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The Constitution and Political Patronage: Supreme Court Jurisprudence and the Balancing of First Amendment Freedoms

Brian L. Porto*

I. Introduction

No discussion of American political history is complete without a reference to the famous statement by New York Governor William Marcy in 1829 that, "[t]o the victor belong the spoils of the enemy."¹ Governor Marcy's statement expressed the philosophical underpinning of the longtime practice in American politics of hiring and firing public employees because of their partisan political affiliations. That practice, known as political patronage, began in the earliest years of this country's existence and thrived in the Jacksonian Era during which Governor Marcy made his memorable observation. Political patronage continues to the present day.² However, modern patronage is less pervasive and influential due to the development of the modern civil service system, which began with Congress' passage of the Pendleton Act in 1883.³

More recently, the United States Supreme Court has limited patronage in three decisions concerning the constitutionality of patronage-based hiring and firing of public employees. In *Elrod v. Burns*,⁴ the Court examined with strict scrutiny the

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1. Susan Lorde Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage Dismissals* 39 AM. U. L. REV. 11, 16 (1989) (citing MARTIN TOLCHIN AND SUSAN J. TOLCHIN, *TO THE VICTOR* 323 (1971)).

2. Kathleen M. Dugan, Note, *An Objective and Practical Test for Adjudicating Patronage Dismissals*, 35 CLEV. ST. L. REV. 277, 280-81 (1987); see also CHARLES H. LEVINE ET AL., *PUBLIC ADMINISTRATION: CHALLENGES, CHOICES, CONSEQUENCES* 220 (1990) [hereinafter LEVINE].

3. See Dugan, *supra* note 2, at 280 n.22.

4. 427 U.S. 347 (1976).

practice of firing public employees because of their partisan political affiliations.⁵ The Court concluded that, in order for that practice to pass constitutional muster, it must further some vital governmental purpose by means that are least restrictive of First Amendment freedoms.⁶ In addition, the Court stated that "[t]he benefit gained must outweigh the loss of constitutionally protected rights."⁷ As a practical matter, this means that patronage dismissals would henceforth be limited to positions whose occupants could be characterized as "policymakers."⁸

In *Branti v. Finkel*,⁹ the Court again examined a patronage dismissal with strict scrutiny, observing that "unless the government can demonstrate 'an overriding interest . . . of vital importance,' requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment."¹⁰ Nonetheless, the *Branti* Court modified the standard it had announced in *Elrod* when it held that, in the future, the constitutionality of a patronage dismissal would depend not upon whether the dismissed employee was a "policymaker," but rather, upon whether "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."¹¹

Subsequently, in *Rutan v. Republican Party of Illinois*,¹² the High Court faced the larger issue of whether promotions and transfers, as well as recall and hiring decisions involving low-level public employees, may be constitutionally based upon the employee's affiliation with and support for a particular political party.¹³ Again employing strict scrutiny, the Court reasoned that patronage-based hirings, promotions, transfers and post-layoff recalls punish public employees for their beliefs and associations just as much as patronage-based firings do.¹⁴ Thus, the Court

5. *Id.* at 363.

6. *Id.*

7. *Id.* at 367-68.

8. *Id.*

9. 445 U.S. 507 (1980).

10. *Id.* at 515-16 (citations omitted).

11. *Id.* at 518.

12. 497 U.S. 62 (1990).

13. *Id.* at 65.

14. *Id.* at 73-76.

concluded in *Rutan* that "promotions, transfers and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees."¹⁵

To be sure, the *Elrod*, *Branti* and *Rutan* decisions have weakened an ancient, if not necessarily venerable, institution of American politics. Political patronage in America dates back at least as far as 1797 to the Administration of President John Adams. Adams' Secretary of the Treasury, a member of the Federalist Party, fired the United States Commissioner of Revenue, who was a member of the Democratic-Republican (also known as the Jeffersonian Republican) Party.¹⁶ The Secretary cited "deliberate misconduct in office,"¹⁷ but the misconduct consisted of aiding the political opposition.¹⁸ Thomas Jefferson, who succeeded Adams, refined patronage practices.¹⁹ During the presidency of Andrew Jackson, from 1829 to 1837, patronage dismissals became an accepted feature of American political life; indeed, President Jackson personally oversaw all patronage appointments.²⁰

Although Jackson's successors continued the practice, patronage appointments had several flaws. These flaws contributed to the passage of the Pendleton Act in 1883.²¹ The flaws included the creation of unnecessary jobs in order to dispense rewards, the employment of unqualified persons, the temptation for officials to use their brief, four-year tenure for personal gain, the need to train a new workforce when the "out-party" defeated the incumbent party, and the diminution in the stature of the president caused by his role as job-broker.²² The Pendleton

15. *Id.* at 75.

16. Martin, *supra* note 1, at 14 (citing CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 19 (1963) (discussing Oliver Wolcott's dismissal of Tench Coxe)).

17. *Id.*

18. *Id.*

19. See Dugan, *supra* note 2, at 280 n.20.

20. Martin, *supra* note 1, at 15 (citing MARTIN TOLCHIN AND SUSAN J. TOLCHIN, *TO THE VICTOR* 323-24 (1971); CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 19 (1963)).

21. LEVINE, *supra* note 2, at 219 (quoting HERBERT KAUFMAN, *The Growth of the Federal Personnel System*, in *THE FEDERAL GOVERNMENT SERVICE* 30-31 (Wallace Stanley Sayre ed., 1965)).

22. *Id.*

Act created the independent, bipartisan Civil Service Commission. The Commission screens federal job candidates by administering competitive examinations, protects federal employees against arbitrary removal, and prevents officials from requiring employees to make financial contributions to political parties.²³ Although partisan resistance slowed the growth of the merit system,²⁴ today, nine out of ten federal employees are protected by one of several merit-based systems used by various agencies.²⁵ An incoming president may only fill about 2,500 posts on a purely partisan basis.²⁶

States were slow to implement civil service reform. New York was the first state to adopt a civil service law, in 1883.²⁷ Massachusetts followed suit in 1884.²⁸ Twenty years would pass before the next state joined the movement; by 1935, only twenty states had adopted merit systems.²⁹ Today, approximately sixty percent of state government employees are protected by merit systems.³⁰

Judicial protection of public employees also developed slowly. Early case law upheld patronage-based hiring and firing, either on the ground that public employment was a state-granted privilege that could be withdrawn or conditioned as the employer saw fit, or on the ground that a patronage recipient waived any constitutional right that might otherwise exist to challenge a partisan dismissal.³¹ In 1952, however, the Supreme Court held that individuals retain certain constitutional rights even though employed by government.³² In the succeeding twenty years, the Court gradually expanded the First Amendment protections to which public employees are entitled.³³ In this context, *Elrod*, *Branti* and *Rutan* can be seen as additional

23. LEVINE, *supra* note 2, at 220.

24. *Id.* at 221.

25. CHARLES B. DENHARDT, *PUBLIC ADMINISTRATION: AN ACTION ORIENTATION* 197 (1990).

26. *Id.*

27. *Id.*

28. *Id.*

29. LEVINE, *supra* note 2, at 202.

30. *Id.*

31. Martin, *supra* note 1, at 17-18.

32. *Id.* at 18 (citing *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952)).

33. *Id.*

steps in the Supreme Court's steady expansion of the expressive and associational rights of public employees.

Nevertheless, both political scientists and legal scholars have criticized the aforementioned decisions, especially *Elrod* and *Branti*.³⁴ Political scientists have charged that, in its zeal to protect First Amendment rights of individuals and to insure fairness in politics and public administration, the Supreme Court has ignored the importance of patronage to the maintenance of strong political parties, and the importance of strong political parties to the preservation of a democratic political system.³⁵

Some law review commentaries have shared the political scientists' view that the Supreme Court's patronage decisions have been insensitive to the important relationships that exist between political patronage, strong political parties, and democratic accountability.³⁶ Other law review commentaries are critical of the High Court's patronage decisions because they view the Court's standards for determining which positions should be subject to patronage-based personnel decisions as vague, confusing, and therefore, of little utility to lower courts and to public employers.³⁷ Not surprisingly, these commentators endeavor to

34. See *infra* notes 35-37.

35. See John Moeller, *The Federal Courts' Involvement in the Reform of Political Parties*, 40 W. POLITICAL QUARTERLY 717-34 (1987); John Moeller, *The Supreme Court's Quest for Fair Politics*, 1 CONSTITUTIONAL COMMENTARY 203-23 (1984); Clifton McCleskey, *Parties at the Bar: Equal Protection, Freedom of Association and the Rights of Political Organizations*, 46 JOURNAL OF POLITICS 346-68 (1984); Debra L. Dodson, *The Federal Courts and American Political Parties: Legal Constraints on the Development of a Responsible Party System* (paper presented at the annual meeting of the Midwest Political Science Association, Chicago, April 11-15, 1984); Kenneth J. Meier, *Ode to Patronage: A Critical Analysis of Two Recent Supreme Court Decisions*, 41 PUB. ADMIN. REV. 558-63 (1981).

36. The law review commentary that makes the political science arguments most comprehensively and effectively is Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567-1645 (1988).

37. See Martin H. Brinkley, Note, *Despoiling the Spoils: Rutan v. Republican Party of Illinois*, 69 N.C. L. REV. 719-40 (1991); Steven G. Heinen, Note, *Political Patronage and the First Amendment: Rutan v. Republican Party of Illinois*, 14 HARV. J.L. & PUB. POL'Y 292-303 (1991); Barry N. Johnson, Note, *Rutan v. Republican Party of Illinois: Another Attempt to Eliminate Political Patronage*, 27 WILLAMETTE L. REV. 405-28 (1991); Ashutosh Bhagwat, Comment, *Patronage and the First Amendment: A Structural Approach*, 56 U. CHI. L. REV. 1369-1401 (1989); Martin, *supra* note 1, at 11-58; Dugan, *supra* note 2, at 277-302.

fashion clearer and more workable standards for implementing the principles announced in *Elrod*, *Branti*, and *Rutan*.³⁸

This article will take issue with those cited above on several grounds. First, it will show that the Supreme Court's patronage decisions do not weaken political parties in any significant way because: 1) those decisions preserve the parties' right to promote their respective policy agendas while in power by means of patronage appointments of high-level administrators; and 2) patronage appointments of low-level public employees engender more public hostility toward, than support for, the parties in today's anti-party milieu.

Second, this article will demonstrate that, when viewed in conjunction with its decisions concerning state regulation of party governance and nomination procedures, the Supreme Court's patronage decisions evince a substantially greater sensitivity to the associational rights of political parties than the aforementioned commentators acknowledge. Taken together, these decisions reveal that the Court endorses the concept of political parties as ideologically meaningful private organizations possessing associational rights. However, the Court also views the patronage-based hiring and firing of non-policymaking employees as unnecessary to the parties' ideological and programmatic aims.

Finally, by carefully analyzing Supreme Court decisions concerning party regulation, Supreme Court patronage decisions, and federal appellate court interpretations of the patronage rulings, this article will identify a clearer and more workable standard for distinguishing between those public positions that should be subject to patronage-based appointments and dismissals and those that should not be. This standard will not sound the death knell for political patronage in the United States, nor will it further weaken our already hobbled political parties.

Any thoughtful analysis of these matters, though, must begin with a thorough assessment of the Supreme Court's decisions in *Elrod*, *Branti*, and *Rutan*. Section II will present that assessment. Section III will discuss the dissents filed by Justice Powell in *Elrod* and *Branti*, and the dissent filed by Justice Scalia in *Rutan*. The ideas expressed in these dissents are the basis of the

38. See *supra* note 37.

political science and legal critiques of *Elrod*, *Branti*, and *Rutan* that were alluded to above and that Section IV will discuss in detail. Section V will discuss the implications of *Elrod*, *Branti*, and *Rutan* for political parties, public employees, public employers and courts. Lastly, Section VI concludes that those decisions neither hurt political parties nor advance an unworkable legal standard for determining which jobs should be patronage eligible.

