Does The First Amendment Incorporate A National Civil Service System?

I. Introduction

The practice of political patronage in which government employment is based upon political affiliation rather than individual merit is as old as the republic.[1] Before 1976, political patronage employees could be dismissed solely on the basis of political affiliation. Yet, in 1976, the United States Supreme Court, in *Elrod v. Burns*,[2] invalidated patronage dismissals of nonpolicymaking, nonconfidential public employees.[3] In the wake of scholarly criticism and difficulty in applying the *Elrod* standard, the Court in 1980 again addressed the validity of patronage practices in the case of *Branti v. Finkel*.[4] In expanding the class of protected public employees the Court in *Branti* redefined the standard of dischargeability and included patronage hirings as an impermissible activity.[5]

This Note details the standard of dischargeability and the breadth of the *Branti* holding, and analyzes the revisions of the *Elrod* standard brought about by *Branti*. The thesis of this Note is that while *Branti* has expanded the first amendment guarantee of freedom of association afforded public employees to protect against patronage-motivated employment practices, the revised standard of dischargeability remains difficult to apply and will result in confusion and inconsistent lower court decisions in determining the extent of the protected class of public employees.[6]

II. A Brief Description of the Political Patronage System

For nearly two hundred years following every partisan election, the "spoils system"[7] has meant that at all levels of government, public employees appointed to non-civil service positions[8] were sub-

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[1]Schoen, *Politics, Patronage, and the Constitution*, 3 Ind. Legal F. 35, 36 (1969).

[2]427 U.S. 347 (1976).

[3]*Id.*

[4]445 U.S. 507 (1980). *See generally* N.Y.L.J., Apr. 1, 1980, at 1, col. 2.

[5]445 U.S. at 507.

[6]For an authoritative warning to this effect, *see* 445 U.S. at 521 (Powell, J., dissenting).

[7]The term "spoils system" evolved during the presidency of Andrew Jackson and is derived from the phrase "to the victor go the spoils." Note, *Patronage and the First Amendment After* Elrod v. Burns, 78 Colum. L. Rev. 468, 468 n.2 (1978).

[8]Non-civil service positions are characterized by the employing authority exercising unfettered discretion in the hiring, promotion, discipline, and termination of its employees. A proliferation of civil service or merit systems which involve competitive

ject to dismissal in the event of an election victory by the opposing political party. This system of political patronage was first utilized by United States Presidents to maintain intra-party discipline and has been most commonly attributed to President Andrew Jackson in his effort to consolidate factions of the Democratic party at the expense of the Federalist-National Republican party.[9] Patronage practices range from favorable treatment in awarding government contracts, to party assessments,[10] to appointments and promotions in public employment. Patronage may for the purposes of this Note be defined as "the process of distributing government jobs wherein the political affiliation of an applicant or employee is *the* consideration or *a* consideration in the decision to hire or fire."[11] Thus, decisions pertaining to employment as well as other favors are based in whole or in part on political affiliation as opposed to individual merit.

The constitutional danger of patronage practices is infringement of the first amendment rights of freedom of belief and association. These encroachments may take the form of overt attempts to change a person's political allegiance[12] or of even more subtle efforts to withhold public benefits from those who are politically disfavored.[13]

III. The Origins of Freedom of Association

While the case law history of the freedoms delineated in the first amendment largely post-dates World War I, the growth of the individual rights of association and expression in the past sixty years has been dramatic.[14] The modern interpretation of the right to association or assembly was first enunciated by the Supreme Court in 1958 in a civil rights setting in the case of *NAACP v. Alabama*.[15] The Court denied an attempt to procure the membership list of the organization, basing its decision on the right of association.[16] The

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examination and ranking of individuals according to merit, has created a decline in the use of non-civil service employment in recent years. *See also* 427 U.S. at 354.

[9]Farkas v. Thornburgh, 493 F. Supp. 1168, 1169 n.3, 1170 n.6 (E.D. Pa. 1980), *aff'd without opinion*, 642 F.2d 441 (3d Cir. 1981).

[10]This may take the form of an involuntary contribution of a percent of the employee's salary, such as a "two-percent club," with that amount going directly to the party coffers.

[11]Schoen, *Politics, Patronage, and the Constitution*, 3 Ind. Legal F. 35, 38 (1969).

[12]*See* notes 67-68 *infra* and accompanying text (public employees discharged for failure to affiliate with the Democratic party).

[13]Delong v. United States, 621 F.2d 618 (1980) (public employee transferred from Maine to Washington, D.C. because of earlier Republican party sponsorship).

[14]G. Gunther, Cases and Materials on Constitutional Law 1105 (10th ed. 1980).

[15]*Id.* at 1457.

[16]357 U.S. 449 (1958).

standard of strict judicial scrutiny along with the requirement of a compelling state interest to justify any infringement upon constitutionally-protected rights was applied by the Court[17] in recognizing a constitutional right of association based on the first amendment and the "liberty" aspects of the due process clause of the fourteenth amendment.[18] The Court described the importance of associational rights in these terms: "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[19] The Court continued:

> It is beyond debate that freedom to engage in association . . . is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[20]

Recently the Supreme Court complemented this analysis by recognizing a counterpart freedom of a right not to associate. In *Abood v. Detroit Board of Education*[21] it was held that while public employees could be required to pay union dues or an equivalent fee for functions such as collective bargaining and grievance administration, individual members could not be required to contribute to the campaigns of political candidates and they could bar the union from expending mandatory fees in a similar manner or from publicly maintaining political positions unrelated to the role of the union as a bargaining agent.[22]

The current limits of freedom of association are illustrated in three recent cases. *Kusper v. Pontikes*[23] involved an Illinois statute which prohibited a person from voting in a primary election if that person had, within the preceeding twenty-three months, voted in the primary of another political party.[24] The Court held that despite the

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[17]*Id.* at 460-61, 463; G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1455 (10th ed. 1980).

[18]357 U.S. at 460.

[19]*Id.* (citing Thomas v. Collins, 323 U.S. 516, 530 (1945); Delong v. Oregon, 299 U.S. 353, 364 (1937)).

[20]357 U.S. at 460-61.

[21]431 U.S. 209 (1977).

[22]*Id.*

[23]414 U.S. 51 (1973).

