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Louis Cammarosano

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APPLICATION OF THE FIRST AMENDMENT TO POLITICAL PATRONAGE EMPLOYMENT DECISIONS

INTRODUCTION

Political patronage is “the allocation of the discretionary favors of government in exchange for political support.”¹ In a patronage system, public officials may award jobs and promotions, or even fire employees, solely on the basis of political affiliation.² Abuses in patronage systems led to the enactment of civil service laws,³ which greatly restricted the role of political considerations in public employment decisions.⁴

The Supreme Court first addressed the impact of the first amendment⁵ on patronage dismissals in 1976. In *Elrod v. Burns*,⁶ a plurality on the Court stated that dismissing public employees because of their political affiliation impermissibly restricted political belief and association.⁷ The Court limited the power of government employers to dismiss public employees for their political affiliation to policymaking positions.⁸ The Court adopted a balancing test based on *Pickering v. Board of Education*⁹ and stated that “any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms.”¹⁰

1. M. Tolchin, *To The Victor* 5 (1971).

2. *See Loughney v. Hickey*, 635 F.2d 1063, 1065 (3d Cir. 1980); P. Van Riper, *History of United States Civil Service* 46 (1958).

3. *See Loughney*, 635 F.2d at 1065; P. Van Riper, *supra* note 2, at 6.

4. Typical of such statutes is the Government Organization and Employees Act, Pub. L. No. 89-554, 80 Stat. 378, 525 (1966) (codified as amended at 5 U.S.C. §§ 7321-7324 (1982)). For example, Section 7321 provides:

The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, that an employee in an Executive agency or in the competitive service is not obliged, by reason of that employment, to contribute to a political fund or to render political service, and that he may not be removed or otherwise prejudiced for refusal to do so.

5 U.S.C. § 7321.

This Note will address employment practices not covered by civil service statutes.

5. The first amendment provides, in pertinent part: “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble.” U.S. Const. amend. I. The Supreme Court has long recognized that the first amendment protects certain forms of group activity. *See NAACP v. Button*, 371 U.S. 415, 430 (1963).

6. 427 U.S. 347 (1976).

7. *See id.* at 355-60.

8. *See id.* at 367-68.

9. 391 U.S. 563 (1968). In *Pickering*, a teacher was dismissed for writing a letter criticizing the school board. The Supreme Court held that where a government benefit is denied due to the exercise of a constitutional right, a balancing test must be used to determine the constitutionality of the denial. *See id.* at 568. The Court balanced the employee's interest in free expression against the state's legitimate interest in the challenged practice. *See id.* In *Pickering*, the Court recognized the public employer's need to promote efficiency in the services it performs through its employees, *see id.* at 568, which may be achieved by allowing the employer to discipline workers. *See id.* at 570 n.3.

10. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Later, in *Branti v. Finkel*,¹¹ the Court modified *Elrod* and established a new test for considering the validity of patronage dismissals. Under the *Branti* test, a patronage dismissal will be upheld when "the hiring authority can demonstrate that party affiliation is an *appropriate* requirement for the effective performance of the public office involved."¹²

Together, *Branti* and *Elrod* enunciate broad principles governing the application of the first amendment to patronage firings.¹³ Lower courts, however, have applied these principles inconsistently when patronage motivates employment decisions which do not involve firing. For example, courts disagree whether a public employer may legitimately consider an employee's political affiliation in decisions relating to hiring,¹⁴ rehiring,¹⁵ promotion,¹⁶ demotion¹⁷ and transfer.¹⁸

Some courts, ignoring the potential benefits of political patronage, strike down all patronage practices.¹⁹ Other courts uphold patronage practices which arguably do not advance any legitimate governmental interest.²⁰ Other courts adopt still another approach. This approach balances the government's interest in maintaining the patronage practice against the first amendment interests of an employee or prospective

11. 445 U.S. 507 (1980).

12. *Id.* at 518 (emphasis added).

13. Many courts have complained that *Elrod* and *Branti* provide insufficient guidance as to what is an appropriate requirement for a patronage dismissal. *See, e.g., Branti*, 445 U.S. at 524 (Powell, J., dissenting); *Figueroa-Rodriguez v. Aquino*, 863 F.2d 1037, 1043 (1st Cir. 1988); *Hawkins v. Steingut*, 829 F.2d 317, 320 (2d Cir. 1987).

14. *Compare* *Messer v. Curci*, 881 F.2d 219 (6th Cir. 1989) (political affiliation may be considered in hiring decisions) *and Avery v. Jennings*, 786 F.2d 233 (6th Cir.) (same), *cert. denied*, 477 U.S. 905 (1986), *with Indiana State Employees Ass'n. v. Indiana Republican State Cent. Comm.*, 630 F. Supp. 1194 (S.D. Ind. 1986) (use of political affiliation in hiring decisions violates first amendment) *and Torres v. Grunkmeyer*, 601 F. Supp. 1043 (D. Wyo. 1985) (same).

15. *See Rutan v. Republican Party*, 848 F.2d 1396 (7th Cir. 1988) (consideration of political affiliation permissible in rehiring decisions), *aff'd in part, rev'd in part*, 868 F.2d 943 (7th Cir.) (en banc), *cert. granted*, 58 U.S.L.W. 3212 (U.S. Oct. 3, 1989) (No. 88-1872).

16. *See Rice v. Ohio Dep't. of Transp.*, No. 86-3312, slip op. at 5-6 (6th Cir. Oct. 13, 1989) (consideration of political affiliation permissible in promotion decisions); *Rutan*, 848 F.2d at 1396 (same).

17. *See Lieberman v. Reisman*, 857 F.2d 896 (2d Cir. 1988) (use of political affiliation to justify retaliatory actions by government employers against employees violates first amendment); *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987) (use of political affiliation in employment decisions violates first amendment).

18. *See Delong v. United States*, 621 F.2d 618 (4th Cir. 1980) (use of political affiliation permissible in transfers not amounting to constructive discharges).