II. The *Elrod*, *Branti* and *Rutan* Decisions

A. *Elrod*

In *Elrod v. Burns*,³⁹ the issue to be resolved was whether four employees of Cook County, Illinois, who alleged that they had been either discharged or threatened with discharge solely because of their partisan political affiliations, presented an actionable claim for the deprivation of First Amendment rights.⁴⁰ Democrat Richard Elrod replaced the incumbent Republican as Sheriff of Cook County in December of 1970.⁴¹ The new Sheriff discharged three of the plaintiffs because they were neither members of the Democratic Party nor sponsored by a local Democratic leader.⁴² The fourth plaintiff was "in imminent danger of being discharged for the same reasons" at the time that the case reached the Supreme Court.⁴³

The United States District Court for the Northern District of Illinois dismissed the plaintiffs' complaint for failure to state any claim upon which relief could be granted.⁴⁴ The United States Court of Appeals for the Seventh Circuit reversed the District Court on the grounds that the complaint had indeed stated a valid legal claim, and remanded the case with instructions to grant the requested preliminary injunction.⁴⁵ Sheriff Elrod thereupon petitioned the United States Supreme Court

39. 427 U.S. 347 (1976).

40. *Id.* at 349.

41. *Id.* at 351.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

for certiorari.⁴⁶

Justice Brennan, writing for a plurality that also included Justices Marshall and White, quickly disposed of Sheriff Elrod's initial argument that the Court lacked jurisdiction in this matter.⁴⁷ First, the political question doctrine did not deny jurisdiction here because:

it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.' " That matters related to a State's or even the Federal Government's, elective process are implicated by this Court's resolution of a question is not sufficient to justify our withholding decision of the question.⁴⁸

Secondly, the separation of powers principle was not a barrier to Supreme Court jurisdiction because "the separation of powers principle, like the political question doctrine, has no applicability to the federal judiciary's relationship to the States."⁴⁹ For that reason, the Court also rejected the Sheriff's argument that, pursuant to the separation of powers principle, the executive's constitutional responsibility to ensure that the laws be faithfully executed requires the power of appointment or removal at will, free from judicial oversight.⁵⁰ Justice Brennan observed that the United States Constitution grants no such power to state-level executive officials, and that the responsibility for determining precisely what powers the Constitution does accord to state executives rests with the Supreme Court.⁵¹

Justice Brennan then turned his attention to patronage dismissals, which he immediately placed under the microscope of strict judicial scrutiny.⁵² He wrote:

The cost of the practice of patronage is the restraint it places on freedoms of belief and association. In order to maintain their

46. *Id.*

47. *Id.* at 351-53.

48. *Id.* at 351-52 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962) (citations omitted)).

49. *Id.* at 352.

50. *Id.*

51. *Id.*

52. *Id.* at 355.

jobs, respondents⁵³ were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives.⁵⁴

Justice Brennan added that patronage not only restricts the freedoms of belief and association, but that it also inhibits the "free functioning of the electoral process."⁵⁵ That is, patronage tips the balance of electoral power in favor of the incumbent party because the public employee who fails to demonstrate support for that party in one or more of the ways cited above risks losing public sector employment.⁵⁶

Justice Brennan also stated that, by so restraining beliefs, patronage practices clash with several decisions of the Court which invalidated government actions inhibiting an employee's political preferences.⁵⁷ For instance, in *Keyishian v. Board of Regents*,⁵⁸ the Court invalidated New York statutes that barred public employment for individuals who were members of "subversive" organizations.⁵⁹ Under the First Amendment, political associations alone could not constitute an adequate ground for denying a person public employment.⁶⁰ Similarly, in *Perry v. Sindermann*,⁶¹ the Court invalidated the dismissal of a professor who had been an outspoken critic of his college's Board of Regents.⁶² In voiding the dismissal, the Court held that government may not deny a benefit to a person in a way that infringes the person's constitutional rights, especially the First Amendment right to speak and associate freely.⁶³ To permit such denials of benefits would be to enable the government to achieve by

53. The original plaintiffs were the petitioners when the case reached the United States Supreme Court, as Sheriff Elrod had petitioned the High Court after having lost in the Seventh Circuit Court of Appeals. *Id.* at 350 (footnote added).

54. *Id.* at 355.

55. *Id.* at 356.

56. *Id.*

57. *Id.* at 357.

58. 385 U.S. 589 (1967).

59. *Id.* at 609-10.

60. *Id.*

61. 408 U.S. 593 (1972).

62. *Id.* at 597-98.

63. *Id.* at 597.

indirect means that which it is prohibited from doing directly.⁶⁴

Justice Brennan observed that patronage practices appear to be prohibited by *Keyishian* and *Perry* because such practices condition public employment, a governmental benefit, upon the acceptability of one's speech and associations.⁶⁵ Nonetheless, patronage is not absolutely prohibited, but rather, can be justified by a compelling governmental interest.⁶⁶ Hastening to add that a governmental interest is not synonymous with a partisan interest,⁶⁷ Justice Brennan noted further that a patronage system can only survive strict scrutiny if it advances some vital governmental end "by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights."⁶⁸

Applying this standard to the circumstances in *Elrod*, Justice Brennan rejected the argument that political patronage was necessary for effective government and efficient public employees.⁶⁹ Justice Brennan wrote:

The inefficiency resulting from the wholesale replacement of large numbers of public employees every time political office changes hands belies this justification. And the prospect of dismissal after an election in which the incumbent party has lost is only a disincentive to good work. Further, it is not clear that dismissal in order to make room for a patronage appointment will result in replacement by a person more qualified to do the job since appointment often occurs in exchange for the delivery of votes, or other party service, not job capability.⁷⁰

Justice Brennan and the plurality acknowledged that patronage may well give employees of the incumbent party an incentive to perform their jobs well and even promote the sort of political loyalty among public employees that facilitates implementation of the policies favored by the electorate.⁷¹ Yet, they remained unpersuaded of the importance of patronage to effi-

64. *Id.*

65. *Elrod*, 427 U.S. at 359-60.

66. *Id.* at 362.

67. *Id.* at 363 n.17.

68. *Id.* at 363.

69. *Id.* at 364.

70. *Id.* at 364-65.

71. *Id.* at 366.

cient government, concluding that means less intrusive upon First Amendment rights than patronage remain available for achieving efficiency and accountability in the public work force.⁷² That is, merit-based hiring and termination for cause should suffice to insure efficient and effective government without resorting to widespread patronage dismissals.⁷³ Patronage dismissals should be limited to "policymaking" positions whose occupants are responsible for implementing the public policy program espoused by the party in power.⁷⁴

In reaching this conclusion, the *Elrod* plurality took the first steps toward fashioning a standard for distinguishing patronage-eligible posts from non-patronage-eligible posts in state bureaucracies. The most important components of that emerging standard were the nature of the responsibilities associated with a particular position and the extent to which the employee who holds that position acts as an advisor or formulates plans for the implementation of broad goals.⁷⁵ Justice Brennan noted that, "the political loyalty 'justification is a matter of proof, or at least argument, directed at particular kinds of jobs.'"⁷⁶

B. *Branti*

Four years after *Elrod*, the Supreme Court faced the issue of whether the First and Fourteenth Amendments protected an Assistant Public Defender discharged for his political beliefs, despite his having performed the duties of his job satisfactorily.⁷⁷ The original plaintiffs in this case, who were the respondents when the matter reached the Supreme Court, were registered Republicans who lost their jobs as Assistants to the Rockland County (New York) Public Defender when *Branti*, a Democrat, was appointed Public Defender by a now Democrat-dominated County Legislature.⁷⁸

The United States District Court for the Southern District

72. *Id.*

73. *Id.*

74. *Id.* at 372.

75. *Id.* at 367-68.

76. *Id.* at 368 (quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 574 (7th Cir. 1972)).

77. *Branti v. Finkel*, 445 U.S. 507, 507-08 (1980).

78. *Id.* at 508-10.

of New York granted the plaintiffs' request for a permanent injunction, preventing Branti from terminating or attempting to terminate them on the basis of their political beliefs because they were not "policymaking employees," according to the meaning given to that term in *Elrod*.⁷⁹ The United States Court of Appeals for the Second Circuit affirmed the District Court's decision and Branti petitioned to the Supreme Court for certiorari.⁸⁰

Justice Stevens, writing for a majority that also included Chief Justice Burger and Justices Brennan, Marshall, White and Blackmun, reaffirmed the strict scrutiny standard employed in *Elrod*.⁸¹ The High Court rejected Branti's argument that *Elrod* prohibited dismissals resulting from an employee's refusal to change his political affiliation or contribute to, or work for, the incumbent party's political candidates, but that it did not prohibit dismissals resulting solely from the employee's failure to obtain the appropriate partisan sponsorship.⁸² Justice Stevens emphasized that the First Amendment, as construed in *Elrod*, prohibits the dismissal of employees based solely upon their political beliefs, and that "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance."⁸³

The Supreme Court's *Branti* decision modified the *Elrod* standard for distinguishing patronage-eligible positions from non-patronage-eligible positions. In *Elrod*, Justice Brennan's

79. *Id.* at 510-11.

80. *Id.* at 511.

81. *Id.* at 515-16. Justice Stewart concurred in *Elrod*, but dissented in *Branti*. *Id.* at 520 (Stewart, J., dissenting); *Elrod v. Burns*, 427 U.S. 347, 374-75 (1976) (Stewart, J., concurring). His *Elrod* concurrence turned on his agreement with the plurality that the respondents were non-policymaking, non-confidential government employees whom the Constitution protects against being dismissed or threatened with dismissal merely because of their political beliefs. *Elrod*, 427 U.S. at 374-75 (Stewart, J., concurring). The *Elrod* respondents were a deputy sheriff, a bailiff-security guard, a process server and an undesignated office worker. *Id.* at 350-51. Justice Stewart's *Branti* dissent, however, concluded that the respondents in that case, Assistant Public Defenders, were confidential employees with whom the Constitution does not compel the Public Defender to enter into a close professional association if the latter does not wish to do so. *Branti*, 445 U.S. at 520-21 (Stewart, J., dissenting).

82. *Branti*, 445 U.S. at 516.

83. *Id.* at 517.

plurality opinion had designated "policy making" posts as eligible for patronage, and Justice Stewart's concurrence had indicated that if the respondents' positions had been "confidential" ones, then their patronage-based dismissals might have been constitutionally permissible.⁸⁴ In *Branti*, however, Justice Stevens stated that a position can be patronage-eligible even if it is neither a policymaking nor a confidential position.⁸⁵ He noted, for example, that "if a state's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration,"⁸⁶ even though the position of election judge is neither a policymaking nor a confidential position.⁸⁷

Therefore, Justice Stevens continued, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."⁸⁸ He also noted, by way of illustration, that although both a state university football coach and a governor's speechwriter or legislative liaison formulate policy, it is inconceivable that being a Democrat or a Republican would make the coach more successful on the field; however, it was eminently reasonable to suggest that a Republican speechwriter or legislative liaison would improve the performance of a Republican governor.⁸⁹

Using this "appropriateness" standard, Justice Stevens and the *Branti* majority concluded that assistant public defenders cannot be discharged solely on the basis of political affiliation because their only discretionary authority relates to the representation of their individual clients.⁹⁰ That is, they have no authority to give advice regarding, or to formulate plans for, the implementation of partisan or ideological goals.⁹¹

Therefore, after *Branti*, the standard for determining

84. *Elrod*, 427 U.S. at 367-68, 374-75.

85. *Branti*, 445 U.S. at 518.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 519.

91. *Id.*

whether a particular public position can properly be subject to patronage dismissals was whether its nature was such that its duties could not be performed effectively unless the occupant of the post shared the political party affiliation of those responsible for filling it. In order to make this determination in individual cases, one would use the criteria that the Supreme Court used in *Elrod*, namely, the extent to which the position at issue involved advising, broad-based policy formation and the confidential communications attendant thereto.

C. *Rutan*

In *Rutan v. Republican Party of Illinois*,⁹² the issue was the constitutionality of predating decisions to hire, promote, transfer and recall public employees on the basis of their partisan affiliations, and the degree of support they enjoyed from officials of the incumbent party.⁹³

The case arose out of the 1980 issuance of an executive order by the Republican Governor of Illinois, proclaiming a freeze on hiring for every Illinois agency, bureau, board or commission subject to gubernatorial control, and prohibiting state officials from filling any vacancy, creating any new position or taking any similar action without the Governor's express permission.⁹⁴ According to the plaintiffs, the governor used the hiring freeze as a means of restricting state employment and favorable employment-related decisions (i.e., promotions, recalls, requested transfers) to individuals who were supported by the Republican Party.⁹⁵ Specifically, the plaintiffs charged that when the Governor's Office reviewed the personnel requests of the agencies under its control, it considered whether an applicant had voted in Republican primaries, provided financial or other support to the Republican Party and its candidates, promised to join and work for the Republican Party in the future, or acquired the support of state and local Republican Party officials.⁹⁶

The United States District Court for the Central District of

92. 497 U.S. 62 (1990).

