Despoiling the Spoils: Rutan v. Republican Party of Illinois

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After years of Democratic hegemony, the people of a hypothetical state elected a Republican governor. The new leader appointed Pol, a campaign lieutenant, to head the state's Department of Commerce. Assembling her staff during the administration's opening weeks, Secretary Pol interviewed applicants for the post of filing clerk. She sought a person of discretion and loyalty. One candidate, Ron Republican, was untrained as a filing clerk, but had served as a precinct captain in the governor's campaign. Dixie Democrat, an outspoken supporter of the previous administration's pro-environmental stances, had worked for ten years as clerk to a corporate executive. Although she appreciated Dixie's superior qualifications, Secretary Pol feared that Dixie might leak political secrets to the capital's principal daily, a vigorous opponent of the new governor's policies. Chary of this possibility and pressured from within Republican ranks to reward faithful partisans, Pol hired Ron. An irate Dixie filed suit in federal district court, alleging that Pol had refused to hire her solely because of her political affiliation, and that the refusal had infringed her first amendment rights. She sought injunctive and declaratory relief forbidding Pol from employing Ron.

Despite three decisions by the nation's highest tribunal and a plethora of litigation over the past fifteen years, no cabinet secretary or applicant for government employment could predict with certainty the outcome of Dixie's claim. The law in the realm of political patronage remains a morass of confusion and doubt. The spoils system, once an unquestioned fact of American political life,

1. U.S. CONST. amend. I. The first amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Id.

2. See Rutan v. Republican Party of Ill., 110 S. Ct. 2729 (1990); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion). For detailed discussions of these decisions, see infra notes 17-65, 139-45 and accompanying texts (Rutan), notes 126-38 and accompanying text (Branti), and notes 113-24 and accompanying text (Elrod).


4. One scholar has defined political patronage as "the use of appointive governmental positions to reward past party work and induce future labors." F. SORAUF, PARTY POLITICS IN AMERICA 82 (1968). Other commentators have explained the term more broadly as "the allocation of the discretionary favors of government in exchange for political support." M. TOLCHIN & S. TOLCHIN, TO THE VICTOR . . . POLITICAL PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE 5 (1971) [hereinafter TOLCHIN]. The latter definition encompasses a wide range of activities: the creation of jobs, the awarding of highway grants and construction contracts, the funding of urban development, and the granting of contracts to artists. See id. at 5-6; see also Sorauf, The Silent Revolution in Patronage, 20 PUB. ADMIN. REV. 28, 28 (1960) (observing that patronage is essentially an "incentive" system, "a political currency with which to 'purchase' political activity and political responses"); Note, Constitutional Law—Political Patronage—Public Employees May Be Dismissed Only if Party Affiliation Affects Job Performance, 11 CUMB. L. REV. 735, 737 n.14 (1980) (definition of patronage reveals the subject's "wide-ranging parameters").
has become the subject of protacted litigation. Lawsuits filed a few months after an election may continue well beyond a former victor's plunge into lame-duck status. A job held over long tenure and performed with great skill may fall victim to the fickle currents of political change. In Rutan v. Republican Party of Illinois, the United States Supreme Court's attempt to clarify the legality of certain patronage practices brought a modicum of success, but the questions the Court failed to answer continue to plague both government servants and the courts that adjudicate their disputes.

In Rutan the Supreme Court held that basing hiring, promotion, recall, and transfer decisions on the party affiliation of public employees violates the first amendment. Rutan was the Court's third in a series of rulings curbing patronage practices; taken together, these three decisions deliver a consistent legal message regarding the unconstitutionality of the spoils system. In Elrod v. Burns, a plurality of the Court declared that officials could dismiss only public employees involved in "policymaking positions" on patronage grounds because such dismissals "severely restrict" workers' rights to free belief and association. Four years later, in Branti v. Finkel, the Court amended Elrod's exception for policymakers and "confidential" employees, determining that the employment authority must be able to show that "party affiliation is an appropriate requirement for the effective performance of the public office involved" before governmental interests can supersede constitutional rights and justify dismissal. Finally, a decade after Branti, the Court in Rutan extended its prohibition of patronage dismissals to bar officials from conditioning most other employment decisions on political affiliation or support. Recognizing that less-drastic patronage activity also pressures public employees and applicants to conform their political beliefs and associations to state-selected orthodoxies, the Court seemingly checkmated a weakened, but tenacious, political tradition. Despite the consistency of the Elrod, Branti, and Rutan holdings, however, a stubborn residue of patronage activity still clings to national, state, and local

5. For examples of government jobs affected in several states and municipalities by patronage activity, see infra notes 91-96 and accompanying text.

6. For an example of a patronage suit extending over nearly two four-year gubernatorial terms, see Stott v. Haworth, 916 F.2d 134 (4th Cir. 1990), discussed infra at notes 157-66 and accompanying text. See also infra note 156 (listing a number of claims filed after the 1984 elections in Puerto Rico and later appealed to the United States Court of Appeals for the First Circuit).


8. Id. at 2739.


10. Id. at 372-73 (plurality opinion). For a more detailed examination of the Court's holding in Elrod, see infra notes 113-24 and accompanying text.


12. Id. at 518. For a discussion of the Court's formulation of the "appropriate requirement" exception in Branti, see infra notes 132-34 and accompanying text; for a discussion of the Court's treatment of Branti's "appropriate requirement" exception in Rutan, see infra notes 142-45 and accompanying text.

13. See Rutan, 110 S. Ct. at 2739.

14. Id. at 2737 (citing Elrod, 427 U.S. at 356-57 (plurality opinion), and West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
This Note traces the history of American spoils systems from their infancy during the Virginia and Massachusetts presidential dynasties through their flowering in the years between 1828 and 1865. After a brief discussion of Congress's adoption of "merit" hiring methods in the 1880s, the Note examines the constitutional foundations of the Supreme Court's public employment jurisprudence and describes how the Court first applied that jurisprudence in patronage contexts. The Note concedes that *Rutan* was a proper result for low-level state employees. It argues, however, that the Court inexcusably failed to seize the opportunity *Rutan* offered to instruct lower courts in the correct interpretation of *Branti*’s "appropriate requirement" exception. The Note faults the *Rutan* Court for disregarding the crucial role party affiliation plays when policymakers, charged with executing the people's mandate, must select confidential, but subordinate, assistants. The Note concludes with a proposal: if the jurisdiction possesses a civil service statute, federal courts should employ the statutory provisions as bases for a rebuttable presumption that a given position is, or is not, subject to patronage action. The Note maintains that a rebuttable presumption would have the positive effect of removing the question whether party affiliation is an appropriate requirement for a public office from the courts and would place in it the hands of legislators where it belongs.

In November 1980, the Republican Governor of Illinois imposed a hiring freeze on every agency, bureau, board, and commission subject to his control. The order forbade state officials from promoting, transferring, or recalling existing employees and from hiring new workers, filling vacancies, or creating new positions without the governor's "express permission." In considering agencies' requests, the governor's office researched whether applicants for employment had voted in Republican primaries, actively supported or contributed money to Republican candidates, and held the confidence of state or local Republican officials.

15. For examples of the use of patronage at many levels of government over the past three decades, see infra notes 86-96 and accompanying text.

16. For a discussion of efforts by lower courts to apply *Branti*’s "appropriate requirement" exception, see infra notes 147-55 and accompanying text; see also *Rutan*, 110 S. Ct. at 2756-58 (Scalia, J., dissenting) (lower court "interpretations of *Branti* are not only significantly at variance with each other, they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement").