19. *See Lieberman*, 857 F.2d at 900; *see also Bennis*, 823 F.2d at 731-32. (while recognizing existence of balancing test, court did not balance potential benefits of political patronage).

20. *See, e.g., Horn v. Kean*, 796 F.2d 668, 674-79 (3d Cir. 1986) (consideration of political affiliation permissible in awarding government contracts); *Lafalce v. Houston*, 712 F.2d 292, 295 (7th Cir. 1983) (same), *cert. denied*, 464 U.S. 1044 (1984); *Loughney v. Hickey*, 635 F.2d 1063, 1071 (3d Cir. 1980) (Aldisert, J., concurring) (patronage necessary despite risk of restricting public servant's freedom of association).

employee.²¹

This Note examines patronage practices in the non-firing context and argues that the use of patronage is appropriate when the government can show that its value in employment decisions outweighs the intrusion into the employee's first amendment interests. Part I of this Note discusses the history of political patronage and demonstrates that, when properly used, patronage serves vital governmental interests. Part II examines the *Elrod*²² and *Branti*²³ decisions and the confusion they have engendered. Part III suggests a balancing test that weighs the government's interest in use of patronage against the extent of the intrusion into the plaintiff's first amendment interests. This Note proposes that the plaintiff's property interest in a position be used to measure the intrusion that patronage has on the plaintiff's first amendment rights. The balancing test is then applied to various non-firing patronage-based employment decisions. This Note concludes that consideration of political affiliation in certain employment decisions does not violate the first amendment.

I. POLITICAL PATRONAGE

Patronage has existed in American politics for over 200 years.²⁴ Presidents Washington, Jefferson, Jackson and Lincoln made use of political patronage in their administrations.²⁵ Moreover, patronage has played an important role in bolstering the political party system.²⁶ It enables political parties, an essential element of our democratic system,²⁷ to encourage political party supporters to participate in the political process.²⁸ These incentives often include awarding employment to party supporters and volunteers.²⁹

Before the enactment of civil service statutes, patronage practices were

21. See, e.g., *Messer v. Curci*, 881 F.2d 219, 223 (6th Cir. 1989); *Rutan v. Republican Party*, 848 F.2d 1396, 1401 (7th Cir. 1988), *aff'd in part, rev'd in part*, 868 F.2d 943 (7th Cir.) (en banc), *cert. granted*, 58 U.S.L.W. 3212 (U.S. Oct. 3, 1989) (No. 88-1872); *Avery v. Jennings*, 786 F.2d 233, 237 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986).

22. 427 U.S. 347 (1976).

23. 445 U.S. 507 (1980).

24. See *Elrod v. Burns*, 427 U.S. 347, 378 (1976) (Powell, J., dissenting). See generally C. Fish, *The Civil Service and the Patronage* (1904) (history of political patronage in the United States); H. Hecllo, *A Government of Strangers* (1977) (same); P. Van Riper, *supra* note 2 (same).

25. Commentators have credited Lincoln's use of patronage during the Civil War with aiding in the preservation of the Union. See C. Fish, *supra* note 24, at 6-16, 105-33, 169-72; P. Van Riper, *supra* note 2, at 43.

26. Political parties ensure that the electorate is informed and provide candidates with an organization to raise the funds necessary to capture the attention of the electorate. See *Branti v. Finkel*, 445 U.S. 507, 528 (1980). Political parties also "recruit potential candidates, train party workers, provide assistance to voters, and act as liaisons between voters and governmental bureaucracies." *Id.* at 529 n.11.

27. See *id.* at 528-29.

28. See *Elrod v. Burns*, 427 U.S. 347, 379 (1976).

29. See *Branti*, 445 U.S. at 529.

widely abused.³⁰ For example, officials often required employees to contribute to political funds or to render political service in exchange for their jobs.³¹ Government employers sometimes rewarded supporters with positions requiring little or no work.³² Abusive patronage practices led to the enactment of civil service laws³³ which replaced patronage systems with merit systems.

One of the goals of a patronage system is to promote governmental efficiency.³⁴ For example, newly elected officials might use patronage to streamline the process of appointing officials in their administrations.³⁵ In a valid patronage system, party affiliation is not the sole determinant in the appointment of officials; each new appointment must have the ability to perform the tasks required.³⁶ Moreover, the selection of individuals with similar political views helps to ensure that the policies mandated by the electorate are carried out efficiently.³⁷ Furthermore, selecting and retaining employees on the basis of political affiliation fosters a spirit of common purpose³⁸ and minimizes the disruptive effects of dissention.

Patronage, however, is not without its critics.³⁹ For example, some have suggested that patronage actually inhibits governmental effectiveness.⁴⁰ This view argues that patronage encourages the government to hire applicants who are not necessarily the most competent, which in turn threatens governmental quality and efficiency.

Arguments criticizing patronage systems, however, fail to take into account that pressures created by a patronage system also provide incen-

30. At the state level, in the 1960s and 70s, Mayor Daley of Chicago was notorious for evading civil service laws and reinstating pure patronage-based systems. *See* M. Rokyo, Boss: Richard J. Daley of Chicago 59-69 (1971). For example, in the days of Daley's "Machine", he awarded no-show jobs and required employees to donate to a political fund. *See id.* at 63, 67.

31. *See Hatch Act, 1977: Hearing Before the Committee on Post Office and Civil Service*, 92d Cong., 2d Sess. 21 (1973) (statement of Senator Stevens).

32. *See* M. Rokyo, *supra* note 30, at 59-68.

33. *See, e.g.*, 5 U.S.C. § 7324(a) (1973); Ill. Rev. Stat., ch. 24½, § 38t (1969); N.Y. Civ. Serv. Law § 107 (McKinney 1983); Pa. Stat. Ann. tit. 71, § 741.904 (Purdon 1962 & Supp. 1989). In addition, many states have recently provided further safeguards against unethical patronage practices by appointing independent ethics commissions to investigate employment practices. *See, e.g.*, N.Y. Times, Jan. 11, 1989, at B4, col. 1 (discussing State Government Integrity Commission investigation into alleged patronage program in New York City).