[24]*Id.*

legitimate state interest in preventing "raiding,"[25] a state may not choose means which unnecessarily restrict the constitutionally protected freedom of association.[26]

A second case, *Broadrick v. Oklahoma*,[27] concerned a challenge by public employees to a state statute which restricted political activity of public officials during working hours.[28] In upholding the regulation, the Court ruled that the statute regulated political activity in an even-handed and neutral manner and that the statute was not directed at any particular group or viewpoint.[29]

The Federal Election Campaign Act was challenged in *Buckley v. Valeo*,[30] in which the Court upheld the statute's limitation on individual contributions to political campaigns. The Court overturned the limitation on the allowable maximum contribution a candidate may make to his own campaign, invalidated provisions limiting total campaign expenditures, and struck down restrictions on expenditures made independently of the candidate's official campaign.[31] In *Kusper* and in *Buckley*, the standard of strict scrutiny was applied.[32]

Several early cases that treated the relationship between patronage practices and freedom of association recognized a limited rule which prohibited the consideration of specified individual characteristics in making public appointments.[33] In *United Public Workers v. Mitchell*[34] the Court agreed that a congressional act which barred from federal employment any "Republican, Negro, or Jew" would be unconstitutional.[35] Similarly, the Court in *Wieman v. Updegraff*[36] concluded that equivalent constitutional protection for Republicans, Negroes, and Jews applied to a state public employment statute.[37] A case dealing with admission for professional prac-

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[25]"Raiding" is the practice of voters sympathetic to one party casting their ballots in the primary election of another party to distort the outcome. *Id.* at 59.

[26]*Id.* at 61.

[27]413 U.S. 601 (1973).

[28]*Id.*

[29]*Id.* at 615-16.

[30]424 U.S. 1 (1976).

[31]*Id.*

[32]*Id.* at 24-27, 52-53, 64-65; 414 U.S. at 58-61.

[33]*See* Schoen, *Politics, Patronage, and the Constitution*, 3 IND. LEGAL F. 35, 61-62 (1969).

[34]330 U.S. 75 (1947).

[35]*Id.* at 100 (Hatch Political Activity Act consistent with the prohibited classifications enumerated).

[36]344 U.S. 183 (1952).

[37]*Id.* at 191-92. In overturning an Oklahoma statute prescribing loyalty oaths for state employees, the Court stated: "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192.

tice, *Schware v. Board of Bar Examiners*,[38] also prohibited exclusionary practices faced by Republicans, Negroes, or "a member of a particular church."[39] While the above cases prohibited consideration of the political membership, race, or religion of an individual, the cases have been narrowly read and have never been construed to apply to patronage practices.[40]

IV. The Traditional Bases for Denying Challenges to the Patronage System

Historically, the courts have denied the constitutional claims of public employees dismissed or injured by patronage practices.[41] The prevailing early judicial attitude is best summarized by one court in the following manner: "Those [public employees] who . . . live by the political sword must be prepared to die by the political sword."[42] As a general rule, public employees enjoyed little job security and were expected to anticipate dismissal in the event of changes on the political front.[43]

The courts have relied upon two theories in denying constitutional attacks upon patronage dismissals. The first theory, entitled the "right-privilege distinction", held that public employment, rather than being a right, was a mere privilege which could be withdrawn by the employing authority at will.[44] The second or "waiver theory" stated that acceptance of public employment when patronage was the selection basis or when the prospective employee knew of relevant past patronage practices created a waiver of applicable constitutional rights.[45] While the "right-privilege distinction" simply declared that no constitutional rights existed, the "waiver theory" recognized that even if such rights existed, they were waived automatically upon the acceptance of an appointment.[46]

In *Adler v. Board of Education of New York*,[47] the "right-privilege distinction" was utilized by the Supreme Court to sustain

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[38]353 U.S. 232 (1957).

[39]*Id.* at 239.

[40]*See* note 33 *supra* and accompanying text.

[41]AFSCME v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971).

[42]*Id.* at 537, 280 A.2d at 378.

[43]Comment, *Political Patronage and the Fourth Circuit's Test of Dischargeability After* Elrod v. Burns, 15 Wake Forest L. Rev. 655, 660 (1979).

[44]*See* Note, *Constitutional Law*—Elrod v. Burns: *Patronage in Public Employment*, 13 Wake Forest L. Rev. 175, 177-78 (1977).

[45]*Id.* at 179.

[46]*See, e.g.*, AFSCME v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971), where the "right-privilege distinction" and the "waiver theory" were both used to defeat the claim of a dismissed public employee.

[47]342 U.S. 485 (1952).

dismissal of several public school teachers. The case involved a state statute which disqualified from public employment any person advocating or teaching the overthrow of the government by force or violence.[48] The teachers, members of the Communist Party, claimed a violation of their freedom of association and speech.[49] The Court held that public employment was a privilege in which constitutional protection was not available and stated that the appellants "may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."[50] *Adler* represented an insurmountable obstacle to any successful constitutional claim arising from a patronage-motivated dismissal of a public employee.

Although not entirely discredited, the "right-privilege distinction" was notably restricted by *Board of Regents of State Colleges v. Roth*[51] in a nonpatronage setting. In *Roth*, a nontenured university professor was notified without explanation that he would not be rehired for the following year. While the Court in holding for the university did not find that a nontenured position constituted a property right as required for due process protection, it did reject "the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."[52]

The "waiver theory" was utilized by the Fourth Circuit Court of Appeals in *Nunnery v. Barber*[53] to deny the claim of a dismissed state employee who knowingly accepted the patronage position of manager rather than a civil service position as a cashier.[54] The court in its holding emphasized the voluntary nature of that choice, stating that "her awareness that her position was a patronage job and that she accepted it voluntarily with full understanding that, granted on the basis of patronage, it was terminable on that same basis, gives her no right to complain of her patronage dismissal."[55] The court concluded that even if no civil service position had been available, the knowing acceptance of such a patronage position constituted a waiver.[56]

In *Elrod v. Burns*[57] the Court was thus confronted by these two

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[48]*Id.* at 489.

[49]*Id.* at 491-92.

[50]*Id.* at 492.

[51]408 U.S. 564 (1972).

[52]*Id.* at 571. *Accord*, Graham v. Richardson, 403 U.S. 365, 374 (1971) (denial of welfare benefits to aliens may not be based on "right-privilege distinction").

[53]503 F.2d 1349 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975).

[54]*Id.* at 1359.

[55]*Id.* at 1359-60.

[56]*Id. See* AFSCME v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971).