18. *Id.* Governor Thompson's order stated:

    Effective at the close of business today, November 12, 1980, no agency, department, bureau, board or commission subject to the control or direction of the Governor shall hire any employee, fill any vacancy, create any new position or take any other action which will result in increases, or the maintenance of present levels, in State employment, including personal service contracts. *All hiring is frozen.* There will be no exceptions to this order without my express permission after submission of appropriate requests to my office.

19. *Rutan*, 110 S. Ct. at 2732. These were the facts as alleged by the petitioners. For an explanation of the Court's duty to assume the truth of these facts, see infra note 32.
Four state employees and one applicant for employment brought suit against Illinois and Republican Party officials, contending that they had suffered discrimination with respect to government employment because of their failure to join the Republican Party, and that this discrimination had violated their constitutional rights to free speech and association, to due process and equal protection, and to a republican form of government. Stating that the Supreme Court had "explicitly limited its rulings in both Branti and Elrod to political firings," the United States District Court for the Central District of Illinois dismissed the plaintiffs' complaints with prejudice for failure to state a claim upon which relief could be granted.

The United States Court of Appeals for the Seventh Circuit heard two oral arguments, first issuing a panel opinion and later rehearing the case en banc. Observing that other circuits had expanded the holdings of Elrod and Branti beyond absolute dismissals, the court reasoned that the employees' challenges should be limited to those patronage practices that the trial court could find to be the "substantial equivalent of dismissal." Although it gauged the plaintiffs' chances of success on the merits as "highly unlikely," the Seventh Circuit reversed the dismissal of four of the complaints, speculating that each might be able to prove that denial of a transfer or promotion or a failure to rehire was the

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20. Rutan, 110 S. Ct. at 2732-33. Cynthia Rutan, a state rehabilitation counselor, and Franklin Taylor, a road equipment operator for the Illinois Department of Transportation, claimed that their failure to work for or support the Republican Party had caused hiring officials to deny them promotions for which they were qualified. Taylor also alleged that officials had refused him a transfer to an office near his home because of his lack of allegiance to the Republican Party. A third plaintiff, James Moore, maintained that the state had denied him employment as a prison guard for the same reason. Ricky Standefer, a state garage worker, and Dan O'Brien, a dietary manager with the state mental health department, complained that the government had refused them recall after layoffs because they were not affiliated with the Republican Party. The plaintiffs brought the action in their individual capacities and on behalf of six alleged classes, including: (1) all Illinois voters; (2) all Illinois taxpayers; (3) all Illinois state employees desiring promotions; (4) all Illinois state employees desiring transfers; (5) all state employees who had been laid off but not rehired; and (6) all persons desiring state employment in Illinois. Rutan v. Republican Party of Ill., 641 F. Supp. 249, 251-52 (C.D. Ill. 1986), aff'd in part, rev'd in part, 868 F.2d 943 (7th Cir. 1989) (en banc), aff'd in part, rev'd in part, 110 S. Ct. 2729 (1990).


22. Id. at 253 (citing Branti v. Finkel, 445 U.S. 507, 513 n.7 (1980), and Elrod v. Burns, 427 U.S. 347, 353 (1976) (plurality opinion)).

23. Id. at 259. The district court relied on LaFalce v. Houston, 712 F.2d 292, 294 (7th Cir. 1983), cert. denied, 464 U.S. 1044 (1984), in which the United States Court of Appeals for the Seventh Circuit had refused to extend the rule of Elrod and Branti to forbid consideration of political factors in awarding government contracts, and on Avery v. Jennings, 786 F.2d 233, 237 (6th Cir.), cert. denied, 477 U.S. 905 (1986), which had held that Elrod and Branti "do not prohibit the practice of hiring applicants who are friends or who are referred by political allies." Rutan v. Republican Party of Ill., 641 F. Supp. 249, 253-54 (C.D. Ill. 1986), aff'd in part, rev'd in part, 868 F.2d 943 (7th Cir. 1989) (en banc), aff'd in part, rev'd in part, 110 S. Ct. 2729 (1990).


26. Id. at 949, 951-52.

27. Id. at 949, 954 (quoting Delong v. United States, 621 F.2d 618, 624 (4th Cir. 1980)). Under the Seventh Circuit's analysis, an employment action constitutes the "substantial equivalent of dismissal" if it would lead a reasonable person to resign. Id. at 955.

28. Id.
substantial equivalent of termination. The court affirmed the dismissal of one claim because “rejecting an employment application does not impose a hardship upon an employee comparable to the loss of a job.”

Rejecting the Seventh Circuit’s “substantial equivalent of dismissal” test, the United States Supreme Court held that Elrod’s and Branti’s first amendment ban extends to transfer, recall, promotion, and hiring decisions based on political affiliation. Writing for a majority of only five Justices, Justice Brennan repeatedly stressed that state actions which pressure state employees to compromise their political beliefs impermissibly inhibit first amendment freedoms of belief and association. The majority then dismissed the contention that because public employees have no “entitlement” to transfer, promotion, or rehire, patronage employment practices cannot infringe their first amendment rights. Lack of entitlement, the Court stated, is irrelevant; the government may not condition benefits on a ground that, considered alone, would be unconstitutional. Similarly, negative employment decisions less extreme than dis-

29. Id. at 956-57. O’Brien’s and Standefer’s claims might be cognizable, the Seventh Circuit explained, if they could prove a formal or informal system of rehiring employees in their positions. Id. The court doubted, however, that Taylor and Rutan could show that denial of a promotion or a transfer constituted the “substantial equivalent of a dismissal.” Id. at 955-56. Nevertheless, the court cautioned: “We are particularly reluctant to scrutinize the pleadings under freshly articulated standards. Whether a particular employment action is equivalent to a dismissal rests upon each case’s facts and circumstances.” Id. at 955.

30. Id. at 954 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-84 (1986) (plurality opinion), and Avery v. Jennings, 786 F.2d 233, 236-37 (6th Cir.), cert. denied, 477 U.S. 905 (1986)).

31. Rutan, 110 S. Ct. at 2737. The Court found the Seventh Circuit’s standard unduly restrictive because it “fails 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.” Id. (citing Elrod v. Burns, 427 U.S. 347, 356-57 (1976) (plurality opinion), and West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

32. The cases came to the Supreme Court in a preliminary posture, so that the issue before the Court was simply whether the petitioners had stated a cognizable first amendment claim sufficient to resist the respondents’ motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The Court, therefore, had to accept the petitioners’ allegations as true. Id. at 2732 n.1 (citing Berkowitz v. United States, 486 U.S. 531, 540 (1988)).

33. Id. at 2739. The Supreme Court affirmed the Seventh Circuit’s remand of Rutan’s, Taylor’s, Standefer’s, and O’Brien’s claims, reversed the lower court’s upholding of the dismissal of Moore’s claim, and remanded all five claims to the district court. Id.

34. Justices White, Marshall, Blackmun, and Stevens joined Justice Brennan’s opinion.

35. See, e.g., Rutan, 110 S. Ct. at 2734. Justice Brennan contended, for example, that “conditioning public employment on the provision of support for the favored political party ‘unequivocally inhibits protected belief and association.’” Id. (quoting Elrod v. Burns, 427 U.S. 347, 359 (1976) (plurality opinion)). He also pointed out that pressuring employees to support policies and candidates they do not agree with is “‘tantamount to coerced belief.’” Id. (quoting Elrod v. Burns, 427 U.S. 347, 355 (plurality opinion)). In addition, conditioning public employment on an employee’s having obtained the approval of a political party violates the first amendment because of “‘the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one’s job.’” Id. at 2735 (quoting Branti v. Finkel, 445 U.S. 507, 516 (1980)). Justice Brennan also noted that employees who do not compromise their beliefs may lose increases in pay and job satisfaction. Id. at 2736.