34. *See* Branti v. Finkel, 445 U.S. 507, 521 (1980) (Powell, J., dissenting).

35. *See* Messer v. Curci, 877 F.2d 219, 233 (6th Cir. 1989); Brauer, *Lost in Transition*, The Atlantic, Nov. 1988, at 74-75.

36. *Cf.* Elrod v. Burns, 427 U.S. 347, 379 (1976) (Powell, J., dissenting) (recognizing a corresponding disadvantage of patronage in that it "also entail[s] costs to government efficiency."). For example, persons whose primary qualifications are party affiliation might be appointed instead of more qualified candidates.

37. *See* Loughney v. Hickey, 635 F.2d 1063, 1065 (3rd Cir. 1980).

38. *See* H. Hecllo, *supra* note 24, at 181-82.

39. *See* Elrod, 427 U.S. at 379 (Powell, J., dissenting).

40. *See id.* (citing D. Rosenbloom, Federal Service and the Constitution 70-74 (1971)).

tives for employees to perform.⁴¹ Employees appointed because of patronage tend to be especially responsive to their superiors' directives.⁴² This responsiveness is motivated, in part, by political self-preservation. Good performance by an employee reflects well on the patron, increasing the chances that voters will return the official to office.⁴³

The continued expansion of government bureaucracies underscores the need to administer these organizations efficiently.⁴⁴ This can be accomplished by allowing the government to select, retain and promote employees partially on the basis of political affiliation.⁴⁵

II. THE SUPREME COURT ON PATRONAGE DISMISSALS

A. *Elrod v. Burns*

In *Elrod v. Burns*,⁴⁶ the Supreme Court addressed the question of whether patronage practices infringe upon first amendment interests.⁴⁷ A plurality struck down the patronage practice at issue, holding that firings⁴⁸ based on political affiliation are allowed only of employees who function in policymaking roles.⁴⁹

Justice Brennan, writing for the plurality, stated that the patronage practice at issue placed an impermissible restriction on freedoms of belief and association with the political party of one's choice.⁵⁰ Brennan concluded that a threatened dismissal for "failure to provide . . . support unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise."⁵¹

As the plurality noted, however, first amendment protections are not absolute.⁵² Restraints on belief and association are permissible when the

41. See *Loughney*, 635 F.2d at 1065-67.

42. See *Branti v. Finkel*, 445 U.S. 507, 530 (1980).

43. See *Loughney*, 635 F.2d at 1065-67.

44. See H. Hecllo, *supra* note 24, at 4.

45. See *id.* at 4-5.

46. 427 U.S. 347 (1976). *Elrod* involved three Republicans who were fired from their non-civil service jobs solely "because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders." *Id.* at 351. Another employee was threatened with dismissal for the same reasons. See *id.* The three dismissed employees brought a suit requesting an injunction to order reinstatement. The other requested an injunction to prevent his discharge. See *id.* at 350.

47. See *id.* at 349.

48. The Court emphasized that the opinion dealt only with patronage dismissals. See *id.* at 353.

49. See *id.* at 372.

50. See *id.* at 372-73 (Brennan, J. concurring).

51. *Id.* at 359.

52. See *id.* at 360. The first amendment appears to speak in absolute terms; if read literally, competing interests would never be balanced. This absolutist view was espoused by Justices Douglas and Black, but has never been adopted by a majority of the Court. See J. Nowak, R. Rotunda, J. Young, *Constitutional Law* § 16.7, at 838 (3d ed. 1986). The majority of first amendment controversies are decided by balancing the plaintiff's interest in free expression against the state's legitimate interest in abridging those free-

government has appropriate reasons.⁵³ For a patronage practice to survive constitutional scrutiny, it must further some vital governmental purpose by means which are least restrictive of freedom of belief and association and "the benefit gained must outweigh the loss of constitutionally protected rights."⁵⁴ The Court held that employers' interests are adequately protected where patronage practices are limited to those positions which require an employee to formulate policy.⁵⁵ Furthermore, in the firing context, the government's interest in promoting an efficient workplace through patronage "does not suffice to override [the] severe encroachment on First Amendment freedoms."⁵⁶

Justices Stewart and Blackmun, in concurring, did not believe the case required a consideration of the value of political patronage.⁵⁷ They saw the issue as whether a government employee could be fired or threatened with dismissal from a job "that he is satisfactorily performing upon the sole ground of his political beliefs."⁵⁸

Justice Powell dissented,⁵⁹ arguing that the plurality ignored the benefits of patronage and its practical relevance.⁶⁰ Justice Powell contended that political patronage has "played a significant role in democratizing American politics."⁶¹ He credited political patronage with strengthening political parties,⁶² by providing incentives to those who participate in the political process. Powell agreed in principle with the plurality that government employment ideally should not be conditioned upon one's political affiliation.⁶³ He advanced, however, a pragmatic counter argument, claiming that the plurality ignored the vital governmental need to attract

doms. See Emerson, *First Amendment Doctrine and the Burger Court*, 68 Calif. L. Rev. 422, 438 (1980).

53. See *Elrod v. Burns*, 427 U.S. 347, 360 (1976).

54. *Id.* at 363. The *Elrod* Court, however, did not give much weight to the government's justifications for its patronage system. See *id.* at 377-78. In *Elrod*, the government argued that patronage was necessary "to insure effective government and the efficiency of public employees." *Id.* at 364. The government also argued that patronage makes government more efficient "by giving the employees of an incumbent party the incentive to perform well in order to insure their party's incumbency and thereby their jobs." *Id.* at 366.

The Court recognized that there is "a vital need for government efficiency and effectiveness." *Id.* at 372. The Court, however, was not convinced that the "mere difference of political persuasion motivates poor performance." *Id.* at 365. Moreover, the Court determined that any benefits of efficiency were "at best marginal," see *id.* at 366, and that dismissing employees for their non-political affiliation was "not the least restrictive means for fostering that end." *Id.* at 372.

