Patronage Employment: Limiting Litigation

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I. INTRODUCTION

In April 2011, Theresa Kohutka, a twenty-four-year employee of the Hempstead Animal Shelter on Long Island in New York, sued the Town

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of Hempstead and five of her supervisors and coworkers.¹ She claimed, inter alia, that her First Amendment rights were violated when her supervisor refused to promote her because she did not become more active in the local Republican Club after he urged her to do so.²

This lawsuit should be surprising because the U.S. Supreme Court seemed to settle the issue of using political affiliation to make employment decisions in a series of three opinions more than twenty years ago.³ Nevertheless, cases on the issue continue to arise in significant numbers. This is an unfortunate situation because the ensuing litigation creates an expensive and unnecessary cost for cities and towns and their hard-pressed taxpayers. Because there is no end in sight, this Article suggests that it is time for the U.S. Supreme Court to revisit the issue and rethink its prior positions.

First, this Article describes the development of the patronage and civil service systems with a reflection on how they work in tandem. Then, the trio of cases, Elrod v. Burns,⁴ Branti v. Finkel,⁵ and Rutan v. Republican Party of Illinois,⁶ is reviewed. How the federal circuit courts have responded to these three cases is examined both in their immediate aftermath and in decisions in more recent cases. Finally, the Article discusses some specific examples of how the current law creating First Amendment rights against negative employment decisions for patronage appointees is not working and how it should be changed.

II. A BRIEF HISTORY OF PATRONAGE AND THE CIVIL SERVICE

A. The Patronage System

The patronage system has been described as “appointing persons to government positions on the basis of political support and work rather than on merit, as measured by objective criteria.”⁷ Patronage has been


². Van Sant, supra note 1.


⁴. 427 U.S. 347.

⁵. 445 U.S. 507.

⁶. 497 U.S. 62.

part of human history as long as people have been governing themselves. There is evidence that the ancient Chinese were buying and selling government jobs as long ago as 243 B.C.E. During the Roman Empire, the emperor’s private army, the Praetorian Guard, sold the offices of emperor, consul, patrician, and senator. When the monarchs of France and Great Britain needed money or political support, they would sell governmental honors and offices.

By the time the U.S. Constitution was adopted, federal officeholders very naturally appointed their supporters to government jobs and dismissed opponents. The first patronage dismissal in the U.S. government probably occurred in 1797 when the Secretary of the Treasury, a Federalist, fired the U.S. Commissioner of Revenue, an ardent Republican. The explanation for the dismissal suggests and foreshadows the ongoing, rather guilty acceptance of the patronage system. The Treasury Secretary reported that the reason for the dismissal was “deliberate misconduct in office,” but the “misconduct” consisted of aiding Republican opponents.

Presidents Washington and Adams, both Federalists, appointed Federalists to government positions; President Jefferson, a Republican-Democrat

also WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1315 (2d ed. 1978) (defining patronage as “the power to appoint to office or grant other favors, especially political ones”); Patronage Definition, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/patronage (last visited Aug. 13, 2012) (defining patronage as “the power to make appointments to government jobs especially for political advantage” and “the distribution of jobs on the basis of patronage”).

8. William Keisling, Hell to Pay: Patronage in Crisis, An Excerpt from When the Levee Breaks by Bill Keisling (2007), http://www.yardbird.com/levee_breaks_5_pa_turnpike_patronage.htm; see also Audrey Hu & Liang Zou, Selecting Less Corruptible Bureaucrats: A Quasi-Auction Approach 29 (Tinbergen Inst. Discussion Paper No. 2007-096/1, 2007) (Neth.), available at http://www.tinbergen.nl/discussion_papers/07096.pdf (asserting that the first recorded auction of public offices was held by Qin Shi Huang, first emperor of the Qin dynasty, and that the idea was adopted by many Chinese emperors thereafter to solve financial problems).