36. Id. at 2735-36. The majority stated that it had “rejected just such an argument” in Elrod and in Branti, because in those cases all of the workers were at-will employees not legally entitled to continued employment. Id. at 2735.

37. Id. at 2736 (“‘[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.’” (emphasis added by Justice Brennan) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972))). The Court based its argument on the doctrine of “unconstitutional conditions,” which holds that the government...
Missal may constitute penalties so dire as to pressure employees to compromise their political creeds. The majority reasoned that because the exercise of guaranteed first amendment rights triggers such significant costs, the governmental interests these penalties serve must be vital, and the penalties must be "narrowly tailored" to further those interests. Otherwise, the costs intolerably obstruct constitutional guarantees.

Invoking both the conclusions Justice Stevens had drawn in Branti and his own discussion in Elrod, Justice Brennan said that government could satisfy its interest in securing loyal employees by hiring or replacing high-level workers on the basis of their political views. Rejecting the argument that patronage promotions, transfers, and rehires preserve democratic processes, the Court cited the Elrod plurality's analysis to support its claim that "political parties are nurtured by other, less intrusive and equally effective methods," and noted the "substantial decline in patronage employment practices in this century." Political parties, the Court maintained, already have survived this decline.

For the same reasons that transfer, promotion, and rehiring decisions based on political affiliation are unconstitutional, the majority found that patronage hiring violates the first amendment. The Court spurned the Seventh Circuit's assertion that losing a job opportunity by refusing to conform one's political convictions to those of a hiring authority "does not impose a hardship upon an employee comparable to the loss of [a] job." Government jobs, Justice Brennan contended, are as valuable a source of employment as positions in the private sector; there are even some occupations for which the government is the major or sole employer. Using party affiliation as a touchstone for discrimi-

cannot deny one of its benefits to a person because of his exercise of a constitutional right. For a discussion of the unconstitutional conditions doctrine, see infra notes 104-12 and accompanying text.

38. Rutan, 110 S. Ct. at 2736. Justice Brennan stated that employees who find themselves in dead-end positions due to their political backgrounds are adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.

Id. (footnote omitted) (emphasis in original).

39. Id.
40. Id.

41. Id. at 2737 (citing Elrod v. Burns, 427 U.S. 347, 365-68 (1976) (plurality opinion), and Branti v. Finkel, 445 U.S. 507, 518, 520 n.14 (1980)).
42. Id.
43. Id. (quoting Elrod, 427 U.S. at 372-73 (plurality opinion)).
44. Id. (citing Elrod, 427 U.S. at 369 n.23 (plurality opinion), and L. Sabato, Goodbye to Good-Time Charlie 67 (1983)).
45. Id.
47. Id. at 2738.
48. Id. The majority mentioned social workers, school teachers, and prison guards as examples of government positions for which there are few or no private sector equivalents. Id.; see also O'Neill,
nating between job applicants is no less patently coercive—and therefore no less unconstitutional—than making party the basis of promotion, transfer, and rehiring decisions. By validating complaints grounded in a variety of patronage practices, the Court's decision effectively broadened the class of plaintiffs that may prevail in patronage suits.

In a vigorous dissent, Justice Scalia attacked the majority's holding as both unworkable and unconstitutional. First, Justice Scalia argued that the restrictions the Constitution places on government in its role as "regulator of private conduct" are not the same as those it imposes upon government as an employer. Justice Scalia noted that in the past the Court had approved restrictions on the free speech rights of government employees that it would not have permitted in the private sector. Second, Justice Scalia contended that when a practice not mentioned in 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," the Supreme Court has no basis for striking it down. Such traditions ought, instead, to be the raw materials from which the Supreme Court forges new doctrines. The dissenters rejected the majority's "strict scrutiny" standard for alleged governmental violations of the Constitution on the ground that dismissing an employee for political affiliation may be "reasonably

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49. Rutan, 110 S. Ct. at 2739. Justice Brennan repeated the argument that the same "unconstitutional condition" which forbade basing promotion, transfer, and recall decisions on party affiliation also tainted hiring decisions made on those grounds. Id. (citing Elrod v. Burns, 427 U.S. 347, 362-63 (1976) (plurality opinion), Branti v. Finkel, 445 U.S. 507, 515-16 (1980), Sherbert v. Verner, 374 U.S. 398, 406 & n.6 (1963), and Speiser v. Randall, 357 U.S. 513, 526 (1958)).

50. Chief Justice Rehnquist and Justice Kennedy joined Justice Scalia in dissent, and Justice O'Connor joined Parts II and III of the dissenting opinion. A clear example of the strident tone of Justice Scalia's opinion is his comment in the opening paragraph of the dissent: "[T]he new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court." Id. at 2747 (Scalia, J., dissenting).

51. Id. (Scalia, J., dissenting).

52. Id. (Scalia, J., dissenting).

53. Id. at 2747-48 (Scalia, J., dissenting); see, e.g., O'Connor v. Ortega, 480 U.S. 709, 723 (1987) (plurality opinion) (although probable cause is necessary for law enforcement officials to search the property of private citizens, it is not required, in many circumstances, for officials to search the property of government employees); Connick v. Myers, 461 U.S. 138, 147 (1983) (government may not punish private citizens for speech of merely private concern, but it may fire public employees for that reason); Kelley v. Johnson, 425 U.S. 238, 247 (1976) (government may not prevent private citizens from wearing long hair, but it may prevent policemen from doing so); Gardner v. Broderick, 392 U.S. 273, 277-78 (1968) (officials may not punish private citizens for refusing to provide incriminating information to the government, but they may discharge public employees when they refuse to provide incriminating evidence relating to the performance of their jobs).

54. Rutan, 110 S. Ct. at 2748 (Scalia, J., dissenting). The Seventh Circuit had paid similar deference to the antiquity of patronage practices. Rutan v. Republican Party of Ill., 868 F.2d 943, 953 (7th Cir. 1989) (en banc) ("[U]sing political considerations in employment decisions is as old as this country."); aff'd in part, rev'd in part, 110 S. Ct. 2729 (1990). Citing Brown v. Board of Education, 347 U.S. 483 (1954), the lower court acknowledged that the age of a tradition "does not immunize it from constitutional challenge," but argued that "'[i]f a thing has been practiced for two hundred years, it will need a strong case for the Fourteenth Amendment to effect [sic] it.'" Id. (quoting Jackman v. Rosenbaum, 260 U.S. 22, 30 (1922) (Holmes, J.).