55. See *id.* at 367.

56. *Id.* at 373.

57. See *id.* at 374 (Stewart, J., concurring).

58. *Id.* at 375.

59. See *id.* at 376 (Powell, J., dissenting).

60. See *id.* at 376-89.

61. *Id.* at 379.

62. See *id.* at 379.

63. See *id.* at 381.

volunteers, which may be achieved by the promise of patronage jobs.⁶⁴ Justice Powell also concluded that employees who protest patronage-based employment decisions are often those who had originally benefited from patronage.⁶⁵ These employees, Powell believed, should "not be heard to challenge it when it comes their turn to be replaced."⁶⁶ In a patronage system volunteers are rewarded for their loyalty.⁶⁷ By awarding volunteers with jobs or promotions, a patronage system may create an expectation that a reward normally follows the rendering of volunteer services. Therefore, the expectations of the beneficiaries of a patronage system should also be taken into account.⁶⁸

B. *Branti v. Finkel*

Four years after *Elrod*, the Court, in *Branti v. Finkel*,⁶⁹ again considered the issue of patronage dismissals⁷⁰ and clarified the *Elrod* test. Rather than requiring the government to show that the dismissed employee was a policymaker, *Branti* required a government employer to show that party affiliation was an "appropriate requirement" for the job.⁷¹

The Court, in reformulating the test, distanced itself from *Elrod* by noting the difficulty that Justice Brennan had in distinguishing between policymaking and non-policymaking officials.⁷² The *Branti* Court stated that "party affiliation is not necessarily relevant to every policymaking or confidential position. The coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of the state government."⁷³ The Court concluded that the *Elrod* test could not be easily applied,⁷⁴ and refocused the inquiry on whether party affiliation is an appropriate requirement for the effective performance of the particular public office.⁷⁵

In applying the new test, the *Branti* Court ruled that the government could not condition the employment of an assistant public defender upon

64. *See id.* at 385.

65. *See id.* at 380.

66. *See id.*

67. *See id.* at 385.

68. *See id.* at 380.

69. 445 U.S. 507 (1980). In *Branti*, two assistant public defenders brought an action to prevent the public defender from discharging them because of their political affiliation. The trial court determined that because respondents were neither policymaking nor confidential employees, they were protected by the test established by *Elrod*. *See id.* at 510-11.

70. In *Branti*, like in *Elrod*, the Court limited its consideration to patronage firings. *See id.* at 513 n.7. ("In [*Elrod*], as in this [case], . . . the *only* practice at issue [is] the dismissal of public employees for partisan reasons.") (emphasis added).

71. *See id.* at 518.

72. *See id.* (citing *Elrod v. Burns*, 427 U.S. 347, 367 (1976)).

73. *Id.*

74. *See id.*

75. *See id.*

allegiance to a political party.⁷⁶ To do so, the Court found, would undermine the effective performance of the public defender's office.⁷⁷ The public defender was consequently enjoined from dismissing the assistant public defenders on patronage grounds.⁷⁸

Justice Powell again wrote a vigorous dissent, arguing that the patronage practice should be upheld and that "[t]he Court largely ignore[d] the substantial governmental interests served by patronage."⁷⁹ Powell offered many of the same defenses of patronage that he had set forth in his *Elrod* dissent.⁸⁰

Although *Branti* articulated a new test for patronage firings,⁸¹ the case did not address the difficult questions that arise in determining whether the use of party affiliation is appropriate in non-firing employment decisions.⁸² Lower courts have subsequently disagreed as to which standard is appropriate in the non-firing context.⁸³ Some courts view the use of political affiliation in non-firing decisions as a violation of the first amendment.⁸⁴ Recently, however, other courts have reassessed the value of political patronage, finding that in some circumstances use of patronage serves vital governmental interests.⁸⁵

In view of the confusion among courts addressing patronage employment questions and in light of the lack of guidance from the Supreme Court, there is a need for a structured, logical framework for judicial

76. *See id.* at 519-20.

77. *See id.* at 519.

78. *See id.* at 520.

79. *Id.* at 522 (Powell, J., dissenting).

80. *See id.* at 520-34; *supra* notes 61-69 and accompanying text.

81. *See supra* notes 73-76 and accompanying text.

82. *See supra* note 13.

83. *See supra* notes 14-18 and accompanying text.

84. *See, e.g.,* Lieberman v. Reisman, 857 F.2d 896 (2d Cir. 1988); Bennis v. Gable, 823 F.2d 723 (3d Cir. 1987); Hermes v. Hein, 742 F.2d 350 (7th Cir. 1984). For example, the court in *Brady v. Patterson*, 515 F. Supp. 695 (N.D.N.Y. 1981), did not balance the competing interests and held that *Branti* stood for the proposition that politics cannot be used as a factor in employment decisions. *See id.* at 698. The court in *Brady* stated that "[d]efendants have not cited, and the Court's research has not disclosed any legal authority for the proposition that *Branti* has no application to failure to reappoint cases." *Id.* at 699.

85. *See, e.g.,* Messer v. Curci, 881 F.2d 219 (6th Cir. 1989) (political affiliation may be used in making non-firing employment decisions); *Rutan v. Republican Party*, 848 F.2d 1396 (7th Cir. 1988) (same), *aff'd in part, rev'd in part*, 868 F.2d 943 (7th Cir.) (en banc), *cert. granted*, 58 U.S.L.W. 3212 (U.S. Oct. 3, 1989) (No. 88-1872); *Avery v. Jennings*, 786 F.2d 233 (6th Cir.) (political affiliation may be used as a criterion in making hiring decisions), *cert. denied*, 477 U.S. 905 (1986); *Visser v. Magnarelli*, 530 F. Supp. 1165 (N.D.N.Y. 1982). In *Visser*, which involved a failure to reappoint on the basis of political affiliation, the court found a violation, but noted "[i]t is to be hoped that in light of the inadequate attention paid to patronage's benefits in the Supreme Court's balancing test, the inherently broad ramifications contained in the *Elrod-Branti* principles, and the uncertainty created by *Branti*'s nebulous test for determining permissible patronage practices, the Supreme Court will reconsider the wisdom of its two decisions." *Id.* at 1175. *Visser* emphasized the salutary features of political patronage set forth in the dissent in *Elrod*. *See id.* at 1174.

consideration of patronage employment decisions outside of the firing context.