9. 1 EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 88 (Oliphant Smeaton ed., E.P. Dutton & Co. 1910) (1776); Keisling, supra note 8. The practice of selling the office of emperor to the highest bidder began in 186 C.E. after the Praetorian Guard gained total authority to make the choice. Fall of the Roman Empire, ROME INFO (2009), http://www.rome.info/history/empire/fall/.

10. LINDA LEVY PECK, COURT PATRONAGE AND CORRUPTION IN EARLY STUART ENGLAND 3–4 (1990); Keisling, supra note 8.


13. Id.
who disliked the idea of patronage, nevertheless pragmatically replaced Federalists with his own supporters.\textsuperscript{14} By the time William Henry Harrison became president in 1841, more than 40,000 people came to Washington hoping to fill one of 23,700 patronage jobs.\textsuperscript{15} Over the next decades, the job of making tens of thousands of political appointments became more and more burdensome for newly elected Presidents.\textsuperscript{16}

When the number of positions was relatively small—about 5,000 in 1816—and the positions rather simple—postmasters and postal clerks, land office surveyors and clerks, and customhouse workers\textsuperscript{17}—the rotation in office that resulted from patronage appointments was viewed as being democratic.\textsuperscript{18} As the numbers increased, both employers and employees became very dissatisfied. As Henry Clay wrote in 1829:

\begin{quote}
The members of [the official working corps] feel something like the inhabitants of Cairo when the plague breaks out; no one knows who is next to encounter the stroke of death; or which, with many of them is the same thing, to be dismissed from office. You have no conception of the moral tyranny which prevails here [in Washington] over those in employment.\textsuperscript{19}
\end{quote}

Congress finally reformed the system in response to the country’s shock when, in 1881, President James Garfield, as he waited on the platform for a train, was shot and killed by a disappointed job applicant.\textsuperscript{20}

\section*{B. The Civil Service and the Pendleton Act}

Congress’s response to the assassination and growing disenchantment with the burdens of the patronage system as the federal workforce became larger and larger was the enactment of the Pendleton Act of 1883.\textsuperscript{21} The Act prohibited removing classified workers on political or religious grounds.\textsuperscript{22} It created the Civil Service Commission, with three commissioners who would create rules for

\begin{itemize}
\item[] 14. Keisling, \textit{supra} note 8.
\item[] 15. \textit{Id}.
\item[] 16. \textit{See id}.
\item[] 20. Keisling, \textit{supra} note 8.
\item[] 22. Ari Hoogenboom, \textit{The Pendleton Act and the Civil Service}, 64 AM. HIST. REV. 301, 307 (1959).
\end{itemize}
open, competitive examinations for testing the fitness of applicants for the public service. . . . Such examinations shall be practical in their character, and . . . will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed. . . . [E]mployments . . . shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.23

When the Act passed, only eleven percent of federal employees were “classified,” or part of the new merit system.24 By 1900, forty-six percent of federal government workers were classified civil service employees.25 By 1922, about eighty percent of federal employees were in the civil service merit system.26 By 2012, more than ninety percent of the 2.7 million federal government civilian employees were part of the civil service merit system.27 The Act’s merit requirements resulted in government employees who were generally viewed as being better educated and from higher social strata than past employees.28 No longer would they be described as James Parton described them in his 1861 biography, Life of Andrew Jackson: “[T]he fact of a man’s holding office under the government is presumptive evidence that he is one of three characters, namely, an adventurer, an incompetent person, or a scoundrel.”29

The result was especially pleasing to businesspeople, who received greatly improved service in post offices and customhouses.30 In addition to receiving more efficient service, businesspeople also became more politically powerful because it was their financial support of political bosses that replaced the two-to-seven-percent assessments that had been demanded of civil servants who had received patronage appointments.31

