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## The Future of *Rutan v. Republican Party of Illinois*: A Proposal for Insulating Independent Contractors from Political Patronage

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# THE FUTURE OF *RUTAN V. REPUBLICAN PARTY OF ILLINOIS*: A PROPOSAL FOR INSULATING INDEPENDENT CONTRACTORS FROM POLITICAL PATRONAGE

*[A] division of the Republic into two great parties . . . is to be dreaded as the greatest political evil under our Constitution.<sup>1</sup>*

## I. INTRODUCTION

In 1976, in the landmark decision of *Elrod v. Burns*,<sup>2</sup> the Supreme Court of the United States firmly established that the dismissal of public employees for reasons of political patronage or party affiliation violates the First Amendment. Specifically, the Court held that requiring public employees to pledge their allegiance to a political party imposes unconstitutional restraints on the freedoms of speech and association.<sup>3</sup> In 1980, *Branti v. Finkel*<sup>4</sup> reaffirmed this position of protectionism. Both of these cases set forth that most patronage practices

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1. *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2741 (1990) (citing John Adams in R. HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* 2-3 (1969) (footnote omitted)). See *infra* note 20.

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

3. The First Amendment to the Constitution of the United States expressly provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The First Amendment expressly protects speech from governmental interference. The freedoms of association, although not explicitly enumerated in the First Amendment, are inherently present within a penumbra where belief and privacy are protected from governmental interference. *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding freedom of association to be an independent right possessing an equal status with the other rights specifically enumerated in the First Amendment); *NAACP v. Button*, 371 U.S. 415 (1963) (setting forth that although freedom of association is not expressly included in the First Amendment, its existence is necessary in making the express guarantees fully meaningful); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (expressing that specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance, and finding the right to marital privacy to be such a right existing within the penumbral zone of privacy). See also *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that requiring appellee to display a government composed state motto on his license plates violated his first amendment right to refrain from speaking and associating); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (upholding the right of public school students to refuse to salute flag); Thomas Irwin Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1 (1964).

The constitutional implications of freedom of association in the patronage context are discussed more fully at *infra* notes 52-59 and accompanying text.

4. 445 U.S. 507 (1980).

offend the First Amendment, and therefore, are not allowed.<sup>5</sup>

In 1990, the third case in this trilogy of political patronage cases emphatically affirmed the position of the earlier courts. *Rutan v. Republican Party of Illinois*<sup>6</sup> extended first amendment protection to politically motivated hiring, promotion, transfer, or recall of governmental employees based on their political affiliations. The Supreme Court held, using a strict scrutiny analysis and relying on *Elrod* and *Branti*, that in addition to termination based on political beliefs, hiring, promotion, transfer, and recall similarly impinge upon the first amendment rights of public employees.<sup>7</sup> The Court reasoned that although a person does not have a right to a government job, a state may not deny that person a job on a basis that infringes upon the person's constitutionally protected interests— especially the person's interest in free speech and association.<sup>8</sup>

A question raised by the *Rutan* decision is whether these same constitutional protections apply to independent contractors.<sup>9</sup> Despite the seemingly clear

5. The Court acknowledged that in some positions, however, partisan affiliation may be necessary for the particular job if it was a position inherently of a policymaking nature, or if party affiliation is crucial to the performance of the employee's job. *Branti v. Finkel*, 445 U.S. 507, 518-20 (1980); *Elrod*, 427 U.S. at 367. These two exceptions are discussed further *infra* in section II, notes 27-32 and accompanying text.

Furthermore, the focus of this note deals exclusively with adverse employment actions based solely on political affiliation or belief, and is not concerned with "mixed-motive" or "facially-neutral" employment discharges. These other patronage actions are addressed briefly at *infra* note 196.

There are numerous cases involving political patronage in the government employment context since *Elrod v. Burns* was decided. For an excellent comprehensive summary of these cases and the holdings of the various federal circuit and state courts, see Richard P. Shafer, Annotation, *Dismissal of, or Other Adverse Personnel Action Relating to, Public Employee for Political Patronage Reasons as Violative of First Amendment*, 70 A.L.R. FED. 371 (1991).

6. 110 S. Ct. 2729 (1990) (a five-four decision, with Justice Brennan writing the majority opinion).

7. *Id.* See *infra* notes 89-110 and accompanying text for a more in-depth analysis of the holding and reasoning of the Court.

8. *Id.* at 2735-36 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that a state college professor had a First Amendment claim if the state's refusal to review his contract was the result of his public criticism of the school board's policies)). See *infra* notes 93-94 and accompanying text.

9. An independent contractor can be defined as "one who, in exercising an independent employment, contracts to do certain work according to his own methods, without being subject to the control of his employer, except as to the product or result of his work." 41 AM. JUR. 2D *Independent Contractors* § 1 (1964); BLACK'S LAW DICTIONARY 530 (6th ed. 1991). For the purposes of this note, a working definition of independent contractors will be confined to contractors who perform duties traditionally performed by the public employees in the past, or jobs public employees could do as a legitimate governmental function, but have contracted out such duties to independent contractors.

The line separating these two positions in terms of responsibilities and rights is non-distinct.

import of *Rutan*, the circuits that have addressed this issue have refused to extend the same first amendment protection to independent contractors who lose government contracts because of their political affiliations.<sup>10</sup> Prior to the *Rutan* decision, appellate courts refused to afford constitutional protection to independent contractors based upon the argument that first amendment rights are more attenuated and insufficient since public contractors are only being deprived of "one customer" due to the patronage practice, and can find other contracts

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However, although there exists a great number of non-public employment positions that contract with the government, the independent contractors referred to throughout the text of this note and who deserve equal constitutional protection could be categorized as performing "closely-related" jobs, i.e., jobs that are closely related to legitimate government functions that have been or could be performed by government employees. The rationale for this focus is that the government should not be allowed to relegate work performed by constitutionally protected government employees to independent contractors who are uninsulated from political patronage. Similarly, the government should not be able to eschew performing certain jobs by contracting them out just so they can practice party politics. The rights implicated by denying public contracts are those of the individual involved who suffers a termination or rejection of a public contract for a particular job, just like those public employees who lose their particular position.

It follows that the parties identified as "independent contractors" who are suggested to be deserving of the same first amendment protections as government employees focus on the *individuals* involved whose rights are infringed upon. Thus, the independent contractors focused on for the purposes of this note do not include large corporations such as General Dynamics whose jobs are outside the realm of traditional governmental undertakings. In other words, this note is concerned only with independent contractors who have been terminated or rejected from contracts for activities such as towing, sewage, waste treatment, custodial work, inspection, other municipal duties, etc., but not with contracts for building airplanes or tanks which are outside the realm of those traditional jobs the government performs itself. This is not to say that similar rights are not implicated in these large corporations, or that they are less deserving of constitutional protections. An exhaustive list of which jobs and contracts are included herein is nearly impossible to compile due to the numerous functions of the government at federal, state, county, and local levels. The focus of this note is on the parallel individual rights existing between government employees and independent contractors as limited above. The difference between employees and contractors may be one of autonomy in the performance of the job, but this does not implicate a lesser right to receive a government benefit. For further discussion on independent contractors and political patronage, see *infra* section IV, notes 111-64 and accompanying text.

10. See *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991) (holding that the First Amendment did not forbid the city from considering the party's adverse lobbying efforts when it refused to renew parking lot leases), *cert. denied*, 112 S. Ct. 640 (1991); *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583 (7th Cir. 1989) (holding that the First Amendment did not protect contractors in the awarding of public contracts), *cert. denied*, 111 S. Ct. 129 (1990); *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc) (holding that motor vehicle agents were independent contractors rather than public employees and were not insulated by the First Amendment from being replaced by the governor's successor who was of a different political party); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983) (holding that the First Amendment does not forbid the city from using political criteria in awarding public contracts), *cert. denied*, 464 U.S. 1044 (1984); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982) (holding that the politically motivated dismissal of Department of Revenue fee agents, classified as independent contractors, does not violate the First Amendment), *cert. denied*, 459 U.S. 878 (1982). Each of these cases is discussed in turn in greater detail *infra* in section IV, notes 111-64 and accompanying text.

elsewhere in the private sector.<sup>11</sup> Since *Rutan*, the courts have followed identical logic and relied solely upon the holdings of the pre-*Rutan* cases. Thus, the lower federal courts have limited the scope of *Elrod* and *Branti* to government employees, and have refused to expand this protection to independent contractors absent a clear Supreme Court decision mandating such an expansion.

In light of the recent extension of constitutional protection from political patronage in terms of hiring, promotion, transfer, or other opportunity, and in light of the first amendment freedoms affected by terminating public contracts, the refusal to further extend this protection to independent contractors warrants a critical re-evaluation. The lower courts in the various circuits have applied the *Elrod-Branti* political patronage doctrines inconsistently and incorrectly by refusing to include independent contractors within those positions warranting constitutional protection. Furthermore, the federal courts have failed to apply the same reasoning of *Rutan* expanding individual protections, and have similarly failed to undertake a critical re-evaluation of the first amendment rights at stake for independent contractors in light of *Rutan*. As a result, this area is in need of uniformity and direction, which can be accomplished by extending the same individual first amendment protections to independent contractors who have fallen victim to politically motivated public contract terminations.

This Note will initially address the inception and development of the political patronage doctrine, including the rationales and bases for constitutional protection.<sup>12</sup> Second, this Note will examine the Supreme Court's treatment of patronage in *Rutan v. Republican Party of Illinois*, as well as the first amendment protections afforded to public employees as a result of the Court's other patronage decisions.<sup>13</sup> Third, this Note will scrutinize the lower courts' general refusal prior to *Rutan* to extend the same first amendment protections to independent contractors who lose contracts with the government or government entities because of their political affiliations or practices.<sup>14</sup> Fourth, this Note will analyze the current status of the judicial treatment of political patronage practices affecting independent contractors after *Rutan*.<sup>15</sup> Finally, a proposition for extending first amendment protection to independent contractors will be offered, in light of *Rutan* and other case law, reflecting a movement toward increased protections for individual freedoms of expression.<sup>16</sup>

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11. See *supra* note 10; *infra* notes 114-64 and accompanying text.

12. See *infra* section II, notes 17-63 and accompanying text.

13. See *infra* section III, notes 64-110 and accompanying text.

14. See *infra* section IV, notes 111-53 and accompanying text.

15. See *infra* section IV, notes 154-64 and accompanying text.

16. See *infra* section V, notes 165-222 and accompanying text.

## II. HISTORICAL AND CONSTITUTIONAL OVERVIEW

A. *The Tradition of the Practice of Political Patronage*

"To the victors belong the spoils."<sup>17</sup> This has been the inherent philosophy of political officeholders who subscribe to the philosophy of patronage, which is the allocation of the discretionary favors of government on the basis of partisan affiliation,<sup>18</sup> in the public employment arena. Such a philosophy is viewed by some as an appropriate, and in fact, a necessary political function in order to preserve the political process, the two-party system, and democracy.<sup>19</sup> Since the inception of the political process in America, the practice of political patronage has been observed and allowed, although it has always evoked controversy.<sup>20</sup> The spoils system has been entrenched in

17. The origins of this phrase are uncertain, but it has symbolized the philosophy of government officials who have succeeded to office, and desire to appoint loyal party supporters to government positions (often referred to as the "spoils system." See Susan Lorde Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11 (1989) (presenting an elaborate discussion of patronage historically and in the individual circuit courts, and proposing an appropriate course of action for newly elected government officials who desire to replace employees of the political opposition with their own supporters); GALES AND SEATON'S REGISTER OF DEBATES IN CONGRESS (Jan. 1832) (statement of Sen. Marcy).

18. MARTIN TOLCHIN & SUSAN TOLCHIN, *TO THE VICTOR* 5-6, 323 (1971). See also Bryan A. Schneider, Comment, *Do Not Go Gentle into that Good Night: The Unquiet Death of Political Patronage*, 1992 WIS. L. REV. 511 (1992) (tracing the elaborate history and origin of political patronage in America and proposing a method for correctly applying the Supreme Court's precedents from *Elrod* through *Rutan* to public employment situations). Patronage has similarly been defined as "[t]he power to appoint to office or grant other favors, especially political ones." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1315 (2d ed. 1980).

19. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 368 (1976); *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2746 (1990) (Scalia, J., dissenting). In *Elrod*, the petitioners stressed that supporting patronage dismissals is necessary to preserve the democratic process. According to the petitioners, "[W]e have contrived no system for the support of a party that does not place considerable reliance on patronage. The party organization makes a democratic government work and charges a price for its services." *Elrod*, 427 U.S. at 368 n.21 (citing Brief for Petitioners 43 (quoting V. KEY, *POLITICS, PARTIES, AND PRESSURE GROUPS* 369 (5th ed. 1964))).

Similarly, Justice Scalia, in a vigorous dissent in *Rutan*, hailed the necessity of the patronage system to maintain a stable democracy. Scalia relied on Justice Powell's dissent in *Elrod* in stating: "[P]atronage stabilizes political parties and prevents excessive political fragmentation—both of which are results in which States have a strong governmental interest. Party strength requires the efforts of the rank-and-file . . . to perform such tasks as organizing precincts, registering new voters, and providing constituent services." *Rutan*, 110 S. Ct. at 2752-53 (citing *Elrod*, 427 U.S. at 385).

20. Patronage practices have been traced back to Thomas Jefferson's presidency, although its popularization and legitimization primarily occurred later in the presidency of Andrew Jackson. *Elrod*, 427 U.S. at 353. See also C. FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 87, 209-10 (1904); D. ROSENBLUM, *FEDERAL SERVICE AND THE CONSTITUTION* 238-40 (1971), for a more detailed discussion of the history of the patronage doctrine.

Nevertheless, this practice evoked much congressional disapproval and battles between Congress and President Andrew Jackson. In fact, after Jackson's administration, strong discontent

American history for almost two hundred years,<sup>21</sup> and for most of that period it was assumed, without serious question or debate, that because public employees have no constitutional right to a job, there could be no valid constitutional objection to their removal.<sup>22</sup>

Political patronage continued uncurbed until the Supreme Court, in *Elrod v. Burns*,<sup>23</sup> held for the first time that political party affiliation is not a sufficient basis for the discharge of public employees, and violates the employees' rights of speech and association under the First Amendment.<sup>24</sup>

with the corruption and inefficiency of the patronage system resulted in the Pendleton Act. See *infra* note 23. Also, ironically, at the time of the adoption of the Bill of Rights, the political party system itself was far from an accepted political norm. *Rutan*, 110 S. Ct. at 2741 (1990) (Stevens, J., concurring). Political scholars of that time, such as Jonathan Swift, proffered the maxim "[p]arty is the madness of many, for the gain of the few," and John Adams believed that "a division of the republic into two great parties . . . is to be dreaded as the greatest political evil under our Constitution." *Id.*

Conversely, George Washington Plunkitt, a firm advocate of the patronage system stated:

I ain't up on sillygisms [sic], but I can give you some arguments nobody can answer. First, this great and glorious country was built upon by political parties; second parties can't hold together if their workers don't get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay.