[57]427 U.S. at 347.

theories detailed in the case law. The "right-privilege distinction," as suggested above, proved a minor obstacle due to its earlier erosion.[58] In its decision the Court stated that it had "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' "[59] The "waiver theory" which was nearly unquestioned to that time was largely ignored by the Court.[60]

V. *ELROD V. BURNS*: PATRONAGE DISMISSALS PROHIBITED

Patronage dismissals have traditionally been justified by the party in power as promoting efficient government through a singleness of staff purpose,[61] as an aid to unity and to effecting those policies newly sanctioned by the electorate,[62] and as a crucial element to the survival of political parties.[63] In *Storer v. Brown*[64] the Court endorsed the role of patronage practices in nurturing stable political parties as a way to avoid "splintered parties and unrestrained factionalism [which] may do significant damage to the fabric of government."[65] Indeed, as Justice Powell indicated, it may be difficult to overestimate the value of patronage to our democratic system of government.[66]

Elrod v. Burns[67] involved dismissal of Republican non-civil service employees of the Cook County, Illinois sheriff's office by the recently elected Democratic sheriff. Because the positions threatened were non-civil service, no statute protected them from arbitrary or patronage-motivated discharge. Traditionally, each newly-elected sheriff of a party different than his predecessor would dismiss those non-civil service employees who "lack or fail to obtain requisite support from, or fail to affiliate with"[68] the party currently in power.

The employees who had been dismissed or had been threatened with dismissal, based their claim on their freedom of political association and expression protected by the first and fourteenth amendments and several federal civil rights statutes.[69] Specifically, they alleged that the sole reason for dismissal was that they were

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[56]*Id.* at 361-62.
[59]427 U.S. at 361 (quoting Sugerman v. Dougall, 413 U.S. 634, 644 (1973)).
[60]427 U.S. at 359 n.13.
[61]*Id.* at 364.
[62]*Id.* at 367.
[63]*Id.* at 368-69.
[64]415 U.S. 724 (1974).
[65]*Id.* at 736.
[66]427 U.S. at 385 (Powell, J., dissenting).
[67]427 U.S. at 347.
[68]*Id.* at 351.
[69]*Id.* at 350.

neither affiliated with nor sponsored by the Democratic party.[70] The district court dismissed the suit for failure to state a claim, but the Seventh Circuit reversed,[71] and the Supreme Court affirmed for the employees.[72] The Supreme Court, though, was divided sharply into a three-justice plurality, a two-justice concurrence, and a three-justice dissent.[73]

A. The Elrod *Plurality Opinion*

The plurality opinion written by Justice Brennan[74] initially rejected both theories which had historically defeated constitutionally-based challenges to patronage dismissals.[75] After reviewing the erosion of the "right-privilege distinction", the Court invalidated the distinction by holding that a public benefit such as public employment could not be characterized as a privilege rather than a right for purposes of limiting constitutional access to that benefit.[76]

The "waiver theory" was dismissed in a footnote as placing an impermissible condition upon a public benefit.[77] Because government may not directly foster one party over another, the plurality reasoned that applying a waiver to the constitutional rights of patronage-discharged employees would achieve by indirection an analogous unconstitutional result.[78] The dissent questioned the plurality's analysis of the pleadings and evidence and strongly criticized its "rush to constitutional adjudication."[79]

Although the plurality explicitly addressed only patronage dismissals, it also discussed other forms of patronage[80] and indicated a disapproval extending beyond the employee discharge setting.[81] The Court noted that when confronted with patronage dismissals, a public employee is coerced by the implicit or actual threat of discharge to support a party counter to his true beliefs while at the same time diminishing the employee's support for his chosen party.[82]

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[70]*Id.*

[71]Burns v. Elrod, 509 F.2d 1133 (7th Cir. 1975), *aff'd*, 427 U.S. 347 (1976).

[72]427 U.S. at 374.

[73]Justice Stevens did not participate. *Id.* His views opposing patronage dismissals were made clear in an earlier opinion in which he said that such practices are at war with the more significant rights embodied in the first amendment. Illinois State Employees Council 34 v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).

[74]Justice Brennan was joined by Justices Marshall and White. 427 U.S. at 349.

[75]*Id.* at 359-61.

[76]*Id.* at 361.

[77]*Id.* at 359 n.13.

[78]*Id.*

[79]*Id.* at 380-81 (Powell, J., dissenting).

[80]*Id.* at 353 (Brennan, J., for the Court).

[81]*Id.* at 355-57, 359.

[82]*Id.* at 355-56.

The only alternative available to the employee was dismissal. The Court then declared that patronage dismissals clearly violated the first amendment freedoms of association and expression and were thus unconstitutional.[83]

Justice Brennan then considered whether the three state interests[84] set forth by the petitioners were sufficient to justify encroachment upon the first amendment.[85] In analyzing the state interests the Court relied upon the standard of strict judicial scrutiny which requires a vital governmental end furthered by means least restrictive of the first amendment rights, with the benefit to the government substantially outweighing the loss of protected rights.[86] The Court found that none of the state interests, with one exception, justified the use of patronage dismissals.

The argument that patronage dismissals encourage efficient government was not accepted by the plurality in view of the inherent inefficiencies in the patronage system itself. Those inefficiencies included indiscriminate terminations and the failure to hire more capable replacements.[87] The Court further ruled that the state interest in effecting those unified policies newly sanctioned by the electorate did not justify dismissing non-policymaking employees who could not frustrate the goals of a new administration,[88] but did justify dismissal of policymaking employees who posed such a threat.[89] Finally, the state interest in retaining patronage dismissals as necessary to the survival of political parties was not accepted, because parties had well survived earlier reductions in their patronage power.[90] Therefore, the plurality ruled that patronage dismissals as practiced by the petitioners were unconstitutional under the first and fourteenth amendments.[91]

B. The Elrod *Concurring Opinion*

The concurrence, authored by Justice Stewart,[92] agreed at least implicitly with all the reasoning set forth by the plurality with the following exceptions:

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[83]*Id.* at 359-60.

[84]*Id.* at 361, 364-68.

[85]*Id.* at 360.

[86]Buckley v. Valeo, 424 U.S. 1 (1976) (recognizing that strict judicial scrutiny applies when first amendment rights are infringed).

[87]427 U.S. at 364-65.

[88]Without explanation the Court assumed that non-policymaking employees could not frustrate an administration's goals even when acting collectively. *Id.* at 367.

[89]*Id.* at 367.

[90]*Id.* at 369. *See* notes 64-66 *supra* and accompanying text.

[91]427 U.S. at 373.

[92]Justice Stewart was joined by Justice Blackmun.