24. Hoogenboom, supra note 22, at 303.
25. Id.; see also Fish, supra note 12, at 229 (noting that by 1900 there were 90,000 classified positions and 100,000 unclassified positions in federal government, and total salaries for classified were $75 million, for unclassified, only $30 million).
28. Hoogenboom, supra note 22, at 312.
29. 3 JAMES PARTON, LIFE OF ANDREW JACKSON 220 (1885).
30. Hoogenboom, supra note 22, at 316.
31. Id. at 302–03; 317.
C. State and Local Civil Service Systems

One year after the passage of the Pendleton Act, New York became the first state to enact a civil service system law for its state workers, and Massachusetts became the second. But by 1936, only nine states had enacted legislation creating a civil service system. So, in 1939, Congress encouraged states to implement civil service systems by enacting amendments to the Social Security Act that required states to establish merit-based personnel standards for administering federal old-age assistance plans. By 1970, about eighty percent of full-time state and local government workers were part of civil service systems. As in the federal government, the purpose of creating these systems was to create a government workforce that was chosen on merit rather than by political partisanship and that was protected from discrimination based on religious or political reasons. The goal was “to promote efficiency through a plan for selection and development of the best available staff, weeding out the incompetent and promoting the outstanding.”

D. Patronage or Civil Service: Which Is Better?

Civil service has been viewed as reforming the patronage system and its evils of incompetence, lack of professionalism and continuity, nepotism, partisanship, and corruption. Career civil servants are supposed to bring to government competence and professionalism, continuity, predictability, and neutrality.

Nevertheless, which system is better is, perhaps, a trick question because the answer depends in large measure on the context in which it is being applied.
asked. For example, commentators of different eras have focused on different factors in attempting to respond. Fewer than twenty years after the enactment of the Pendleton Act, Carl Russell Fish, a professor at the University of Wisconsin, noted that the speculative nature of the old patronage system afforded opportunities that “attracted clever, sometimes brilliant, men.”

41. FISH, supra note 12, at 233.

42. Id.

43. Id.

44. Id. at 234.

45. Hoogenboom, supra note 22, at 301.

46. Id. at 302–03.

47. JOHNSON & LIBECAP, supra note 17, at 37.

48. Id. at 39.

In contrast, the then-new civil service system offered “the advantage of steady, light employment at a moderate remuneration and attract[ed] the steady-going and unimaginative . . . who ha[d] no better financial opportunities.”

42. Professor Fish believed that if civil service jobs had no special inducements, such as opportunities for travel or research, “able young men” would not be tempted away from equivalent business opportunities.

43. He also concluded that because “college men” did not do better on civil service exams than those with elementary school or high school educations, “many of the college-bred men who applied were of inferior capacity.”

44. On the other hand, Ari Hoogenboom, a professor at the City University of New York-Brooklyn College, wrote convincingly in 1959 about the “motley group of individuals” who, before the passage of the Pendleton Act, were given jobs in the federal government for which they were clearly unqualified.

45. Hoogenboom, supra note 22, at 301.

46. He described “misfits employed on a temporary basis” who had low morale, little professionalism, and a constant fear of losing their jobs.

46. In 1994, Professors Ronald N. Johnson of Montana State University and Gary D. Libecap of the University of Arizona focused on the increased size of the federal labor force as the major reason for adopting a civil service merit system.

47. They argued that if labor management had not become a problem, then demand for greater professionalism in the ranks of appointees could have been achieved by giving proficiency tests to patronage appointees.

48. More recently, Professor David E. Lewis of Princeton University, after concluding that there is no consensus about whether patronage appointees or merit civil servants are better for conducting federal
government business, did a study of federal program performance to analyze its relationship to the two kinds of employees.\footnote{David E. Lewis, Testing Pendleton’s Premise: Do Political Appointees Make Worse Bureaucrats?, 69 J. Pol. 1073, 1074 (2007).} He used scores on the Bush Administration’s Program Assessment Rating Tool (PART) to assess federal program performance and concluded that programs administered by patronage appointees received lower PART evaluations than those run by civil service workers.\footnote{Id.} The patronage appointees did have more education and business experience, but those factors were not correlated with program performance.\footnote{Id. at 1083.} The chief factor that may explain the greater success of civil service workers is the likelihood that they have more experience, both in length and depth, in the specific area they are administering.\footnote{Id. at 1086.} Professor Lewis concluded that government program performance could be improved by creating just the right balance between patronage appointees, who carry out the democratic will of the people, and civil service workers, who carry out the competent, ongoing functions of their agencies, without the one eroding the value of the other.\footnote{See, e.g., D’Isidoro, supra note 32, at 1133.}