III. AN EFFICIENT BALANCING TEST

A. *Factors to Consider*

Courts can best ensure a fair and practical resolution of patronage employment disputes by applying a balancing test that weighs the extent of the alleged first amendment deprivation against the benefit resulting from the use of patronage in the employment decision. On one side of the balance, courts should focus on whether the patronage practice at issue yields any identifiable benefit for the government.⁸⁶ An employment decision that is purely a retaliatory measure, for example, should always be struck down as inappropriate.⁸⁷ Conversely, when a patronage-based employment decision advances legitimate governmental goals—such as enhancing efficiency⁸⁸—courts should consider whether those benefits outweigh the concomitant intrusion into the plaintiff's first amendment interests.⁸⁹

86. This approach does not recreate an atmosphere ripe for abuse because "[c]ivil service . . . already adequately shelter[s] most public employees from patronage problems. The small pocket left by the legislative and executive branches for a modified spoils system to play a role should be given deference, not short shrift, by the 'least dangerous' branch." *Visser*, 530 F. Supp. at 1174.

87. See *Pickering v. Board of Educ.*, 391 U.S. 563, 574-75 (1968). The Court of Appeals for the Seventh Circuit has held that retaliatory harassment falling short of actual or constructive discharge is actionable as a violation of the first amendment. See *Bart v. Telford*, 677 F.2d 622, 625-26 (7th Cir. 1982). The Seventh Circuit has also noted that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a non-supporter no better off." *Rutan*, 868 F.2d at 954 n.4.

88. See *supra* notes 34-38 and accompanying text.

89. See *Messer v. Curci*, 881 F.2d 219 (6th Cir. 1989); *Rutan v. Republican Party*, 848 F.2d 1396 (7th Cir. 1988), *aff'd in part, rev'd in part*, 868 F.2d 943 (7th Cir.) (en banc), *cert. granted*, 58 U.S.L.W. 3212 (U.S. Oct. 3, 1989) (No. 88-1272).

One court has indicated that the Courts of Appeals for the Second and Third Circuits provide more protection than *Branti* and *Elrod* and apply the equivalent of a *per se* rule against the use of political affiliation in making demotion decisions. See *Messer v. Curci*, 881 F.2d 219, 224 (6th Cir. 1989); *cf. Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988); *Bennis v. Gable*, 823 F. 2d 723 (3d Cir. 1987).

An analysis of the Second and Third Circuits' reasoning shows that the Sixth Circuit's characterization of the two circuits is correct. For example, the court in *Bennis* rejected the idea that in order to receive judicial protection, the employment decision must be the "substantial equivalent of dismissal." *Bennis*, 823 F.2d at 731 n.9 (quoting *Delong v. United States*, 621 F.2d 618, 623 (4th Cir. 1980)). The court extended protection to "any disciplinary action." *Id.* at 731. In *Bennis*, a chief of police demoted the plaintiff to boost morale. The court held that "the constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech." *Id.* (emphasis added). The *Bennis* court held that the *Pickering* balancing test was pertinent, see *supra* note 9, but did not balance the government's interest in maintaining a patronage system.

The Court of Appeals for the Second Circuit, in *Lieberman*, adopted the *Bennis* reasoning and stated that "to affirm the dismissal of plaintiff's . . . cause of action might condone politically motivated harassment or other unconstitutional treatment of public

The responsibilities of a particular position should also be a factor in determining whether the application of patronage is appropriate.⁹⁰ The use of patronage alone to make an employment decision concerning a purely ministerial⁹¹ position is especially difficult for the government to justify.⁹² On the other hand, as the Supreme Court stated in *Elrod*, if the disputed position is discretionary,⁹³ patronage is more likely to serve a legitimate governmental interest.⁹⁴

The extent to which the government uses political affiliation in an employment decision is another factor to consider in the non-firing context. Because the central purpose of government is to serve general, non-partisan interests,⁹⁵ an employment decision that is based solely on political affiliation should not be upheld.⁹⁶

Balanced against the government's interest is the plaintiff's first amendment right to freedom of belief and association. The difficulty in analyzing patronage-based employment decisions has been quantifying the degree of intrusion into a plaintiff's first amendment interests. In order to solve this problem, courts should look for guidance to an area of constitutional analysis that addresses analogous concerns. Under the fourteenth amendment, the degree of intrusion into a plaintiff's interests has been measured according to the existing property interest in a particular position or right to promotion.⁹⁷

In *Wygant v. Jackson Board of Education*,⁹⁸ a case analyzed under the

employees in those cases where the public employer's action stops short of actual discharge." *Lieberman*, 857 F.2d at 900. The result in *Lieberman* would be the same using a balancing test. Politically motivated harassment of employees cannot legitimately promote efficiency or other governmental ends. In contrast, rationally based patronage demotions may withstand constitutional scrutiny.

Both *Bennis* and *Lieberman* illustrate the long-rejected absolutist view that balancing tests should not be applied to first amendment issues. See *Barenblatt v. United States*, 360 U.S. 109, 141 (1959) (Black, J., dissenting). Both cases, while providing over-expansive protection to employees, limit the government's capacity to implement structural changes which could increase efficiency.

90. See *Elrod v. Burns*, 427 U.S. 347, 367 (1976).

91. "Ministerial" has been defined as a duty "in respect to which nothing is left to discretion.'" *In re Sealed Case*, 838 F.2d 476, 488 n.21 (D.C. Cir.), *rev'd on other grounds sub nom.* *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (quoting *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 607-08 (D.C. Cir. 1974) (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498 (1867))).