> This case does not require us to consider the broad contours of the so-called patronage system, with all its variations and permutations. In particular, it does not require us to consider the constitutional validity of a system that confines the hiring of some governmental employees to those of a particular political party, and I would intimate no views whatever on that question.[93]

Thus, the members of the concurrence refused to join in the expansive plurality opinion and thereby limited the holding to prohibit only patronage-motivated dismissals. The concurrence also qualified the policymaking standard to include a confidential-nonconfidential inquiry, without an explanation for so doing.[94]

C. *The* Elrod *Dissenting Opinion*

Justice Powell's dissent initially relied upon the "waiver theory" to argue that respondents had waived their first amendment rights by accepting public employment with knowledge of past patronage practices.[95] In emphasizing the importance of the plaintiff's earlier use and enjoyment of the same system now challenged, the dissent stated that: "beneficiaries of a patronage system may not be heard to challenge it when it comes their turn to be replaced."[96]

The dissent noted that the historical importance of patronage was greater than that recited by the plurality, and criticized this shortcoming.[97] It reasoned that the state interests claimed by petitioners justified the encroachment upon first amendment rights. The dissent criticized the plurality for seriously underestimating "the strength of the government interest—especially at the local level—in allowing some patronage hiring practices, and [exaggerating] the perceived burden on First Amendment rights."[98]

The dissent emphasized the role that patronage has played in preventing political fragmentation[99] by attracting campaign support

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[93]*Id.* at 374 (Stewart, J., concurring).

[94]*Id.* at 375.

[95]Justice Powell was joined by Chief Justice Burger and Justice Rehnquist. The Chief Justice additionally published a brief separate dissent in which he criticized the Court's decision as usurping the proper role of the states and their legislatures. In characterizing the Court's decision as "trivializing constitutional adjudication," he stated that the majority strained the bounds of the first amendment "to hold that the Constitution *commands* something it has not been thought to require for 185 years." *Id.* at 375-76. (Burger, C.J., dissenting).

[96]*Id.* at 380 (Powell, J., dissenting).

[97]*Id.* at 382.

[98]*Id.* (footnote omitted).

[99]*Id.* at 383.

to the parties even during times of widespread voter apathy.[100] The importance of patronage at the local level, such as in the case at hand, was especially emphasized as critical to the democratic process in that "the hope of some reward generates a major portion of the local political activity supporting parties."[101]

VI. *ELROD V. BURNS*: THE AFTERMATH

Legal scholars welcomed *Elrod* as a much needed limit on patronage dismissals and as a vindication of the first amendment rights of association and expression.[102] However, *Elrod* has been widely criticized for introducing new uncertainties into political patronage practices. Two criticisms have been widely voiced: (1) the breadth of the *Elrod* holding and its effect upon patronage practices other than dismissals are unclear;[103] and (2) difficulty has been experienced in distinguishing between nonpolicymaking, nonconfidential employees, who are protected from dismissal, and policymaking, confidential employees who are not so protected.[104]

The scope of the *Elrod* holding was limited by the divergence of the plurality and concurring opinions. Based on the least common denominator[105] of the two opinions, the *Elrod* holding first prohibited patronage dismissals limited to the facts of the case, and second, the test of dischargeability considered confidential relationships in addition to the policymaking nature of the position.[106] Questions remained, however, as to the potential applicability of the above standards to political hiring, political non-rehiring, and other patronage practices.

One case which has interpreted *Elrod* refused to extend the umbrella of protection to situations involving a patronage-motivated refusal to rehire a public employee.[107] In *Ramey v. Harber*,[108] several deputies held office only during the term of their appointing sheriff. When the newly elected Democratic sheriff took office, he refused, solely on the basis of their political affiliation, to reappoint the deputies. The court in dicta noted that "there is considerable uncer-

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[100]*Id.* at 384.

[101]*Id.* at 385.

[102]Note, Elrod v. Burns: *Chipping at the Iceberg of Political Patronage*, 34 WASH. & LEE L. REV. 225 (1977). *See* notes 104, 127, & 193 *infra*.

[103]*See* Note, *Patronage and the First Amendment After* Elrod v. Burns, 78 COLUM. L. REV. 468 (1978).

[104]*See* Note, *Political Patronage and the Fourth Circuit's Test of Dischargeability After* Elrod v. Burns, 15 WAKE FOREST L. REV. 655 (1979).

[105]Marks v. United States, 430 U.S. 188, 193 (1977).

[106]427 U.S. at 347.

[107]Ramey v. Harber, 589 F.2d 753 (4th Cir. 1978), *cert. denied*, 442 U.S. 910 (1979).

[108]*Id.*

tainty as to how a majority of the Supreme Court would treat a failure to rehire and other patronage practices."[109]

In *Johnson v. Bergland*,[110] the plaintiff asserted that his interstate reassignment constituted a demotion caused by his "incorrect" political affiliation. The district court held for the defendants and the Fourth Circuit reversed. In recognizing a valid claim for relief, the court stated that if the plaintiff was a nonpolicymaking, nonconfidential employee transferred for political reasons, "the fact that he was relocated in a distant state shortly after being placed . . . would suffice to establish an infringement of his first amendment rights."[111]

One commentator, in analyzing political non-rehiring by the tests employed in *Elrod*, concluded that the Court would find a political refusal to rehire unconstitutional because the burdens on the first amendment are comparable.[112] Using a similar analysis, the author found it less likely that political hiring and nonemployment patronage practices would be invalidated by the Court because of a lesser burden on first amendment rights and a stronger state interest to justify burdening protected rights.[113]

These cases and comments clearly indicate the uncertainty of the breadth of *Elrod* beyond its particular fact situation. Difficulty in applying the policymaking-nonpolicymaking, confidential-nonconfidential distinctions also evoked criticism. In its plurality opinion the Court set forth some guidance for making the determination even though it acknowledged that "[n]o clear line"[114] exists:

> While policymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have . . . only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.[115]

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[109]*Id.* at 757.

[110]586 F.2d 993 (4th Cir. 1978).

[111]*Id.* at 995.

[112]Note, *Patronage and the First Amendment After* Elrod v. Burns, 78 COLUM. L. REV. 468, 474-75 (1978).

[113]*Id.* at 476-78.

[114]427 U.S. at 367.

[115]*Id.* at 367-68.