Part of the problem in achieving that balance is that civil service systems, although correcting some of the faults of patronage systems, can become mired in their own inefficiencies. In protecting government employees from political partisanship, civil service regulations can make it very difficult to dismiss incompetent performers or to reward the meritorious sufficiently.\footnote{Aronson, supra note 38, at 6.} Compounding those difficulties are strategies government administrators use to blunt their effects. One such strategy is the use of provisional appointments to hire applicants who are not on civil service exam lists.\footnote{Jonathan Walters, Toward a High-Performance Workplace: Fixing Civil Service in Massachusetts, v (Pioneer Inst. for Pub. Policy Research, White Paper No. 13, 2000), available at http://www.pioneerinstitute.org/pdf/wp13.pdf. In New York State, the provisional rate is less than one percent. Id. at 5.} More than sixty years ago, some states routinely hired non-civil-service-exam “provisional” employees as permanent staff members.\footnote{Id. at 5.} In Massachusetts, for example, provisionals may serve for only up to one year, but that rule was not enforced, and by 2000 an estimated forty percent of state employees were hired outside the civil service system.\footnote{Id. at 1083.}
provisional employees has often been lower than that of a random sample of the applicants and seriously lower than that of the better candidates.\textsuperscript{58}

Another statutory limitation on a merit-based civil service system is an absolute preference given to particular groups so that they must be hired ahead of others scoring higher on civil service exams. Among the groups receiving preferences in some states are veterans, children of police officers and firefighters killed in the line of duty, police officers and firefighters permanently disabled in the line of duty, and winners of governmental honors.\textsuperscript{59}

Two commentators whose ideas achieved great popularity in the 1990s argued that the civil service personnel system was one of the most destructive government programs.\textsuperscript{60} They asserted that government managers become stuck with civil service workers whom they cannot manage appropriately regarding promotion, dismissal, and compensation.\textsuperscript{61} Many analysts have offered a variety of reforms to address the perceived weaknesses of civil service systems, such as promoting and dismissing based on performance rather than seniority, using performance-based and market-based salary scales, and bypassing the civil service system to recruit and hire the “best people.”\textsuperscript{62}

The purpose of this Article is not to find that perfect balance between patronage appointees and civil service employees to achieve maximum performance but to suggest how workers should be characterized as falling into one group or the other so that their legal rights are transparent and without the ambiguities that result in a multitude of lawsuits every time an opposition administration takes office. The new administration will fire the prior administration’s patronage appointees because they belong to the opposition party, and the fired workers will sue, claiming

\textsuperscript{58} Aronson, supra note 38, at 6.


\textsuperscript{60} DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 124 (1992).

\textsuperscript{61} Id. at 125–27. Some commentators have quoted an old saying: “Government workers are like headless nails: you can get them in, but you can’t get them out.” Id. at 126; see also Pat Hardy, Civil Service: Some Pros, Cons and Suggestions for Reform 5 (Univ. of Tenn. Mun. Technical Advisory Serv. Knowledgebase Series, 2006), available at http://www.mtas.tennessee.edu/KnowledgeBase.nsf/0/667E2DAC7E73DECA8525723B0059C0A9?OpenDocument.

\textsuperscript{62} Hardy, supra note 61, at 7.
that their constitutional rights have been violated. In three cases decided between 1976 and 1990, the U.S. Supreme Court determined what those legal rights are with respect to hiring, promotion, transfer, recall, and dismissal. It would seem that with more than twenty years of appellate cases interpreting the Supreme Court decisions, the issues would have been decided, government employers would know what is required of them in dealing with patronage employees, and litigation would have diminished to an occasional trickle. Nevertheless, the opinions continue to give rise to lawsuits.