92. See *Torres v. Grunkmeyer*, 601 F. Supp. 1043 (D. Wyo. 1985). In *Torres*, the court stated that it is difficult for defendants to show that party affiliation is an appropriate requirement for not hiring a janitor. See *id.* at 1047.

93. "Discretionary" has been defined as that in which there is "room for policy judgment and decision." *Dalehite v. United States*, 346 U.S. 15, 36 (1953).

94. See *Elrod v. Burns*, 427 U.S. 347, 367-68 (1976).

95. See *Elrod*, 427 U.S. at 354 (1976).

96. See *Avery v. Jennings*, 786 F.2d 233, 234 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986). *But see* *Messer v. Curci*, 881 F.2d 219 (1989).

97. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 599 (1972) (untenured state college professor lacked sufficient property interest to support due process claim); *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972) (same).

98. 476 U.S. 267 (1986).

Equal Protection Clause of the fourteenth amendment, petitioners contended that a school board's policy of preferential treatment of minorities in layoffs was discriminatory.⁹⁹ The Supreme Court held that the layoff plan "disrupted settled expectations"¹⁰⁰ and therefore was too intrusive to withstand constitutional scrutiny.¹⁰¹ The Court suggested, however, that hiring policies to remedy past racial discrimination would be less burdensome because the affected class had less of an interest in the disputed positions.¹⁰²

Wygant's distinction between existing and expectant interests has been extended to cases where patronage-based employment decisions are challenged on first amendment grounds. The Seventh Circuit Court of Appeals, in *Rutan v. Republican Party*,¹⁰³ employed the *Wygant* analysis to distinguish firings from non-firing decisions in the first amendment context.¹⁰⁴ In *Rutan*, plaintiffs complained that they were denied either employment, promotion or transfer because of their political affiliation.¹⁰⁵ The court, citing *Wygant*, struck down the plaintiffs' claims, reasoning that "losing an employment opportunity is not as intrusive as losing an existing job."¹⁰⁶ The *Rutan* court distinguished an existing employee's interest from that of a job applicant.¹⁰⁷ While an "employee on the job has an important stake in his position,"¹⁰⁸ the court noted that an applicant's interest in a position is less substantial because the potential employee "has not arranged his affairs around any expectation of an income stream."¹⁰⁹ The court also noted that existing employees have different interests in their positions,¹¹⁰ holding that failure to promote an employee, however disappointing, is significantly less disruptive than firing an employee.¹¹¹ The panel decision in *Rutan* was recently upheld by the Seventh Circuit Court of Appeals in an en banc decision.¹¹²

More recently, the Court of Appeals for the Sixth Circuit, in *Messer v. Curci*,¹¹³ adopted the approach used in *Wygant* to measure the intrusion into the plaintiff's first amendment interests. *Messer* involved plaintiffs who complained that other applicants were given preferential treatment based on their political activities.¹¹⁴ The court noted that there is a sig-

99. *See id.* at 273.

100. *Id.* at 283.

101. *See id.* at 283.

102. *See id.*

103. 848 F.2d 1396.

104. *See id.* at 1405-06.

105. *Id.* at 1397.

106. *Id.* at 1405-06.

107. *Id.* at 1406.

108. *Id.*

109. *Id.*

110. *See id.*

111. *See id.*

112. *See Rutan v. Republican Party*, 868 F.2d 948 (7th Cir. 1989) (en banc), cert. granted, 58 U.S.L.W. 3212 (U.S. Oct. 3, 1989) (No. 88-1272).

113. *See Messer v. Curci*, 881 F.2d 219, 223 (6th Cir. 1989).

114. *See id.* at 220.

nificant difference between the decision to fire and the decision to hire an employee.¹¹⁵ The *Messer* court concluded that "as noted in *Wygant*, the pain to the individual from a certainty of loss of existing employment is much greater than the loss of some possibility of employment."¹¹⁶ In this scenario, the government's interest in "effective and vigorous government"¹¹⁷ outweighed the plaintiff's minimal interest in an applied for position.¹¹⁸

Messer and *Rutan* indicate that one method of quantifying an intrusion upon the plaintiff's first amendment interests in patronage-based employment claims is to determine whether the plaintiff possesses a property interest in the post.¹¹⁹ A property interest exists when the government

115. *See id.* at 223.

116. *Id.*

117. *See id.* The court in *Messer* argued that patronage hirings, especially at the lower levels, will enhance the spirit of an administration. *See id.* The court held that hiring decisions involving non-discretionary employees based on patronage alone was constitutional. *See id.* This holding represents a departure from *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986).

The *Messer* conclusion is questionable. The use of patronage as the sole criterion in an employment decision involving non-discretionary employees should be avoided because government is meant to serve non-partisan interests. *See supra* note 96. Furthermore, such practices intrude substantially into an individual's first amendment interests. *See Torres v. Grunkmeyer*, 601 F. Supp. 1043 (D. Wyo. 1985).

118. *See Messer*, 881 F.2d at 233. The *Messer* court, after deciding that the plaintiff did not possess a sufficient interest to allege a constitutional violation, dismissed the complaint on the failure to state a claim. *See id.* at 220. The court was justified in using the plaintiff's interest in the position to quantify first amendment interests. *See supra* notes 113-118 and accompanying text. The court, however, should not have dismissed the plaintiff's action for failure to state a claim.

An important distinction exists between claims brought under the fourteenth amendment and those brought under the first amendment. To establish a due process claim under the fourteenth amendment, the plaintiff must first establish that there exists either a property or liberty interest. *See Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); *Thomas v. Board of Examiners*, 866 F.2d 225, 227 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1433 (1989). When the plaintiff fails to do so, the cause of action will be dismissed for failure to state a claim. *See Thomas*, 866 F.2d at 227. On the other hand, under the first amendment, the plaintiff's failure to establish an existing property interest in the position alone should not bar the plaintiff's claim. While such a claim may be weak, *see infra* notes 127-138, the first amendment, because of its central importance to our democratic process, requires that the claim receive judicial scrutiny. *See Buckley v. Valeo*, 424 U.S. 1, 65 (1975). The *Messer* court's willingness to dismiss the plaintiff's claim merely because the interest was expectant, therefore, seems unjustified.