The confidential-nonconfidential component of the dischargeability test as presented in the concurrence was neither illustrated nor defined.[116]

Because actual application of the *Elrod* dischargeability standard has been difficult, various courts have been forced to redefine the test with differing results.[117] A discretionary versus purely ministerial inquiry[118] has been undertaken to ascertain the role of the employee in the policymaking process.[119] Alternatively, the impact of the employee's decisions on the overall operation or broad goals of the office has been employed to ascertain the policymaking or nonpolicymaking nature of the position.[120]

The confidential-nonconfidential distinction has received little comment, but the least common denominator test[121] requires that the confidential inquiry supplement the policymaking-nonpolicymaking distinction to form a two-part standard. Thus an employee must be both nonpolicymaking and nonconfidential to be accorded constitutional protection against partisan discharge.[122] One court has described the traits of a confidential position as requiring loyalty to the officeholder or such a relationship to the officeholder that illegal conduct on the employee's part could expose the employer to civil liability.[123]

Procedural problems germane to patronage actions were detailed by the Court in *Mount Healthy City Board of Education v. Doyle*[124] in which a public school teacher was not rehired in substantial part because of protected speech.[125] A dismissed public employee bears a formidable burden of proof in demonstrating that constitutionally protected conduct was a "substantial" or "motivating" factor in the decision to dismiss an employee.[126] If this burden is discharged, the burden of going forward shifts to the employer who may demonstrate that the employee would have been discharged even if he had not engaged in protected conduct. Thus, an impermissibly dismissed

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[116]*Id.* at 374-75 (Stewart, J., concurring).

[117]Newcomb v. Brennan, 558 F.2d 825 (7th Cir. 1977), *cert. denied*, 434 U.S. 968 (1977).

[118]558 F.2d at 830.

[119]*Id.* at 829-31.

[120]*Id.* at 825.

[121]*See* note 105 *supra.*

[122]427 U.S. at 375.

[123]McCollum v. Stahl, 579 F.2d 869, 872 (4th Cir. 1978), *cert. denied*, 440 U.S. 912 (1979) (While *McCollum* allows dismissal of a secretary or a deputy sheriff under the loyalty standard, only the deputy sheriff could be dismissed under the *McCollum* imputed illegal conduct standard).

[124]429 U.S. 274 (1977).

[125]*Id.* at 282.

[126]*Id.* at 287 (construing Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977)).

employee "can prevail only if the court finds that he would have been rehired *but for* the impermissible factor."[127]

VII. *BRANTI V. FINKEL*: A CLARIFICATION?

In its first opportunity to clarify the questions raised by *Elrod*, the Supreme Court in *Branti v. Finkel*[128] was faced with the claims of two assistant county public defenders who alleged impending dismissal solely because of their political affiliation. The plaintiffs were appointed by the Rockland County Public Defender, a Republican, who in turn was appointed by the Republican-dominated County Legislature. When the Democrats gained control of the legislature, a Democrat was appointed to the public defender position and notification of termination was given to the plaintiffs.[129]

The district court ruled that the sole ground for removing the plaintiffs was that their "political beliefs differed from those of the ruling Democratic majority in the County Legislature . . . ."[130] In declaring the plaintiffs to be nonpolicymakers, the district court conceded that while strategy decisions were made concerning individual cases, no policy was formulated by the plaintiffs respecting the "broad goals of the office."[131] The plaintiffs were classified as nonconfidential by the court because they did not have access to confidential documents and because no confidential relationships existed which affected formulation of broad office policy.[132] The defendant's claim in the alternative that the plaintiffs were incompetent was dismissed by the court as unsupported by the clear weight of the evidence.[133] On appeal, the Second Circuit affirmed without opinion.[134]

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[127]Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 YALE L.J. 376, 384 (1979) (emphasis added) (This Note argues that the "but for" test imposes too great a burden of proof upon the employee and proposes use of a "substantial cause test" to prevent after the fact justifications by the employing authority).

[128]445 U.S. 507.

[129]Finkel v. Branti, 457 F. Supp. 1284 (S.D.N.Y. 1978), *aff'd*, 598 F.2d 609 (2d Cir. 1979), *aff'd*, 445 U.S. 507 (1980).

[130]457 F. Supp. at 1293.

[131]*Id.* at 1291. The court characterized decisions made in the context of specific cases, such as plea bargaining, as outside the formulation of policy affecting the "broad goals of the office." *Id.*

[132]*Id.* at 1292. The court did not decide whether an employee who executes broad office policy would be considered confidential. *Id.*

[133]*Id.*

[134]Finkel v. Branti, 598 F.2d 609 (2d Cir. 1979), *aff'd*, 445 U.S. 507 (1980).

A. The Branti *Majority Opinion*

The defendant raised four arguments before the Supreme Court, two of which were summarily dismissed. The claim that the plaintiffs were incompetent and would have been dismissed despite the protected activity[135] was dismissed by the Court as unsubstantiated by the evidence.[136] The Court further observed that the defendant's "waiver theory" argument was clearly rejected in *Elrod*.[137]

The defendant then contended that the holding in *Elrod* was limited to those situations in which a public employee is "coerced into pledging allegiance to a political party that [he] would not voluntarily support and does not apply to a simple requirement that an employee be sponsored by the party in power . . . ."[138] In the opinion written by Justice Stevens,[139] the Court reviewed the *Elrod* rationale for invalidating patronage dismissals. The first reason supporting *Elrod* was that the dismissals encroached upon the first amendment freedoms of belief and association because employment could only be secure if employees pledged their allegiance to work for, or obtain a sponsor from, the Democratic party.[140] The Court stated that the "inevitable tendency of such a system was to coerce employees into compromising their true beliefs."[141]

Justice Stevens noted the second reason supporting the *Elrod* holding was that the practice imposed an unconstitutional condition upon the receipt of a public benefit.[142] Reiterating the erosion of the "right-privilege distinction," the majority stated that even an employee who has no right to retain his job "cannot be dismissed for engaging in constitutionally protected speech . . ."[143] or association.

Applying the rationale of *Elrod*, the Court considered the position of the defendant anomalous in that a public employee could be "dismissed with impunity"[144] as long as there was no coercion to support the party in power.[145] The Court ruled that:

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[135]*See, e.g.*, notes 124-27 *supra* and accompanying text.

[136]445 U.S. at 512 n.6.

[137]*Id. See* notes 77 & 78 *supra* and accompanying text.

[138]445 U.S. at 512.

[139]Justice Stevens was joined by Chief Justice Burger and Justices Brennan, Marshall, White, and Blackmun.

[140]The district court observed that the plaintiff Finkel changed his party affiliation in 1977 from Republican to Democrat to further his chances of reappointment under the patronage system. 457 F. Supp. at 1285 n.2.