W. RIORDIN, PLUNKITT OF TAMMANY HALL 13 (1963), *quoted in Rutan*, 110 S. Ct. at 2747 (Scalia, J., dissenting).

21. See *Alomar v. Dwyer*, 447 F.2d 482, 483 (2d Cir. 1971) (upholding a city employee's discharge solely for failing to switch her political party because her position was not protected and "the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities, or affiliations.") (quoting *Bailey v. Richardson*, 182 F.2d 46 (U.S. App. D.C. 1950)). The court noted that although civil service laws have ameliorated the devastating effects that the spoils system can have on the government, because of the longstanding tradition of patronage in the public employment realm, the victors will still reap the harvest of those public positions still exempt from civil service laws. *Id.* at 483-84.

22. See *Bailey v. Richardson*, 182 F.2d 46, 59 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951) (upholding the denial to reinstate a federal worker because of alleged affiliations with the Communist party which led the government to believe she was disloyal). See also *Perry v. Sindermann*, 408 U.S. 593 (1972), discussed at *infra* notes 93-94 and accompanying text.

23. 427 U.S. 347 (1976). This case and its progeny (*Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990)) are discussed in greater detail, *infra* notes 24-51 and accompanying text. However, as a result of the Pendleton Act, Act of Jan. 16, 1883, c. 27, § 2(2) Fifth, Sixth, 22 Stat. 404, and the implementation of merit systems for public employees in the early 1800s, unbridled patronage had been displaced to some extent. *Elrod*, 427 U.S. at 354. The Court acknowledged, nevertheless, that "[t]he decline of patronage employment is not, of course, relevant to the question of its constitutionality. It is the practice itself, not the magnitude of its occurrence, the constitutionality of which must be determined." *Id.*

24. *Elrod v. Burns*, 427 U.S. 347, 356-57 (1976). The Court initially noted that freedom of association for the common advancement of political beliefs and ideas is protected by the First as well as the Fourteenth Amendment. *Id.* Under the theory of selective incorporation, provisions of the Bill of Rights that the Supreme Court deems fundamental are applied to the states through the

Specifically, the Court held that political belief, expression, and association are within those core activities protected by the First Amendment.<sup>25</sup> Thus, the Court concluded that the threat of dismissal for failing to support a particular political party inhibits the protected belief and association, and penalizes their exercise by denying the receipt of a government benefit.<sup>26</sup> While acknowledging the importance of these individual rights, the *Elrod* Court created an exception allowing patronage dismissals for public positions which inherently involved "policymaking" duties.<sup>27</sup> However, the lines distinguishing policymaking positions, where party affiliation and political loyalty are necessary for the implementation of policies, from nonpolicymaking positions were unclearly drawn and broadly construed in *Elrod*, thus perpetuating the potential

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Due Process Clause of the Fourteenth Amendment. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §10.2, at 332 (4th ed. 1991). All the provisions of the First Amendment concerning freedom of speech have been held applicable to the states. *Id.* See *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931). Thus, if a state were to abridge the freedom of speech, it would be abridging the First Amendment as applied to it through the Fourteenth Amendment. NOWAK & ROTUNDA, *supra*, at 332. For the purposes of this note, the first amendment concerns will be referred to as applicable to the states and addressed as such, rather than addressing fourteenth amendment implications. Further, potential due process liberty interests under the Fourteenth Amendment in the patronage area are beyond the scope of this note.

25. *Elrod*, 427 U.S. at 356. The Court noted that although freedom of belief is central, the First Amendment protects political association as well as political expression. *Id.* at 357.

26. *Id.* at 359-60. The Court relied heavily on three cases in concluding that patronage conditions the receipt of a public benefit upon pledging allegiance to a political party and inhibits free exercise: *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (invalidating New York statutes barring employment merely on the basis of membership in "subversive" organizations, holding that political association alone could not constitute an adequate ground for denying public employment and was inconsistent with the First Amendment); *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that a state college professor had a first amendment claim if the state's refusal to renew his contract was the result of his public criticisms of the school board's policies, thus rejecting limitations on first amendment rights as a condition to the receipt of a governmental benefit); and *Speiser v. Randall*, 357 U.S. 513 (1958) (holding that denying public benefits to a person because of his constitutionally protected speech or association would inhibit and penalize those freedoms). *Id.* These cases are discussed further at *infra* notes 75, 78, 109 and accompanying text.

27. *Elrod*, 427 U.S. at 359-60. It has been noted by William Luneburg that:

The restrictions that have been imposed on patronage practices under *Elrod* and its progeny help assure that, when intragovernmental debate does occur, there may be a greater diversity of views expressed than would be the case if various tests of political loyalty could be imposed in structuring the composition of the public workforce. The "policymaking" position exception to *Elrod*, however, should be very narrowly limited to control its erosion of that diversity within the higher levels of policy debate where such diversity may be essential to a deliberative process capable of taking account of all significant points of view.

William V. Luneburg, *Civic Republicanism, the First Amendment, and Executive Branch Policymaking*, 43 ADMIN. L. REV. 367 (1991).

for party nepotism.<sup>28</sup>

Four years later, *Branti v. Finkel*<sup>29</sup> reaffirmed the first amendment ban on patronage dismissals and revised the “policymaking” criteria. The majority acknowledged the determination in *Elrod* that party affiliation may be necessary for some governmental positions, but concluded that the appropriate 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.”<sup>30</sup>

In focusing on the essentiality of party membership to a position to determine whether the patronage dismissal was justified, the *Branti* Court demonstrated that the label “policymaker” is not the touchstone of constitutionality regarding politically motivated dismissals.<sup>31</sup> Hence, the Court

28. The Court in *Elrod* specifically acknowledged that “[n]o clear line can be drawn between policymaking and nonpolicymaking positions.” *Elrod*, 427 U.S. at 368; *Lohorn v. Michal*, 913 F.2d 327, 332 (7th Cir. 1990). The Court further noted that “[w]hile nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position.” *Elrod*, 427 U.S. at 367. The Court stated that the nature of the responsibilities is critical, and further stated that “[a]n employee with responsibilities that are not well-defined or are of broad scope more likely functions in a policymaking position.” *Id.* at 367-68. Thus, the political loyalty “justification is a matter of proof, or at least argument, directed at particular kinds of jobs.” *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 574 (7th Cir. 1972) (Stevens, J., with Campbell, J., concurring) *cert. denied*, 410 U.S. 928 (1973), *quoted in Elrod*, 427 U.S. at 367-68. *See Lohorn*, 913 F.2d at 332-35 (acknowledging that no clear line between policymaking and nonpolicymaking positions can be drawn in a suit for alleged violations of First Amendment by a Democratic assistant chief of police who was demoted to detective after a Republican mayor took office, and removing case from summary judgment because the term “policymaker” was not substantial enough to show that position was inherently policymaking in nature).

29. 445 U.S. 507 (1980).

30. *Id.* at 518. (Stevens, J., writing for the majority).

31. *Branti v. Finkel*, 445 U.S. at 518-20. The Court stated that “whatever policymaking occurs in the public defender’s office must relate to the needs of individual clients and not to any partisan political interest.” *Id.* at 519. In differentiating between party necessity and policymaker, the Court noted:

It is equally clear 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. On the other hand, it is equally clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments.

*Id.* at 518.

held that certain high-ranking, policymaking employees, who under *Elrod* could have been discharged solely for political reasons, were protected from politically motivated dismissals.<sup>32</sup> Nevertheless, the case offered further evidence of the Court's increasing disfavor of political patronage practices and heightened protection for individuals.

#### B. First Amendment Concerns and Reasoning by the Court

The Supreme Court, in both *Elrod* and *Branti*, concluded that requiring public employees to pledge their allegiance to a political party imposes unconstitutional restraints on the freedoms of speech and association. In determining what impairment patronage practices had on the employees' first amendment rights, the Court employed a strict scrutiny standard of review to determine whether the justifications for patronage dismissals outweighed the infringement on the public employees' constitutional rights.<sup>33</sup> The Court disregarded the interests of the political parties involved,<sup>34</sup> and instead focused on whether the government had a vital and compelling interest in practicing patronage. The Court concluded that only dismissals from positions involving policymaking or confidential information (*Elrod*), and later, positions where party affiliation is essential to job performance (*Branti*), would pass constitutional muster to warrant patronage practice.<sup>35</sup>

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32. *Branti v. Finkel*, 445 U.S. at 517-19. See also *Schneider*, *supra* note 18, at 511.

33. *Elrod v. Burns*, 427 U.S. 347, 362, 368 (1976); *Branti v. Finkel*, 445 U.S. at 515-16 (1980) (quoting *Elrod*, 427 U.S. at 362, 368). The Court acknowledged that it is firmly established that a significant impairment of first amendment rights triggers a strict scrutiny standard where the constitutional impairment must survive exacting scrutiny. *Elrod*, 427 U.S. at 362, 368; *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958). Thus, encroachment of these rights cannot be justified upon a mere showing of a legitimate state interest; the interest advanced must be paramount and of vital importance, and the burden is on the government to show the existence of such an interest. *Kusper v. Pontikes*, 414 U.S. 51, 58, 59 (1973). Relying on this, the *Elrod* plurality expressly declined to apply a "rational relation" test where the government merely needs to show that the government's conduct was rationally related to a legitimate governmental interest. *Elrod*, 427 U.S. at 362-63. When the government significantly impairs a person's first amendment rights, the Court set forth that the government must show a compelling government interest that is "of vital importance," the "gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights," and the government must "employ means closely drawn to avoid unnecessary abridgment." *Id.*

34. *Elrod*, 427 U.S. at 362. The Court determined that "care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice." *Id.* Justice Powell's dissent argued that the interests of the parties involved were important, and that the distinction between what is beneficial for the parties and for the government is flawed. *Id.* at 383 (Powell, J., dissenting). See S. Jay Dobbs, *Elected Officials Can no Longer Reward Supporters With Jobs . . . or Can They?* 69 WASH. U. L.Q. 925, 928-30 (Fall, 1991), discussed at *infra* note 167.

35. *Elrod*, 427 U.S. at 362, 367; *Branti v. Finkel*, 445 U.S. at 516-18.

The important individual rights that patronage dismissals violate are the rights of freedom of speech and freedom to associate under the First Amendment. In the absence of a compelling government interest, individual rights are paramount, and warrant protection.<sup>36</sup> The premise behind facilitating public speech, especially speech that is political in nature, stems from a series of cases involving the advocacy of illegal action,<sup>37</sup> and has been attributed to Justice Holmes' "marketplace of ideas" theory, which supposes that competition of the market is the best test of truth.<sup>38</sup> This position reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."<sup>39</sup>

This principle is itself reflective of the fundamental understanding that "[c]ompetition in ideas and governmental policies is at the core of our electoral process."<sup>40</sup> Similarly, speech that is political in nature fosters healthy criticisms of the government that ultimately keeps its power in check and maintains a balanced democracy. The courts have placed free debate regarding political issues on "the highest rung of the hierarchy of first amendment values."<sup>41</sup> Thus, to the extent that it compels or restrains belief and speech, especially that which is political in nature, patronage is inconsistent with the basic tenets of the First Amendment.

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36. *Elrod*, 427 U.S. at 362.

37. See generally *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919).

38. Justice Holmes' "marketplace of ideas" model originated in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919), in which he stated:

[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loath and believe to be fraught with death . . . [Only] the emergency which makes it immediately dangerous to leave the correction of evil warrants counsels to time making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech."

*Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting). According to the marketplace of ideas theory, speech in the public arena will be rebutted or supported by more speech, which will ultimately determine the truthfulness or falsity of the propounded speech; and thus, such public expressive speech warrants first amendment protection.

39. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

40. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

41. *Carey v. Brown*, 447 U.S. 455, 467 (1980). See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (addressing first amendment freedom of speech rights in the broadcast arena, noting that "[it] is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market" by the government or other individuals).

In terms of the speech and belief rights at stake in public employment cases, it is necessary to distinguish between cases involving public employee "passive" political beliefs and freedoms to support or not support a particular candidate or party, from employee speech that "actively" criticizes or comments on governmental policymaking or political beliefs. In the former situation, the employee's speech is protected under the First Amendment and triggers a strict scrutiny standard of review requiring a compelling governmental interest.<sup>42</sup> In the latter situation, the public employee's speech is protected under the First Amendment, but that protection is limited to "matters of public concern."<sup>43</sup> Internal government personnel matters or disgruntled employee criticisms of the government do not meet this criteria, and the government is given greater deference to regulate the employee's speech.<sup>44</sup> Public employees may speak their minds publicly or privately on issues relevant to governmental policymaking, but the speech will be unprotected if it is deemed "materially disruptive" of the workplace environment.<sup>45</sup>

This latter principle was at issue in *Connick v. Myers*,<sup>46</sup> where the Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest" the federal courts are not in a position to review the wisdom of a personnel decision based on that employee's behavior.<sup>47</sup> Similarly, *Rankin v. McPherson*<sup>48</sup> suggests that public employee open speech is protected by the First Amendment, but unlike the "speech" in *Elrod*, the interests of the State in efficiency of

42. See *supra* note 33.

43. *Connick v. Myers*, 461 U.S. 138, 146 (1983), discussed at *infra* notes 46-51 and accompanying text.

44. See *Connick v. Myers*, 461 U.S. 138 (1983). See also *Rankin v. McPherson*, 483 U.S. 378 (1987); *Pickering v. Board of Education*, 391 U.S. 563 (1968), discussed at *infra* notes 45-51 and accompanying text.