93. *Id.* at 65-68.

94. *Id.* at 65.

95. *Id.*

96. *Id.* at 66.

Illinois dismissed the plaintiffs' complaint for failure to state a claim upon which relief could be granted.⁹⁷ The United States Court of Appeals for the Seventh Circuit, upon rehearing the case *en banc*, affirmed the portion of the District Court's ruling that had concluded that basing the decision to hire upon political affiliation is permissible under the First Amendment.⁹⁸ However, the Seventh Circuit reversed and remanded the remainder of the District Court's decision, holding that patronage practices other than dismissal (e.g., transfers, promotions, recalls) violate the First Amendment only when they are "substantially equivalent to a discharge;"⁹⁹ that is, would lead a reasonable person to resign.¹⁰⁰

The plaintiffs then petitioned to the Supreme Court for a determination of whether the *Elrod/Branti* standard regarding patronage dismissals extends to the promotion, transfer, recall and/or hiring of public employees.¹⁰¹ Justice Brennan, joined by Justices Marshall, White, Blackmun and Stevens, made it clear from the outset of his opinion that patronage-based promotions, transfers and recalls would be subjected to strict scrutiny and that the *Elrod/Branti* standard would apply.¹⁰² He disposed of the argument made by the Illinois Republican Party that the petitioners' First Amendment rights had not been infringed because the petitioners, unlike public employees who are terminated for partisan reasons, enjoyed no "entitlement" to promotions, requested transfers or post-layoff recalls.¹⁰³ In so doing, he reiterated the view that he had expressed years earlier in *Elrod*, that even though a person has no right to a valuable governmental benefit, government may not deny the benefit to that person on grounds that infringe constitutionally protected interests, especially the freedom of speech.¹⁰⁴

Justice Brennan also rejected the Illinois Republican Party's argument that the employment decisions at issue in

97. *Rutan v. Republican Party of Ill.*, 641 F. Supp. 249 (C.D. Ill. 1986).

98. *Rutan v. Republican Party of Ill.*, 868 F.2d 943 (7th Cir. 1989).

99. *Id.* at 955-56.

100. *Id.*

101. *Rutan*, 497 U.S. at 62.

102. *Id.* at 65.

103. *Id.* at 72.

104. *Id.*

Rutan did not violate the First Amendment because they were not punitive, did not adversely affect the terms of employment and, therefore, did not chill the exercise of the freedom of belief or association.¹⁰⁵ In Brennan's view, the employment decisions at issue in *Rutan* did indeed adversely affect the terms of employment, and impose penalties upon certain employees, because of their political affiliations and beliefs.¹⁰⁶ He wrote:

The same First Amendment concerns that underlay our decisions in *Elrod* . . . and *Branti* . . . are implicated here. Employees who do not compromise their beliefs stand to lose the considerable increase in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a "temporary" layoff. These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment.¹⁰⁷

In reaching this conclusion, Justice Brennan also rejected the Seventh Circuit's holding that only those employment decisions that are the substantial equivalent of a dismissal violate a public employee's First Amendment rights.¹⁰⁸ He observed that the circuit court's holding failed to recognize that "there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy."¹⁰⁹ Thus, promotions, transfers and recalls of public employees that are based upon political affiliations, or support, violate the First Amendment rights of these employees.¹¹⁰

Justice Brennan then addressed the constitutionality of patronage-based hiring, noting once again that government may not condition public employment upon political beliefs or associations absent a vital interest in doing so and adding that no such interest existed in these cases.¹¹¹ He wrote:

105. *Id.* at 73.

106. *Id.*

107. *Id.* at 74.

108. *Id.* at 75.

109. *Id.*

110. *Id.*

111. *Id.* at 78.

Patronage hiring places burdens on free speech and association similar to those imposed by the patronage practices discussed above. A state job is valuable. Like most employment, it provides regular paychecks, health insurance, and other benefits. In addition, there may be openings with the State when business in the private sector is slow. There are also occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards. Thus, denial of a state job is a serious privation.¹¹²

At the same time, unrestricted patronage is not vital to the achievement of effective government staffed by loyal employees who are accountable to the public. This is because a government's interest in securing loyal employees who will implement its policies can be adequately served by: 1) dismissing inefficient low-level employees for cause; and 2) choosing or dismissing policymaking employees according to the limited patronage practices permitted by *Elrod* and *Branti*.¹¹³ Accordingly, Justice Brennan announced that "the rule of *Elrod* and *Branti* extends to promotion, transfer, recall and hiring decisions based on party affiliation and support."¹¹⁴

III. Dissenting Opinions

The ideas expressed in Justice Powell's *Elrod* and *Branti* dissents and Justice Scalia's *Rutan* dissent are worthy of a detailed explanation because they underlie the political science and legal critiques of *Elrod*, *Branti*, and *Rutan* that were alluded to in Section I and will be assessed in Section IV.

Moreover, those ideas could soon be the basis of a Supreme Court decision that reverses one or more of the aforementioned trio. Justices Brennan and Marshall, members of the majority or plurality in all three patronage cases, have retired and have been replaced by Justices Souter and Thomas, respectively, whose views on patronage are unknown. If either Justice Souter or Justice Thomas joins the *Rutan* minority of Chief Justice Rehnquist and Justices Scalia, Kennedy, and O'Connor in a future patronage case, the *Elrod/Branti/Rutan* standard is likely to

112. *Id.* at 77.

113. *Id.* at 74.

114. *Id.* at 79.

fall.

Finally, the ideas of Justices Powell and Scalia are noteworthy because, in this commentator's view, they greatly overstate the nexus between patronage and strong political parties and desirable public administration. The *Elrod/Branti/Rutan* rule is substantially clearer and more sensitive to the importance of political parties in democratic politics than the Powell and Scalia dissents recognize.

In *Elrod*, Justice Powell wrote a vigorous dissent in which he argued that patronage stimulates political activity and strengthens political parties, thereby contributing to the vitality of American democracy by insuring the accountability of governmental institutions.¹¹⁵ Indeed, patronage is essential to encourage citizens to participate in election campaigns for lesser offices that do not attract media attention or widespread public interest.¹¹⁶ Justice Powell wrote that, "[u]nless the candidates for these offices are able to dispense the traditional patronage that has accrued to the offices, they also are unlikely to attract donations of time or money from voluntary groups."¹¹⁷

Justice Powell added that patronage also helps to preserve viable local-level political party organizations that, between elections, perform valuable democratic functions such as registering new voters and facilitating access to officeholders for citizens who otherwise might be denied such access.¹¹⁸ He observed:

It is naive to think that these types of political actives are motivated at these levels by some academic interest in "democracy" or other public service impulse. For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties.¹¹⁹

Powell acknowledged that the intrusion into First Amendment rights affected by patronage is "not insignificant,"¹²⁰ but he admonished that the intrusion must be measured relative to the benefits resulting from patronage and the limited role that

115. *Elrod v. Burns*, 427 U.S. 347, 382 (1976) (Powell, J., dissenting).

116. *Id.* at 384.

117. *Id.*

118. *Id.* at 385.

119. *Id.*

120. *Id.* at 388.

patronage plays in the American public sector.¹²¹ He concluded that the pressure imposed by patronage to abandon one's beliefs and associations in order to obtain government employment is insufficient "to assume impermissible proportions in light of the interests to be served."¹²² Thus, Justice Powell did not reject the use of strict scrutiny in patronage cases, but rather determined that the state's interests in stimulating political participation, strengthening political parties and promoting accountable public administration are sufficiently compelling, and the restrictions imposed on the public employee's freedom of association are sufficiently mild, to enable patronage-based personnel practices to survive such scrutiny.¹²³

Justice Powell also dissented in *Branti*, noting once again that patronage serves the public interest by facilitating the implementation of policies endorsed by the electorate, and that effective policy implementation is just as important to successful governance as is thoughtful, creative policymaking.¹²⁴ He noted that:

[t]he Court's decision today thus limits the ability of the voters of a county to structure their democratic government in the way that they please. Now those voters must elect both the public defender and his assistants if they are to fill governmental positions on a partisan basis. Because voters certainly may elect governmental officials on the basis of party ties, it is difficult to perceive a constitutional reason for prohibiting them from delegating that same authority to legislators and appointed officials.¹²⁵

Justice Powell argued further that the *Branti* Court had announced a vague and overbroad standard for distinguishing patronage-eligible posts from those that are not patronage-eligible.¹²⁶ As a result, courts would not only be forced to review governmental hiring practices that should be left to legislative and executive discretion, but would have to do so absent clear guidelines for resolving individual cases.¹²⁷ He warned that:

121. *Id.*

122. *Id.*

123. *Id.* at 383-85.

124. *Branti v. Finkel*, 445 U.S. 507, 529 (1980) (Powell, J., dissenting).

125. *Id.* at 533-34.

126. *Id.* at 525.

127. *Id.*

elected and appointed officials at all levels who now receive guidance from civil service laws, no longer will know when political affiliation is an appropriate consideration in filling a position. Legislative bodies will not be certain whether they have the final authority to make the delicate line-drawing decisions embodied in the civil service laws. Prudent individuals requested to accept a public appointment must consider whether their predecessors will threaten to oust them through legal action.¹²⁸

In *Rutan*, Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy (in toto) and O'Connor (in part), wrote a dissent that was every bit as critical of the majority's reasoning as Justice Powell's dissents in *Elrod* and *Branti* had been.¹²⁹

Justice Scalia observed that the strict scrutiny standard that the majority had employed concerning patronage practices was inappropriate because "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down."¹³⁰

He also noted that outside the patronage context, the Supreme Court had ruled that a governmental employer may restrict the free expression of its employees if such restrictions are necessary to promote effective government.¹³¹ Scalia pointed out that the Court had upheld provisions of the Hatch Act that prohibited political activities by federal employees.¹³² Specifically,

128. *Id.* at 524.

129. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting).

130. *Id.*

131. *Id.* at 98 (citing *Brown v. Glines*, 444 U.S. 348 (1980)).

132. *Id.* (citing *United Public Workers v. Mitchell*, 330 U.S. 75 (1949) (which the Court reaffirmed in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973))). The Hatch Act refers to two laws, passed in 1939 and 1940, that restrict the political activities of public employees. Hatch Act, 5 U.S.C. §§ 7321-28 (1930) (amended 1974); Hatch Act, 5 U.S.C. §§ 1501-08 (1940) (amended 1974); see *Bauers v. Cornett*, 865 F.2d 1517, 1520 (8th Cir. 1989). One part covers federal employees. 5 U.S.C. §§ 7321-28 (1939). The second part applies to employees of state and local agencies that receive federal funds. 5 U.S.C. §§ 1501-08 (1940).

In 1974, the Federal Election Campaign Act "amended the Federal Hatch Act as it applied to state and local employees by removing the prohibition against taking an active part in political management or campaigns, but left intact the prohibition against being a candidate for elective office in a partisan election." *Bauers*, 865 F.2d at 1523 (discussing Federal Election Campaign Act, Pub. L. No. 93-443 (codified as amended at 5 U.S.C. § 1502 (1974))). As a result of the 1974 change, "only three federal restrictions remain

Justice Scalia explained that:

we have held that government employment decisions taken on the basis of an employee's speech do not "abridg[e] the freedom of speech," U.S. Const., Amdt. 1, merely because they fail the narrow-tailoring and compelling-interest tests applicable to direct regulation of speech. We have not subjected such decisions to strict scrutiny, but have accorded "a wide degree of deference to the employer's judgment" that an employee's speech will interfere with close working relationships.¹³³

The Scalia dissent concluded that the Court ought to accord similar deference to the governmental employer when the employer can demonstrate a logical nexus between patronage and effective public administration.¹³⁴ Justice Scalia wrote that "[s]ince the government may dismiss an employee for political speech 'reasonably deemed by Congress to interfere with the efficiency of the public service,' it follows *a fortiori* that the government may dismiss an employee for political *affiliation* if 'reasonably necessary to promote effective government.'"¹³⁵

Thus, the Court, in Scalia's view, ought to abandon strict scrutiny in patronage cases and instead adhere to a balancing standard that endeavors to determine whether the advantages that accrue to government, as a result of the patronage practice at issue, can reasonably be deemed to outweigh the restrictions upon belief and association imposed by that practice.¹³⁶ The Court also ought to recognize, according to Justice Scalia, that

in effect for State and local government employees whose positions are funded in whole or in part by federal funds." Id. First, those "employees cannot use their official authority or influence [to] interfer[e] with or affect[] the results of an election or nomination for office." Id. at 1523-24. Second, they cannot "directly or indirectly coerce contributions from subordinates in support of a political party or candidate." Id. at 1524. Third, they cannot be "candidates for public elected office in a partisan election." Id.

