of discretion is very significant. Because of the autonomous nature of policing, deputies and all other law enforcement officers have de facto discretionary power to enforce the law. Sheriffs may handle this reality in several different ways. They may choose to prescribe a literal policy to enforce all laws fully. On the other hand, they may explicitly grant front line deputies full discretion to decide which laws to enforce. Between these extremes, sheriffs may prescribe standards for enforcing laws under particular circumstances. In each of these situations, the initial policy determination comes from the sheriff or a subordinate chosen to decide policy questions. Each of these situations also raises different concerns in the patronage context.

Under a policy of full enforcement, sheriffs are practically foreclosed from arguing that political conformity is an essential job requirement for deputies. Because discretion is nearly non-existent in that deputies' political beliefs could be irrelevant to their employment. See Brief for Plaintiffs-Appellants at 30, Harter v. Vernon, 139 N.C. App. 85, 532 S.E.2d 836 (2000), appeal dismissed, 335 N.C. 263, 546 S.E.2d 97 (2000), cert. denied, 121 S.Ct. 1962 (2001).

305. See N.C. CONST. art. VII. § 2; S. Ry. Co. v. Mecklenburg County, 231 N.C. 148, 151, 56 S.E.2d 438, 440 (1949) (noting that the sheriff holds the county's chief law enforcement position). If this were not so, the constitution would not have provided for their election. Indeed, the sheriff is the only local government official provided for by the constitution. N.C. GEN. STAT. § 17E-1 (1999). The sheriff has other powers besides law enforcement, see PAUL KNEPPER, NORTH CAROLINA'S CRIMINAL JUSTICE SYSTEM 87 (1999), but these generally are ministerial, such as serving process, or maintenance of the county jail. Id.

306. See Jenkins, 119 F.3d at 1162.

307. See KENNETH CULP DAVIS, POLICE DISCRETION 52-53 (1975) (discussing enforcement at the patrol level).

308. Id. at 165.

309. Id. at 52.

310. Id. at 168-71.

311. For example, a sheriff may permit a chief deputy to craft policy for his department.
a full enforcement system, politics decrease in importance to the job. A sheriff cannot assert that discretion exists while purporting to have removed it. Political belief cannot affect a deputy’s choice when he merely implements a law enforcement policy in which he has no say.

But political conformity becomes more relevant when deputies are given full discretion to enforce the law. When no departmental standards exist for guidance, the deputy relies on his own decisions as to who should be arrested and charged with crimes. Here the deputy both implements and makes policy. As policy guidelines increase, deputies’ discretion decreases.

Similarly, with increased rank and tenure, deputies may receive considerably more discretion. The chief deputy in a patrol division certainly has more policymaking discretion than a front-line deputy. Thus, political conformity’s relevance to the job is a function of the amount of discretion the deputy has.

Deputies’ discretion and the breadth of enforcement guidelines will vary between sheriffs’ offices, and with those offices’ size and the particular county’s law enforcement needs. The last two factors also distinguish the duties of certain deputies from others. In North Carolina, although the sheriff is the chief law enforcement officer of the county, and retains this power throughout the county jurisdiction, sheriffs’ offices generally patrol and enforce the law only in unincorporated areas of each county, and in municipalities without police departments of their own.

Sheriffs’ offices vary between employment of six to several hundred deputies. In large departments, where sheriffs perhaps employ state-of-the-art technology and law enforcement methods, sheriffs may find it difficult to defend a political conformity requirement. On the other hand, in a small department with only a few deputies, political conformity may take on real significance.