45. See *Rankin v. McPherson*, 483 U.S. 378 (1987) (finding that office talk critical of the state office interferes with the regular operation of the enterprise and impairs harmonious conditions among co-workers), at *infra* notes 48-49; *Connick v. Myers*, 461 U.S. 138 (1983) (discharge of assistant district attorney for objecting to office policy and questionnaire did not offend the First Amendment), at *infra* notes 46-47; *Pickering v. Board of Education*, 391 U.S. 563 (1968) (dismissal of a public school teacher for sending a letter to a local newspaper criticizing the Board of Education did not present a first amendment claim). Both *Rankin* and *Connick* follow the decision of *Pickering*, which specifically set forth that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. at 568.

46. 461 U.S. 138 (1983).

47. *Id.* at 138. The determination of whether a public employee's speech addresses a matter of public concern is to be determined by the content, form, and context of a given statement as revealed by the whole record. *Id.*

48. 483 U.S. 378 (1987).

operation take on increased weight.<sup>49</sup> Thus, in contrast to the cases involving *Elrod*-type speech, which demonstrate a particularly high degree of first amendment protection, cases in this latter category display less solicitude for the interest in freedom of speech of public employees.<sup>50</sup> This distinction between *Elrod*-type political speech and *Connick*-type political speech is based on the premise that merely holding certain political beliefs will create much less of a threat to legitimate governmental interests than would overt expression of those beliefs in the workplace.<sup>51</sup>

Another significant first amendment right implicated by political patronage is that of freedom of association. A government employee who is a member of the out-party<sup>52</sup> is forced to maintain affiliation and association with the out-party, thereby risking the loss of a government job.<sup>53</sup> The financial and campaign assistance that the employee is induced to provide to another party "furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief."<sup>54</sup> The First Amendment guarantees the right to think and associate free from governmental interference, and protects "the right of individuals to hold a point of view different from the majority" and refuse to foster a view they find objectionable.<sup>55</sup> It follows that the First Amendment protects political association as well as political expression.<sup>56</sup> This is confirmed by *NAACP v. Button*,<sup>57</sup> which stated, "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendment."<sup>58</sup> Further, the right to associate with the

49. *Id.* at 388-91.

50. *Lunenburg*, *supra* note 27.

51. *Id.* at 367. Further, officers and employees within the administrative bureaucracy can speak their minds publicly or privately on issues relevant to government policymaking, but only at the substantial risk that the court may deem that speech unduly disruptive of the workplace environment. *Id.*

52. The term "out-party" refers to affiliation with the opposing or other party who is not dominant or the party in control (e.g., a Republican government employee who works for a newly elected Democrat Mayor would not be in the dominant party and thus, would be in the "out-party").

53. *Elrod v. Burns*, 427 U.S. 347, 355 (1976). *See also Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952) (holding that a state statute requiring a broad loyalty oath as a condition of employment violated public employee's first and fourteenth amendment rights of free association).

54. *Id.* at 355; *see also Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

55. *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that requiring a state resident to display the motto on his license plates violated his first amendment right not to be associated with particular ideas and right not to speak).

56. *Buckley v. Valeo*, 424 U.S. at 11.

57. 371 U.S. 415 (1963).

58. *NAACP v. Button*, 371 U.S. at 430. *See also Bates v. Little Rock*, 361 U.S. 516, 522-23 (1960); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

political party of one's choice is an integral part of these basic constitutional freedoms,<sup>59</sup> thus warranting protection from pressure or coercion to pledge allegiance to the dominant political party.

Ironically, the same first amendment protections of speech and association from political patronage practices have not been extended to encompass independent contractors who have been terminated from public contracts for partisan political reasons.<sup>60</sup> The courts that have addressed this concern have suggested that one reason not to protect contractors, though arguably weak, is that the coerciveness associated with public employees carries diminished weight when an independent contractor simply loses one "customer" due to patronage.<sup>61</sup> Consequently, an independent contractor would feel a lesser sense of dependency if it lost a government contract than an employee losing a government job.<sup>62</sup> Because of this, first amendment rights are more attenuated and insufficient to trigger strict scrutiny and to justify interfering with political institutions.<sup>63</sup> Such rationale, however, neglects to incorporate the expansive language and increased protections of individual rights reflected in *Rutan* and

59. *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). This is correlative to the principle espoused in *West Virginia State Bd. of Educ. v. Barnette* that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (upholding the right of public school students to refuse to salute flag).

60. See *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991) (holding that the First Amendment did not forbid the city from considering party's adverse lobbying efforts when it refused to renew parking lot leases), *cert. denied*, 112 S. Ct. 640 (1991), discussed at *infra* notes 154-64; *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583 (7th Cir. 1989) (holding that the First Amendment did not protect contractors in the awarding of public contracts), *cert. denied*, 111 S. Ct. 129 (1990), discussed at *infra* notes 144-46; *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (holding that motor vehicle agents were independent contractors rather than public employees and were not insulated by the First Amendment from being replaced by the governor's successor who was of a different political party), discussed at *infra* notes 131-43 and accompanying text; *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983) (holding that the First Amendment does not forbid the city to use political criteria in awarding public contracts), *cert. denied*, 464 U.S. 1044 (1984), discussed at *infra* notes 121-30 and accompanying text; *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982) (holding that politically motivated dismissal of Department of Revenue fee agents, classified as independent contractors, does not violate the First Amendment), *cert. denied*, 459 U.S. 878 (1982), discussed at *infra* notes 114-20 and accompanying text.

The Supreme Court has not yet addressed the validity of patronage in the context of independent contractors or other non-government employees. The courts that have addressed this issue are all lower federal courts who have relied on earlier precedent, and have refused to extend the principles espoused in *Elrod* and *Branti* outside of the public "employment" arena, and are content to leave this issue for the Supreme Court to resolve.

61. *Triad*, 892 F.2d at 583. See also *Horn*, 796 F.2d at 668; *LaFalce*, 712 F.2d at 292; *Sweeney*, 669 F.2d at 542, discussed at *infra* notes 114-64 and accompanying text.

62. *Horn*, 796 F.2d at 674-75. See also *Triad*, 892 F.2d at 583.

63. *Horn*, 796 F.2d at 674-75.

fails to address those same basic rights in the context of independent contractors. Furthermore, this reasoning fails to capture the spirit and intent of the decisions of the *Elrod-Branti-Rutan* trilogy. These shortcomings will be examined more critically in subsequent sections.

### III. JUDICIAL TREATMENT OF PATRONAGE PRACTICES

#### A. *The Inception of Legal Limits on the Practice of Political Patronage*

In 1976, in *Elrod v. Burns*,<sup>64</sup> the Supreme Court addressed the claim of several governmental employees alleging that they were discharged for partisan reasons.<sup>65</sup> In *Elrod*, Republican non-civil service employees of a county sheriff's office commenced this action when they were discharged or threatened with discharge after a Democratic sheriff was elected. They asserted that they were discharged or threatened with discharge based solely on their refusal to affiliate or sponsor the Democratic party, which violated their first amendment rights.<sup>66</sup> The Court concluded for the first time that the dismissed employees had a legally cognizable claim for deprivation of their constitutional rights as secured by the First Amendment.<sup>67</sup>

The Court addressed three specific areas in determining whether patronage unconstitutionally infringed upon the employees' rights: the restraints patronage places on freedoms of belief and association; the role of patronage as acting to deny or condition the receipt of a government benefit to persons in detriment to their rights; and the validity of competing governmental interests in allowing patronage in the employment arena.<sup>68</sup>

The *Elrod* Court noted that "political belief and association constitute the core of those activities protected by the First Amendment."<sup>69</sup> The Court concluded that the dismissals violated the employees' first amendment rights of

64. 427 U.S. 347 (1976).

65. *Id.* at 353.

66. *Id.* at 350-51.

67. *Id.* at 349-50. *Elrod* has been viewed by Susan Lorde Martin as a logical expansion of what was a growing trend increasing the rights of government workers: "In 1952 the Supreme Court first recognized that individuals retain certain constitutional rights even though they are employed by the government." Martin, *supra* note 17, at 18; *see also* Wieman v. Updegraff, 344 U.S. 183 (1952); *supra* note 53 and accompanying text. She went on to state: "Over the next twenty years, the Court gradually expanded the first amendment protection to which public employees were entitled. Viewed in the context of the Court's doctrinal progression, *Elrod* seems but one more step in the expansion of religious, speech, and associational rights that government workers enjoy. Martin, *supra* note 17, at 18; *see also* Perry v. Sindermann, 408 U.S. 593 (1972), *and* Keyishian v. Board of Regents, 385 U.S. 589 (1967); *supra* note 26 and accompanying text.

68. *Elrod v. Burns*, 427 U.S. 347, 355-70, 373-75 (1976).

69. *Id.* at 356.

free speech and association, and identified two separate but interrelated reasons to support this conclusion. First, the Court stated that the inevitable tendency of a political patronage system is to improperly coerce employees into compromising their true political beliefs.<sup>70</sup> In effect, "the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished."<sup>71</sup>

Second, not only are the individual beliefs and associational freedoms impaired, but the free functioning of the electoral process also suffers.<sup>72</sup> Conditioning public employment on partisan support prevents support of competing political interests, tips the electoral process in favor of the incumbent party, and significantly impacts the political process.<sup>73</sup> Thus, the Court concluded that patronage, to the extent that it compels or restrains belief and association, is inimical to the process that underlies our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment."<sup>74</sup>

The Court next determined that the government may not deny a benefit to a person on a basis that infringes upon constitutionally protected interests, especially interest in freedom of speech.<sup>75</sup> The Court stated that a political patronage system has such an effect by imposing an unconstitutional condition on the receipt of a public benefit.<sup>76</sup> Under the patronage practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party, and subsequent dismissal for failure to provide such support unquestionably penalizes its exercise.<sup>77</sup>

70. *Id.* at 355.

71. *Elrod*, 427 U.S. at 355-56. The Court reasoned that this is because the average public employee is required to support the opposing party in terms of financial and campaign assistance. Because the average employee is hardly in the financial position to support his party and another, or lend his time to two parties, pledging allegiance to the party in charge restricts, if not eliminates, his loyalty and support to his true political party and ideology. *Id.*

72. *Id.* at 356.

73. *Id.* at 356-57.

74. *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972), quoted in *Elrod v. Burns*, 427 U.S. 347, 357 (1976).

75. *Elrod*, 427 U.S. at 357; *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (prohibiting the refusal of the state to renew a state college teacher's contract in response to his public criticisms of the board of education's policies); *Keyishian v. Board of Regents*, 385 U.S. 589, 687 (1967) (invalidating New York statutes barring employment merely on the basis of membership in subversive organizations); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (holding that the First Amendment prohibits limiting the grant of a tax exemption to only those who affirm their loyalty to the State granting the exemption).

76. *Elrod*, 427 U.S. at 357-59. See also *Shafer*, *supra* note 5, at § 2 (surveying and summarizing the treatment of various patronage claims at different governmental positions by the Supreme Court, federal circuit courts, and state courts).

77. *Elrod*, 427 U.S. at 359.

Further, the Court stated that even though a person has no "right" to a valuable governmental benefit, and the government may deny the benefit for any number of reasons, promoting party interests in the employment context is one reason upon which the government may not rely.<sup>78</sup>

Upon determining that political patronage offends the public employees' first amendment rights, thus triggering strict scrutiny, the Court assessed the interests of the government in allowing patronage in the workplace. The Court ultimately rejected the government's interests of efficiency, employee loyalty, and the preservation of the democratic process in practicing patronage,<sup>79</sup> with the notable exception for those employees who were in a "policymaking" or "confidential" position.<sup>80</sup> The Court conceded that there was a vital need for government efficiency and effectiveness, but concluded that political patronage dismissals are not the least restrictive means for fostering that end, and therefore are unconstitutional.<sup>81</sup>

In 1980, the Supreme Court reaffirmed *Elrod* in *Branti v. Finkel*,<sup>82</sup> holding that a Democratic public defender's requirement that his assistant public defenders obtain Democratic party support in order to retain their employment offended the First Amendment.<sup>83</sup> The Court explained that conditioning continued public employment on an employee securing support from a particular political party violates the First Amendment because of "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job."<sup>84</sup> Furthermore, the *Branti* Court broadened the individual protections of *Elrod* further by stating that dismissed employees need not actually prove that they, or any other employees, have been coerced into changing, either actually or ostensibly, their political allegiance.<sup>85</sup>

78. *Id.* at 360-61. The Court further quoted *Keyishian v. Board of Regents*, recognizing such impermissible reasons: "The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly." *Keyishian v. Board of Regents*, 385 U.S. at 605-06.

79. *Elrod v. Burns*, 427 U.S. 347, 366-69 (1976).

80. *Id.* at 367. The plurality recognized that the line between policymaking and nonpolicymaking positions is a fine one, but identified that factors of the number and nature of the employee's responsibilities, and whether the employee acts as an advisor or assists in the implementation of broad governmental goals, may be relevant considerations in determining whether the position is policymaking in nature. *Id.* See *supra* notes 27-28 and accompanying text.

81. *Elrod*, 427 U.S. at 372-73.

82. 445 U.S. 507 (1980).

83. *Id.*

84. *Id.* at 507, 516.

85. *Branti v. Finkel*, 445 U.S. at 517. The Court rejected petitioner's argument that *Elrod* should be read to prohibit only dismissals resulting from "an employee's failure to capitulate to political coercion." *Id.* at 516. This argument was premised on the proposal that so long as an employee is not asked to change his political affiliation or contribute to the party's candidates, he

In order to prevail, public employees need only show that they were discharged because they were not affiliated with or sponsored by a particular party.<sup>86</sup>

The Court in *Branti* also observed, as in *Elrod*, that in some circumstances a position of public employment may be conditioned on party affiliation, but acknowledged that it is not always easy to determine whether a position is one for which political affiliation is a legitimate factor for consideration.<sup>87</sup> However, in determining this, the *Branti* Court shifted the focus of positions where party affiliation is necessary from that set forth in *Elrod*. The Court concluded that the appropriate test is not whether the label "policymaker" or "confidential" fits a particular position, but rather "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."<sup>88</sup> The effect of this modification narrows the range of positions that can validly use party affiliation as a necessary criterion in hiring or dismissal, and only allows patronage practices in those positions that are inherently political in nature and require affiliation for the effective performance and implementation of governmental policies.