[141]445 U.S. at 513 (construing Elrod v. Burns, 427 U.S. 347, 355-56 (1976)).

[142]445 U.S. at 514.

[143]*Id.* (construing Perry v. Sinderman, 408 U.S. 593 (1972)).

[144]445 U.S. at 516.

[145]*Id.*

> While it would perhaps eliminate the more blatant forms of coercion described in *Elrod*, it would not eliminate 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. More importantly, [defendant's] interpretation would require the Court to repudiate entirely the conclusion . . . that the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs.[146]

In sum, the Court stated that it would be sufficient to prove that the discharge was motivated solely by lack of affiliation with the dominant party, making it unnecessary to demonstrate coercion.[147]

As to the defendant's final argument that the discharged employees held policymaking or confidential positions, Justice Stevens wrote that the policymaking and confidentiality distinctions noted in *Elrod* did not encompass those areas of proscribed dismissal with sufficient accuracy.[148] He declared that the policymaking distinction was over-inclusive, illustrating his position with an example of the policymaking and confidential, albeit nonpolitical, position of the coach of a state university football team.[149] Similarly, Justice Stevens indicated the under-inclusive nature of the policymaking and confidentiality distinctions with an example of election judges who are statutorily required to be members of different parties, thereby illustrating a political but nonpolicymaking, nonconfidential position.[150]

Based on this weakness of the *Elrod* standard, Justice Stevens revised the policymaking, confidentiality inquiry, stating: "In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[151]

Applying this revised standard, the Court ruled that an assistant public defender is primarily responsible to his individual clients. Any policymaking or confidential information obtained would

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[146]*Id.* at 516-17 (footnote omitted).

[147]*Id.* at 517.

[148]*Id.* at 517-18.

[149]*Id.* at 518. The Court observed that the relevance of party affiliation to patronage dismissal was not based upon a policymaking or confidentiality inquiry but upon the responsibilities of the position in question. *Id.*

[150]*Id.* at 518. The Court emphasized that its conclusion was not based upon the absence of policymaking or confidential duties, but upon the necessity for specific party membership to discharge the responsibilities of the position. *Id.*

[151]*Id.* at 518.

have no relationship to partisan political concerns.[152] In this light, the Court ruled that to best nurture effectiveness of the office, an assistant public defender could not permissibly be dismissed for partisan political reasons.[153]

B. The Branti *Dissenting Opinion*

Writing for the dissent,[154] Justice Powell[155] criticized the vagueness of the new standard. Noting the standard's sweeping language, the opinion emphasized that public officials, among others, will be without guidance in determining whether a position may properly be considered political.[156] Justice Powell strongly questioned the majority's use of inappliable precedents in applying the first amendment to the issue of patronage dismissals.[157] Additionally, the dissent argued that the voters of Rockland County had ratified the patronage system by its continuation through their elected legislators and that the majority opinion effectively abolished the right to the electorate to choose its own structure of government.[158]

Finally, Justice Powell maintained that important government interests in patronage dismissals justify burdening first amendment rights. He characterized the role of patronage as central to stable political parties, efficient functioning of the election process, and the operation of government during an officeholder's term. Justice Powell predicted that in the final analysis, "the effect of the Court's decision will be to decrease the accountability and denigrate the role of our national political parties."[159]

VIII. The Expansion of Patronage Practice Prohibitions

One of the most significant changes ushered in by *Branti* was in shifting the focus of the dischargeability standard from the duties of

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[152]Conversely, the Court intimated that a prosecutor could be dismissed for partisan reasons because of the broader public responsibilities of the office and implied that this logic applied to a public defender as well. *Id.* at 519 n.13.

[153]*Id.*

[154]Justice Stewart published a brief separate dissent in which he characterized the plaintiffs as confidential employees similar to the professional association found in a firm of lawyers and thus not qualified for constitutional protection. *Id.* at 520-21. *But see id.* at 520 n.14.

[155]Justice Powell was joined by Justice Rehnquist and in part by Justice Stewart. *Id.* at 521.

[156]*Id.* at 523-26 (Powell, J., dissenting).

[157]*Id.* at 526-27. The dissent reasoned that had the majority applied applicable precedents, any burdening of first amendment rights could have been justified with an intermediate level of judicial scrutiny and no constitutional violation would have been found. *Id.*

[158]*Id.* at 532-34.

[159]*Id.* at 531.

a particular public employee to the effective performance of a public office. The *Elrod* standard emphasized the actual position held by the discharge-targeted employee, including the scope of his responsibilities, the concreteness of his objectives, and his influence upon the formulation and implementation of broad goals.[160] Conversely, the *Branti* test of dischargeability scrutinizes, in the abstract, the position concerned as being policymaking or confidential and poses the question of whether "party affiliation is an appropriate requirement for the effective performance of the public office involved."[161]

In an effort to clarify the *Elrod* standard, Justice Stevens in *Branti* changed the fundamental inquiry to one more expansive in its protection from patronage dismissals of public employees. While the *Elrod* standard is concrete and particular in nature in that the actual duties of the employee are examined, the *Branti* standard is abstract and general because the position itself is viewed theoretically, without regard for the actual duties performed by the occupant.[162] Under *Elrod*, an employee could be considered policymaking or confidential because of his actual conduct or other duties.[163] However, such a disqualification from protection presumably could not occur under *Branti* because the position is viewed in the abstract without considering the role of the individual.[164] Ostensibly the Court recognized the difficulty of utilizing the *Elrod* standard and, as the legal community had advocated,[165] revised the standard in *Branti* to meet this criticism.

Two reasons compel this conclusion. First, the expansive nature of the *Branti* holding, unlike that of *Elrod*, involved a narrower level of review emphasizing only the primary duty of the targeted office.[166] Thus, the public office under *Branti* cannot be scrutinized as closely as was the public employee under *Elrod*. Because many positions marginally involve both nonpolitical and political duties, fewer partisan responsibilities will be detected and the resulting permissible class of dischargeable employees will be reduced.[167] Second, the *Branti* dissent conceded that the majority enlarged the protected class of employees when Justice Powell described the revised standard as "sweeping," "broad," and "substantially expanded."[168]

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[160]427 U.S. at 368.
[161]445 U.S. at 518.
[162]*See* notes 164 & 165 *infra*.
[163]427 U.S. 347.
[164]445 U.S. 507.
[165]*See* notes 117-23 *supra* and accompanying text.
[166]445 U.S. at 518.
[167]*Id.*
[168]*Id.* at 522-24 (Powell, J., dissenting).