Federal employees, however, "still must refrain from active political management" and "active participation" in partisan campaigns, although they are permitted to participate in nonpartisan campaigns and in campaigns concerning constitutional amendments, referenda and municipal ordinances. *Id.* at 1523 (discussing 5 U.S.C. §§ 7324, 7326 (1940)).

133. *Rutan*, 497 U.S. at 99-100 (Scalia, J., dissenting) (citing *Eight v. At*, 461 U.S. 138 (1983)).

134. *Id.* at 100-02.

135. *Id.* at 100 (quoting *United Public Workers v. Mitchell*, 330 U.S. 75, 101 (1949); *Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980)).

136. *Id.* at 102.

"[i]t is self-evident that eliminating patronage will significantly undermine party discipline; and that as party discipline wanes, so will the strength of the two-party system."¹³⁷

Thus, on the one hand, Justice Scalia echoed Justice Powell's observation in *Branti* that the results of the Court's strict scrutiny analyses in patronage cases were judicial interference in a policy question appropriately decided by elected officials and an unclear line of demarcation between permissible and impermissible patronage that neither judges, nor lawyers, nor public administrators could comprehend.¹³⁸ Justice Scalia added that the line chosen by the *Elrod* and *Branti* Courts was not necessarily the wrong one, but rather that there was no readily identifiable line between permissible and impermissible patronage that can be determined by judges and applied nationally.¹³⁹ On the other hand, Justice Scalia, unlike Justice Powell, rejected strict scrutiny in patronage cases in favor of a balancing test that would enable a public employer to dismiss an employee on the basis of the latter's political affiliation if the employer could show that such a dismissal was reasonably necessary to promote effective government.¹⁴⁰

The Scalia "reasonable necessity" standard is considerably more generous to employers than the Powell "compelling interest" standard because it will undoubtedly be substantially easier for a public employer to demonstrate that patronage-based personnel practices are reasonably necessary to insure effective government than to demonstrate that such practices are the least restrictive means available of limiting employees' First Amendment rights in furtherance of a compelling state interest. The Scalia standard also appears more likely to become the governing standard in future patronage cases because it commands four votes in *Rutan*;¹⁴¹ hence, it needs only one additional vote to become the basis for a majority opinion that abandons the much maligned *Elrod/Branti/Rutan* standard.

137. *Id.* at 106.

138. *Id.* at 111.

139. *Id.*

140. *Id.* at 97.

141. See *supra* text accompanying note 129.

IV. Political Science and Legal Critiques of the Patronage Decisions

As noted in Section I, political scientists have been critical of the Supreme Court's patronage decisions for being overly zealous in protecting First Amendment rights of public employees, and inattentive to the important relationships that exist between patronage and strong political parties, and between strong political parties and the preservation of a democratic political system.¹⁴²

The criticism that political scientists have most often leveled at the patronage decisions, especially *Elrod* and *Branti*, is that they assign too low a priority to the organizational interests of political parties¹⁴³ and too high a priority to the voting rights of individual citizens.¹⁴⁴ This is because the individual rights emphasis results in a judicial image of political parties as quasi-public organizations and as "ideologically heterogeneous, ephemeral coalition[s]."¹⁴⁵

In the view of these critics the Court erred in equating arguably unfair practices, such as patronage dismissals, to violation of First Amendment rights.¹⁴⁶ One political scientist writes that "[t]o call these actions unconstitutional simply because they seem unfair is to evidence considerable naiveté about the realities of a healthy political democracy."¹⁴⁷ This commentator also argues that the Court erred in *Elrod* and *Branti* when it equated the patronage dismissals of a deputy sheriff and an assistant public defender to the firings of teachers who had expressed dissident political opinions with which their superiors disagreed.¹⁴⁸ He observes that to draw such a parallel is to ignore the fact that patronage advances democratic politics; "unlike the firing of teachers with dissident views," he maintains, "patronage does not threaten the existence of an open

142. See *supra* note 35.

143. See *supra* note 35.

144. Dodson, *supra* note 35, at 52-53.

145. *Id.*

146. See *supra* note 35.

147. John Moeller, *The Supreme Court's Quest for Fair Politics*, 1 CONST. COMMENTARY 203, 216 (1984).

148. *Id.* at 216.

society.”¹⁴⁹

This political party-based criticism of the patronage decisions is reflected in Justice Powell's *Elrod* and *Branti* dissents and in Justice Scalia's *Rutan* dissent.¹⁵⁰ In *Elrod*, Justice Powell wrote that “[t]he pressure to abandon one's beliefs and associations [that patronage engenders is not insignificant, but it does not] . . . assume impermissible proportions in light of the interests to be served.”¹⁵¹ In *Branti*, he added that patronage “serves the public interest by facilitating the implementation of policies endorsed by the electorate.”¹⁵² In *Rutan*, Justice Scalia wrote that the majority's holding, stating that the coercive features of patronage outweigh its benefits,¹⁵³ “reflects a naive vision of politics and [exhibits] an inadequate appreciation of the systemic effects of patronage in promoting political stability and facilitating the social and political integration of previously powerless groups.”¹⁵⁴ It thus appears that if a majority of the Court adopts the Scalia view in a future patronage case, thereby rejecting the *Elrod/Branti/Rutan* rule, there will be considerable support for the change among political scientists who believe that the Court failed to give political parties their due in *Elrod*, *Branti* and *Rutan*.

Political scientists who are scholars of public administration might also support the change. One such scholar has criticized the *Elrod* and *Branti* decisions because of the majority's or plurality's failure in each case to consider social science evidence indicating that employees who are committed to the goals of the organization for which they work are more productive than employees who lack such a commitment.¹⁵⁵ Patronage employees, according to this analysis, are likely to be highly productive because of their ideological commitment to the goals of the government office for which they work.¹⁵⁶ Moreover, patronage systems

149. *Id.* at 216-17.

150. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 103 (1990) (Scalia, J., dissenting); *Branti v. Finkel*, 445 U.S. 507, 529 (1980) (Powell, J., dissenting); *Elrod v. Burns*, 427 U.S. 347, 388 (1976) (Powell, J., dissenting).

151. *Elrod*, 427 U.S. at 388 (Powell, J., dissenting).

152. *Branti*, 445 U.S. at 529 (Powell, J., dissenting).

153. *Rutan*, 497 U.S. at 103 (Scalia, J., dissenting).

154. *Id.* at 103-04.

155. Meier, *supra* note 35, at 561.

156. *Id.*

serve the larger goals of a democratic society because, by linking job security to the electoral fortunes of a political party, they stimulate bureaucrats to respond to public demands, thereby rendering the public administration more accountable to the citizenry than it would need to be in the absence of patronage.¹⁵⁷

Like the party-based critique of the patronage decisions, this public administration-centered critique also winds its way through the Powell dissent in *Branti* and the Scalia dissent in *Rutan*.¹⁵⁸ Justice Powell's argument in *Branti*, that patronage facilitates the implementation of policies endorsed by the electorate,¹⁵⁹ and Justice Scalia's contention in *Rutan*, that public employers, not judges, are best positioned to determine whether an employee's partisan affiliation will interfere with close working relationships or otherwise prevent effective public administration,¹⁶⁰ are closely akin to the arguments cited above.

One law review commentary, published shortly after the *Elrod* decision, echoes the political scientist's view that the Supreme Court regards individuals as more important than political parties to the democratic political process.¹⁶¹ The author argues that in *Elrod*, the Court, in effect, created a hierarchy of First Amendment rights, wherein the parties' freedom of association is ranked lower than the individual's freedoms of belief and expression.¹⁶² According to this hierarchy, "if partisan activity abridges the individual's freedom to believe and affiliate as he chooses, it must yield since it is a right derived from and subsidiary to the very freedom it threatens."¹⁶³ No doubt, there would be support for abandonment of the *Elrod/Branti/Rutan* standard among some legal scholars, as well as some political scientists.

Other law review commentaries, though, are critical of the High Court's patronage decisions, primarily because they view

157. *Id.*

158. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 104 (1990) (Scalia, J., dissenting); *Branti v. Finkel*, 445 U.S. 507, 529 (1980) (Powell, J., dissenting).

159. *Branti*, 445 U.S. at 529 (Powell, J., dissenting).

160. *Rutan*, 497 U.S. at 104 (Scalia, J., dissenting).

161. Bill Steffes, Note, *Elrod v. Burns: Constitutional Job Security for Public Employees?*, 37 LA. L. REV. 990, 990-99 (1977).

162. *Id.* at 997-98.

163. *Id.*

the standards announced therein for determining which positions should be subject to patronage-based personnel decisions and which should not, to be vague, confusing and, therefore, of little utility to lower courts and to public employers.¹⁶⁴ Not surprisingly, these commentaries endeavor to fashion clearer and more workable standards for implementing the principles announced in *Elrod*, *Branti*, and *Rutan*.¹⁶⁵ This commentary will join that endeavor in the following section.

V. The Implications of *Elrod*, *Branti* and *Rutan*

A. Political Science Arguments

As indicated in section IV, political scientists have criticized the Supreme Court's decisions in *Elrod* and *Branti* as having favored public employees' freedoms of belief and affiliation, to the detriment of equally important values such as strong political parties and accountable public administration.¹⁶⁶ These critiques are effectively summarized by one commentary that concludes that *Elrod* and *Branti* reflect naiveté about electoral politics, distrust of political parties, a misguided anti-establishment feeling, and considerable confusion about the needs as well as the value of political parties.¹⁶⁷

Such critiques are overstated, if not clearly erroneous, for several reasons. First, *Elrod*, *Branti* and now *Rutan* limit, but by no means eliminate, patronage.¹⁶⁸ Moreover, they limit patronage in a way that not only does not harm political parties, but may, in fact, assist parties.¹⁶⁹ That is, the aforementioned decisions permit patronage hiring and firing for those positions whose occupants make the very policy choices that derive from party-based ideological agendas.¹⁷⁰ For example, Justice Stevens recognized in *Branti* that patronage is inappropriate to the positions of elected judge or state university football coach because

164. See *supra* note 37.

165. See *supra* note 37.

166. See *supra* note 35.

167. McCleskey, *supra* note 35, at 367.

168. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990); *Branti v. Finkel*, 445 U.S. 507, 518-19 (1980); *Elrod v. Burns*, 427 U.S. 347, 367-68 (1976).

169. See *supra* note 168.

170. See *supra* note 168.

the occupants of those posts are not charged with a duty to formulate a public policy agenda that has been broadly endorsed by the electorate.¹⁷¹ However, he also recognized that patronage is appropriate to posts like a governor's speechwriter or legislative liaison because the occupants of such posts are responsible for devising and implementing an ideologically-based policy program.¹⁷²

Furthermore, *Elrod*, *Branti*, and *Rutan* only prohibit personnel decisions concerning public employees that are based solely upon partisan considerations.¹⁷³ When a public employee is dismissed on the basis of mixed motivations, the *Elrod/Branti/Rutan* standard is replaced by one that requires the plaintiff to demonstrate that protected First Amendment activity was involved and that that activity was a substantial or motivating factor in the dismissal.¹⁷⁴ The employer must then demonstrate that it would have dismissed the employee even in the absence of the protected activity.¹⁷⁵

Contrary to Justice Scalia's opinion in *Rutan*, the mere fact that the Court employs a different standard in pure patronage cases than it uses in mixed motive cases is not a reason to question the wisdom of the *Elrod/Branti/Rutan* standard. The different standards are entirely appropriate because they apply to rather different situations. For instance, when a public employee is dismissed solely because of political affiliation, protected First Amendment freedoms of belief and association are implicated and should be vindicated absent a showing that a compelling state interest justifies the intrusion. On the other hand, when a public employee is dismissed on the basis of mixed motivations, including, perhaps, partisan hostility, it becomes necessary to determine whether partisanship triggered the dismissal or whether the employee would have been dismissed for cause in the event of shared partisanship. This determination is absolutely essential to a conclusion as to whether the dismissal was permissible or impermissible.