*B. Further Extension of First Amendment Protection from Political Patronage:  
Rutan v. Republican Party of Illinois*

In 1990, the Supreme Court decided the monumental case of *Rutan v. Republican Party of Illinois*,<sup>89</sup> completing the trilogy of patronage cases. In *Rutan*, former and present low-level public employees and an employment applicant brought an action challenging the Governor of Illinois' use of political

may be dismissed with impunity. The Court rejected this contention and stated that although "it would perhaps eliminate the more blatant forms of coercion described in *Elrod*," it would not eliminate the inherent coercive effects of being in the out-party and not having a sponsor in the dominant party. *Id.*

86. *Branti*, 445 U.S. at 517.

87. *Id.* at 517-18.

88. *Id.* at 518. The Court opined that under some circumstances, a position may be appropriately considered political even though it is neither policymaking nor confidential in nature. *Id.* at 518-19. As an example, the Court offered:

[I]f a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his political party registration. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. Rather, it would simply rest on the fact that party membership was essential to the discharge of the employee's governmental responsibilities.

*Id.* at 518.

89. 110 S. Ct. 2729 (1990). *Rutan* was a five-four decision, with Justice Brennan writing the majority opinion.

considerations in hiring, transferring, and promoting.<sup>90</sup> The Supreme Court rejected an argument by the respondents that *Elrod* and *Branti* were inapplicable because the patronage dismissals at issue in those cases were different from a failure to promote, transfer, or recall after layoff.<sup>91</sup> In doing so, the Court rejected the respondents' argument that the employees' rights had not been infringed because they had no right to promotion, transfer, or rehire.<sup>92</sup> In reaching this conclusion, the Court acknowledged that it had rejected such an argument in both *Elrod* and *Branti*, and quoted *Perry v. Sindermann*:<sup>93</sup>

[E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited . . . . Such interference with constitutional rights is impermissible.<sup>94</sup>

The *Rutan* Court ultimately concluded that the same first amendment concerns that were present in *Elrod* and *Branti* were implicated here: patronage imposes restraints on individual freedoms of speech and association; patronage penalizes the receipt of a government benefit to the detriment of constitutionally protected rights; and the government interests in efficiency, effectiveness, and the preservation of the democratic process do not outweigh the burdens of patronage on first amendment freedoms. First, patronage in these contexts chills the exercise of political belief and association of the employee, which constitute the core of those activities protected by the First Amendment.<sup>95</sup> Employees of the out-party will feel a significant obligation to support political positions held

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90. *Id.* at 2729-30. Governor Thompson issued an executive order on November 12, 1980, that imposed a hiring freeze on positions within his administration subject to his control. In order to implement the order, the Governor's Office had looked at whether the applicant voted in Republican primaries in past election years, whether the applicant had provided financial or other support to the Republican Party and its candidates, whether the applicant had promised to join and work for the Republican Party in the future, and whether the applicant had the support of Republican party officials at state or local levels. *Id.* at 2732.

91. *Rutan*, 110 S. Ct. at 2735.

92. *Id.*

93. 408 U.S. 593 (1972). *Perry* held that a state college professor had a first amendment claim if the state's refusal to review his contract was the result of his public criticism of the school board's policies. *Id.* at 593. Further, the professor's lack of a contractual or tenure right to re-employment was determined to be immaterial of his first amendment claim. *Id.* at 596-98.

94. *Id.* at 597; *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2735-36 (1990).

95. *Rutan*, 110 S. Ct. at 2734, 2736.

by their superiors, and they will refrain from following the political views that they themselves hold in order to progress up the career ladder.<sup>96</sup>

Second, patronage in the form of denying promotion, transfer, or recall serves to deny a government benefit on the basis of constitutionally protected activities.<sup>97</sup> The Court believed that employees who do not compromise their beliefs and support the party in charge stand to lose “the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a ‘temporary’ layoff.”<sup>98</sup> These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment.

Third, the Court concluded that these patronage practices impermissibly encroach on the first amendment freedoms of public employees and are not narrowly tailored to further vital government interests.<sup>99</sup> As in *Elrod*, the *Rutan* Court determined that the government’s interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient.<sup>100</sup> Likewise, the preservation of the democratic process is no more furthered by the patronage promotions, transfers, and rehires at issue than it is by patronage dismissals.<sup>101</sup> In fact, it detrimentally impairs the elective process by discouraging free political expression by public employees.<sup>102</sup>

In holding that promotions, transfers, and recalls after layoffs based on political affiliation or support are impermissible infringements on the first

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96. *Id.* at 2736. The Court rejected petitioner’s argument that the employment decisions at issue did not violate the First Amendment because the decisions were not punitive, did not adversely affect the terms of employment, and therefore, did not chill the exercise of protected belief and association of public employees. *Id.* The Court set forth that employees who find themselves in dead-end positions due to their political backgrounds are adversely affected. *Id.* Similarly, employees denied transfers to workplaces close to their homes until they join the dominant party “will feel a daily pressure from their long commutes to do so.” *Id.* Also, employees who have been laid off will feel “compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.” *Id.*

97. *Rutan*, 110 S. Ct. at 2736.

98. *Id.*

99. *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2736-37 (1990).

100. *Id.* at 2737. In *Elrod v. Burns*, 427 U.S. 347, 365-66 (1976), the Court recognized the government interest in employee effectiveness and efficiency, but concluded that the government can ensure this through the less drastic means of discharging staff members whose work is inadequate.

101. *Rutan*, 110 S. Ct. at 2737. See also *Elrod*, 427 U.S. at 372-73, where the Court rejected respondents’ argument that political patronage dismissals furthered the “preservation of the democratic process” and nurtured the two-party system by facilitating the effective implementation of government policies.

102. *Rutan*, 110 S. Ct. at 2736-37.

amendment rights of public employees, the Supreme Court expressly rejected the presumption that only those employment decisions that are the "substantial equivalent of a dismissal" violate a public employee's rights under the First Amendment.<sup>103</sup> Even though denial of promotion, transfer, or recall are deprivations less harsh than dismissal, they nevertheless pressure government employees to conform their beliefs and associations to some state-selected orthodoxy.<sup>104</sup> In using strict scrutiny, requiring a vital or compelling government interest to override the individuals' rights, the Court determined that the governmental benefits of political patronage cannot be thought to outweigh its coercive effects.<sup>105</sup>

Similarly, patronage hiring places burdens on free speech and association comparable to those imposed by patronage promotions, transfers, and recalls.<sup>106</sup> The Court acknowledged that a state job is valuable, provides regular paychecks and other benefits, and there may be openings with the state when business in the private sector is slow.<sup>107</sup> Additionally, the government may be the major, or the only, source of employment. Thus, the Court opined that "denial of a state job is a serious privation."<sup>108</sup> The burden of the loss of a job opportunity for failure to compromise one's convictions is unquestionably of such magnitude to state a constitutional claim.<sup>109</sup> The Court found no vital government interest in basing hiring practices on patronage, for

103. *Id.* at 2737. The "substantial equivalent of a dismissal" constitutional standard by which to measure alleged patronage practices in government employment was proposed by the Seventh Circuit. *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 954-57 (7th Cir. 1989). The Court of Appeals for the Seventh Circuit reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." *Id.* at 954 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality opinion)). The Supreme Court rejected this proffered test by the Seventh Circuit and rejected the applicability of *Wygant* to the question at issue in the present case. *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2739 (1990).

104. *Rutan*, 110 S. Ct. at 2737; *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943). The Court went on to state that the First Amendment is not a tenure provision that protects public employees from actual or constructive discharge. Rather, the First Amendment prevents the government from wielding its power to interfere with its employees' freedom to believe and associate, or not to believe and associate. *Rutan*, 110 S. Ct. at 2737-38.

105. *Id.* at 2736-39.

106. *Id.* at 2738-39.

107. *Id.* at 2738.

108. *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2738 (1990).

109. *Id.* (citing *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that Maryland could not refuse an appointee a commission for the position of notary public on the ground that he refused to declare his belief in God, because the oath unconstitutionally invaded his freedom of belief)); *Keyishian v. Board of Regents*, 385 U.S. 589, 609-10 (1967) (holding a law affecting appointment and retention of teachers invalid because it premised employment on an unconstitutional restriction of political belief and association); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (holding invalid a loyalty oath which was a prerequisite for public employment); *Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947) (holding that the government may not enact a regulation providing that no Republican shall be appointed to federal office).

the same reasons it found that the government lacks justification for patronage promotions, transfers, or recalls.<sup>110</sup>

#### IV. POLITICAL PATRONAGE IN THE ARENA OF INDEPENDENT CONTRACTORS

Despite the violations of individual first amendment rights enumerated in *Elrod v. Burns*, *Branti v. Finkel*, and *Rutan v. Republican Party of Illinois*, courts have refused to afford the same constitutional protections to independent contractors who have lost or been denied government contracts.<sup>111</sup> In light of the paramount individual interests at stake, it would seem logical to afford the same first amendment protections to independent contractors, who are ultimately in a position tantamount to that of a public employee in terms of receiving government benefits. Termination of a public contract would appear to weigh

110. *Rutan*, 110 S. Ct. at 2739. Contrary to the majority's firm position finding most patronage practices to offend the First Amendment, Justice Scalia authored a vigorous dissent (joined by Chief Justice Rehnquist, Justice Kennedy, and Justice O'Connor in part), arguing, in short, that holding politically motivated promotions, transfers, or recalls to be unconstitutional would inevitably lead to an unmanageable flood of litigation. Furthermore, Justice Scalia predicted that this flood of litigation resulting from expanding protections from patronage practices would lead the Court to reconsider its intrusion into the entire field of political patronage, arguing that the party system is an inherent part of political history. *Id.* at 2758-59 (Scalia, J., dissenting). However, no such flood has occurred as of present.

Justice Scalia even went so far as to say that the majority's holding that the "governmental benefits of patronage cannot reasonably be thought to outweigh its 'coercive' effects," reflects a "naive vision of politics and an inadequate appreciation of the systematic effects of patronage in promoting stability and facilitating the social and political integration of previously powerless groups." *Id.* at 2752 (Scalia, J., dissenting). Further, Scalia asserted that a strict scrutiny standard of review was not appropriate in patronage cases, but rather a lower level of scrutiny should be used, and ultimately suggested that *Elrod* and *Branti* were incorrectly decided initially. *Id.* at 2749-50 (Scalia, J., dissenting).

111. See *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991) (holding that the First Amendment did not forbid the city from considering party's adverse lobbying efforts when it refused to renew parking lot leases), *cert. denied*, 112 S. Ct. 640 (1991), discussed at *infra* notes 154-64; *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583 (7th Cir. 1989), (holding that the First Amendment did not protect contractors in the awarding of public contracts), *cert. denied*, 111 S. Ct. 129 (1990), discussed at *infra* notes 144-46; *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc) (holding that motor vehicle agents were independent contractors rather than public employees and were not insulated by the First Amendment from being replaced by the governor's successor who was of a different political party), discussed at *infra* notes 131-43 and accompanying text; *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983) (holding that the First Amendment does not forbid the city to use political criteria in awarding public contracts), *cert. denied*, 464 U.S. 1044 (1984), discussed at *infra* notes 121-30 and accompanying text; *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982) (holding that politically motivated dismissal of Department of Revenue fee agents, classified as independent contractors, does not violate the First Amendment), *cert. denied*, 459 U.S. 878 (1982), discussed at *infra* notes 114-20 and accompanying text.

equally with dismissal from a public position when based on political affiliation.<sup>112</sup>

More readily apparent is that independent contractors, whose rights of belief and association have been encroached upon by politically motivated contract terminations, should not be forced to comply or associate with the political views of the dominant governmental party in order to receive the same benefits and warrant the same protections as employees who are denied promotion, transfer, or recall for patronage reasons. Similarly, the protection of public employees from party practices in hiring should equate equally to

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112. The government has often used the independent contractor as a way to allow political patronage for certain positions while circumventing the constitutionally protected rights of employees. Unfortunately, the federal courts have supported this distinction and policy practice by simply categorizing certain government functions as independent contractors, and thus warranting no constitutional protection. This approach is in itself somewhat flawed since there are several similarities between public employees and contractors, as defined at *supra* note 9, in performing governmental functions.

Often, governmental functions contracted out to private contractors carry with them attached responsibility and affiliation as an "employee" of the government. This can be seen generally in the context of Title VII of the Civil Rights Act of 1964 and the Federal Tort Claims Act. Title VII protects against discrimination of employees, but this does not always exclude independent contractors. The court in *Mathis v. Standard Brands Chem. Indus.* established guidelines by which the plaintiff, who performed industrial waste removal under contract could be deemed an "employee" within the meaning of 42 U.S.C.S. § 2000e(f). 10 FEP (BNA) 295 (N.D. Ga. 1975). The distinction between employment and an independent contractual affiliation depends on the "economic realities" of the relationship including salary or wages, as opposed to profits, and the degree of control by the company over the method and manner of the work performed. *Id.* Obviously, this classification varies from contractor to contractor, but the court made clear that the efforts of a company, or the government for that matter, to classify an employee as an independent contractor in hope of evading Title VII can be pierced. *Id.*

Thus, just as employers cannot contract out work in order to discriminate against certain individuals, the government as an employer should not be able to violate an individual's first amendment rights by contracting out its work and practicing patronage. Similar to the harms the First Amendment seeks to protect, Congress intended to cover the full range of workers who may be subject to the harms Title VII was designed to prevent, and as such, there is no tacit dichotomy between employees and independent contractors. *Ambruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983); Wesley Kobylak, Annotation, *Who is "Employee" as Defined in § 701(f) of the Civil Rights Act of 1964*, 42 *USCS* § 2000e(f), 72 *A.L.R.* FED. 522 (1992).

This similarity in treatment between the two parties can be seen also in the context of the Federal Tort Claims Act, 28 USC § 1346(b). Depending on the amount of control by the government over the job contracted out, the contracting party may be held to be an "employee." Annotation, *Who are "Employees" of the United States within the Federal Tort Claims Act*, 57 *A.L.R.*2d 1448 (1984). Further, many contractors work in close contact or directly with public employees, receive a regular paycheck, and perform regular duties over substantial periods of time. Similarly, many contractors report directly to government officials who oversee their work and specify the manner in which it is to be performed. Obviously, the spectrum of contractual relationships is very broad. However, those positions that were once governmental, or could effectively be done by the government itself but have been contracted out, warrant protection tantamount to that afforded to government employees.

protect independent contractors who are denied their bids on public contracts because they are not in the "correct" political party. Nevertheless, the federal courts that have addressed this issue have refused to extend the holdings of *Elrod*, *Branti*, and *Rutan* to patronage practices outside of the employment sphere.<sup>113</sup> The reasoning behind this divergence in treatment will be examined in light of cases both prior to *Rutan* in the following section, and subsequent to *Rutan* in the section thereafter.