55. Rutan, 110 S. Ct. at 2748 (Scalia, J., dissenting).
necessary to promote effective government.'” 56 Third, Justice Scalia maintained that the use of political patronage is a policy question proper only for legislatures to decide. 57 Finally, the dissent documented “the shambles Branti has produced” 58 in lower court attempts to make sense of its “appropriate requirement” exception 59 as evidence that the Court had decided Elrod, Branti, and Rutan incorrectly. 60

Justice Stevens joined the majority’s opinion, but wrote a separate concurrence to respond to three arguments advanced by Justice Scalia. 61 After rejecting the proposition that the majority had forced a civil service system upon the State of Illinois, 62 Justice Stevens denounced the notion that “traditional practices are immune from constitutional scrutiny.” 63 Without its underlying assumption that no public employee has a right to his job, he argued, patronage would not have entrenched itself in American politics for nearly two centuries. 64 Finally, Justice Stevens disputed Justice Scalia’s assertion that Elrod’s holding constituted a sharp break from Supreme Court acceptance of the constitutionality of patronage practices. 65

Constitutional debate over patronage in cases such as Rutan represents only

56. Id. at 2750-51 (Scalia, J., dissenting) (quoting Brown v. Glines, 444 U.S. 348, 356 n.13 (1980)).
57. Id. at 2752-53 (Scalia, J., dissenting).
58. Id. at 2756 (Scalia, J., dissenting). For a discussion of lower court attempts to interpret the Branti “appropriate requirement” exception, see infra notes 147-55 and accompanying text.
59. Rutan, 110 S. Ct. at 2756-58 (Scalia, J., dissenting).
60. Id. at 2756 (Scalia, J., dissenting) (“Elrod and Branti should be overruled, rather than merely not extended.”). Justice Scalia argued that although the Court had been unwilling to leave the fate of patronage to the political process, neither had it been “prepared to rule that no such line exists... nor able to design the line itself in a manner that judges, lawyers, and public employees can understand.” Id.
61. Id. at 2740-46 (Stevens, J., concurring).
62. Id. at 2740 (Stevens, J., concurring). Justice Stevens referred to his own opinion in Illinois State Employees Union v. Lewis, 473 F.2d 561, 567-68 (7th Cir. 1972), cert. denied, 410 U.S. 928 (1973), in which, as a United States Court of Appeals judge, he had distinguished between denying a state agency the right to adopt an unconstitutional employment policy and imposing a civil service code.
63. Rutan, 110 S. Ct. at 2741 (Stevens, J., concurring). Justice Stevens went on to state that “if the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure.” Id. (Stevens, J., concurring) (quoting Lewis, 473 F.2d at 568 n.14, and citing Brown v. Board of Educ., 347 U.S. 483 (1954)). Justice Stevens finally stated: “The tradition that is relevant in this case is the American commitment to examine and reexamine past and present practices against the basic principles embodied in the Constitution.” Id. at 2746 (Stevens, J., concurring).
64. Id. at 2741-42 (Stevens, J., concurring) (quoting Lewis, 473 F.2d at 568).
65. Id. at 2742-44 (Stevens, J., concurring). Justice Stevens noted that as early as 1947 the Court had acknowledged public employees' interests in political action. Id. at 2742 (quoting Lewis, 473 F.2d at 569-70 (citing United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947))). Over twenty years after Mitchell, the Court had held that “a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.” Id. at 2743 (quoting Lewis, 473 F.2d at 571 (quoting Pickering v. Board of Educ., 391 U.S. 563, 574 (1968))). Justice Stevens then pointed to the line of cases exemplified by Perry v. Sindermann, 408 U.S. 593 (1972), as evidence that in several contexts the Court already had applied the general principle that spawned Elrod and Branti: the government may not condition receipt of a benefit on a basis that infringes a person's constitutionally protected interests. Id. at 2743-44 (quoting Lewis, 473 F.2d at 561-72 (citing Supreme Court cases discussing tax exemptions, welfare payments, and public employment)). For a discussion of Perry and this so-called doctrine of "unconstitutional conditions," see infra notes 104-12 and accompanying text.
one prominent twist in a venerable conflict. For two centuries the evils and efficacies of the American spoils system have remained wellsprings of political and moral controversy. The features of the debate have often changed. One historian has remarked that viewing patronage in the mirror of twentieth-century political scruples distorts fair consideration of its role in the past. The national attitude towards all public employment has varied considerably from generation to generation. One model describes these variations as the interplay between the ideal of "discretion," in which the executive possesses an absolute privilege to hire and remove employees in whatever way best accomplishes her goals, and that of "constraint," in which people worry about the rights of individual workers. Whatever the historical theory, questions about the extent of executive hiring privileges plagued legislators in the First Congress just as they demand resolution from the Justices of today's Supreme Court.

John Adams's appointment of "midnight" judges during the four days immediately preceding Thomas Jefferson's 1801 inauguration provides a notorious early example of the use of patronage as a tool to strengthen political parties. After twelve years of Federalist control, the new President entered office to find not only the judiciary but indeed the entire federal bureaucracy staffed by his opponents. At first, Jefferson thought that retirements, resignations, and re-

66. Negative impressions of patronage have inspired writers and artists for over a century. As one commentator wrote:

The word conjures up pictures of... hordes of Jacksonian politicians, descending upon Washington, D.C., to devour the spoils; of a President assassinated by a disappointed office seeker; of fat and bloated Boss Tweed in the Nast cartoons; of incompetents lounging about government offices; of "political hacks" outrageously rewarded for devious political activity at public expense.

Note, supra note 4, at 737 n.13 (quoting E. COSTIKYAN, BEHIND CLOSED DOORS 252 (1966)); see also id. (citing cases which argue that patronage is inimical to the spirit and traditions of American democracy).

67. A. SCHLESINGER, THE AGE OF JACKSON 47 (1945) ("Until recent years, the study of the spoils system has been marred by a tendency to substitute moral disapproval for an understanding of causes and necessities."). Schlesinger argues that although patronage may have introduced some evils into American life, its original function was to "narrow the gap between the people and the government—to expand popular participation in the workings of democracy." Id.


69. Some early legislators viewed the President's ability to remove unworthy officials as a matter of paramount importance; others feared his capricious exercise of this power. See 1 ANNALS OF CONG. 496 (J. Gales ed. 1789) (remarks of Rep. James Madison); id. at 458 (remarks of Rep. William Smith), quoted in Developments, supra note 68, at 1620 n.3, 1621 nn.7-8. Representative Smith advanced the view that a public servant's office was his "property," thereby foreshadowing the discussion of interests in government benefits as "property" based on the concept of "entitlement" in Board of Regents v. Roth, 408 U.S. 564, 568-70 (1972). See Developments, supra note 68, at 1620 n.3, 1621 nn.7-8; cf. THE FEDERALIST No. 76 at 454-59 (A. Hamilton) (C. Rossiter ed. 1961) (Hamilton feared that unchecked discretion lodged in the executive might dissuade able workers from entering the public service, and thus, weaken popular confidence in government.).

70. See Rutan, 110 S. Ct. at 2746-47 (Scalia, J., dissenting) (noting that most federal judges, including Supreme Court Justices, are chosen on a partisan basis). For a spirited defense of the Federalist position in the last days of the Adams administration, see Letter from Abigail Adams to Thomas Jefferson (Oct. 25, 1804), in THE ADAMS-JEFFERSON LETTERS 280-82 (L. Cappon ed. 1988).

71. R. HOFSTADTER, THE IDEA OF A PARTY SYSTEM 134 (1969). Jefferson did not begin removing Federalists from their jobs immediately; a wholesale sweep of Federalists from all government offices might have produced an era of bitter and divisive partisan feeling, implying that a desire
Legend has exaggerated Andrew Jackson's reputation as American history's premier White House spoilsman. 73 Historians estimate that Jackson dismissed between one-fifth and one-third of all federal officials during his two terms, many for cause. 74 In addition, Jackson's patronage of federal positions, which for decades had been the thralls of landed interests, may have contributed to restoring the electorate's confidence and participation in the national government. 75 To Jackson, patronage fulfilled the moral duty of asserting the intelligence of the common man by strengthening his ability to participate in representative government. 76 Jackson's vice-president and successor, Martin Van Buren, venerated party loyalty as a virtual creed. Van Buren embraced the spoils system 77 as a proper tool for nourishing party co-

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72. R. Hofstadter, supra note 71, at 157. Jefferson removed 109 of 433 presidential appointees; of these 109, 40 were Adams's "midnight" appointments. Id.