171. *Branti*, 445 U.S. at 518.

172. *Id.*

173. *Rutan*, 497 U.S. at 64; *Branti*, 445 U.S. at 520; *Elrod*, 427 U.S. at 349.

174. See *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-85 (1977).

175. *Id.* at 287.

Second, *Elrod*, *Branti* and *Rutan* correctly perceive that although politics and administration are closely linked, they are not identical.¹⁷⁶ One political scientist's study of the federal government context is instructive in this regard.¹⁷⁷ Although *Elrod*, *Branti* and *Rutan* address state public administration, one would be hard pressed to demonstrate that the generic distinctions between politics and administration that this commentator identifies do not also apply in the state context.¹⁷⁸ He observes that:

differences of background and style distinguish bureaucrats and politicians, each set of officials making different contributions to the formulation of public policy. Appointees' political skills are needed to identify goals and to mobilize support for them. The strength of civil servants on the other hand, lies in designing programs to implement those goals.¹⁷⁹

The same commentator also describes the elements of a bureaucratic disposition as gradualism, indirection, political caution and a concern for maintaining relationships.¹⁸⁰ He notes that bureaucrats are concerned about the institutions they manage as well as the current policies of those institutions, while political appointees tend to view public agencies primarily as convenient tools with which to achieve their policy objectives.¹⁸¹ He concludes that "the different strengths of political appointees and career bureaucrats must thus be merged in an appropriate balance if government is to be both responsive and effective."¹⁸²

Former political appointees of both Democratic and Republican presidents support this view.¹⁸³ John Gardner, Secretary of Health, Education and Welfare (HEW) in the Johnson Administration observed, regarding career civil servants, that,

[t]here are a lot of potential teammates out there, and you have

176. *Rutan*, 497 U.S. at 71-76; *Branti*, 445 U.S. at 518; *Elrod*, 427 U.S. at 364-65.

177. James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57, 57-65 (1987).

178. *Id.*

179. *Id.* at 60.

180. *Id.* (citing HUGH HECLLO, A GOVERNMENT OF STRANGERS (1977)).

181. *Id.* (citing HUGH HECLLO, *Executive Budget Making*, in FEDERAL BUDGET POLICY IN THE 1980's (Gregory Mills and John Palmer eds., 1984)).

182. *Id.*

183. *Id.*

to find them. And the faster you do the better. . . . I fairly soon found the people who could keep me out of the bear traps and could advise me I found that immensely helpful, and I think any newcomer will.¹⁸⁴

Elliot Richardson, who in the course of the Nixon Administration served alternately as Secretary of Commerce, Defense, Health, Education & Welfare, and Attorney General, said of civil servants: "[p]eople who had devoted a lifetime or significant part of it to expertise in their field are entitled to be listened to with respect. . . . [M]any presidential appointees make the gross mistake of not sufficiently respecting the people they are dealing with . . . and get themselves into trouble as a result."¹⁸⁵ Similarly, Walter McDonald, Assistant Secretary of the Treasury in the Carter Administration, observed:

I think politicals learn after they're burned a few times that careerists are really there to serve them. They're not wedded to any party. And it's very hard for the politicals to understand that . . . and it takes four years to convince them of this. How you do this, [G]od, I don't know.¹⁸⁶

Perhaps the clearest testimony of the value of civil servants comes from Richard Lyng, Secretary of Agriculture in the Reagan Administration, who stated flatly that, "[a] presidential appointee who doesn't work with the career people will not make it."¹⁸⁷ It would appear then that *Elrod*, *Branti* and *Rutan*, by restricting patronage to positions whose occupants formulate policy, foster the merger between pragmatic and programmatic orientations that both scholars and practitioners of public administration support.

Third, the Court in *Elrod*, *Branti* and *Rutan* must have realized that the American public is no longer as attached to political parties as it once was, and that in the current anti-party atmosphere, political patronage, in the words of former Pennsylvania Governor William Scranton, "isn't the great blessing of political power that some people think it is!"¹⁸⁸ Indeed, in the

184. *Id.* at 61.

185. *Id.*

186. *Id.*

187. *Id.*

188. LARRY SABATO, GOODBYE TO GOOD-TIME CHARLIE: THE AMERICAN GOVERNORSHIP

current atmosphere, political patronage may well destroy more public support for political party organizations than it builds.¹⁸⁹

The many manifestations of the aforementioned anti-party ethos are well-known. Nominations for state and local offices are decided by direct primaries open to nearly all voters, regardless of their party loyalty, instead of by party activists in caucuses and conventions.¹⁹⁰ Even attempts by party leaders to endorse candidates in primaries are now limited.¹⁹¹ Where attempted, such efforts are often self-defeating because they subject the endorsed candidate to charges that the candidate is the choice of the "bosses."¹⁹² Presidential nominations are decided in state primaries that are heavily influenced by national media coverage, and national party nominating conventions merely ratify the verdicts of the primaries.¹⁹³

In the presidential contest, the federal treasury, and in congressional and statewide races, private interest groups furnish campaign funds directly to candidates, while financial support from parties is minimal.¹⁹⁴ Split-ticket voting abounds and elections are staggered so as to reduce the likelihood of party-based voting trends across national, state and local levels.¹⁹⁵ Many municipal officials are elected in nonpartisan contests which prohibit parties from using such posts as vehicles for recruiting local officials for higher office.¹⁹⁶

Not surprisingly, in this environment, government workers are increasingly selected on the basis of civil service examinations, and even high level administrators are recruited from within the bureaucracy or professional associations, rather than on the basis of loyal service to a political party.¹⁹⁷ Therefore, if

TRANSFORMED 68 (2d ed. 1983) (quoting Governor William Scranton).

189. *Id.* at 69; see also GERALD N. POMPER, *VOTERS, ELECTIONS AND PARTIES* 255-56 (1988) [hereinafter POMPER] (examining the decline in public support for political patronage in recent times).

190. POMPER, *supra* note 189, at 255.

191. Gerald M. Pomper, *The Decline of the Party in American Elections*, 92 *POL. SCIENCE Q.* 21, 35 (1977) [hereinafter Pomper II].

192. *Id.*

193. POMPER, *supra* note 189, at 255.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

the parties' ability to use patronage as a tool of personnel management were enhanced, it is likely that many voters would give the parties less rather than more support.

Data support this contention.¹⁹⁸ Between 1958 and 1980, the percentage of full-time state government employees whose positions were filled by a merit-based hiring system rose from 50.7 percent to 75 percent.¹⁹⁹ Moreover, during the 1970s and early 1980s, Iowa Governor Robert Ray spearheaded civil service reform in his state, Washington Governor Daniel Evans abolished a category of patronage appointments (appraisers) to fulfill a campaign pledge, and Utah Governor Calvin Rampton requested and guided to enactment his state's first merit system.²⁰⁰ Governor Rampton noted that:

I've asked for the bills. I don't regard it as a weakening of the governor. Running government, in many respects, is running a business. And nobody would be naive enough to say that the skills of running a business or a department of government are always going to coincide with the person who happens to be active in a political campaign.²⁰¹

Governor Rampton added, in response to the suggestion that patronage promotes loyalty and effectiveness in the state bureaucracy, that, on balance, the civil service is a benefit to a governor, while patronage is a burden.²⁰² He observed that, "I think it's much better to have the employee morale that comes from tenure than to be able to put your own people in."²⁰³

Former Florida Governor Reuben Askew observed that appointments to library, drainage and mosquito control districts absorb a governor's time far in excess of their worth and that the only appointments that actually assist a governor are those made at the top levels of executive departments.²⁰⁴ Former Ohio Governor John Gilligan summed up such sentiments in stating that he would happily have given away a good deal of his pa-

198. SABATO, *supra* note 188, at 67.

199. *Id.*

200. *Id.* at 68.

201. *Id.*

202. *Id.* at 69.

203. *Id.*

204. *Id.*

tronage power.²⁰⁵

The above statements reflect an understanding of the current American political reality that "[m]ost voters not only have considerably loosened their party ties, but have come to resent the blatant partisanship that naturally characterizes patronage."²⁰⁶ Part of that reality is that, contrary to the assumptions of Justices Powell and Scalia, individuals continue to participate actively in party politics despite the absence of patronage.²⁰⁷

A study of local party activists in Detroit is illustrative.²⁰⁸ Conducted in 1980, the study revealed that factors other than patronage account for the survival of local political party organizations.²⁰⁹ The most significant factors are: 1) the extent to which activists feel they have "adequate input into the party's decision-making process at the local level;"²¹⁰ 2) the extent to which the local activists are able to interact with party leaders who occupy higher level posts, thereby acquiring a greater loyalty to the party; and 3) the extent to which the activists possess political aspirations, which are defined as an interest "in continuing in party work and taking on a more responsible position."²¹¹

The last factor is the most powerful of the three in accounting for variations in the efficiency levels of local party activists.²¹² Based upon these results, the author concluded that "clearly the development of organizational conditions which make the activist feel involved are critical for improving the efficiency level of the parties."²¹³ Where such conditions exist, local political party organizations can be vibrant and effective even where patronage is no longer prominent and the party organizations are "volunteer structures."²¹⁴

Moreover, there is evidence to indicate that jobs are an inef-

205. *Id.*

206. *Id.*

207. *Id.*

208. SAMUEL J. ELDERSVELD, *POLITICAL PARTIES IN AMERICAN SOCIETY* 147 (1982).

209. *Id.* at 188.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 187.

factive means of building a political party organization because, even assuming that the patron can motivate the recipients by dispensing jobs, once the job is awarded, the patron's options for adjusting the reward are limited.²¹⁵ The patron can reward a productive jobholder by means of a salary increase or a more prestigious job, but the size of the public budget or the finite nature of the services to be delivered may well restrict the patron's ability to make such adjustments on a significant scale.²¹⁶ The patron's options for punishing an unproductive jobholder are even fewer because those options often consist of the relatively extreme step of taking away a job or tolerating a sub-par performance.²¹⁷

The results of a study of the post-employment political behavior of 675 recipients of Comprehensive Employment and Training Act (CETA) jobs dispensed by the New Haven (Connecticut) Democratic political machine in 1974 are, therefore, not surprising. The study found that the recipients, who previously had been hard-core unemployed "did not become an army of willing political workers."²¹⁸ Although their political participation increased post-employment, seventy-one percent of that increase took the form of more frequent voting; "[o]nly a small increase was reported in canvassing and poll-watching, the mainstays of machine campaigning."²¹⁹ Thus, one commentator concluded that, "while a few individuals may have increased their political activity after hiring, as a group the respondents do not conform to the traditional image of patronage recipients."²²⁰ Indeed, much of the increase in political activity that did occur may well be explained by maturation, rather than patronage, for the job recipients in this study were all young people and "[w]e would expect *some* increase in participation, over time, in *any* sample of this age group."²²¹

Under the circumstances discussed above, the Supreme

215. See Michael Johnston, *Patrons and Clients, Jobs and Machines: A Case Study in the Uses of Patronage*, 73 AM. POL. SCI. R. 385 (1979).

216. *Id.* at 395.

217. *Id.*

218. *Id.* at 391.