312. DAVIS, supra note 307, at 2.
314. KNEPPER, supra note 305, at 88.
315. INST. OF GOV'T, MUNICIPAL GOVERNMENT IN NORTH CAROLINA 765 (David M. Lawrence & Warren Jake Wicker eds., 2d ed. 1995). In some counties, where law enforcement has been consolidated into a county police department, the sheriff’s office plays a minor role in law enforcement. Id.
316. See MAPS GROUP, supra note 153, at 36-47.
especially where the citizenry views the deputies as directly speaking on the sheriff's behalf.\footnote{318}

In addition to levels of discretion, duties, ranks, and office size that distinguish deputies from one another, the level of abstraction from political belief that formed the basis for a patronage termination also may prove a relevant factor in the inquiry. Anything from pure ideology, to one's registration as a Republican or a Democrat,\footnote{319} to concrete support for a particular candidate\footnote{320} or agenda may provide the basis for a patronage discharge. Each item on the spectrum has a different level of relevance to a deputy's job performance. For example, a deputy's belief that laws prohibiting the use and possession of marijuana should be abolished is highly relevant to his performance as a law enforcement officer. Although the deputy is entitled to such belief, the sheriff may seriously question his ability to enforce those laws.

Abstract beliefs in Democratic or Republican ideals seem to have less relevance to law enforcement. The state constitution presumes political ideology's significance with respect to sheriffs, however.\footnote{321} Relevance with respect to deputies may follow, especially in instances where the department is small, where the deputy's rank requires a degree of policymaking, or where the sheriff has established a community-oriented policing strategy.\footnote{322} Active opposition against the sheriff's election or current support for another candidate changes the inquiry as well. Loyalty to the sheriff is an essential quality for a deputy.\footnote{323} The sheriff should be entitled to some measure of control regarding employment of inferiors who question his entitlement to the office. A different problem arises when the deputy chooses to remain neutral in an election, or refuses


319. E.g., Branti, 445 U.S. at 509–10 (discussing Democratic county public defender's threatened discharge of assistants solely because they were Republican).

320. E.g., Upton v. Thompson, 930 F.2d 1209, 1210, 1218 (7th Cir. 1991) (applying Elrod-Branti to deputy who displayed a bumper sticker in support of the candidate opposing the incumbent sheriff).


to support the sheriff’s campaign actively.\(^{324}\) A requirement of outward political support comes closest to actual compulsion of belief.\(^{325}\) In any event, section 153A-99 seems to prohibit actions such as compulsory campaign funding.\(^{326}\)

These significant differences in the levels of rights exercised, levels of discretion, ranks, and office sizes demonstrate the futility of a categorical rule rejecting all patronage claims by deputies. In some instances, political conformity simply bears no relevance to a deputy’s job. But that reality does not imply that patronage is always improper. \textit{Jenkins} may have been decided correctly in regard to the deputies before the court, but that does not dictate that the decision should apply with respect to all the diverse deputies in North Carolina. Given its connection with freedom of speech, freedom of political belief warrants an individual approach to patronage cases by the state courts of North Carolina.

**CONCLUSION**

In light of the ruling in \textit{Jenkins v. Medford} that all North Carolina deputies are subject to patronage discharge,\(^{327}\) considerable need exists to establish what North Carolina state law says about deputies’ rights. The United States Supreme Court’s rulings on patronage and public employee freedom of speech seem to confuse the courts and lead to conflicting opinions as to whether deputy sheriffs properly are subject to discharge for political reasons.\(^{328}\) North Carolina statutory law appears to give deputies at least some protection from political patronage practices, but its protection is limited.\(^{329}\) Given this limited protection, deputies must rely on the North Carolina State Constitution’s Declaration of Rights to protect their liberties with respect to patronage.\(^{330}\) In determining deputies’ rights, courts should remember the individual nature of each deputy’s duties and avoid declaring a categorical denial of protection from


\(^{326}\) N.C. GEN. STAT. § 153A-99(c) (1999).

\(^{327}\) 119 F.3d 1156, 1164 (4th Cir. 1997) (en banc).

\(^{328}\) \textit{See supra} notes 86–126.

\(^{329}\) \textit{See supra} notes 129–190.

\(^{330}\) \textit{See supra} notes 191–254.
patronage. Only then will the Declaration of Rights be such a “great bulwark of liberty.”

MICHAEL PATRICK BURKE

331. See supra notes 254–281.