A. *Political Patronage and Independent Contractor Terminations Before Rutan v. Republican Party of Illinois*

The first significant case to address the constitutional rights of patronage practices affecting non-public employees after the *Elrod-Branti* decisions was *Sweeney v. Bond*.<sup>114</sup> In *Sweeney*, plaintiffs were fee agents for the State of Missouri who alleged that they were dismissed from their positions because of their political beliefs in violation of the First Amendment.<sup>115</sup> The Eighth Circuit initially determined that fee agents were not state employees, but rather more akin to independent contractors.<sup>116</sup> The court was then required to address whether the protections of *Elrod* and *Branti* were applicable to such non-employees. The Eighth Circuit held that these precedential cases did not apply, and thus, that non-government employees are not protected from dismissal based on party affiliation.<sup>117</sup>

The *Sweeney* court concluded that the holdings in *Elrod* and *Branti* were limited specifically to the dismissal of *public employees* for partisan reasons.<sup>118</sup> Specifically, the court relied on the language in *Elrod*: "Although political patronage comprises a broad range of activities, we are here concerned only

113. See *supra* note 111. See also *infra* notes 114-64 and accompanying text for a full discussion of the federal circuit courts' treatment of independent contractors.

114. 669 F.2d 542 (8th Cir. 1982), cert. denied, 459 U.S. 878 (1982).

115. *Id.* at 544. See also *Fox & Co. v. Schoemehl*, 671 F.2d 303, 305 (8th Cir. 1982), discussed at *infra* note 117, for a similar treatment of independent contractors by the Eighth Circuit.

116. *Sweeney*, 669 F.2d at 545. In determining this, the court looked at the factors that the Department of Revenue does not supervise the daily operation of agents, does not account for fees collected, does not participate in hiring and firing within the offices, agents pay all of their expenses, agents pay self-employment tax, and are not members of the state retirement system. *Id.* at 545-46.

117. *Id.* at 546. The Eighth Circuit, also in 1982, affirmed *Sweeney* in *Fox*, 671 F.2d at 303. This case held that city auditors hired to audit books and records of the school board were similarly not "public employees," but rather independent contractors who could be denied auditing contracts in succeeding years solely based on political affiliations. *Id.* at 305. The court followed *Sweeney* exclusively, and relied completely upon the language used within that case, refusing to extend the patronage decisions to cases which do not involve public employees. *Id.* Without discussion, the court dismissed the claim by the auditors. *Id.*

118. *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir. 1982) (emphasis added).

with the constitutionality of dismissing public employees for partisan reasons,"<sup>119</sup> and expressly proclaimed it was not willing to extend the patronage decisions to cases which did not involve public employees.<sup>120</sup> Thus, in dismissing any potential applicability of *Elrod* and *Branti*, the Eighth Circuit never reached the merits of the case, nor did it address any competing interests between individual rights of speech and association, and overriding governmental concerns. A categorization of the employees as independent contractors was apparently enough to distinguish *Elrod* and *Branti* and dismiss the validity of any constitutional claim.

One year later, the Seventh Circuit followed suit in refusing to extend the *Elrod-Branti* protections to non-state employees in *LaFalce v. Houston*.<sup>121</sup> In *LaFalce*, the court held that the First Amendment did not protect a contractor whose bid for a public contract was rejected solely because the owners of the contracting business were not political supporters of the mayor.<sup>122</sup> This conclusion was based, in large part, on what was deemed to be a distinction between the first amendment interests of "independent contractors" and "public employees," and on the long history of patronage that was ultimately rejected by the *Elrod-Branti* Court.<sup>123</sup> The plaintiffs argued that, as with public employees, independent contractors will similarly be discouraged from expressing their true political beliefs if the result of doing so may be the loss of public contracts—they will have an incentive, regardless of their beliefs, to support incumbents or likely winners financially or in other ways.<sup>124</sup> The court conceded that this argument has an appealing symmetry, but balked at the opportunity to analyze its validity and applicability by deferring to the only two reported cases denying to consider such an argument.<sup>125</sup>

The *LaFalce* court further dismissed this appeal by weighing the costs of further subjecting this country's long-established patronage system to first amendment scrutiny against the benefits to a contractor's exercise of first

119. *Elrod v. Burns*, 427 U.S. 347, 353 (1976).

120. *Sweeney*, 669 F.2d at 545.

121. 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

122. *Id.* at 293-94.

123. *Id.* See *infra* notes 141-42 and accompanying text. The *LaFalce* court, however, propounded that the "practice of favoring political supporters in awarding contracts for public projects has a long history at the federal and particularly state and local levels." *Id.* at 293. See *infra* note 126.

124. *LaFalce*, 712 F.2d at 293.

125. *Id.* at 293-94. The court cited to *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir. 1982), and *Fox & Co. v. Schoemehl*, 671 F.2d 303 (8th Cir. 1982).

amendment rights.<sup>126</sup> The Seventh Circuit also acknowledged the apparent narrow application of the *Elrod-Branti* doctrine, and concluded that in light of these factors, the costs of protecting contractors outweighed the benefits of protecting them: "To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable."<sup>127</sup> In setting forth this reasoning, the court ignored all of the tenets of first amendment rights and oppositions to patronage practices as expressed in *Elrod* and *Branti*.

The *LaFalce* court also recognized what it deemed to be a significant difference in the extent of interference from patronage practices between public employees and independent contractors because many government contractors also have private customers. The court reasoned that "[i]f the contractor does not get the particular government contract on which he bids . . . it is not the end of the world for him; there are other government entities to bid to, and private ones as well. It's not like losing your job."<sup>128</sup> The court reasoned further that with the loss of a government contract, as opposed to the loss of a government job, an independent contractor would feel a somewhat lesser sense of dependency.<sup>129</sup> This reasoning seems somewhat dubious. Arguably, if contractors deal exclusively with, or devote a substantial portion of their business to, government entities, the loss of a government contract may in fact be commensurate to losing a job. Interestingly, the court attempted to discount this argument by characterizing those contractors who have extensive government contracts as "political hermaphrodites" who support both major parties, and thus would not be affected as greatly by partisan policies.<sup>130</sup>

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126. *LaFalce v. Houston*, 712 F.2d 292, 293 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984). The court noted that the practice of favoring political supporters in awarding contracts for public projects has a long history at the federal and particularly state and local levels. *Id.* See generally ROBERT A. CARO, *THE POWER BROKERS: ROBERT MOSES AND THE FALL OF NEW YORK* 713-14, 723-24, 738-39, 799 (1974); ALEXANDER HEARD, *THE COSTS OF DEMOCRACY* 144 (1960).

127. *LaFalce*, 712 F.2d at 294-95.

128. *Id.* at 294. Judge Posner, writing the opinion of the court, went on to state that "many government workers could not find employment at the same wage in the private sector; and the prospect that a protracted period of search following discharge might well result in a substantially less well paid job would cause many government workers to flinch from taking political stands adverse to their superiors." *Id.*

129. *Id.*

130. *Id.* The court reasoned that contractors with extensive public contracts support both major parties, not because some contracts are issued on a partisan basis, but rather because the pervasive role of government in modern American life has made it important for business firms to be on good terms with the major political groupings in the society. *Id.* This rationale goes against the grain of the court's argument. If the court is allowing the practice of patronage in awarding government contracts in order to advance that party's interest, then contractors who support both parties cannot realistically be awarded contracts based on their partisan affiliation since their loyalties are split.

Nevertheless, the *LaFalce* court ultimately refused to address the applicability of *Elrod* and *Branti* to the present situation, or to extend constitutional protections to independent contractors.

In 1986, the Third Circuit reaffirmed the position of the Seventh and Eighth Circuits that independent contractors are not insulated from patronage practices by the First Amendment. In *Horn v. Kean*,<sup>131</sup> former New Jersey motor vehicle agents who were chosen for their positions by a Democratic governor through the political patronage system, were later replaced by a Republican governor and subsequently brought claims for violations of their constitutional rights.<sup>132</sup> The court, applying an almost identical analysis as that of *Sweeney* and *LaFalce*, held that the agents were independent contractors rather than public employees, and as such, were not within the First Amendment's protections.<sup>133</sup>

Despite a more detailed analysis of the historical patronage doctrines and the reasoning of *Elrod* and *Branti*, the *Horn* court held that *Elrod* and *Branti* explicitly encompassed only the dismissal of public employees for partisan reasons and did not include independent contractors.<sup>134</sup> The court did, however, marginally address the interests of independent contractors and noted that "the respective interests identified to be weighed by the court in *Elrod* and *Branti* are similar to interests implicated when patronage practices affect

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If contractors do support both parties by *choice*, then there is no coerced belief, but there is no practical reason for the government to award contracts to those contractors since they vacillate between two loyalties and will not effectively aid in the implementation of the party-based policies.

The *LaFalce* court further reasoned that "[i]t seems unlikely that the cautious neutrality that characterizes the political activities of American business would be altered even by an ironclad constitutional rule against allowing politics to influence the contracting process." *Id.* at 294. Thus, the court concludes that the "costs" outweigh the "uncertain benefits." *Id.* at 294-95. Such reasoning is unconvincing in that it asserts a position of futility. The basic premise that banning patronage in the government contracts arena will have no effect begs the question. The court refuses to address the potential implications of protecting contractors, and then asserts that even if they did protect contractors from patronage practices, it would not curb any of the abuses that exist presently.

131. 796 F.2d 668 (3d Cir. 1986) (en banc).

132. *Id.* at 669-70.

133. *Id.* at 669.

134. *Horn*, 796 F.2d at 673-74. The court believed that it is beyond doubt that the teachings of the *Elrod-Branti* cases did not encompass all individuals who perform compensated work for a governmental agency. *Id.* See also *Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989), cert. denied, 111 S. Ct. 2889 (1991). In *Lundblad*, the court never even reached the underlying issue of whether *Elrod* and *Branti* should be extended to situations involving independent contractors because no such extension was "clearly established" in 1983 in light of the *Elrod-Branti* holdings not expressly extending protections to contractors, and *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir. 1982), at *supra* notes 114-20, refusing to extend First Amendment protections to independent contractors for politically motivated dismissals. *Lundblad*, 874 F.2d at 1102.

independent contractors.”<sup>135</sup> However, the court supplied its own reasoning as to the vitality of the government interest in patronage and concluded that the actual balance struck produces a different result.<sup>136</sup>

The *Horn* court applied the same interests advanced by the government that were rejected in *Elrod* and *Branti* of preservation of the democratic process and effective implementation of the administration’s program. Here, however, the court ultimately held that party affiliation provides an effective method to implement and accommodate these government interests that outweighs the lesser burden imposed when a public contractor’s rights are at stake rather than an employee’s.<sup>137</sup> Thus, as the Seventh Circuit did in *LaFalce*, the *Horn* court concluded that independent contractors would feel a lesser sense of dependency, and thus, first amendment rights are less infringed upon and insufficient to warrant intervention in the political institutions.<sup>138</sup>

There was a sharp dissent in this case, however, that focused on this distinction, and lends support to contractors by discounting the validity of the distinction in terms of the purposes of the First Amendment.<sup>139</sup> The dissenters saw no distinction between public servants and independent contractors, and held that distinction to be “entirely irrelevant to the animating purposes of the First Amendment.”<sup>140</sup> Similarly, the dissenters discounted the validity of any arguments prefaced on a difference in economic impacts between employees and contractors, and noted that the Supreme Court has never suggested that the availability of the substantive protection of the First Amendment depends upon

135. *Horn*, 796 F.2d at 674.

136. *Id.* at 674-75. The court again addressed the assumed understanding that partisan politics lies at the core of our democratic process and that it is necessary for the effective implementation of the administration’s programs. *Id.* at 674. However, the court conceded that “the politically-based interests sought to be advanced by patronage practices are similar whether public employees or contractors are involved,” but decided that “the countervailing First Amendment interests differ.” *Id.* This distinction set forth by the court was deemed important because the central concern of the Court in *Elrod* and *Branti*—that public employees are coerced by patronage to adopt a new belief or disassociate themselves from a particular belief—has diminished importance when the recipient is a contractor with the state rather than a state employee. *Id.* The court relied on *LaFalce v. Houston* to support this alleged distinction. *Id.* at 674-75.

137. *Horn v. Kean*, 796 F.2d 668, 674 (3d Cir. 1986) (en banc). The court noted that preservation of the democratic process and implementation of the administration’s programs are certainly interests that may justify limitations on first amendment freedoms. *Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 368 (1976) (quoting *Buckley v. Valeo*, 424, U.S. 1 (1976))).

138. *Horn*, 796 F.2d at 674-75; Rosalie Berger Levinson, Survey, *State and Federal Constitutional Law Developments Affecting Indiana Law*, 25 IND. L. REV. 1129, 1143-45 (1992) [hereinafter Levinson, *Indiana Law Survey*].

139. *Horn*, 796 F.2d at 680-81 (dissenting opinion). The tenets and principles argued in this dissent will be recounted further in section V.

140. *Id.* at 680-81.

the economic status of the party claiming protection.<sup>141</sup> Moreover, the adoption of this distinction by the majority has the potential for eroding the First Amendment's protection for millions of Americans whose livelihood depends upon the expenditure of funds raised by federal, state, and local governmental entities.<sup>142</sup> Despite the persuasiveness of the dissenters' argument, the majority persisted in recognizing a distinction between the rights of independent contractors and government employees.<sup>143</sup>

Only six months before *Rutan v. Republican Party of Illinois* was decided, the Seventh Circuit reaffirmed its position of allowing party practices to influence government contracts in *Triad Associates, Inc. v. Chicago Housing Authority*.<sup>144</sup> Triad Associates alleged, *inter alia*, that the housing authority had deprived them of their rights to free association and speech by failing to award them contracts because they supported political opponents of the new mayor.<sup>145</sup> As in *LaFalce v. Houston*, the *Triad Associates* court declined to accept the invitation to reevaluate and extend the principles of public employment protections to independent contractors.<sup>146</sup>

It is readily apparent that none of the circuits who had addressed this issue prior to *Rutan* were willing to expand first amendment protections such as those prescribed in *Elrod* and *Branti* to encompass independent contractors who fell victim to political patronage practices.<sup>147</sup> The obvious reason is that neither *Elrod* nor *Branti* expressly provide for such an extension, and the courts were content to let the Supreme Court resolve the issue. The reasoning behind this is unclear. Whether this refusal to extend protection to independent contractors is based on deference to the Supreme Court or on some other judicial doctrine,

141. *Horn*, 796 F.2d at 681-82. The dissenters noted that the First Amendment protects all persons in the United States regardless of the degree of economic interests suffered. *Id.* at 681. Furthermore, there should be no distinction between the protections of general employees and the general public; their rights are equal. *Id.* at 682. As noted by Justice White in *Connick v. Myers*, "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state." *Connick v. Myers*, 461 U.S. 138, 147 (1983). See *infra* notes 45-51 and accompanying text.