219. *Id.*

220. *Id.*

221. *Id.*

Court's decisions in *Elrod*, *Branti* and *Rutan* cannot properly or fairly be criticized as politically naive or as insensitive to the organizational needs of political parties. This conclusion is reinforced when those decisions are assessed, as they will be in the following subsection, in conjunction with the Court's decisions concerning state efforts to regulate nomination procedures and party self-governance. When the two sets of cases are examined together, they reveal a fourth reason why the aforementioned political science critiques of the patronage cases are flawed: the Court's demonstrated support for the rights of political parties.²²²

B. *Legal Arguments*

1. *Overview*

Law review commentaries have criticized the Supreme Court's decisions in *Elrod*, *Branti* and, to a lesser extent, *Rutan*, for announcing a rule that makes it virtually impossible for public employers and employees to determine whether political party affiliation is a permissible prerequisite for a particular position until a lower federal court has rendered a decision concerning that position or one that is similar.²²³ One commentator has observed that "[t]he number of cases brought and won by former public employees charging that their First and Fourteenth Amendment rights of association were violated when they were fired because of their political affiliation confirms that government employers do not understand their responsibilities under *Elrod* and *Branti*."²²⁴

Another commentator has suggested that the reason why public employers do not understand their responsibilities under the Court's patronage decisions is that the standard articulated therein is impossible to apply in a consistent and logical manner.²²⁵ This is because the determination of whether a particular position should be subject to patronage-based employment decisions is an inherently political question that is poorly suited to

222. See *infra* parts V.B.1.-V.B.4.

223. See *supra* note 37.

224. Martin, *supra* note 1, at 22-23.

225. Heinen, *supra* note 37, at 303.

judicial resolution.²²⁶ According to this view, the First Amendment rights of public employees would be more effectively protected by permitting state legislatures to decide which positions will be patronage-eligible, subject to a judicial review that will determine whether the legislative decision is rationally related to a legitimate state interest.²²⁷

The aforementioned comments thus echo the view expressed by Justice Scalia in his *Rutan* dissent that judicial attempts to decide which jobs should be patronage-eligible, and which jobs should not, are futile because, "there is no bright line [that separates the two categories of jobs] - or at least no bright line that can be nationally applied and that is known by judges."²²⁸

On the contrary, the *Elrod/Branti/Rutan* standard, as the following discussion will demonstrate, offers a workable set of guidelines for determining which public positions are properly staffed by political appointees and which ones are properly staffed by permanent employees.²²⁹ The standard also recognizes that patronage-based personnel practices require public employees to surrender fundamental First Amendment rights in favor of a practice that is neither necessary nor even very helpful to the building of democratic institutions. For this reason, the *Elrod/Branti/Rutan* standard is certainly preferable to those offered by Justices Powell and Scalia in their dissents.

2. *The Powell and Scalia Dissents*

As noted earlier, Justice Powell would retain strict scrutiny in patronage cases, but the result of that scrutiny would typically be preservation of patronage practices on the ground that they serve the compelling interest of governmental accountability at the cost of a minimal intrusion upon First Amendment values.²³⁰ This standard is misguided because it underestimates the heavy price the employee must pay for a particular political

226. *Id.*

227. *Id.*

228. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 113 (1990) (Scalia, J., dissenting).

229. Those guidelines form the basis for the standard presented in Section IV, *supra* notes 142-65 and accompanying text.

230. *See supra* notes 115-28 and accompanying text.

affiliation. As Justice Brennan observed in *Rutan*, a public sector position is valuable, not only because it provides the security of regular paychecks, health insurance and associated benefits, but also because public employment may be the only employment available to some workers because of an economic downturn or because there is no private sector equivalent to their particular positions.²³¹ When public employment is the only employment available, a patronage dismissal may cause a lengthy bout of joblessness and its attendant privations, merely because of one's political affiliation.

The Powell strict scrutiny standard also greatly exaggerates the beneficial effects of patronage upon democratic institutions. As indicated in Section IV, both scholars and practitioners of politics have discovered that, in today's anti-party atmosphere, patronage is more likely to weaken political parties than strengthen them because voters have come to resent the tendency of that practice to subordinate competence to partisan advantage.²³² Even in a pro-party atmosphere, patronage is not necessarily an effective party-building device because the rewards and punishments available to the patron are often few, and the receipt of a patronage job does not inevitably spur the recipient to active political participation.²³³

Finally, the Powell standard ignores the fact that a challenged practice can only survive strict scrutiny if the means it uses to limit constitutional rights are the least restrictive means that are available to the actor seeking to implement it.²³⁴ Even if patronage arguably strengthens political parties, participation and, in turn, governmental accountability, it still fails to survive strict scrutiny because partisan dismissal is hardly the least constitutionally restrictive means of achieving those ends. As Justice Brennan noted in *Elrod*, merit-based hiring and terminations for cause are perfectly adequate to insure efficient and responsive government.²³⁵

231. *Rutan*, 497 U.S. at 62.

232. See Pfiffner, *supra* note 177, at 61; SABATO, *supra* note 188, at 67-69; Pomper II, *supra* note 191, at 35.

233. See Johnston, *supra* note 215, at 390-95.

234. See, e.g., *Rutan*, 497 U.S. at 68-71 (Scalia, J., dissenting); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976) (Powell, J., dissenting).

235. *Elrod*, 427 U.S. at 366.

Justice Scalia would replace the strict scrutiny standard in patronage cases, although he admits that "the precise test that replaces it is not so clear."²³⁶ He offers two alternatives, the first of which is "whether the practice could be 'reasonably deemed' by the enacting legislature to further a legitimate goal."²³⁷ The second, which he applies in order to critique the majority opinion in *Rutan*, is whether the advantages that accrue to government as a result of patronage practices are outweighed by the coercive effects of those practices.²³⁸ Even the latter standard, which Justice Scalia identifies as the "less permissive"²³⁹ of the two in allowing patronage-based hiring and firing, is misguided because it is predicated upon flawed assumptions.

One such assumption is that patronage has enjoyed "a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic."²⁴⁰ Patronage practices may well be traditional and open in American politics, but they have hardly been "unchallenged." As noted earlier, between 1958 and 1980, the percentage of full-time state government employees whose positions were filled by a merit-based hiring system increased from 50.7 percent to 75 percent.²⁴¹ This is powerful evidence that even in state government, patronage has not only been challenged, but supplanted, as a means of filling vacancies. The same is true of the federal government. Late in the nineteenth century and early in the twentieth, the civil service reform movement removed most federal government jobs from the spoils system by expanding appointment by merit, although it left the top tier of positions to presidential discretion.²⁴² Under these circumstances, it is clearly erroneous to characterize patronage as an "unchallenged" or even as a "widespread" practice. It is, arguably, misleading.

Another flawed assumption underlying the Scalia standard is that because government may dismiss an employee for political speech "reasonably deemed by Congress to interfere with the

236. *Rutan*, 497 U.S. at 100-01 (Scalia, J., dissenting).

237. *Id.* at 101-02. See *Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947).

238. *Rutan*, 497 U.S. at 102 (Scalia, J., dissenting).

239. *Id.*

240. *Id.* at 95.

241. See SABATO, *supra* note 188, at 67.

242. See LEVINE, *supra* note 2, at 218-21; Denhardt, *supra* note 25, at 193-97.

efficiency of the public service,"²⁴³ it may also dismiss an employee for political affiliation if such a dismissal is "reasonably necessary to promote effective government."²⁴⁴ Justice Scalia is in error because an employee who is dismissed for political speech that interferes with efficient public administration is dismissed not on the basis of beliefs alone, but rather because those beliefs may have adversely affected the employee's job performance in some way. In such circumstances, beliefs and job performance intersect, and the adverse effect of the former upon the latter may well justify the "deference to the employer's judgment" that Justice Scalia cites approvingly.²⁴⁵

However, Justice Scalia is wrong to apply the same standard when government dismisses an employee not because of a subpar job performance perhaps influenced by partisanship, but because of the employee's partisan affiliation alone.²⁴⁶ In the latter instance, because of the gravity of the loss to the employee and the dubious value of the practice causing that loss, the public employer should be required to demonstrate more than just a "rational relationship" between patronage and effective government.²⁴⁷ The mistake then, in leaving the patronage question entirely in the hands of legislators, as Justice Scalia suggests, is severely undervaluing the First Amendment freedoms sacrificed by the employee and grossly overestimating the benefits to government as a result of patronage-based personnel practices. These circumstances militate in favor of, not against, active judicial involvement.

A third Scalia assumption, that "eliminating patronage will significantly undermine party discipline,"²⁴⁸ is also flawed. The earlier discussion of Justice Powell's two patronage dissents demonstrates that there is a considerable body of evidence, furnished by scholars and practitioners of American politics, indi-

243. *Rutan*, 497 U.S. at 98 (Scalia, J., dissenting) (quoting *United Public Workers of America v. Mitchell*, 330 U.S. 75, 101 (1947)).

244. *Id.* at 100 (quoting *Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980)).

245. *Id.* at 100 (quoting *Connick v. Myers*, 461 U.S. 138, 152 (1983)).

246. *Id.* at 102.

247. *Id.* at 78 ("[u]nder sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so.").

248. *Id.* at 106 (Scalia, J., dissenting).

cating that the nexus between patronage and strong political parties,²⁴⁹ which Justice Scalia assumes to exist,²⁵⁰ does not in fact exist. Furthermore, even if that nexus existed, it would still not justify replacing the *Elrod/Branti/Rutan* standard with the Scalia standard because the former does not eliminate patronage, but merely limits it to positions for which it is most appropriate.

Moreover, to suggest, as both Justice Powell and Justice Scalia do in their respective dissents, that the Court is insensitive to the value of strong political parties in a democratic society,²⁵¹ is to ignore the Court's two recent decisions concerning state regulation of political party nomination and internal governance procedures.²⁵² These two decisions are examined below.

3. *The Tashjian and Eu Decisions*

In *Tashjian v. Republican Party of Connecticut*²⁵³ and *Eu v. San Francisco County Democratic Central Committee*,²⁵⁴ the Court examined state regulation of political parties' nomination and internal governance procedures. The Court held that freedom of association entitles the parties to determine these procedures free from state regulation.²⁵⁵

Tashjian arose out of a conflict between a rule adopted by the Connecticut Republican Party that permitted independent voters to vote in Republican primaries for federal and statewide offices, and a State statute that required voters in a primary to be registered members of the party in whose primary they participated.²⁵⁶ The Republican Party of Connecticut, its federal of-

249. See *supra* notes 115-28 and accompanying text.

250. See *supra* notes 130-40 and accompanying text.

251. *Rutan*, 497 U.S. at 104 (Scalia, J., dissenting); *Branti v. Finkel*, 445 U.S. 507, 528-29 (1980) (Powell, J., dissenting); *Elrod v. Burns*, 427 U.S. 347, 383 (1976) (Powell, J., dissenting).

252. See *infra* notes 253-79 and accompanying text.

253. 479 U.S. 208 (1986).

254. 489 U.S. 214 (1989).

255. *Eu*, 489 U.S. at 216; *Tashjian*, 479 U.S. at 211; see Brian L. Porto, *The Constitution and Political Parties: Supreme Court Jurisprudence and its Implications for Partybuilding*, 8 CONST. COMMENTARY 433, 440 (1991).

256. *Tashjian*, 479 U.S. at 212. Connecticut statutory law provided in pertinent part: "No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district." CONN.

fice holders and State Chair challenged the primary eligibility law, arguing that it deprived the Party of its First Amendment right to enter into political association with individuals of its own choosing.²⁵⁷ More precisely, the Party contended that opening its primary to independent voters represented an attempt to broaden its base of support in the electorate, which was essential to its exercise of the freedom of association.²⁵⁸

Agreeing with the petitioners, the Supreme Court rejected each of the arguments presented by Tashjian, Connecticut's Secretary of State.²⁵⁹ The most notable of Tashjian's arguments was that the challenged statute furthered Connecticut's compelling interest in protecting the government because closed primaries promote responsiveness by elected officials and strengthen political parties.²⁶⁰ The majority noted that even if Tashjian were correct in her assertion, "a State, or a court, may not constitutionally substitute its own judgment for that of the Party."²⁶¹ The Court went on to elaborate on its reasoning: "[T]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution."²⁶² It further added that, "as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational."²⁶³

GEN. STAT. § 9-431 (1985). The Connecticut Republican party's rule stated:

"Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer."

Tashjian, 479 U.S. at 212 (citations omitted).

257. *Tashjian*, 479 U.S. at 211.

258. *Id.* at 214.

259. *Id.* at 222-24.

260. *Id.* at 222.