In a subsequent public employee dismissal case, *Farkas v. Thornburgh*,[169] a federal district court elaborated upon the conclusion that the revised *Branti* standard increased public employee protection against patronage dismissals.[170] Agreeing that the protected class had been expanded, the district court observed that while "*Branti* did not expressly overrule *Elrod*, *Branti* certainly made unconstitutional dismissals which would have passed muster under *Elrod*."[171]

A second major criticism of *Elrod* involved the uncertainty surrounding the breadth of the Court's holding.[172] The *Elrod* plurality spoke in broad terms as to the general unconstitutionality of all patronage practices.[173] But the concurrence limited the holding to proscribe only patronage dismissals and expanded the policymaking distinction to include the confidentiality inquiry.[174] The Court in *Branti* adopted the confidentiality distinction enunciated in the concurrence without discussion.[175]

As to the scope of the holding in *Branti*, no limiting language such as that found in the *Elrod* concurrence was present. In a footnote, the Court did refuse to rule on the dismissability of a deputy prosecutor.[176] Noting the broader public duties of a prosecutor as compared to a public defender, the majority in *Branti* expressly offered no opinion on the constitutionality of the political discharge of such an employee.[177]

Significantly, the Court did address one other patronage practice, thereby implying that it, too, may be unconstitutional. The Court observed the difficulty of conceiving any justification for conditioning upon partisan grounds the hiring of an assistant public defender.[178] The Court quoted with approval the following statement of the district court:

> Perhaps not squarely presented in this action, but deeply disturbing nonetheless, is the question of the propriety of political considerations entering into the selection of attorneys to serve in the sensitive positions of Assistant

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[169]493 F. Supp. 1168 (E.D. Pa. 1980), *aff'd without opinion*, 642 F.2d 441 (3d Cir. 1981).

[170]*Id.* at 1179 n.23.

[171]*Id.*

[172]*See* notes 103-13 *supra* and accompanying text.

[173]*See* notes 80-83 *supra* and accompanying text.

[174]*See* notes 92-94 *supra* and accompanying text.

[175]445 U.S. at 518.

[176]*Id.* at 519 n.13.

[177]*Id.*

[178]*Id.* at 520 n.14.

> Public Defenders. By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime? No "compelling state interest" can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans).[179]

Justice Powell writing for the dissent agreed that the majority had, in dicta, proscribed the patronage practice of partisan-motivated hiring of assistant public defenders.[180]

Although *Branti* has "expanded the immunity of non-civil service employees from patronage dismissals, it has left the contours of the broadened constitutional protections somewhat unclear."[181] The procedure by which an employee obtains this protection is fortunately not so obscure. The burden of proof rests upon the plaintiff-employee to demonstrate by a preponderance of the evidence that the public employer discharged or threatened to discharge him solely because of his political affiliation.[182] The burden of going forward then shifts to the public authority to establish one of two justifications.

Using the *Branti* abstract standard, the authority can justify its conduct by showing that party membership was essential to the effective performance of the position.[183] Alternatively, the public authority can demonstrate that a permissible apolitical motivation prompted the dismissal. Utilizing the *Mount Healthy* "but for" test,[184] the public authority may carry its burden of going forward, even if an impermissible motivation exists, by showing that the primary motive for discharge lacked any unconstitutional quality.[185] Under the *Mount Healthy* analysis, in order for a motivation to be considered permissible it must advance a governmental rather than a partisan interest.[186] Thus, even if specific political affiliation is required to effectively perform the duties of the position, the dismissal would be unconstitutional and the justification would fail if the motivation were based upon partisan rather than governmental considerations.

Finally, if the claimed constitutional infringement involves patronage practices other than those involved in hiring or discharge,

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[179]*Id.* (quoting Finkel v. Branti, 457 F. Supp. 1284, 1293 n.13 (S.D.N.Y. 1978)).

[180]445 U.S. at 524.

[181]G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1479 (10th ed. 1980).

[182]445 U.S. at 517.

[183]*Id.*

[184]*See* notes 124-27 *supra* and accompanying text.

[185]429 U.S. at 287.

[186]427 U.S. at 362.

the Court will employ strict judicial scrutiny, rather than the abstract *Branti* dischargeability standard, and balance those first and fourteenth amendment rights diminished against the state interests being upheld.[187]

Branti has successfully met the criticisms of *Elrod* in several respects. The abstract standard enunciated in *Branti* has decreased the difficulty of distinguishing between policymaking-nonpolicymaking and confidential-nonconfidential employees.[188] This is because application of an abstract standard in which the position in question is viewed hypothetically not only expands the scope of immunity but also relieves the fact finder of the need to examine the actual duties performed by the employee proposed for termination.[189]

Criticism that *Elrod* left unspecified the breadth of its application was also addressed in part by *Branti*. The Court in *Branti* reiterated the view that dismissal of public employees based solely on political affiliation is impermissible despite the apparent absence of coercion to change party membership.[190] The Court also cited with approval language which invalidated the use of partisan considerations in the hiring of employees for positions where specific political affiliation was not relevant to effective performance of the duties of the office.[191] The Court did not, however, address other patronage practices such as the failure to rehire and the distribution of other nonemployment benefits.[192]

The Court's retreat from the concrete standard expressed in *Elrod* was not altogether unpredictable.[193] An analgous standard was employed by the Court in *Barr v. Mateo*[194] in which public officials were clothed with an immunity from defamation claims.[195] In that opinion the Court fashioned a discretionary-nondiscretionary distinction to ascertain whether a public employee was operating within the proper scope of his authority.[196] The distinction underwent

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[187]*Id.*

[188]*See* Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980) (strict scrutiny and balancing of interests employed on basis of freedom of speech in reviewing dismissal of public employee).

[189]*See* notes 163-64 *supra.*

[190]445 U.S. at 516-17.

[191]*See* notes 178-79 *supra* and accompanying text.

[192]445 U.S. at 513 n.7.

[193]*See* Note, *Patronage Dismissals and Compelling State Interests: Can the Policymaking/NonPolicymaking Distinction Withstand Strict Scrutiny?*, 1978 S. ILL. U.L.J. 278, 296-300.

[194]360 U.S. 564 (1959).