142. *Horn v. Kean*, 796 F.2d 668, 682-83 (3d Cir. 1986) (en banc) (dissenting opinion).

143. See *supra* notes 136-38 and accompanying text.

144. 892 F.2d 583 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 129 (1990).

145. *Id.* at 584-86. The court relied upon their earlier decision in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983) as applicable and binding, as well as *Horn*, 796 F.2d at 668.

146. *Triad Assocs.*, 892 F.2d at 587-88. The plaintiffs in this case asked the court to reevaluate and overturn their decision in *LaFalce*. The court declined to accept this invitation. *Id.* at 588. The court determined that in light of the holdings of *LaFalce*, *Fax & Co.*, *Sweeney*, and *Horn*, it would decline to extend the protections granted to employees under the *Elrod-Branti* line of cases, and would leave it up to the Supreme Court to extend this principle. *Id.* at 587-88.

147. See *supra* notes 111-46 and accompanying text.

it ultimately results in a slippery slope effect by failing to address the issue itself, and continually relying and building upon other cases similarly failing to address the various interests and rights involved.

No court has decided the merits of this issue, or enumerated substantive reasons why independent contractors should not receive the same insulation from patronage. Instead, the lower courts have relied on tradition and built a body of case law upon what is arguably a flawed foundation.<sup>148</sup> As noted in the dissenting opinion in *Horn*, none of these courts “engage in the necessary comparison of the [government’s] interests in patronage to the independent contractors’ interest in freedom of belief and association.”<sup>149</sup> Further, these courts also assume, without analysis, that independent contractors lack any substantive liberty interests that need to be accommodated to the patronage interests of incumbent officials.<sup>150</sup>

The Seventh Circuit noted in *LaFalce*, “Some day the Supreme Court may extend the principle of its public-employee cases to independent contractors. But there are enough differences in the strength of the competing classes of cases to persuade us not to attempt to do so.”<sup>151</sup> The *Horn* court similarly stated, “As the force of a First Amendment assault on state patronage practices moves from public employment into the outer spheres of political life, we are extremely hesitant to realign radically, in the name of the Constitution, a political constellation that has been with us since the Republic was formed.”<sup>152</sup> The *Triad* decision supplemented this position of aversion by stating “to the extent the protection granted to public employees under the *Elrod-Branti* line of cases may be extended to contractors, we leave that extension to the Supreme Court.”<sup>153</sup>

This rationale indicates that to some extent, courts recognize the principles involved and acknowledge that independent contractors have first amendment rights that may be unconstitutionally infringed upon by patronage practices.

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148. *Horn v. Kean*, 796 F.2d 668, 684 (3d Cir. 1986) (en banc) (dissenting opinion). The dissenters noted that the majority’s reasoning and the cases they rely on showing a “sentimental attachment to the supposed virtues of the patronage system has led it to announce bad constitutional law.” *Id.* Further, “[s]tare decisis is a cornerstone of our legal system, but it has less power in constitutional cases where, save constitutional amendments, this Court is the only body able to make needed changes.” *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). Thus, the flawed foundation is in need of repair by the Supreme Court, and the precedent should be critically reexamined.

149. *Horn*, 796 F.2d at 683 (dissenting opinion).

150. *Id.*

151. *LaFalce v. Houston*, 712 F.2d 292, 295 (7th Cir. 1983).

152. *Horn*, 796 F.2d at 677.

153. *Triad Assocs., Inc. v. Chicago Housing Auth.*, 892 F.2d 583, 588 (7th Cir. 1989).

However, no court has been willing to take the initiative to make an in-depth evaluation of the rights at stake or further the logical extension of first amendment protection to independent contractors. Thus, the Supreme Court must address this issue and extend the same protections of freedom of belief and association afforded to government employees to encompass independent contractors.

*B. Political Patronage and Independent Contractor Terminations After Rutan v. Republican Party of Illinois*

The Seventh Circuit was unpersuaded by the precedent set in *Rutan* extending constitutional protections to a number of other employment actions and reaffirmed its staunch position that independent contractors are not shielded from patronage practices in *Downtown Auto Parks, Inc. v. City of Milwaukee*.<sup>154</sup> *Downtown Auto Parks* brought an action against the City of Milwaukee for its refusal to renew parking leases after it learned that Auto Parks had lobbied against the current administration's attempts to revise the legislature.<sup>155</sup> This was the first case to address independent contractors' rights to protection from patronage practices since *Rutan*, and the Seventh Circuit was in a viable position to extend first amendment protections to independent contractors. However, the court declined to do so, relying again on the precedential cases that this court had decided prior to *Rutan* in *LaFalce v. Houston*,<sup>156</sup> *Triad Associates, Inc. v. Chicago Housing Authority*,<sup>157</sup> as well as *Horn v. Kean*<sup>158</sup> and *Sweeney v. Bond*.<sup>159</sup>

Most important, however, is the fact that the court in *Downtown Auto Parks* conceded that the decision in *Rutan*, by significantly expanding first amendment protection in the political patronage context, had cast doubt on the validity of the reasoning in these four cases relied upon as precedent.<sup>160</sup> Furthermore, the court admitted that although *Rutan* directly addressed only the plight of

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154. 938 F.2d 705 (7th Cir. 1991), cert. denied, 112 S. Ct. 640 (1991).

155. *Downtown Auto Parks*, 938 F.2d at 707.

156. 712 F.2d 292 (7th Cir. 1983).

157. 892 F.2d 583 (7th Cir. 1989).

158. 796 F.2d 668 (3d Cir. 1986).

159. 669 F.2d 542 (8th Cir. 1982).

160. *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705, 709 (7th Cir. 1991), cert. denied, 112 S. Ct. 640 (1991). The concession by the Seventh Circuit that the reasoning behind these cases is questionable further supports the assumption that the entire foundation relied upon for precedent suffers from a defect that is no longer latent in light of *Rutan*. See *supra* note 148 and accompanying text.

In *Rutan*, the Supreme Court also rejected the Seventh Circuit's view that the First Amendment only bars patronage practices that are substantially equivalent to a dismissal. *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2737 (1990). See *supra* note 103.

government employees and did not expressly address the first amendment rights of independent contractors, in light of the increased protections afforded to individuals from patronage practices, "*Rutan* significantly extended First Amendment protection in the political patronage context" and "the scope of *Rutan*, and rationale behind it, seem to be at odds with the holding of *LaFalce* and *Triad*."<sup>161</sup> The court even recognized that "*Rutan* has altered some of the assumptions upon which the *LaFalce* and *Triad* decisions were based" and acknowledged that the Supreme Court had rejected the Seventh Circuit's view that the First Amendment only barred patronage practices "substantially equivalent to dismissal."<sup>162</sup> However, the *Downtown Auto Parks* court still relied on the holdings of these cases as unwavering precedent.

Despite these countervailing factors, the Seventh Circuit in *Downtown Auto Parks* ultimately decided to limit *Rutan* to its facts, and again refused to extend first amendment protections beyond the context of government employment, premising this decision on the very cases that were at odds with *Rutan*.<sup>163</sup> The fact that *Rutan* did not expressly extend protections outside the realm of public employment in its holding was limiting enough for the court to refrain from applying its principles to the instant matter.<sup>164</sup> Thus, the apparent shortcomings and inconsistencies in the earlier independent contractor patronage cases, in conjunction with the increased scope of protection in *Rutan*, demands a critical reevaluation and warrants the extension of constitutional protection

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161. *Downtown Auto Parks*, 938 F.2d at 709-10.

162. *Id.* at 710. See *supra* note 103 and accompanying text on the Seventh Circuit's "substantial equivalent to dismissal" test.

163. *Id.* The court deemed *Rutan* to be the culmination of a line of cases "concerned only with the constitutionality of dismissing public employees for partisan reasons," akin to *Elrod* and *Branti*. *Id.* The court also reiterated its concern expressed in *LaFalce* of flooding the federal courts with new first amendment claims, and supposed that the "Supreme Court apparently has less fear of the expansion of litigation in this area for in *Rutan* it explicitly granted disappointed applicants, as well as discharged employees, a cause of action." *Id.* at 709. However, no such flood has occurred as of present.

Identical treatment was recently given to a claim alleging that school board members violated plaintiff's first amendment rights by failing to renew his school bus transportation contract after he refused to support the candidate favored by the school board, in *Lewis v. Hager*, No. 91-5621, 1992 U.S. App. LEXIS 4399 (6th Cir., Mar. 10, 1992) (table opinion) (not intended for publication). There, the Sixth Circuit looked for binding precedent and, while not even acknowledging *Rutan*, 110 S. Ct. at 2729, followed the earlier cases of *Downtown Auto Parks*, 938 F.2d at 705, and *Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989), *cert. denied*, 111 S. Ct. 2889 (1992), in holding there is no law clearly establishing a constitutional violation when public contracts are awarded on the basis of partisan politics. *Lewis v. Hager*, No. 91-5621, 1992 U.S. App. LEXIS 4399 (6th Cir., Mar. 10, 1992).

164. *Downtown Auto Parks*, 938 F.2d at 710. The court specifically set forth that "*Rutan* did extend First Amendment protection, but only within the context of government employment. *Rutan* was the culmination of a line of cases concerned only with the constitutionality of dismissing public employees for partisan reasons." *Id.*

from political patronage practices to independent contractors by the Supreme Court.

V. A PROPOSAL FOR EXTENDING FIRST AMENDMENT PROTECTION  
FROM POLITICAL PATRONAGE PRACTICES TO  
INDEPENDENT CONTRACTORS

The Supreme Court must decisively address the first amendment rights of independent contractors in the political patronage context. It is apparent that even in light of *Rutan*, the lower federal courts are not willing to expound upon the continuous trend granting greater constitutional protections to individuals without a Supreme Court ruling expressly insulating independent contractors or other non-governmental employees from political patronage practices.<sup>165</sup> The imminent result has been an inconsistent body of precedent that ignores the rights of independent contractors and that has been followed reverently without question or distinction. Absent an express provision in *Elrod* and *Branti* indicating that other forms of patronage should be abolished outside of the public employee context, the lower court opinions limit these cases solely to public employees.<sup>166</sup>

The Supreme Court in *Rutan* expanded the scope of patronage practices that offend the First Amendment to include promotion, transfer, recall, and hiring.<sup>167</sup> The Supreme Court extended the provisions of the *Elrod-Branti* decisions in *Rutan* to encompass other adverse employment actions, although neither *Elrod* nor *Branti* expressly addressed patronage in these contexts.<sup>168</sup>

165. See *supra* notes 111-64 and accompanying text.

166. The only exception made allowing patronage in the *Elrod-Branti* cases were for those positions requiring party affiliation for the effective performance of the public office involved. *Branti v. Finkel*, 445 U.S. 507, 518 (1980), see *supra* notes 29-32 and accompanying text. The Court was silent as to any positions or other areas in between.

167. See *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990), discussed at *supra* notes 89-110 and accompanying text. But see generally S. Jay Dobbs, *supra* note 34 (arguing that despite *Rutan*'s positive effects, the decision has created more problems than it has solved: it destroys the working-class citizen's participation in the two-party system; it will create a flood of litigation by disgruntled employees; it will have little practical effect on curbing patronage; and future employment decisions will be disguised as based on other factors, or as mixed-motive decisions).

168. The effect of this culmination of patronage cases from *Elrod* through *Rutan* is to expand the scope of first amendment protections to individuals from patronage practices. This increasing expansion is obviously derived from inherent rights rather than an express grant of protection within the cases. The courts who have denied extension of constitutional protections to independent contractors claim this is because the *Elrod-Branti-Rutan* holdings did not expressly address the rights of independent contractors. This does not mean that these rights are nonexistent. The Supreme Court in *Rutan* expanded the scope of protections to include denial of promotion, transfer, recall, or hire, but the express textual commitment of *Elrod* and *Branti* was limited to dismissal only. See *supra* note 91 and accompanying text. The Court in *Rutan* obviously extended these protections absent an express intent to encompass these employment decisions in *Elrod*.

Similarly, the Court rejected the position that the actions had to be substantially equivalent to that of a dismissal to warrant protection.<sup>169</sup> Thus, the next logical step is to allow constitutional protection for independent contractors whose contracts have been terminated, not renewed, or initially denied as a result of party politics. The success of continuing this expansionist approach of providing first amendment protection from political patronage practices thus depends upon the Supreme Court addressing the issue of non-governmental employees head-on and resolving the lack of express authority problem that has been plaguing the federal courts.

In addressing this issue, the Supreme Court will undoubtedly rely on the arguments and holdings of *Elrod*, *Branti*, and *Rutan* in assessing the merits of a claim by an independent contractor. It follows that focusing on the same three recurrent areas of concern stressed in those cases will provide a useful framework in which to assess the constitutionality of patronage in the non-employee realm. Thus, the validity of an extension of first amendment protection to independent contractors will depend on whether patronage places restraints upon the free exercise of belief and association of independent contractors, whether the government is denying or conditioning the receipt of a government benefit on a relinquishment of these rights, and whether the competing governmental interests in practicing patronage as to independent contractors are compelling and the least restrictive of first amendment rights.<sup>170</sup>

The first concern is whether the patronage practice encroaches upon independent contractors' freedoms of belief and association. Inherent in the language of *Elrod* itself is that the inevitable tendency of a political patronage system is to improperly coerce employees into compromising their true political beliefs.<sup>171</sup> *Rutan* mirrored this position in terms of patronage promotions, transfers, and recalls, holding that patronage pressures employees to pledge their political allegiance to a party with which they prefer not to associate, and further policies with which they do not agree.<sup>172</sup> This is "tantamount to coerced belief."<sup>173</sup>

Thus, individuals who find themselves not in the dominant party are forced to surrender their exercise of protected belief and association by refraining from

169. *Rutan*, 110 S. Ct. at 2737. See *supra* note 103.