73. A. Schlesinger, supra note 67, at 47; see R. Remini, The Age of Jackson xii n.11 (1972) (During the first eighteen months of his administration Jackson removed only 919 persons from the 10,093 positions under his control); M. Tolchin, supra note 4, at 325 (Jackson removed the holders of only 252 of 612 executive positions, and dismissed a mere 600 of 8,000 postmasters to make way for his own partisans.).

74. A. Schlesinger, supra note 67, at 47. Officials discovered frauds of at least $280,000 in the Treasury Department alone. Id.

75. Id. "The spoils system, whatever its faults, at least destroyed peaceably the monopoly of offices by a class which could not govern, and brought to power a fresh and alert group which had the energy to meet the needs of the day." Id.; cf. Rutan v. Republican Party of Ill., 868 F.2d 943, 953 (7th Cir. 1989) ("The more widespread use of patronage, beginning with Andrew Jackson and extending to modern times, has been credited with increasing the level of participation in American politics.") (citing Elrod v. Burns, 427 U.S. 347, 377-80 (1976) (Powell, J., dissenting)), aff'd in part, rev'd in part, 110 S. Ct. 2729 (1990). Ironically, the evils of patronage formed a theme of Jackson's 1828 campaign. When John Quincy Adams, Henry Clay, and Jackson split the Electoral College three ways in the 1824 election, Clay threw his support to Adams, and Adams rewarded him with the position of Secretary of State. Four years later, Jackson accused his dour and austere predecessor of having sealed a "corrupt bargain." M. Tolchin, supra note 4, at 323-24 & n.2.

76. See R. Hofstadter, The American Political Tradition 50 (1959). Jackson articulated this philosophy in his first address to Congress in December 1829. Id.; see also M. Tolchin, supra note 4, at 323 (explaining that Jackson's populist philosophy endorsed the service of ordinary people in government).

77. Senator William L. Marcy first employed the expression "To the victor belong the spoils of the enemy" in a speech supporting Van Buren's appointee to the American Embassy at the Court of St. James's in January 1832. See I. Spencer, The Victor and the Spoils: A Life of William L. Marcy 58-60 (1959); cf. Nunnery v. Barber, 503 F.2d 1349, 1351 (4th Cir. 1974) ("[I]t is well understood that the victors will reap the harvest . . . .") (quoting Alomar v. Dwyer, 447 F.2d 482, 483 (2d Cir. 1971), cert. denied, 404 U.S. 1020 (1972), cert. denied, 420 U.S. 1005 (1975); R. Hofstadter, supra note 71, at 250 n.37 (noting that Marcy may have borrowed the phrase from James T. Austin's biography of Elbridge Gerry). By the time of Van Buren's administration, however, many Americans had become troubled about the moral effects of the extensive Jacksonian patronage system. A Senate committee commissioned to study the problem concluded that patronage systems tend "to raise up a host of hungry, greedy, and subservient partisans, ready for every service, however base and corrupt." Special Senate Committee, Report on Extent of Executive Pa-
hesion.78 Twenty years later, Abraham Lincoln employed patronage with consummate dexterity, convinced that only by yielding punctiliously to senatorial courtesy could he weave a Republican network whose responsiveness and loyalty would preserve him in the presidency.79 The spoils reached their zenith under the guiding hand of a president with an Olympian reputation for honesty and probity.

After the Civil War, concern with the inefficiency of the federal bureaucracy erupted into a moral campaign for civil service reform.80 Until the assassination of President James Garfield by a disappointed office-hunter in 1881, however, repeated efforts to maneuver civil service legislation through Congress failed.81 Public outrage over the President's death led Democratic representatives to demand reform, and Congress passed the Pendleton Act two months after the election of 1882.82 The Act, which erected the foundations of the modern civil service, made competitive, practical83 examinations the key to securing government positions84 and authorized a bipartisan commission to help the President implement the new law.85

According to Justice Brennan, "[m]ore recent times have witnessed a strong decline" in the use of patronage to fill government posts.86 Careful research, however, reveals more disagreement among political scientists about the extent and influence of spoils systems than this bald assertion would suggest. Although the paucity of empirical studies of patronage renders generalizations futile,87


79. Id. at 270 & n.55 ("Lincoln used the patronage with the virtuoso skill of an inveterate spoliessman, and became instrumental in 'the most sweeping removal of federal office holders up to that time in American history.' " (quoting H. Carman & R. Luthin, Lincoln and the Patronage 331 (1943))).

80. See generally A. Hoogenboom, Outlawing the Spoils: A History of the Civil Service Reform Movement 1865-1883, at 111-34 (1961) (describing the efforts of civil service reformers in the presidential election of 1872 and President Grant's subsequent dealings with reform advocates); P. Van Ripper, History of the United States Civil Service 60-112 (1958) (tracing the history of the national movement towards civil service).

81. See Developments, supra note 68, at 1627-28 & n.58 (Because Garfield's assassination was perceived to be an extreme manifestation of the excesses of the spoils system, it served as a rallying point for proponents of reform. (citing A. Hoogenboom, supra note 80, at 212, and The Moral of It, Nation, July 14, 1881, at 26, reprinted in A. Hoogenboom, Spoilsmen and Reformers 31-32 (1964))).

82. Civil Service (Pendleton) Act, ch. 27, 22 Stat. 403 (1883). Senator George Pendleton of Ohio introduced the measure, which the New York Civil Service Reform Association, a leader in the reformist cause, had drafted. Developments, supra note 68, at 1627 & n.57 (citing A. Hoogenboom, supra note 80, at 201 & n.10, and P. Van Ripper, supra note 80, at 94).

83. Developments, supra note 68, at 1628. Congressional lawmakers feared that the new system might become like its British counterpart, closed to all but those with adequate training in the classics. Id. at 1628 & n.61. For an exhaustive treatment of the history of the civil service, see P. Van Ripper, supra note 80.


85. Id. §§ 1-2 (currently constituted as the Office of Personnel Management by authority of 5 U.S.C. §§ 1101, 1301 (1988); see Developments, supra note 68, at 1628; Note, supra note 4, at 739.


87. See infra note 174 and accompanying text.
some commentators believe that the practice continues to flourish at local, \(^{88}\) and occasionally, at state levels. \(^{89}\) One simple reason for the decline in patronage activity perceived by commentators may be the increasing dominance of many employment fields by public agencies. \(^{90}\)

Patronage activity often occurs in state government after transfers of power from one political party to the other. \(^{91}\) In the early 1960s, shortly after Pennsylvania voters elected Republican Governor William Scranton, the state’s Transportation Department dismissed some 7,800 Democrats and replaced them with Republicans. \(^{92}\) In 1970, following the election of a Democratic governor, Pennsylvania fired some 3,500 Republican highway workers. \(^{93}\) Studies have documented similar occurrences elsewhere. In a 1982 national survey, one-fourth of the county chairmen of both political parties ranked recommending and clearing patronage appointees as a "very important" responsibility of their position. \(^{94}\) Thus, making political appointments and rewarding faithful workers remained a critical element in the organizational strength of political parties, particularly at state and local levels, \(^{95}\) at least until the advent of \textit{Elrod} and

\begin{itemize}
  \item \textit{Patronage has generally been the political way of life and the political ally of the local centers of political power in their losing battle for political superiority in America. It survives to a great extent in their protest against the growth of national politics and centralized parties in the United States.} \textit{Id.}


\item A 1975 study found that school teachers have few opportunities for alternative positions in the private sector; similarly, nurses, librarians, safety personnel, and some scientists and engineers must turn to government for jobs. "The simple fact is that jobs in many fields now exist only in the public sector." O’Neil, \textit{supra} note 48, at 727; cf. \textit{Elrod} v. \textit{Burns}, 427 U.S. 347, 359 n.13 (1976) (plurality opinion) ("The increasingly pervasive nature of public employment provides officials with substantial power through conditioning jobs on partisan support . . . .").