261. *Id.* at 224 (quoting *Democratic Party of United States v. Wis. ex rel. La Follette*, 450 U.S. 107, 123-24 (1981)). The *Tashjian* majority consisted of Justices Marshall, Brennan, Powell, White and Blackmun. *Id.* at 209. The dissenters included Chief Justice Rehnquist and Justices Stevens, Scalia, and O'Connor. *Id.* at 230, 234. This indicates that the rule announced in *Tashjian*, like the *Elrod/Branti/Rutan* standard, may be modified or reversed in a future case as a result of the replacement of Justices Brennan and Marshall by Justices Souter and Thomas, respectively.

262. *Id.* at 224.

263. *Id.* (quoting *La Follette*, 450 U.S. at 124).

At issue in *Eu* were several sections of the California Elections Code, one of which forbade official governing bodies of political parties from endorsing candidates in primaries, and others which: 1) dictated the necessary organization and composition of the State Central Committee; 2) fixed the maximum terms of office for the Chair of that Committee; 3) required that that post be held, alternately, by residents of northern and southern California; 4) specified the time and place of Central Committee meetings; and 5) limited the dues the parties could impose upon members.²⁶⁴ The Code further provided that violations of each provision were punishable by fine and imprisonment.²⁶⁵

The Supreme Court rejected the arguments of Secretary of State Eu for the endorsement ban and the restrictions on party self-government.²⁶⁶ The Court held that the endorsement ban violates the parties' freedom of association because it "directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues."²⁶⁷ The Court stated:

Freedom of association means not only that an individual voter has the right to associate with the political party of her choice,

264. *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 217-19 nn.2-10 (1989). Section 11702 of the California Election Code contained the endorsements ban. CAL. ELEC. CODE § 11702 (West 1977 & Supp. 1988). Sections 8660-61 of the Code dictated the size and composition of the Democratic Party Central Committee, while sections 9160-9164 specified the size and composition of the Republican counterpart. *Id.* §§ 8660-61, 9160-64. California Elections Code, sections 8663-72, governed the selection and removal of Democratic Central Committee members, and sections 9161-70 performed the same function for Republican Central Committee members. *Id.* §§ 8663-72, 9161-70. Section 8774 of the Code limited the term of office of a Democratic Central Committee Chair to two years and prohibited successive terms, while section 9274 applied identical restrictions to a Republican Central Committee Chair. *Id.* §§ 8774, 9274. Code section 8774 contained the residential rotation requirement for the Democratic Chair and section 9274 contained the same requirement for the Republican Chair. *Id.* §§ 8774, 9274. Sections 8710-11 of the Code specified the time and place of Democratic Central Committee meetings, and sections 9210-11 specified the same for Republican Central Committee meetings. *Id.* §§ 8710 (repealed 1991), 8711, 9210-11 (repealed 1991). Code sections 8775 and 8945 indicated permissible dues for Democrats and section 9275 indicated the same for Republicans. *Id.* §§ 8775, 8945 (repealed 1991), 9275 (repealed 1991).

265. CAL. ELEC. CODE § 29102.

266. *Eu*, 489 U.S. at 229, 233. The Court's decision in *Eu* was a unanimous 8-0 decision. *Id.* at 215. Justice Stevens filed a concurring opinion. *Id.* at 233. Chief Justice Rehnquist did not participate. *Id.*

267. *Id.* at 223.

but also that a political party has a right to 'identify the people who constitute the association' and to select a standard bearer who best represents the party's ideologies and preferences.²⁶⁸

In the face of such violations of the parties' freedom of association, Eu failed to convince the Court that a ban on endorsements in primaries promoted governmental stability or protected voters from fraud and corruption resulting from the exercise of undue influence by parties upon nominations.²⁶⁹ Eu was unable to demonstrate that California's political system was any more stable in 1989 than it had been in 1963, when the ban was enacted.²⁷⁰ He also failed to show that a ban on party endorsements in primaries serves the admittedly compelling state interest in preventing electoral fraud and corruption.²⁷¹

The Court also rejected Eu's contention that the challenged restrictions on party self-government served California's compelling interests in governmental stability and voter protection.²⁷² This is because the challenged restrictions contained in the California Elections Code do not help to ensure fair and honest elections.²⁷³ The Court found that "a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair."²⁷⁴

Tashjian and *Eu* reflect a Supreme Court that cannot properly be characterized as insensitive to the merits of strong political parties or as more protective of the First Amendment rights of individual voters than the First Amendment rights of the parties. Both decisions stand for the proposition that neither state legislatures nor courts should substitute their judgments for those of the parties with respect to the manner in which the parties themselves and their nomination procedures are structured, absent a showing of a real threat to the fairness of the electoral process.²⁷⁵ Political parties, consistent with that proposition, can

268. *Id.* at 224 (quoting *La Follette*, 450 U.S. at 122; *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 601 (D.C. Cir. 1975)) (citations omitted).

269. *Id.* at 226-29.

270. *Id.* at 226.

271. *Id.* at 228-29.

272. *Id.* at 229-33.

273. *Id.*

274. *Id.* at 233.

275. *See id.* at 223-49; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224

influence nomination procedures in their ideological and electoral interests by opening (or closing) primaries and endorsing candidates.

The political parties' influence on nomination procedures exists because their freedom of association entitles their members to expressive rights that independent voters lack.²⁷⁶ A state infringes upon those rights when it attempts to control the content of the beliefs advanced by the party, interferes with a party so as to deny members the advantages conferred by association or inhibits the party's efforts to convince others to adopt the shared beliefs of the party members, absent a compelling state interest.²⁷⁷ Freedom of association means little unless it includes the power to define membership or affiliation requirements as encompassing a commitment to shared organizational goals and to determine whether prospective adherents possess such a commitment.²⁷⁸ Nonetheless, the state retains power to prevent parties from excluding would-be participants as a result of their race, ethnicity or gender, because those characteristics bear no necessary nexus to ideology; that is, such exclusions are unrelated to the commonality of ideological purpose that underlies the parties' freedom of association.²⁷⁹

In light of *Tashjian* and *Eu*, the former patronage decisions can no longer be dismissed as well-intentioned, but misguided, products of political naiveté. Instead, they genuinely appear to be the products of two reasonable conclusions. One conclusion is that protecting public employees from partisan dismissal is a considerably more compelling state interest than protecting a voter's right to vote in the primary of a political party, with which the voter is not registered, or prohibiting official governing bodies of political parties from endorsing candidates in primary elections. The other is that political patronage is considerably less important to building strong, vibrant political parties than are the parties' capacities to control their own nominations and internal governance procedures. Viewed in this light,

(1986).

276. Julia E. Gottman, Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 YALE L.J. 117, 120 (1984).

277. *Id.* at 123-24.

278. *Id.* at 126.

279. See Porto, *supra* note 255, at 439.

the Supreme Court's decisions in *Elrod*, *Branti* and *Rutan* are more appropriately characterized as the products of political savvy rather than political naiveté.

4. *Working Toward A Viable Standard: The Circuit Decisions*

The import of *Elrod*, *Branti* and *Rutan* is that public employees cannot be hired, fired, transferred, promoted, not promoted, or subjected to permanent layoffs solely because of their political affiliations, unless they occupy positions that feature formulating policy, advising elected or high-level appointed officials, and being privy to confidential communications.²⁸⁰ That is, patronage-based personnel decisions are appropriate only for those posts that are so essential to the implementation of a policy agenda that their occupants need to share the partisan identity of the hiring authority.²⁸¹ This standard can be modified, without losing any of its meaning, to provide that patronage-based personnel decisions are appropriate only for those posts that are so essential to the associational freedom of the party in power that the party's First Amendment rights will be abridged unless the occupants of such posts share the partisan identity of the hiring authority.

The modified standard incorporates the lesson of *Tashjian* and *Eu*, namely that members of political parties possess a freedom of association that entitles them to control the content of the beliefs advanced by the party and to confer upon fellow members the advantages of association, absent a compelling state interest to the contrary.²⁸² The modified standard further recognizes that a freedom of association grounded in common ideological goals includes the capacity to implement those ideological goals in an efficient manner when they are endorsed by the electorate at the ballot box. It also recognizes that the parties are not entitled to make patronage-based personnel decisions about public posts that are not essential to their associa-

280. See *supra* notes 39-141 and accompanying text for a full discussion of these cases.

281. See *supra* notes 39-114 and accompanying text.

282. See *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224-25 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224-25 (1986).

tional freedom because the occupants of those posts deserve First Amendment protection for their individual beliefs and partisan affiliations.

Several federal appellate courts have endorsed similar guidelines, which can readily be folded into the associational freedom standard discussed above. In *Jimenez Fuentes v. Torres Gaztambide*,²⁸³ the United States Court of Appeals for the First Circuit announced a two-pronged test to be applied in patronage cases.²⁸⁴ The initial inquiry is: does the position at issue involve "governmental decision-making on issues where there is room for political disagreement on goals or their implementation? Otherwise stated, do party goals or programs affect the direction, pace, or quality of governance?"²⁸⁵ If the answer to the first inquiry is yes, the second inquiry proceeds to determine whether the particular position at issue "resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement."²⁸⁶

In *Jimenez Fuentes* and other cases, the First Circuit has applied the first prong of its test in such a way that a position will be patronage-eligible if it involves services that the electorate considers to be important (such as water, housing or education), and if the competing political parties differ in their approaches to providing these services.²⁸⁷ The First Circuit has applied the second prong in such way as to consider: 1) relative pay; 2) technical competence; 3) power to control others; 4) authority to speak for policymakers; 5) public perceptions of the position; 6) influence over programs; 7) contact with elected officials; 8) responsiveness to partisan politics and political leaders; and 9) whether the responsibilities of the position are broadly defined or of broad scope.²⁸⁸

283. 807 F.2d 236 (1st Cir. 1986).

284. *Id.* at 241-42.

285. *Id.*

286. *Id.* at 242.

287. See, e.g., *Roman Melendez v. Inclan*, 826 F.2d 130 (1st Cir. 1987); *Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255 (1st Cir. 1987); *Collasco Rivera v. Torres Gaztambide*, 812 F.2d 258 (1st Cir. 1987); *Jimenez Fuentes*, 807 F.2d at 241-42; see also *Martin*, *supra* note 1, at 25-26.

288. *Jimenez Fuentes*, 807 F.2d at 242; see also *Martin*, *supra* note 1, at 26.

Using this two-prong test, the *Jimenez Fuentes* court concluded that the plaintiffs, two Regional Directors of Puerto Rico's Urban Development and Housing Corporation who claimed they were transferred from their government posts for political reasons, had not been denied their rights under the First and Fourteenth Amendments.²⁸⁹ In the court's view, Regional Directors:

develop, plan, coordinate, revise and monitor the progress of the agency's programs and thus gauge the success of . . . policies. Without the Regional Directors' political sympathy and loyal cooperation, the Executive Director (their superior) might face a situation where the hostile efforts or foot-dragging actions of any one of the [eleven Regional Directors] could singlehandedly thwart the Administration's goals in that particular [region].²⁹⁰

Consequently, the First Circuit determined that the plaintiffs held positions for which patronage-based transfers were constitutionally permissible.²⁹¹

In *Savage v. Gorski*,²⁹² the United States Court of Appeals for the Second Circuit held that "political affiliation is an appropriate requirement [for public employment] when there is a rational connection between shared ideology and job performance."²⁹³ The plaintiffs in that case were: 1) a confidential secretary to the director of a county correctional facility; 2) a coordinator for a county pre-trial release services program; and 3) an officer of a county veterans' service agency.²⁹⁴ In addition, the plaintiffs were all Republicans who lost their jobs in January, 1988, when the defendant became County Executive of Erie County, New York.²⁹⁵

The court observed that the secretarial post required confidentiality, discretion regarding the dissemination of information to the public, and judgment concerning departmental policies and procedures.²⁹⁶ The pre-trial release services position fea-

289. *Jimenez Fuentes*, 807 F.2d at 246.

290. *Id.*

291. *Id.*

292. 850 F.2d 64 (2d Cir. 1988).

293. *Id.* at 68.

294. *Id.* at 65.