[195]*Id.*

[196]*Id.* at 572-74. In that opinion, Justice Harlan enunciated the following rather vague standard to be employed:

The privilege is not a badge or emolument of exalted office, but an expres-

substantial criticism for its vagueness and was ultimately revised in *Scheuer v. Rhodes*.[197] In *Scheuer*, the Court shifted from an analysis of the individual duties performed by the officer to an abstract inquiry concerning the office. The essentially theoretical standard provided that "a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action . . . ."[198] By analogy it may be inferred that the vagueness created by both *Elrod* and *Barr* in establishing a concrete standard ultimately led to substitution of an abstract inquiry to make obtainable the desired immunity for public employees.

Despite revision of the *Elrod* standard, the *Branti* opinion failed in two significant respects. First, under the revised standard of dischargeability, the contours of the newly created class of protected employees are unduly vague and will result in inconsistent lower court decisions.[199] The dissenters in *Branti* described the confusion expected to confront public officials, legislators, and prospective public employees when they stated that those groups "who now receive guidance from civil service laws, no longer will know when political affiliation is an appropriate consideration in filling a position."[200] The majority in *Branti* apparently did not recognize the potential for confusion arising from its holding.[201]

Second, and even more fundamental, the majority in *Branti* ignored the depreciating effect of its expansive decision on the stability of national political parties.[202] This absence of justification was vigorously criticized by the dissent. Justice Powell warned that

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sion of a policy designed to aid in the effective functioning of government. . . .

. . .

To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to "matters committed by law to his control or supervision," . . .—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.

Id. (citation omitted).

[197]416 U.S. 232 (1974).

[198]*Id.* at 247.

[199]G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1479 (10th ed. 1980).

[200]445 U.S. at 524 (Powell, J., dissenting).

[201]*Id.* at 507 (Stevens, J., for the Court).

[202]*Id.* at 532 (Powell, J., dissenting).

Branti will impair the role of political parties in fostering national goals, and concluded that the quality of government will suffer "when candidates and officeholders are forced [as a result of *Branti*] to be more responsive to the narrow concerns of unrepresentative special interest groups than to overarching issues of domestic and foreign policy."[203] Justice Powell theorized that this insensitivity to the value of political parties will contribute to a factionalized, multiple-party system of government.[204]

IX. Judicial Interpretation of the *Branti* Prohibition of Patronage Practices

Cases interpreting the changes resulting from *Branti* have generally fallen into one of two categories: (1) cases which have recognized the expansion of public employee rights under *Branti*; and (2) cases in which *Elrod-Branti* immunities are not available.[205]

In the case of *Delong v. United States*,[206] the court interpreted the breadth of the *Branti* holding as significantly expanding the scope of public employee protection to include other patronage practices. The court recognized that a valid cause of action existed for the political reassignment and transfer of existing employees because of infringement of first amendment rights.[207] As discussed above, the court in *Farkas v. Thornburgh*[208] described the *Branti* standard of dischargeability as more expansive than the *Elrod* standard because of the change in focus from a concrete to an abstract inquiry.[209]

In *Blameuser v. Andrews*,[210] the Seventh Circuit Court of Appeals held that refusal to admit the plaintiff to an Army ROTC program was based on his Nazi sympathies.[211] The court reasoned that the state interest in recruiting qualified candidates to be officers

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[203]*Id.* (Powell, J., dissenting).

[204]*Id.* at 528 (Powell, J., dissenting).

[205]Several courts have held that the plaintiff-employee failed to carry the initial burden of proof. In *Farkas v. Thornburgh*, 493 F. Supp. 1168 (E.D. Pa. 1980), *aff'd without opinion*, 642 F.2d 441 (3d Cir. 1981), the court ruled that the plaintiff had performed at a substandard level and that the plaintiff's successor was competent and able. *Id.* at 1178. *Aufiero v. Clarke*, 489 F. Supp. 650 (D. Mass. 1980), involved a plaintiff who established a prima facie case of discharge based on political activity, but who did not establish that the political activity was constitutionally protected and accordingly failed to carry the burden of proof. *Id.* at 652.

[206]621 F.2d 618 (4th Cir. 1980).

[207]*Id.* at 624.

[208]493 F. Supp. 1168.

[209]*Id.* at 1179 n.23.

[210]630 F.2d 538 (7th Cir. 1980).

[211]*Id.*

justified burdening the first amendment in a way which would be impermissible if civilians were involved.[212]

In *Bavoso v. Harding*,[213] a federal district court ruled that a municipal corporation counsel did not qualify for immunity under *Branti*. Because the selection process to hire municipal counsel statutorily required approval by the mayor and a majority of the legislative council, the court reasoned that it was essentially a political process outside the scope of *Branti*.[214]

Bavoso raises the question of whether the patronage practice prohibitions under *Branti* could be completely circumvented by merely dedicating the selection, appointment, and termination of all public employees to such a political process. The mechanics would simply involve a statute requiring the approval of the executive and legislative branches of a governmental entity in making fundamental personnel decisions.[215] However, the district court in *Bavoso* implicitly suggested that a municipal corporation counsel could permissibly be removed for political reasons under the *Branti* analysis.[216] For this reason, it appears that the court would not extend its "dedicated to a political process" rationale to permit the political hiring or dismissal of public employees who qualify for protection under *Branti*.[217] However, the court's holding is not so explicitly limited, allowing for the possibility that such an argument may successfully be made.

These subsequent lower court cases indicate that initially the *Branti* standard has been correctly interpreted as expanding both the standard of dischargeability established by *Elrod* and the breadth of the *Elrod* holding.[218] But the potential for uncertainty illustrated by *Bavoso* indicates that officials and employees of public authorities will recurringly be without guidance in determining whether political affiliation is an appropriate requirement to fulfill the responsibilities of a given public office.[219]

X. Conclusion

The thesis of this Note is that while *Branti* has expanded the first amendment freedom of association in its application to public employees, providing protection against patronage-motivated em-

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[212]*Id.* at 542.

[213]507 F. Supp. 313 (S.D.N.Y. 1980).

[214]*Id.* at 316.

[215]*Id.* at 314.

[216]*Id.* at 316.

[217]*Id.*

[218]*See* Tanner v. McCall, 625 F.2d 1183, 1189-96 (5th Cir. 1980).

[219]*See* notes 199-201 *supra* and accompanying text.

ployment practices, the revised standard is unduly vague and will result in inconsistent lower court decisions. As exemplified by *Bavoso*, the availability of *Branti's* protection may be difficult to predict. For this reason, it may be said that while *Branti* has significantly increased the class of public employees shielded from patronage practices, the resulting protections do not approximate a civil service system on a national basis.

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