\item \textit{See infra} note 156 and accompanying text (listing patronage suits that arose after a Republican victory in the 1984 Puerto Rican elections); see also \textit{Stott} v. \textit{Haworth}, 916 F.2d 134 (4th Cir. 1990) (litigation growing out of North Carolina’s 1984 election of the state’s second Republican governor since 1900), analyzed in \textit{infra} at notes 157-66.

\item \textit{Taking the Politics Out of the Paycheck}, \textit{Bus. Week}, May 22, 1971, at 22. The Transportation Department’s total force numbered only 8,000.

\item \textit{Id.}


\end{itemize}
Legal challenges to dismissal from public employment are far older than the dates the first civil service legislation might suggest.97 In several early cases the Supreme Court sustained such removals on the theory that public employment is a privilege, not a right, or that workers who accept public employment waive their rights to freedom of association and speech.98 Justice Holmes expressed the core of the right-privilege distinction when he trenchantly observed, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."99

The right-privilege distinction reappeared half a century later in Bailey v. Richardson,100 in which a federal appeals court upheld the dismissal from a non-political position of a government servant suspected of disloyalty. The court observed: "The First Amendment guarantees free speech and assembly, but it does not guarantee government employ."101 Two decades later, in Alomar v. Dwyer,102 another federal court of appeals held that first amendment guarantees


97. In one of the earliest dismissal cases, the Supreme Court permitted a district judge to remove a loyal, hardworking clerk solely to fill the post with a friend. Ex parte Hennen, 38 U.S. (13 Pet.) 230, 261-62 (1839).

98. See Note, supra note 4, at 739-40; cf. Keim v. United States, 177 U.S. 290, 293-94 (1900) (Secretary of Interior's discharge of clerk in his department not subject to judicial review in absence of a specific congressional statute creating such review); Parsons v. United States, 167 U.S. 324, 343 (1897) (President may remove United States attorney in his discretion for the public good); Crenshaw v. United States, 134 U.S. 99, 109-10 (1890) (Naval Academy graduate could lose his commission when there were no positions for him to fill). For a modern example of the waiver theory, see Nunnery v. Barber, 503 F.2d 1349, 1359-60 (4th Cir. 1974) (operator of state-owned liquor store who voluntarily accepted his job knowing it was a patronage position had no first amendment right to challenge his dismissal), cert. denied, 420 U.S. 1005 (1975).

99. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). Justice Holmes went on to conclude that the governmental hiring authority may impose "any reasonable condition upon holding office." Id., 29 N.E. at 518; see Comment, Patronage Dismissals: Constitutional Limits and Political Justifications, 41 U. CHI. L. REV. 297, 308 (1974); cf. Scopes v. State, 154 Tenn. 105, 109-10, 289 S.W. 363, 364 (1927) ("[Defendant] had no right or privilege to serve the state except upon such terms as the state prescribed.").

100. 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951) (per curiam).

101. Id. at 59. The court commented that there was no constitutional doctrine to stop "Republican Presidents from dismissing Democrats or Democratic Presidents from dismissing Republicans." Id.; see Note, supra note 4, at 740-41 nn.35-41.

102. 447 F.2d 482 (2d Cir. 1971), cert. denied, 404 U.S. 1020 (1972). Officials allegedly discharged plaintiff in Alomar for her refusal to switch her party registration from Democratic to Re-
of free speech and association did not apply to an employee not protected by civil service statutes. Government employment, the court ruled, was a privilege "terminable at will without notice." 103

Even as it affirmed the constitutionality of the right-privilege distinction, the Supreme Court gradually developed the nemesis of right-privilege, the so-called doctrine of "unconstitutional conditions." 104 The doctrine forbids the government from conditioning receipt of its benefits upon disaffirmation of constitutional rights even if the benefits are "mere privileges." 105 In 1967 the Court directly addressed the question of whether hiring officials could condition public employment on political association. 106 In *Keyishian v. Board of Regents* 107 the Court invalidated a New York law barring employment on grounds of mere membership in a "subversive" organization. The majority held that the statute was overbroad because it did not allow academic employees to deny their specific intent to advance the organization's unlawful goals. 108 Specifically, the Court stated that free speech in academic settings is a matter of "transcendent value." 109

Similarly, the Court in *Perry v. Sindermann* 110 rejected restrictions on first amendment rights as conditions to receiving public employment benefits. 111 The Court held that the government may not bypass constitutional guar-
Four years after Perry, in 1976, the Supreme Court confronted patronage practices nearly two centuries old in the seminal decision Elrod v. Burns. The respondents in Elrod were Republican deputy sheriffs discharged or threatened with discharge by the newly elected Democratic sheriff of Cook County, Illinois. For the first time, the Court encountered dismissals ordered merely on the basis of affiliation with an opposing political party. Justice Brennan, writing for a plurality of three Justices, framed the issue squarely within the commanding principle of Keyishian and Perry. Conditioning public employment on support for the favored political party restricts constitutionally protected belief and association, and achieves indirectly that which the state may not order directly. Although the plurality weighed the state's interest in ensuring an efficient and effective public work force, it found that interest unpersuasive, noting that the availability of merit systems and the accountability of elected officials to the public provided "less intrusive" means of securing effective government than patronage. The plurality recognized, however, the government's need to withhold first amendment rights from "policy-making" employees, and created an exception to its holding for them.

In a ringing dissent, Justice Powell traced the history of patronage from Washington's presidency through Jackson's. The dissenting Justices argued that the government's interest in fostering stable political parties and avoiding excessive political fragmentation, as well as the importance of spoils systems to the promotion of broader social interests, outweighed first amendment concerns.

112. Id. In Elrod v. Burns, the plurality stated that both Keyishian and Perry were "particularly pertinent" to the constitutionality of patronage dismissals. 427 U.S. 347, 358 (1976) (plurality opinion). As the plurality further explained, "Keyishian squarely held that political association alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment." Id. at 358-59 (plurality opinion).


114. Id. at 350-51 (plurality opinion).

115. Justices White and Marshall joined in the opinion.


117. Elrod, 427 U.S. at 359 & n.13 (plurality opinion).

118. Id. at 364-65 (plurality opinion).

119. Id. at 366 (plurality opinion).

120. Id. at 367 (plurality opinion). Justice Brennan admitted that "[n]o clear line can be drawn between policymaking and non-policymaking positions." Id. (plurality opinion). Yet the plurality set forth two criteria for determining what label should attach to a given position: (1) an employee whose responsibilities were "not well defined" or "of broad scope" more likely would operate as a policymaker, and (2) "consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." Id. at 368 (plurality opinion). Justice Brennan used the example of an employee supervisor to illustrate these propositions; while such a position could entail many responsibilities, its duties might involve "only limited and well-defined objectives." Id. at 367-68 (plurality opinion).

121. Id. at 376-89 (Powell, J., dissenting). Chief Justice Burger and Justice Rehnquist joined Justice Powell in dissent.