119. Both *Messer* and *Rutan* use vague labels to measure the intrusion into the plaintiff's first amendment interests. The *Rutan* court referred to the "stake" an employee has in a position and the "disappointment" in not getting a promotion. *See Rutan v. Republican Party*, 848 F.2d 1396, 1406 (7th Cir. 1988), *aff'd in part, rev'd in part*, 868 F.2d 948 (7th Cir.) (en banc), *cert. granted*, 58 U.S.L.W. 3212 (U.S. Oct. 3, 1989) (No. 88-1272). The *Messer* court referred to the "pain" of losing an existing job. *See Messer*, 881 F.2d 219 at 233. While these terms aid in a first amendment analysis, they do not provide complete guidance on how to quantify any intrusion into the plaintiff's interests. A more concrete way to quantify plaintiff's interest is to focus on the distinction between an existing employment position and a desired, but not yet existent position. The former is defined as a "vested property interest" whereas the latter is a "non-vested property inter-

recognizes that a plaintiff has an entitlement.¹²⁰ In the first amendment context, where a vested property interest¹²¹ in government employment is present, political affiliation has been found not to be an appropriate condition for the retention of a governmental position.¹²² In other words, when balanced against the government's interest in the use of patronage, the plaintiff's first amendment interest is too substantial to allow patronage-based employment decisions. Conversely, when the plaintiff does not have a vested property interest in the disputed position, the balance shifts in favor of the government.¹²³ These interests, when balanced against the government's interest in using political patronage, will not normally rise to the level of a constitutional violation.¹²⁴

B. *The Balancing Test in the Non-Firing Context*

A balancing test represents a starting point for judicial examination of employment decisions which do not amount to a dismissal. The specific manner in which the test is applied will vary depending on the parties and the circumstances of a particular case. Application of the test to the most common non-firing situations, however, confirms that the test will prove to be useful in determining the appropriateness of a particular use of patronage.¹²⁵

est." *Cf.* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (discussing requirements for determining property interest).

120. Courts have long recognized that an employee may have a property interest in a position. *See* Perry v. Sindermann, 408 U.S. 593, 599 (1972); *Roth*, 408 U.S. at 577-78.

An entitlement exists when the government recognizes that an individual is legally entitled to a benefit. *See Roth*, 408 U.S. at 577; *Thomas*, 866 F.2d at 227.

121. A vested property interest is one where the individual has present rights and not merely rights for which the individual has applied. *See Roth*, 408 U.S. at 578; *supra* note 119.

122. Implicit in *Branti* and *Elrod* was the concern that the plaintiffs were being deprived of a property interest. *See Branti v. Finkel*, 445 U.S. 507, 515-16 (1980); *Elrod v. Burns*, 427 U.S. 347, 359 (1976).

123. A determination that a plaintiff does not have a property interest should weigh heavily against him, but should not preclude his claim. When the employee does not have a vested property interest, first amendment interests still exist and must be scrutinized. *See supra* note 119.

124. *See, e.g.,* Messer v. Curci, 881 F.2d 219, 223 (6th Cir. 1989); *Rutan v. Republican Party*, 848 F.2d 1396, 1408 (7th Cir. 1988), *aff'd in part, rev'd in part*, 868 F.2d 943 (7th Cir.) (en banc), *cert. granted*, 58 U.S.L.W. 3212 (U.S. Oct. 3, 1989) (No. 88-1972); *Avery v. Jennings*, 786 F.2d 233, 236 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986).

125. Balancing the various factors demonstrates that as the range of a public employer's action shifts from firing to failure to hire, the infringement on the plaintiff's first amendment rights generally lessens while the government's position in maintaining a patronage system grows stronger. The Court of Appeals for the Sixth Circuit, in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), recognized the distinction between patronage dismissals and less burdensome practices. An informal hiring practice favoring one party over another is a burden, but not enough to rise to the level of a constitutional deprivation. *See id.* at 236. *Avery* also distinguished an intentional, strict political test and a "patronage system that relies on family, friends and political allies for recommendations." *Id.* at 237. An informal system which prefers members of one's own party is "natural and reasonable." *Id.* at 235. *But see* Note, *Patronage and the First*

There is a broad range of employment actions—such as demotions—which affect the nature of a government worker's employment, but which do not amount to firing.¹²⁶ In determining whether a demotion based on patronage amounts to a first amendment violation, courts should carefully examine the employer's motive for the decision. For example, where a demotion is found to be retaliatory, the employee could prove a violation of the first amendment because the intrusion into his first amendment interests would be substantial, while there would be no legitimate countervailing government interest served by the retaliation.

In cases of denied promotions, government employers will have less difficulty demonstrating that a patronage based decision did not violate an employee's first amendment rights.¹²⁷ An employee's interest in a promotion usually consists only of an expectation.¹²⁸ Therefore, when the minor intrusion into the plaintiff's first amendment interests is balanced against the government's interest, the plaintiff will likely lose. Moreover, an employee who is a party member is likely to have a greater expectation of promotion than does a non-member.¹²⁹ If a non-member accepts a position knowing that a patronage system exists and his work is substantially the same quality as that of a party supporter, the government should be allowed to give preferential treatment to the party supporter.¹³⁰

Amendment After Elrod v. Burns, 78 Colum. L. Rev. 468, 474-75 (1978) (arguing that burdens on plaintiff in non-firing context are almost identical to those in firing context).