295. *Id.*

296. *Id.* at 69.

tured the making of recommendations to judges "which . . . involve policymaking 'at the questionable fringes.'"²⁹⁷ The veterans' service post called for serving as liaison to the public and to veterans' groups, in addition to managing an office and interviewing veterans to determine their eligibility for benefits.²⁹⁸ In sum, the court noted: "There are sufficient indicia here to locate all three positions at the policymaking end of the Erie County government spectrum, where the individual employee's political or social philosophy can make a difference in the implementation of programs."²⁹⁹ Consequently, the court concluded that "the grant of a preliminary injunction [for the plaintiffs] was an abuse of discretion [by the trial court]."³⁰⁰

In *Brown v. Trench*,³⁰¹ the United States Court of Appeals for the Third Circuit held that the most important factor in the resolution of patronage cases is whether the position at issue features "meaningful input into decisionmaking concerning the nature and scope of a major . . . program."³⁰² In that case, the plaintiff, a Republican who had prepared and distributed press releases, contacted media representatives, and promoted county government projects as Assistant Director of Public Information for Bucks County, Pennsylvania, was fired in January, 1984, by the newly elected Democratic majority on the County Commission.³⁰³

The Third Circuit observed that the trial court had "correctly determined that Brown's position is one which cannot be performed effectively except by someone who shares the political beliefs of the Commissioners."³⁰⁴ This is because "her principal duty was to act as spokesman for the Commissioners and help promote county projects."³⁰⁵ Thus, "Brown could . . . be dismissed because of her political affiliation without any violation of her [F]irst [A]mendment rights."³⁰⁶

297. *Id.* (citation omitted).

298. *Id.*

299. *Id.*

300. *Id.*

301. 787 F.2d 167 (3d Cir. 1986).

302. *Id.* at 169-70.

303. *Id.* at 168.

304. *Id.* at 170.

305. *Id.*

306. *Id.*

In *Nekolny v. Painter*,³⁰⁷ the United States Court of Appeals for the Seventh Circuit held that a position's patronage-eligibility depends upon whether that position "authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation."³⁰⁸ At issue in *Nekolny* was whether the firing of three employees of Lyons Township, Illinois, because they had campaigned for the incumbent Township Supervisor's electoral opponent, had violated their rights under the First and Fourteenth Amendments.³⁰⁹ The employees were a driver for a senior citizens' bus service, the Senior Citizens' Coordinator and a secretary-dispatcher.³¹⁰

The appeals court affirmed the trial court's directed verdicts in favor of the bus driver and the secretary-dispatcher.³¹¹ However, it vacated a directed verdict in favor of the Senior Citizens' Coordinator and remanded the case to the district court for a determination of whether that post was a policymaking post.³¹² In that connection, the Seventh Circuit noted that the duties of the Senior Citizens' Coordinator included conducting feasibility studies and other research concerning the nature and extent of programs for senior citizens, and that one program that he had recommended to the previous Township Supervisor had been abolished when the defendant assumed that post.³¹³

In *Tomczak v. City of Chicago*,³¹⁴ the Seventh Circuit reformulated its test to state that an employee's position is unprotected from patronage if "first, there is room for principled disagreement in the decisions reached by the employee and his superiors, and, second, he has meaningful direct or indirect input into the decisionmaking process."³¹⁵ In that case, the plaintiff, First Deputy Commissioner of the City of Chicago's Department of Water, claimed that he lost his job because the new

307. 653 F.2d 1164 (7th Cir. 1981).

308. *Id.* at 1170.

309. *Id.* at 1165-66.

310. *Id.* at 1166.

311. *Id.* at 1173.

312. *Id.*

313. *Id.* at 1170.

314. 765 F.2d 633 (7th Cir. 1985).

315. *Id.* at 641.

Mayor wanted to replace him with someone who was more loyal to the new Administration.³¹⁶ Observing that

the fact that plaintiff's position concerned the provision of water to all citizens does not mean that the Water Department had no goals which there could be principled disagreements [about] . . . [the court concluded that the] plaintiff was in a position where his political affiliation could affect the ability of a new administration to implement new policies.³¹⁷

Thus, the Seventh Circuit reversed the district court's judgment for the plaintiff and remanded for further proceedings consistent with its opinion.³¹⁸

5. *The Proposed Standard*

The guidelines articulated in the aforementioned cases can and should be revised into a single, overarching standard that reflects the import of *Elrod*, *Branti* and *Rutan*. This standard, which, in essence, is the *Jimenez Fuentes* standard modified by the *Brown* and *Tomczak* guidelines, will achieve the goals of *Elrod*, *Branti* and *Rutan* for three reasons.

First, this standard will insure that the party in power possesses the human resources necessary to implement the programmatic agenda that the voters have endorsed. Second, it will simultaneously ensure that public employees who do not support the party in power will nevertheless retain their jobs so long as those jobs are not essential to implementing the governing party's goals and the employees who hold them perform competently. Third, it will offer the federal trial and appellate courts a means of distinguishing between patronage-eligible and non-patronage-eligible positions that is clearer and more rooted in the Constitution than either the *Elrod* "policymaker" standard or the *Branti* "appropriateness" standard.

Courts should begin their analyses in patronage cases by endeavoring to determine, as the First Circuit did in *Jimenez-Fuentes*, whether the position at issue involves decisionmaking on issues where there is room for disagreement on goals or their

316. *Id.* at 636.

317. *Id.* at 641-42.

318. *Id.* at 643.

implementation, based upon ideological or partisan differences.³¹⁹ This is virtually identical to the initial inquiry recommended by the Seventh Circuit in *Tomczak*: whether there is room for principled disagreement in the decisions reached by the employee and superior.³²⁰ The answer should follow an examination into whether the position at issue concerns services that the electorate considers to be important and whether the competing political parties disagree on how best to provide those services.

If the answer to this question is "no," then the position should not be subjected to patronage-based personnel decisions. If the answer is "yes," a second inquiry ought to be undertaken, as the First Circuit did in *Jimenez Fuentes*, to determine whether the position at issue is that of a policymaker or a communicator.³²¹ Of additional relevance at this point is the Third Circuit's inquiry in *Brown* concerning the extent to which the position features meaningful input into decisionmaking concerning the nature and scope of a major program,³²² and the Seventh Circuit's query in *Tomczak* regarding the employee's meaningful direct or indirect input into the decisionmaking process.³²³

This second-stage inquiry should consider the factors identified in *Jimenez Fuentes*: the salary; technical expertise; power over others; authority to speak for policymakers; public perceptions; influence over programs; contact with elected officials; responsiveness to partisan politics; and the breadth of responsibilities that are associated with the position at issue.³²⁴ In so doing, one may likely conclude that non-policymaking positions are not eligible for patronage, even when their occupants have close and regular contact with a public official (e.g. a judge's secretary or law clerk). This is a desirable result because public employees should not be required to relinquish their positions for their superiors' comfort or convenience; rather, they should be required to relinquish only when shared partisanship is essential

319. See *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986).

320. See *Tomczak*, 765 F.2d at 641.

321. *Jimenez Fuentes*, 807 F.2d at 242.

322. *Brown v. Trench*, 787 F.2d 167, 169-70 (3d Cir. 1986).

323. *Tomczak*, 765 F.2d at 641.

324. *Jimenez Fuentes*, 807 F.2d at 242.

to the achievement of programmatic ends. Thus, a patronage position should feature not merely the rational connection between shared ideology and job performance required by the Second Circuit in *Savage*,³²⁵ but instead, a substantial nexus between shared ideology and job performance. In this respect, the proposed standard is intentionally more generous to plaintiff employees and less generous to defendant employers than the standards employed by the respective circuits in the decisions cited above.

Similarly, jobs that are confidential, but do not involve policymaking, such as a personal secretary or assistant, should not be patronage posts; they require personal loyalty, but not necessarily partisan loyalty, in order for the superior's goals to be achieved. Such jobs can be performed admirably on the basis of personal loyalty alone, and a demonstrated lack of personal loyalty, whether or not it derives from partisan differences, would constitute sufficient cause for termination. Thus, the plaintiff secretary in *Savage* would not, in all likelihood, be judged an appropriate candidate for partisan dismissal under the proposed standard.³²⁶

Admittedly, the associational freedom standard recommended here leaves the judiciary very much a part of the process whereby the reach of patronage is determined. This is necessary, however, in a context that requires the balancing of competing First Amendment interests and the finding of facts in order to properly balance those respective interests in specific instances. Moreover, no barrier prevents legislators or executive branch officials from devising personnel guidelines that carefully distinguish between patronage and non-patronage posts so as to reduce the frequency of disputes and litigation.³²⁷

325. *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988).

326. However, even under the proposed standard, the secretary would have to demonstrate that the defendant was aware of her political affiliation and fired her solely because of that affiliation, which she failed to do in *Savage*. *Id.* at 68. Neither the standard used in *Savage* nor the proposed standard will infer that a dismissal is necessarily politically motivated when a Democrat fires a Republican or vice versa. *Id.* This is true especially where, similar to *Savage*, there is no evidence to indicate that the firing party even knows the partisan affiliation of the fired party. *Id.*

327. Moreover, there is evidence that when legislators devise such guidelines, federal courts treat the guidelines with deference, in the form of a rebuttable presumption of constitutionality. See Brinkley, *supra* note 37, at 737-40. In *Nunnery v. Barber*, 503 F.2d

VI. Conclusion

Political scientists and legal commentators have mischaracterized the United States Supreme Court's decisions in *Elrod*,³²⁸ *Branti*³²⁹ and *Rutan*³³⁰ as detrimental to political parties and unworkable.³³¹ In fact, these decisions neither hurt political parties nor advance an unworkable legal standard.

Elrod, *Branti* and *Rutan* do not eliminate political patronage, but rather, limit it in a way that assists political parties by confining patronage to positions whose occupants make the policy choices that flow from party-based ideologies.³³² These decisions correctly perceive that the American public is no longer as attached to parties as it once was and that in the current atmosphere, patronage may cost political parties more support than it can gain for them.

Moreover, an examination of the aforementioned cases in conjunction with *Tashjian*³³³ and *Eu*³³⁴ leads to the conclusion

1349 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975), the Fourth Circuit stated:

We find convincing the point that the delineation between the employees who are and who are not protected from patronage discharge poses an issue which should be resolved legislatively, not judicially, and that the legislative determination, when made, should be overturned only if it can be said that it is palpably arbitrary or irrational.

Id. at 1356.

Subsequently, in *Scott v. Haworth*, 916 F.2d 134 (4th Cir. 1990), the Fourth Circuit stated that, "[w]e believe the fact that each of the plaintiffs in this case held an exempt position, so designated by the governor, creates a presumption at law that discharge or demotion was proper." *Id.* at 142.

In *Savage*, 850 F.2d 64, the Second Circuit similarly observed, "[b]oth the interests of federalism and the conservation of judicial resources would ordinarily be better served by the federal courts' giving substantial deference to the state's judgment where government positions are so defined." *Id.* at 69.

Such deference is not inconsistent with the proposed standard for distinguishing between posts that are patronage-eligible and posts that are not. Indeed, the device that is most likely to be effective in limiting judicial involvement in public personnel matters is carefully drawn guidelines that strike a reasonable balance between the respective First Amendment freedoms of political parties and public employees, in keeping with *Elrod*, *Branti* and *Rutan*.

328. *Elrod v. Burns*, 427 U.S. 347 (1976).

329. *Branti v. Finkel*, 445 U.S. 507 (1980).

330. *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).

331. See *supra* notes 142-229 and accompanying text.

332. See *supra* notes 230-52 and accompanying text.

333. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

334. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989).

that *Elrod*, *Branti* and *Rutan* are more appropriately characterized as politically sagacious than politically naive.³³⁵ In those decisions, the Court realized the importance of protecting public employees from partisan dismissals, and the relative unimportance of patronage to building strong political parties in the America of the 1990s.³³⁶

A subsequent examination of the above cases together with several federal appellate decisions that construe *Elrod* and *Branti* leads to the conclusion that the *Elrod/Branti/Rutan* legacy is not confusion, but instead, a workable legal standard that effectively balances the respective First Amendment freedoms of public employees and political parties.³³⁷

Ironically, that standard may soon change if the recently re-constituted Supreme Court hears a patronage case in the near future. Perhaps the real ambiguity in the *Elrod/Branti/Rutan* standard is the prognosis for its survival.

335. See *supra* notes 253-79 and accompanying text.

336. See *supra* notes 253-79 and accompanying text.

337. See *supra* notes 280-327 and accompanying text.