122. Id. at 377-79 (Powell, J, dissenting); see supra text accompanying notes 70-79.

123. Elrod, 427 U.S. at 383 (Powell, J., dissenting).

124. Justice Powell noted the ability of patronage practices to encourage minority involvement in the democratic process. Id. at 382 n.6 (Powell, J., dissenting); see supra note 96.
Despite Elrod's sweeping ruling, the Court, during the same term, cautioned that federal courts are not appropriate fora in which to review the multitude of personnel decisions public agencies make daily. Yet in Branti v. Finkel, a majority of the Court reaffirmed Elrod's protection against patronage removals. Respondents, two Republican assistant public defenders, brought suit to enjoin the newly elected Democratic public defender from discharging them from their positions. The district court, applying Elrod's "policymaking" test, found that an assistant public defender is neither a policymaker nor a confidential employee, and granted injunctive relief. The United States Court of Appeals for the Second Circuit affirmed.

The Supreme Court, speaking through Justice Stevens, affirmed the court of appeals. Justice Stevens modified Elrod's "policymaking" exception, stating that the proper test to determine whether political affiliation is a legitimate factor to consider in public employment "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." Justice Stevens apparently designed the new test to limit further the positions that a hiring authority might argue fall within the "policymaker" category. The new test also appeared to place the burden of establishing that party affiliation is an "appropriate requirement" for the post upon the hiring authority.

Justice Stewart, in a short dissent, wrote that he believed that the relationship between a public defender and his assistants necessarily implied a "close

127. The vote in Branti was six to three. Chief Justice Burger and Justices Brennan, White, Marshall, and Blackmun joined Justice Stevens's majority opinion.
131. Branti, 445 U.S. at 511. The petitioner argued that the Court should distinguish Elrod on two grounds. First, he contended that the Elrod plurality had limited its holding to situations in which hiring authorities coerced state employees to pledge allegiance to a political party they would not voluntarily support. Elrod, therefore, would not apply when the employee merely needed the support of the party in power. Second, the petitioner maintained that party membership is an acceptable requirement for assistant public defenders. Id. at 512.
132. Id. at 518 (emphasis added).
133. Id. ("It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position."). Justice Stevens compared a state university football coach with a governor's assistant as examples of positions on which the "policymaker" exception might run aground. Although a football coach clearly formulates policy, no one could seriously argue that Republicans make better coaches than Democrats; conversely, a governor might properly question the ability of someone not in harmony with his political beliefs to communicate his views effectively. Id.
134. Branti, 445 U.S. at 518 ("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.").
135. Id. at 520-21 (Stewart, J., dissenting).
professional and necessarily confidential association," thus removing the respondents from Elrod's exception. Justice Powell also dissented, objecting that the Court once again had ignored nearly two centuries of American political tradition in eviscerating patronage practices. "The standard articulated by the Court," Justice Powell argued, "is framed in vague and sweeping language certain to create vast uncertainty." 

Rutan's significance lies in its simple expansion of the facts on which plaintiffs may base a cognizable patronage claim. Without elaborating on the strand of first amendment jurisprudence it had introduced in Elrod and refined in Branti, the Rutan Court merely continued on its course of chipping away the lingering taint of patronage from American political life. Yet despite its incremental contribution to constitutional theory, Rutan may prove a more effective decision than its ground-breaking predecessors. The reason is the number and pervasiveness of the very patronage practices that the Rutan majority declared unconstitutional: using party affiliation to influence promotion, transfer, rehiring, and hiring decisions. Collectively, these four factual scenarios may realize a far greater impact on actual patronage activity than Elrod and Branti, which confronted only its most heinous form.

A vital question left unanswered in Rutan is the extent to which the Court intended lower courts to confine the case to its facts. The majority raised this issue twice, and twice failed to explain its intentions. In his initial exposition of the Court's holding, Justice Brennan spoke of the petitioners as "low-level employees," but never defined the phrase nor gave any indication of the effect he meant their status to have on the holding. Later, in a footnote, Justice Bren-
nan refused to consider whether the Supreme Court's adjudication of the petitioners' claims might affect the scope of Branti's "appropriate requirement" exception. Admittedly, this response does not reflect directly on the petitioners' "low-level" status; it does, however, reinforce the argument that Rutan's claimants did not hold, or hope to hold, positions for whose effective performance party affiliation might prove an "appropriate requirement." Moreover, Justice Stevens, who joined the majority's opinion, also denied the applicability of the Branti exception to the public positions the petitioners filled. Thus, future defendants in Rutan actions could argue that the Court intended to limit its ruling to plaintiffs on the lower rungs of the public employment ladder.

Whatever the limits of Rutan itself, the scope of Branti's "appropriate requirement" exception remains a problem with which many patronage claimants must grapple. The responses of lower courts attempting to formulate consistent interpretations of the exception have proved Justice Powell correct: the "appropriate requirement" standard has created vast uncertainty, prompting openly negative comment from lower court judges in some cases. Efforts to apply the standard have produced results that vary widely even when virtually the same position is involved. Four decisions reveal the depth of these

thought later in the opinion, although less obviously. Discussing the state's interest in securing employees who would "loyally implement its policies," he argued that those interests "[could] be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." Rutan, 110 S. Ct. at 2737 (citing Elrod v. Burns, 427 U.S. 347, 365-68 (1976) (plurality opinion), and Branti v. Finkel, 445 U.S. 508, 518, 520 n.14 (1980) (emphasis added)).

144. See supra notes 132-34 and accompanying text.
145. Rutan, 110 S. Ct. at 2745 n.5 (Stevens, J., concurring) (citing id. at 2756-58 (Scalia, J., dissenting) (citation omitted)). Responding to Justice Scalia's attack on the uncertainty engendered in lower courts by the exception he had created in Branti, Justice Stevens stated:

Neither Justice Scalia nor any of the parties suggests that party affiliation is relevant to any of the positions at stake in this litigation—rehabilitation counselor, road equipment operator, prison guard, dietary manager, and temporary garage worker. Reliance on the difficulty of precisely dividing the positions in which political affiliation is relevant to the quality of public service from those in which it is not an appropriate requirement is thus inapposite. Difficulty in deciding borderline cases does not justify imposition of a loyalty oath in the vast category of positions in which it is irrelevant.

Id. (Stevens, J., concurring)

146. Justice Brennan reaffirmed the viability of the exception for Rutan claims in a footnote. Id. at 2735 n.5.
147. See, e.g., Rodriguez Rodriguez v. Munoz Munoz, 808 F.2d 138, 140 (1st Cir. 1986) (describing the state of the law after Branti as "murky" and marked by "outright confusion"); Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 241 (1st Cir. 1986) (en banc) ("Identifying generic categories of positions where partisan selection and rejection are permissible has . . . proven to be an elusive and intractable task."); cert. denied, 481 U.S. 1014 (1987); Brown v. Trench, 787 F.2d 167, 169 (3d Cir. 1986) ("While Branti provides us with a 'test,' the Supreme Court has not specified the particular factors which indicate that a position falls within the Branti test."); Meeks v. Grimes, 779 F.2d 417, 419 (7th Cir. 1985) ("The problems faced by the courts in applying the Branti standard have become increasingly intractable."); Auriemma v. City of Chicago, 601 F. Supp. 1080, 1085 n.6 (N.D. Ill. 1984) (noting that the "appropriate requirement" standard is vague, but refusing to refine the formulation); Gannon v. Daley, 561 F. Supp. 1377, 1383 (N.D. Ill. 1983) (stating that the "appropriate requirement" exception, although vague, should be applied with reference to its aim of promoting efficient public administration).