126. The United States Court of Appeals for the Fourth Circuit has recognized that an employee may be constructively discharged from his position when the employer's action requires the employee either to accept new and onerous conditions or to resign. See *Delong v. United States*, 621 F.2d 618, 624 (4th Cir. 1980). Under *Delong*, if a court finds that an employer's action amounts to the substantial equivalent of a dismissal, the employee will receive the protections of *Elrod* and *Branti*. See *id.* at 623-24. The *Delong* court articulated a test to determine whether a given employment action amounts to a constructive discharge. Under this test, "[t]he ultimate issue . . . is whether, all things considered, the challenged reassignment and transfer can reasonably be thought to have imposed so unfair a choice between continued employment and the exercise of protected beliefs and associations as to be tantamount to the choice imposed by threatened dismissal." *Id.* at 624. This determination requires a factual inquiry into the "objective and subjective factors pertaining to the office holder's expectations and reliance upon the continuation of particular assignments and geographical locations in his employment." *Id.* The court added that only "reasonable expectations and reliance should be weighed in the balance." *Id.*

127. See *Rice v. Ohio Dep't of Transp.*, No. 86-3312, slip op. at 5-6 (6th Cir. Oct. 13, 1989); *Rutan v. Republican Party*, 848 F.2d 1396, 1408 (7th Cir. 1988), *aff'd in part, rev'd in part*, 868 F.2d 943 (7th Cir.) (en banc), *cert. granted*, 58 U.S.L.W. 3212 (U.S. Oct. 3, 1989) (No. 88-1872).

128. Sometimes, however, there may exist a property interest in a promotion. See *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972). For example, courts have recognized that where a de facto promotion system exists, an employee may have a property interest in being promoted. In *Perry*, the Court held that a property interest in tenure need not arise out of a contract or statute, but may be based on a de facto tenure program. See *id.*

129. See *Elrod v. Burns*, 427 U.S. 347, 380 (1976) (Powell, J., dissenting).

130. See *id.*; *Loughney v. Hickey*, 635 F.2d 1063, 1069 (3d Cir. 1980). Giving the government the latitude to consider political affiliation in promotion decisions will also

The government's decision not to reappoint an employee may also be based on political affiliation. When a plaintiff complains that he was not reappointed to his position because of the operation of patronage,¹³¹ his claim is weak; the employee lacks both an identifiable property interest in his position and an expectation of reappointment.¹³² If the employee has a contractual right to be reappointed, a violation can more easily be demonstrated.¹³³

The initial decision to hire an employee may be based in part on political affiliation. In this context, the prospective employee's case is very weak because he has neither a property nor an expectation interest in the position he is seeking.¹³⁴ Conversely, the government in this context has a great interest in hiring only those employees it believes can perform efficiently in the workplace.¹³⁵ In challenges to hiring decisions, courts should examine the type of position involved. Political affiliation should not be used as the sole criterion for hiring non-discretionary employees.¹³⁶ It may be appropriate to use political affiliation, on the other hand, as a criteria in hiring other professional employees.¹³⁷ Moreover, the employer has a greater interest in using political affiliation as a criterion in making a hiring decision because, unlike other employment deci-

minimize the number of suits brought by disappointed public employees who fail to receive promotions. See *Rutan*, 848 F.2d at 1407.

131. See, e.g., *Furlong v. Gudknecht*, 808 F.2d 233, 234 (3d Cir. 1986); *Tanner v. McCall*, 625 F.2d 1183, 1186 (5th Cir.), cert. denied, 451 U.S. 907 (1980).

132. See *Rutan v. Republican Party*, 848 F.2d 1396, 1406 (7th Cir. 1988), aff'd in part, rev'd in part, 868 F.2d 943 (7th Cir.) (en banc), cert. granted, 58 U.S.L.W. 3212 (U.S. Oct. 3, 1989) (No. 88-1872).

The Third and Fifth Circuits hold, however, that the use of patronage in re hiring violates protected first amendment rights. For example, the court in *Tanner v. McCall*, 625 F.2d 1183 (5th Cir.), cert. denied, 451 U.S. 907 (1980), held that *Branti* applies to failure to reappoint. See *id.* at 1186; accord *Brady v. Patterson*, 515 F. Supp. 695 (N.D.N.Y. 1981). In *Tanner*, however, the plaintiffs failed to meet the burden of proving discrimination based on their political affiliation. See *Tanner*, 625 F.2d at 1195. In *Furlong v. Grunkmeyer*, 808 F.2d 233 (3d Cir. 1986), the Third Circuit used the same standard for firing and failure to reappoint. *Id.* at 237-38.

133. See *supra* note 128.

134. See *Messer v. Curci*, 881 F.2d 219, 223 (6th Cir. 1989); cf. *Board of Regents v. Roth*, 408 U.S. 564, 578 (1971) (no property interest in reappointment on conclusion of employment term). Some courts, however, find no reason to distinguish between firing and hiring. For example, in *Indiana State Employees Ass'n v. Indiana Republican State Cent. Comm.*, 630 F. Supp. 1194 (S.D. Ind. 1986), the court, in a failure to hire case in which political affiliation was one of the criteria used by the public employer, held that "[t]he refusal to hire someone based on political beliefs can chill a person's first amendment rights as easily as firing someone for political reasons." *Id.* at 1196.

Although first amendment rights are chilled by being denied employment partly because of political affiliation, the deprivation is not enough to rise to the level of a constitutional violation. See *Avery v. Jennings*, 786 F.2d 233, 237 (6th Cir.), cert. denied, 477 U.S. 905 (1986).

135. See *Messer v. Curci*, 881 F.2d 219, 223 (6th Cir. 1989).

136. See *supra* note 95.

137. See *Avery v. Jennings*, 786 F.2d 233, 234 (6th Cir.), cert. denied, 477 U.S. 905 (1986).

sions, the employer may have little information available upon which to make a decision.¹³⁸

CONCLUSION

Patronage allows the government to make employment decisions which may enhance its ability to serve its citizens more efficiently. When considering the role of patronage in public employment decisions, courts should use a balancing test which takes into account the government's interest in using a political patronage system. At the same time, the test should consider the potential harmful effects that public employers' adverse actions may have on the employee's first amendment interests.

Louis Cammarosano

138. See *Branti v. Finkel*, 445 U.S. 507, 530 (1980) (Powell, J. dissenting).