170. See *Rutan*, 110 S. Ct. at 2729, discussed at *supra* notes 95-105 and accompanying text; *Elrod v. Burns*, 427 U.S. 347 (1976), discussed at *supra* notes 68-81 and accompanying text.

171. *Elrod*, 427 U.S. at 357-59. See *supra* notes 70-71 and accompanying text.

172. *Rutan v. Republican Party of Illinois*, 110 S. Ct. at 2734. See *supra* notes 95-96 and accompanying text.

173. *Elrod*, 427 U.S. at 355 (citing *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)).

acting on the political views they actually hold in order to retain their job.<sup>174</sup> Patronage-based hiring similarly coerces beliefs and unconstitutionally infringes upon individuals' protected rights according to *Rutan*.<sup>175</sup> A state job is valuable, and "there may be openings with the State when business in the private sector is slow. There are also occupations for which the government is a major (or the only) source of employment."<sup>176</sup> These situations are readily analogous to the situations of independent contractors. It is not questionable that a government contract is valuable or that some types of contracting work are exclusive to government control.<sup>177</sup> Public contracts offer an available market for contractors to participate in to earn their livelihood. Limiting the availability of this market by conditioning contracts on partisan affiliations impermissibly hinders free belief and association. As with the denial of a state job, the loss or rejection of a public contract is equatable to a job opportunity, and is equally a "serious privation."<sup>178</sup> Thus, "loss of a job opportunity for failure to compromise one's convictions states a constitutional claim."<sup>179</sup> Alternatively, if individuals greatly desire certain government contracts, they will suppress their free speech and associational rights in order to successfully obtain and establish such contracts. In either situation, sacrificing one's political affiliations and convictions or sacrificing a public contract results in the oppression of constitutional liberties, and the choice is, in fact, no choice at all.

Similarly, arguments speculating that the coerciveness associated with public employees is diminished when an independent contractor simply loses one "customer" due to the patronage practice,<sup>180</sup> or that an independent contractor would feel a lesser sense of dependency, thus making first amendment rights more attenuated and insufficient to require intervention into the political institution,<sup>181</sup> are unconvincing. Independent contractors may significantly rely on public contracts as a source of employment and income just as employees do. Regardless, the amount of reliance is not the critical inquiry in terms of constitutional magnitude when an individual is being denied access to public "employment." By denying contracts based on party affiliation, patronage contracting is coercive in the same manner that patronage employment is

174. *Rutan*, 110 S. Ct. at 2736.

175. *Id.* at 2739.

176. *Id.* at 2738.

177. *See supra* note 112.

178. *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2738 (1990).

179. *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (holding that Maryland could not refuse an appointee a commission for the position of notary public on the ground he refused to take an oath declaring his belief in God, because the oath unconstitutionally invaded the individual's freedom of belief).

180. *Triad Assocs., Inc. v. Chicago Housing Auth.*, 892 F.2d 583 (7th Cir. 1989). *See also Horn v. Kean*, 796 F.2d 668, 673-75 (3d Cir. 1986).

181. *Horn*, 796 F.2d at 674-75.

coercive.

More importantly, the Court in *Rutan* stated: "The question in the patronage context is not which penalty is more acute, but whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their first amendment rights."<sup>182</sup> In the case of independent contractors, as with employees, the answer to this question is clearly "yes." The constitutional wrong condemned in *Elrod*, *Branti*, and *Rutan* was the government's attempt to control the beliefs and associations of its citizens.<sup>183</sup> That control can be just as effective and offensive when the government reduces the citizen's income by twenty percent as when the government reduces the citizen's interest by one hundred percent—"[t]he constitutionally significant point is not the quantum of impact, but rather it is the impact itself."<sup>184</sup> While independent contractors may not lose all their income if a public contract is withdrawn, "the knowledge that their income would drop by ten percent may be sufficient to induce the contractors to conform their political views to those of the reigning power."<sup>185</sup> Support for this position is analogously seen in *Rutan* in terms of denying promotions, recalls, or hiring. The loss is just as great when a contractor is denied a contract as when a public employee is denied a promotion, recall or hire. The ultimate termination of all economic benefits is not the main concern, but rather that some benefits are being denied in terms of lost opportunities as a result of coercive patronage practices.

Strong support for this view abounds in the dissenting opinion of *Horn v. Kean*.<sup>186</sup> The dissenters acknowledged that the opinions of *Elrod* and *Branti* rest squarely upon the government's interference with the federally protected substantive liberty interest of freedom from government attempts to control beliefs and associations.<sup>187</sup> The Supreme Court has never suggested that "the availability of the substantive protection of the first amendment depends upon the economic status of the party claiming that protection. The first amendment

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182. *Rutan*, 110 S. Ct. at 2739. Along these lines, in the instant matter the Court determined that it was not necessary to consider whether not being hired is less burdensome than being discharged because the government can do neither on the basis of political affiliation. *Id.*

183. See *Branti v. Finkel*, 445 U.S. 507, 515-17 (1980); *Elrod v. Burns*, 427 U.S. 347, 372 (1976).

184. *Horn*, 796 F.2d at 683 (dissenting opinion).

185. *Id.* at 683. This chilling effect on citizens' first amendment rights produced the holding in *Elrod* and *Branti*, and because the same chilling effect inhibits independent contractors who lose their contracts because of their political views, the rule of *Elrod* and *Branti* is equally applicable to the case of independent contractors. *Id.*

186. *Horn v. King*, 796 F.2d 668, 680 (3d Cir. 1986) (en banc) (dissenting opinion).

187. *Id.* (dissenting opinion).

protects all persons in the United States."<sup>188</sup>

In a similar argument, the *Horn* dissenters found the competing first amendment rights of public employees and independent contractors to be equal. The dissenters argued that *Elrod* and *Branti* did not announce any revolutionary first amendment rights applicable only to servants of the government, but rather they rejected the contention that public employees had fewer first amendment rights than other members of society.<sup>189</sup> Thus, by treating the *Elrod-Branti* rule as applicable only to servants of the government, the cases that have denied protections to independent contractors have managed to avoid the balancing of interests required by the Constitution.<sup>190</sup>

The second concern is whether patronage conditions or penalizes the receipt of a government benefit at the cost of individual rights. It is clear that patronage systems themselves have the effect of imposing unconstitutional conditions on the receipt of a public benefit.<sup>191</sup> Public employees hold their jobs on the condition that they provide support for the favored political party. This has the effect of the government producing a result which it could not command directly itself.<sup>192</sup> Like government employees, this similarly implicates individual rights of independent contractors by forcing them to

188. *Horn*, 796 F.2d at 681 (dissenting opinion). The court premised this reasoning on a hypothetical change in facts to *Elrod*:

If *Elrod v. Burns* were a procedural due process case aimed at the protection of an expectation in continued employment found in state law, the distinction adopted by the majority between servants and independent contractors arguably would be relevant. In such a hypothetical case, the degree of due process protection might well depend on the degree of economic dependence of the plaintiff on the contract or property right being terminated. In *Elrod*, however, there was no state-law expectation in the continuance of an at-will employment relationship.

*Id.* at 681 (footnotes omitted).

189. *Id.* at 680 (dissenting opinion). This interpretation of *Elrod* and *Branti* is consistent with the Court's treatment of public employee first amendment claims prior to and since 1980. See, e.g., *Pickering v. Board of Education*, 391 U.S. 563 (1968) (holding that the public employee enjoyed the same first amendment right to free expression as did the general public); see also *supra* notes 45-51 and accompanying text. More recently, in *Connick v. Myers*, the Court held that the first amendment rights of public employees were the same as, not greater than, those of the general public. *Connick v. Myers*, 461 U.S. 138, 147 (1983); see also *supra* notes 45-51 and accompanying text. Justice White opined that "[o]ur responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant to those who do not work for the State." *Id.* The dissenters in *Horn* believed that the judges in the majority were standing the Supreme Court's reasoning in these cases on its head by treating public employees as if they have rights not conferred upon others. *Horn*, 796 F.2d at 683 (dissenting opinion).

190. *Horn v. Kean*, 796 F.2d 668, 683 (3d Cir. 1986) (en banc).

191. *Elrod v. Burns*, 427 U.S. 347, 357-59 (1976). See *supra* notes 75-78 and accompanying text.

192. *Id.* at 358-59 (quoting *Spieser v. Randall*, 357 U.S. 513, 526 (1958)); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

suppress or give up their true speech and associational beliefs to receive a public contract. *Rutan* also recognized that the government may not condition valuable benefits on relinquishing constitutional rights or deny those benefits to a person on a basis that infringes upon an individual's constitutionally protected interests.<sup>193</sup>

Further support for this rationale is evidenced by the *Elrod* Court's indication that there is a lack of distinction between the economic interests at stake between public employees and contractors in conditioning benefits upon party affiliation. The Court specifically stated:

[T]he inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated. Rights are infringed both where the government fines a person one penny for being a Republican and where it withholds the grant of a penny for the same reason.<sup>194</sup>

One recent case, *North Mississippi Communications, Inc. v. Jones*,<sup>195</sup> addresses this issue and stresses that equal constitutional weight should be given to penalties hindering the receipt of government benefits, regardless of their degree. This case expands *Elrod*, *Branti*, and *Rutan* beyond their limitation to government employees.<sup>196</sup> In *North Mississippi Communications*, the Fifth

193. *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2736 (1990).

194. *Elrod*, 427 U.S. at 359-60 n.13. Further noted by the Court was the fact that the increasingly pervasive nature of public employment provides officials with substantial power through conditioning jobs on partisan support. Because the government, however, may not seek to achieve an unlawful end either directly or indirectly, the degree of penalization is not the focus of unconstitutionality. *Id.* at 360.

Also worth noting is that the supposed economic differences between state servants and state independent contractors is at best relevant only in a due process protection of property interests context. It has never been suggested that the substantive liberty rights enshrined in the First Amendment vary with the economic status of the party exercising them. *Horn*, 796 F.2d at 683 (dissenting opinion).

195. 951 F.2d 652 (5th Cir.), *cert. denied*, 113 S. Ct. 184 (1992).

196. *North Mississippi Communications*, 951 F.2d at 653-54. *North Mississippi Communications* is distinguishable from the other independent contractor cases because it is concerned only with the proper burden-shifting approach for the newspaper's § 1983 claim and is more akin to the "Connick-type" political speech as discussed at *supra* notes 45-51 and accompanying text. Similarly, this case involved what was equivalent to a mixed-motive discharge, involving termination based on political affiliation in conjunction with other factors, rather than the overt discharge solely for political patronage reasons which is the focus of this Note.

However, in a broader context, this case expands the constitutional protections for non-public employees. The court extended the applicability of the *Mt. Healthy* burden-shifting analysis, discussed below, which provides more protection to independent contractors in this context in terms of the amount of proof required to show a violation of a constitutionally protected right. The *Mt. Healthy* test has been used as the standard for assessing the constitutionality of mixed-motive

Circuit held that the DeSoto County Board of Supervisors' withholding of legal notice advertising from a newspaper in retaliation for not supporting the Board and printing negative stories about their policies violated important constitutional rights.<sup>197</sup> This case expands protections for non-public employees by holding that the Board's denial of awarding even *one* county legal notice based upon the

patronage dismissals. See, e.g., *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981) (involving a dispute regarding the motive of a public employee). See also *DeCore v. City of Parma*, No. 91-4170, 1992 U.S. App. LEXIS 25072 (6th Cir., Oct. 7, 1992) (not intended for publication) (addressing that discharge of city employee for political reasons who would have been terminated in any event under *Mt. Healthy* does not offend the Constitution). For a further and more in depth discussion of the mixed-motive discharge standard, see generally Robert S. Whitman, Note, *Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII*, 87 MICH. L. REV. 863 (1989); Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982); Mark S. Wolly, *What Hath Mt. Healthy Wrought?*, 41 OHIO ST. L.J. 385 (1980); Kevin W. Dogan, *The Supreme Court's Attack on Political Patronage From Elrod to Rutan: What does it Mean for Indiana Elected Officials?*, *Municipal Law*, in INDIANA CONTINUING LEGAL EDUCATION FORUM (1991). Furthermore, "facially neutral" firing decisions—those not overtly considering political affiliations—may also be challenged as unconstitutional patronage dismissals and involves a content-neutral analysis, although no court has considered precisely this issue. Thomas L. Pantalione, Comment, *Republicans Only Need Apply: Patronage Hiring and the First Amendment in Avery v. Jennings*, 71 MINN. L. REV. 1374, 1383 (1987). These two areas are, however, beyond the scope of this note and will not be discussed in great detail except as relevant.

*Mt. Healthy City School Dist. Bd. of Educ. v. Doyle* involved the refusal to reemploy a public school teacher because of the teacher's exercise of his free speech rights which violated his first and fourteenth amendment rights. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). This case gave birth to the two step burden-shifting rule, which has now become standard in discrimination cases. The Supreme Court held that (1) the plaintiff must first show that his constitutionally protected conduct was a substantial or motivating factor in the defendant's decision; and (2) if the plaintiff carries this burden, the burden shifts to the defendant to prove by a preponderance of the evidence that it would have made the same decision even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 274.

In *North Mississippi Communications*, the DeSoto County Board argued that this analysis is unique to cases involving termination of employment or refusal to rehire. *North Mississippi Communications*, 951 F.2d at 655 n.10 (5th Cir. 1992). The Fifth Circuit rejected this argument, and saw no reason why *Mt. Healthy* should not be applied in the patronage context since "*Mt. Healthy's* rule is broad enough potentially to lend itself to a wide variety of fact patterns." *Id.* at 654. This case concluded that denying benefits to a party in retaliation for exercising constitutionally protected rights violates the First Amendment. Here, that party was an independent newspaper, and the court's analysis arguably applies equally when applied in the independent contractor context where contracts are denied based on the exercise of a valid constitutional right.

Furthermore, *North Mississippi Communications* is the first case to break with the line of cases denying commensurate protections from patronage for independent contractors, discussed at *supra* notes 111-64. In fact, the court did not take into account any of the cases involving political patronage in the context of independent contractors, thus, expanding the potential scope of *Elrod*, *Branti*, and *Rutan* beyond their alleged "express" limitation to government employees. Most importantly, the court expressly set forth that retaliatory denial of publication of even one county legal notice, as a government benefit, violates the First Amendment. *Id.*

197. *North Mississippi Communications*, 951 F.2d at 653-54.

publication of non-supportive stories about the Board constitutes a violation of the First Amendment.<sup>198</sup> The court rejected any argument that the “bulk” of the advertisements would have to be denied for political reasons in order to constitute a first amendment violation.<sup>199</sup> This case illustrates that in terms of constitutional importance, the fact that a right is violated, regardless of how slight that violation is, constitutes a valid claim.