148. The most exhaustive study of attempts by the federal circuits to grapple with the Branti exception is Martin, supra note 3. Although the article predates Rutan, it is an excellent source for anyone seeking to obtain a better sense of the positions around which patronage activity often occurs.
ribs. A city cannot fire its deputy court clerk because of her party affiliation, but it can dismiss the clerk's legal assistant on patronage grounds. A city cannot discharge its highway director for political reasons, but it may dismiss the assistant head of its water department. At least one court tried to reduce the standard to more objective criteria to determine whether particular jobs appropriately required political affiliation. As one lower court has suggested, there is virtually no public office for which party affiliation would be an indispensable requirement.

The months following an election can prove a fertile season for the filing of complaints alleging unconstitutional patronage dismissals. A number of patronage suits that reached the United States Court of Appeals for the First Circuit in the mid- to late-1980s stemmed from the change in administration after the 1984 Puerto Rican gubernatorial election. Recently, a panel of the United States Court of Appeals for the Fourth Circuit decided an appeal from a North Carolina federal district court arising out of that state's 1984 election. In Stott v. Haworth, a group of North Carolina non-civil-service employees sued Republican Governor James G. Martin and other state officials, maintaining that the administration had terminated or demoted them solely because they...
were Democrats.159 Although the Stott Court did not directly address the merits of each plaintiff's complaint,160 it ruled on two preliminary issues of considerable interest to future patronage claimants.

The first of these issues involved the trial court's certification of a class action. Claimants maintained that they represented a far larger group which was or might be subject to adverse employment actions based solely on party affiliation. Plaintiffs, therefore, moved for class certification of their cause pursuant to Federal Rule of Civil Procedure 23(a),161 on the theory that their claims satisfied the "commonality" of fact and law and "typicality" of claims required for a class action. The Stott court concluded that "where proper resolution requires a thorough inquiry into the facts surrounding the adverse personnel action taken against each claimant ... class certification is improper as a matter of law."162

More significantly, the Stott court relied on North Carolina's civil service statute163 to establish a rebuttable presumption164 that the plaintiffs were subject to lawful discharge. The statute permitted the governor to designate certain state positions as exempt from civil-service protection.165 The court determined that the statute effectively fulfilled Branti's "appropriate requirement" test.166

160. See Stott, 916 F.2d at 138. The Fourth Circuit considered only the effect of the employees' exempt status under the North Carolina statute and the district court's decision to certify their claims as a class action.
161. FED. R. CIV. P. 23(a). The rule provides, in relevant part, as follows:
One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ... ."
162. Stott, 916 F.2d at 139 (emphasis added). The Stott majority also dismissed plaintiffs' contention that "whether the governor and his staff pursued a pattern or practice of patronage dismissals" presented a constant and pervasive issue as to all of them. Id. at 140. The court stated that, unlike Title VII actions alleging racial or ethnic discrimination, patronage dismissal cases mandate inquiry on more levels than simply observing a "pattern or practice." Such inquiry must determine "(1) whether the position held was subject to patronage dismissal, and (2) if not, whether there was another constitutionally sufficient reason ... to justify the action taken." Id. at 143.

Judge Murnaghan, dissenting, noted that in Title VII contexts, courts had used the "pattern or practice" inquiry merely to establish a presumption, which was rebuttable upon a showing that the discriminatory factor was bona fide or did not cause the adverse action. Thus, the dissenting judge argued, a trial judge in his discretion might certify a class of patronage claims on the same grounds as a Title VII claim. Id. at 146-47 (Murnaghan, J., dissenting).
164. "We 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." Stott, 916 F.2d at 142.
166. "The rationale for creating exempt positions, positions exempt from the protection afforded by the civil service statute, was to allow the governor to employ top level state employees on an at-will basis ... ." Stott, 916 F.2d at 142. The statutory scheme allowed the governor to designate "policy-making" positions for exemption, see N.C. GEN. STAT. § 126-5(d)(4), and defined "policy-making" positions as "[those] in which the job duties include a significant input into and control over the final determination of a settled course of action affecting the level or nature of services of a defined governmental program." Id. § 126-5(g).
The benefit of the *Stott* result was to give the trial court a standard by which to evaluate plaintiffs' claims upon remand.

The ameliorative effect of the use of a rebuttable presumption is evident in a group of decisions, closely related to *Stott*, which involved dismissals based not only on the employee's political affiliation but also on some other factor. In these so-called "mixed motive" cases, the employee must show that his exercise of his constitutionally protected belief was a "substantial" or "motivating" factor in the decision to dismiss. If the employee makes such a showing, the burden shifts to the employer to establish that he would have made the same decision whether or not the employee behaved as he did.

Patronage adjudication would become simpler for the lower federal courts if, like the Fourth Circuit in *Stott*, they would adopt a rebuttable presumption standard in these cases. A good example of such a presumption is that mandated by the Second Circuit in *Savage v. Gorski*, when the court declared that substantial deference would be paid to the state's statutory declaration of its patronage law. Another advantage of adopting a rebuttable presumption based upon state law is that it places the responsibility for weighing the benefits and disadvantages of patronage ultimately in the hands of legislators, not federal judges.

The plurality in *Elrod* and the *Branti* and *Rutan* majorities consistently downplayed the legitimacy of the governmental interests patronage practices foster. Yet there is no systematically obtained body of reliable data to sup-

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168. Martin, supra note 3, at 48.


170. 850 F.2d 64 (2d Cir. 1988).

171. The Second Circuit's adoption of the presumption was unequivocal:

Both 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. Otherwise, federal courts will be embroiled in determining at each change of state or local administration which positions are appropriately within the political patronage system. Such a determination not only creates the possibility of a super-civil service overseen by the courts, but allows the federal judiciary to intrude undesirably into the very structure of state and local governments.

*Id.* at 69.

172. The Fourth Circuit earlier recognized the same principle:

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.


173. *See Rutan*, 110 S. Ct. at 2737; Branti v. Finkel, 445 U.S. 507, 517-18 (1980); *Elrod v. Burns*, 427 U.S. 347, 362-66 (1976) (plurality opinion). In *Elrod*, the government employer had argued that patronage (1) "furthe[ed] government effectiveness and efficiency," 427 U.S. at 366 (plurality opinion); (2) promoted "representative government" by ensuring that "policies presumably sanctioned by the electorate" are implemented, *id.* at 367 (plurality opinion); and
port so unequivocal a pronouncement on the evils, or for that matter the benefits, of patronage systems. This dearth of hard fact is understandable; merely defining the parameters of such a study, and the definitions it would employ, would prove a daunting task. In a politically charged atmosphere, however, public employees can become mere pawns to patronage systems. Unfortunately, in its haste to despoil the spoils with a rush to constitutional adjudication, the Rutan Court ignored the difficult interpretative problems it had already created in Elrod and Branti. When next confronted with a patronage case, perhaps the Supreme Court finally will acknowledge legislatures' superior ability to decide the fate of the spoils by establishing a rebuttable presumption as the standard in future patronage litigation.

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(3) "preserv[ed] . . . the democratic process," id. at 368 (plurality opinion). The plurality considered the first and third arguments unpersuasive. Id. (plurality opinion).

174. See E. COSTIKYAN, BEHIND CLOSED DOORS 252-53 (1966); Note, supra note 4, at 737-38 n.18 (stating that current statistics often appear after patronage has been removed, not during its actual use).

175. The Seventh Circuit agreed. "While the wisdom of patronage hiring practices is certainly open to debate, the validity of such practices is something more appropriately addressed to the legislature than to the courts." Rutan v. Republican Party of Ill., 868 F.2d 943, 955 (7th Cir. 1989) (en banc), aff'd in part, rev'd in part, 110 S. Ct. 2729 (1990).