The Supreme Court has recognized the lack of distinction between the rights of independent contractors and public employees in another important context. In *Lefkowitz v. Turley*,<sup>200</sup> the Supreme Court invalidated a state statute requiring public contractors to waive their fifth amendment immunity from self-incrimination in any proceeding relating to their government contract or face a five year ban from doing further business with the government.<sup>201</sup> The Court held that the waiver was not voluntary, but rather that it was coerced.<sup>202</sup> Consequently, the Court held that disqualification from public contracting was a penalty for asserting a constitutional privilege.<sup>203</sup>

The Supreme Court recognized that although independent contractors may not depend entirely on transactions with the State for their livelihood, they “failed to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a

198. *Id.* at 656. The Board is appealing this case, alleging that the court “failed to take into account cases involving political patronage in [the] context of independent contractor[s],” which expands the *Elrod-Branti-Rutan* trilogy beyond their limitation to government employees, and “thereby conflicts with every other circuit that has addressed [this] issue.” *DeSoto County Bd. of Supervisors v. North Mississippi Communications, Inc.*, 61 U.S.L.W. 3154 (U.S. Aug. 25, 1993). However, certiorari was denied. *DeSoto County Bd. of Supervisors v. North Mississippi Communications, Inc.*, 113 S. Ct. 184 (1992).

199. *North Mississippi Communications*, 951 F.2d at 656. This court addressed numerous factors in determining whether this retaliation posed a valid infringement on the newspaper’s (the *Times*) first amendment rights. In assessing this claim, the court applied the burden-shifting analysis of *Mt. Healthy*, 429 U.S. at 274; *see supra* note 196. It is unfortunate, however, that certiorari was denied in this case. This forestalls the clarification of this issue, and continues to leave unresolved the question of patronage practices outside of government employees.

200. 414 U.S. 70 (1973); Rosalie Berger Levinson, Survey, *Constitutional Law: Nude Dancing and Political Speech as Protected Expression—The Scope of the Due Process Guarantee*, 24 IND. L. REV. 697 (1991).

201. *Lefkowitz v. Turley*, 414 U.S. 70, 70-76 (1973).

202. *Id.* at 82-83. The Court specifically noted that “[t]he waiver sought by the State, under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to the waiver device. A waiver secured under threat of substantial economic sanction cannot be termed voluntary.” *Id.*

203. *Id.* at 83.

contractor."<sup>204</sup> In reaching this conclusion, the Court rejected any arguments that the cost to a contractor is small in comparison to the cost to an employee of losing a job, or that it is harder for a state employee to find employment in the private sector than it is for an independent contractor.<sup>205</sup> Justice Stevens cited the conclusion of *Lefkowitz* in *Branti v. Finkel*, noting that "many . . . practices are included within the definition of a patronage system, including . . . granting supporters lucrative government contracts . . . ."<sup>206</sup> In light of *Rutan's* increased protections, this decision is applicable to positions outside of government employment and recognizes independent contractors rights as tantamount to those of public employees. Thus, in terms of the corresponding rights at stake, and the equivalent unconstitutional penalties imposed on independent contractors by patronage practices, this recognition carries equal weight when applied to first amendment protections for independent contractors.

The third critical concern is whether the government's interests in "firing" independent contractors because of their political associations are sufficiently compelling to overcome the contractors' first amendment interests. Because there are impairments to contractors' constitutional freedoms, along with the fact that the loss of a promotion, transfer, or rehire is considered a significant penalty to trigger strict scrutiny, the loss of a government contract evokes the same analysis. Thus, a compelling state interest is required to override the valuable rights of the contractors.<sup>207</sup>

In the lower court cases that have addressed this issue, the only government interest that is even mentioned is the interest in political patronage itself.<sup>208</sup>

204. *Id.* The Court followed *Garrity v. New Jersey*, 385 U.S. 493 (1967), stating that the option to lose their means of livelihood or to pay the penalty of giving up constitutional freedoms is the antithesis of free choice to speak out or remain silent. *Id.* at 497.

The court in *Horn v. Kean* acknowledged this lack of distinction between public employees' and independent contractors' rights, but determined that *Lefkowitz* did not control the outcome. *Horn v. Kean*, 796 F.2d 668, 675-76 (3d Cir. 1986). The court determined that *Lefkowitz* concerned well-settled Fifth Amendment rights, whereas their court had a different task of analyzing unsettled first amendment rights as prescribed by the holdings of *Elrod* and *Branti*, and refused to apply it to their present facts. *Id.* at 676.

205. *Lefkowitz*, 414 U.S. at 83-84. An architect lives off contracting fees as surely as a state employee lives off salary, and fees and salaries may be equally hard to come by in the private sector after sanctions have been taken by the State. In some senses, the plight of the architect may be worse since he may be subject to future contract cancellations. *Id.* at 84. "A significant infringement of constitutional rights cannot be justified by the speculative ability of those affected to cover the damage." *Id.*

206. *Branti v. Finkel*, 445 U.S. 507, 513 n.7 (1980). Furthermore, the court declined to extend the protections to independent contractors because the Supreme Court in *Elrod* and *Branti* limited its rulings to public employees, and it was not for their court to expand upon that ruling. *Id.* at 676.

207. Levinson, *Indiana Law Survey*, *supra* note 138, at 1144.

208. *Horn*, 796 F.2d at 683 (dissenting opinion).

This is "an interest found wanting in *Elrod*, and an interest that has never been recognized in a first amendment context by a majority of the Supreme Court."<sup>209</sup>

Thus, it is not evident that the government's interest in patronage takes on greater weight in the independent contractor context—indeed, just the opposite may prove to be true.<sup>210</sup> By affording the public employees greater first amendment rights than independent contractors and members of the public, the government will be encouraged to contract out of governmental functions. Public employees will no longer be needed because their work will be contracted out, and then they can be freely discharged as surplus.<sup>211</sup> Consequently, the government will remain free to pressure contractors and their employees to support incumbent politicians or parties. The contractors and their employees will be forced against their will to contribute time, money, and loyalty to a party not of their choice, and they will be without a remedy.<sup>212</sup> Thus, the state interest may take on less weight when applied in this context.

The only government interest recognized by the *Elrod-Branti* Court as sufficient to justify a limitation on first amendment rights was the government's interest in having policymaking or essentially political positions occupied by persons aligned with the policies espoused by the administration.<sup>213</sup> Patronage was allowed as the least restrictive means of accomplishing the governmental ends in those contexts.<sup>214</sup> However, such party affiliation has never been deemed crucial to public contracts, and thus, the benefits of patronage do not exceed the loss of first amendment rights as strict scrutiny demands. Although hiring politically affiliated contractors may be an effective way to implement the administration's program, the work of the government should not be a conduit through which political factions gain and wield economic power.<sup>215</sup> Promoting these ends to the detriment of the political society cannot be the least restrictive means to accomplish government policy implementation, especially in the

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209. *Id.* In discounting the majority's opinion in *Horn*, the dissenters note that even in identifying this interest, the majority does not engage in the necessary comparison of the state's interests in patronage to the independent contractors' interests in freedom of belief and association. *Id.* The majority assumes without analysis that independent contractors lack any serious interests that need to be insulated from patronage. *Id.*

210. *Horn v. Kean*, 796 F.2d 668, 683 (3d Cir. 1986) (dissenting opinion).

211. *Id.* at 684. The dissenting opinion in *Horn* presents a persuasive scenario which illustrates this argument.

212. *Id.* at 683 (dissenting opinion).

213. See *Branti v. Finkel*, 445 U.S. 507, 518 (1980); *Elrod v. Burns*, 427 U.S. 347, 366, 372-73 (1976).

214. See generally *Elrod*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

215. *Horn*, 796 F.2d at 685 (dissenting opinion).

independent contractor context.<sup>216</sup> As with the narrow exception for policymaking positions, unless an independent contractor's political affiliation clearly indicates it will compromise the government's ability to discharge its responsibilities, the government should not be entitled to disable aspects of a contractor's political commitment that lie at the core of responsible citizenship.<sup>217</sup>

The government's only other asserted interests are securing efficient and effective employees and preserving the democratic process and the two-party system. These are not vital interests, as rejected in the *Elrod-Branti-Rutan* cases, and can be served without relying on patronage practices.<sup>218</sup> Government activity which unnecessarily restricts certain constitutional protections, even if only minimally, must fail; the government must find other means of achieving their desired goals that will create less interference with individual freedoms.<sup>219</sup>

The individuals acquiring certain governmental positions have the right to affiliate with political parties. However, the government, as an artificial entity, has a collective interest in efficiency, but the government itself has no right under the First Amendment or any other constitutional or statutory provision to advance the interests of a political party.<sup>220</sup> The effect of supporting an interest in political affiliation gives individuals, who have gained powerful government positions, and their parties, a forum to assert their own political interests as "government interests." In asserting their interest, the party-position holders are ultimately using the economic power of the government "for the purpose of preventing other members of the political collective from competing effectively to replace them."<sup>221</sup> Whether the parties involved are employees or contractors, the Constitution, which carefully devises checks and balances for

216. See *infra* note 218.

217. Peter M. Shane, *Rubin: A Glimpse at his Contributions to the Law: The Rust That Corrodes: State Action, Free Speech, and Responsibility*, 52 LA. L. REV. 1585, 1596 (1992).

218. *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2739 (1990). Just as the government can ensure employee effectiveness and efficiency through the less drastic means of discharging those staff members whose work is inadequate, so can the government ensure effective contracting by employing the same means. Furthermore, the "political process" functions as well without patronage practices, perhaps even better. *Elrod v. Burns*, 427 U.S. at 368-70. As with the employment context, patronage in the contractor context "can result in the entrenchment of one or a few parties to the exclusion of others" and "is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government." *Id.* at 370.

219. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). See also *Schneider*, *supra* note 18, at 526-29.

220. *Horn v. Kean*, 796 F.2d 668, 684 (3d Cir. 1986) (dissenting opinion).

221. *Id.* at 684-85. Further, utilizing government revenues for the purpose of enhancing the position of the reigning political faction to the disadvantage of all others flies in the face of our constitutional system. *Id.* at 685.

the resolution of tension among competing interest groups, never intended to allow one political party to use government positions or economic power as a weapon in its competition with other political parties.<sup>222</sup>

Thus, the Supreme Court needs to address the issue of extending constitutional protections to independent contractors. Upon undertaking such an endeavor, these three separate but interrelated interests mandate that independent contractors should be protected from the same patronage practices that detrimentally encroach upon the first amendment rights of government employees. Therefore, the Supreme Court should rule that the government may not use political patronage practices to award, renew, or terminate public contracts.

## VI. CONCLUSION

In light of this expansionist approach originating from *Elrod v. Burns*,<sup>223</sup> followed by *Branti v. Finkel*,<sup>224</sup> and culminating in *Rutan v. Republican Party of Illinois*,<sup>225</sup> denying public contractors the same rights afforded to public employees warrants a critical reevaluation. Based on these arguments, bolstered by the majority decision in *Rutan* indicating a greater accommodation for individual rights, and in conjunction with incomplete federal case law restricting first amendment protections, it is obvious that the scope of insulation from political patronage warrants a detailed analysis and clear guidelines setting forth which areas of government practice mandatory party affiliation will be tolerated.

Although conceding that the respective interests implicated by the Supreme Court in *Elrod* and *Branti* are basically the same interests implicated when patronage practices affect independent contractors, the lower courts have made it clear that they are not willing to address the competing interests of independent contractors and thus are not willing to expand the provisions of *Elrod*, *Branti*, or *Rutan*. Equally clear is that the lower courts will leave any extension of this principle to the Supreme Court. Unfortunately, the Supreme Court has yet to address the rights of independent contractors in a patronage context.

Although the next logical step in the Court's patronage doctrine is to extend constitutional protections to independent contractors, it is unclear whether this issue will ever be addressed definitively by the Supreme Court. Ironically, it is also unclear whether, if it is addressed, the expansionist approach towards

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222. *Horn*, 796 F.2d at 685 (dissenting opinion).

223. 427 U.S. 347 (1976). See also *supra* note 67.

224. 445 U.S. 507 (1980).

225. 110 S. Ct. 2729 (1990).

greater first amendment protection of individual rights will prevail to insulate independent contractors. Because *Rutan* was a five-four decision authored by Justice Brennan, his absence on the Court, coupled with Justice Marshall's absence, may signal the end of this approach,<sup>226</sup> thus ultimately sealing the fate of independent contractors. It is questionable whether Justice Souter and Justice Thomas, whose views are more unknown in this context, but probably akin to those of the dissenters in *Rutan*, would uphold such an extension. On the other hand, with the succession of President Bill Clinton and his Democratic administration to the White House, thereby replacing the twelve-year Republican reign, the Supreme Court may extend protections to independent contractors to dissuade or remedy any large-scale attempts by President Clinton to "clean house" of Republican contract-holders and reward political supporters with government contracts. Furthermore, President Clinton has announced his plan to eliminate or phase out several thousand federal positions over the course of his presidency. The jobs usually performed by these government employees may consequently be contracted out to Democrats in the private sector. This has the potentiality of infringing upon the first amendment rights of individual independent contractors in the private sector, which also may force the Court to extend first amendment protections outside of the government employment sphere.

Nevertheless, while acknowledging that there are potential weaknesses and numerous criticisms to curtailing party practices outside the context of public employees, this subject warrants a critical analysis. Firmer parameters on the types of non-government employment decisions that are subject to first amendment challenges, and thus warranting protection, should be sought. Similarly, a practical standard for determining which practices are exempt from party politics is in order. The only way to successfully accomplish this task is for the Supreme Court to acknowledge that the first amendment rights of independent contractors are unconstitutionally infringed upon by having public contracts that are motivated by political patronage terminated, not renewed, or rejected at the bidding stage. This result would be just and in alignment with the basic tenets that the First Amendment to the Constitution of the United States espouses and protects.

Bradford S. Moyer

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226. Levinson, *Indiana Law Survey*, *supra* note 138, at 1145.