III. CONSTITUTIONAL RIGHTS OF PATRONAGE APPOINTEES

A. Elrod v. Burns

The 1976 case, *Elrod v. Burns*, involved Republican plaintiffs who had been non-civil-service employees of the Cook County, Illinois Sheriff’s Office. When Richard Elrod, a Democrat, replaced a Republican as Sheriff of Cook County, he followed past practice and fired the plaintiffs because they were Republicans. The U.S. Supreme Court held that patronage dismissals are unconstitutional under the First and Fourteenth Amendments because they “severely restrict political belief and association.”

The Court, however, carved out one exception, permitting patronage dismissals of people in policymaking positions who would be able to “obstruct[] the implementation of policies of the new administration, policies presumably sanctioned by the electorate.” Foreshadowing the myriad of lawsuits resulting from this opinion, the Court noted that “[n]o clear line can be drawn between policymaking and nonpolicymaking positions.” But the opinion suggested that “[a]n employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position,” as would an employee who “acts as an adviser or formulates plans for the implementation of broad goals.” In his concurrence, Justice Stewart referred to constitutional protection for nonpolicymaking and nonconfidential patronage employees.
and that expansion of the exception to “confidants” has generally been accepted.\(^{72}\) Justice Stewart did not, however, define who those employees might be.\(^{73}\)

**B. Branti v. Finkel**

Four years later, in a case involving two Republican assistant public defenders who were dismissed by the newly elected Democratic Public Defender, the Court reaffirmed its *Elrod* holding that patronage dismissals violate the First Amendment protection for private political beliefs.\(^{74}\) The Court also reaffirmed the *Elrod* exception, adding that patronage dismissals are acceptable for some jobs because “First Amendment rights may be required to yield to the State’s vital interest in maintaining governmental effectiveness and efficiency.”\(^ {75}\)

The most important outcome of the *Branti* decision that affected the course of litigation following political party changes in administrations was a new description for the patronage employees who fall into the exception and may be dismissed for their politics. Merely designating someone as a policymaker or a confidant was no longer sufficient; the test became whether party affiliation was an appropriate requirement for effective job performance.\(^ {76}\) A policymaker or confidant may or may not pass that test. Both Justice Stevens, writing for the Court, and Justice Powell, in dissent, acknowledged the difficulty government employers and lower courts would have in deciding whether an employee in a specific government job fell within the “dismissable” category or not.\(^ {77}\)

**C. Rutan v. Republican Party of Illinois**

Besides creating the problem of differentiating between protected and unprotected jobs, the *Elrod/Branti* decisions did not address the issue of adverse personnel decisions other than dismissal. In 1990, in *Rutan v. Republican Party of Illinois*,\(^ {78}\) the Supreme Court extended the

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73. *Elrod*, 427 U.S. at 374–75 (Stewart, J., concurring).
75. *Id.* at 517. The Court in *Elrod* had said that effectiveness and efficiency arguments could not support patronage dismissals because it is unlikely that belonging to a particular political party would motivate poor performance. *Elrod*, 427 U.S. at 365.
77. *Id.; id.* at 524 (Powell, J., dissenting).
Elrod/Branti holdings to promotion, transfer, recall, and hiring decisions. In this case it was not in dispute that all the plaintiffs held protected positions, so the Court did not discuss how one decides whether an employee serves in a protected position or not, other than to note that Elrod created an exception that allowed patronage dismissals for policymakers and confidants and that Branti refined that exception to include only those employees in jobs for which party affiliation is an appropriate requirement for effective performance.

D. Circuit Court Interpretations

1. Early Circuit Court Decisions Following Elrod/Branti/Rutan

In the 1980s and early 1990s lower courts were faced with many cases in which patronage appointees claimed that negative employment actions were taken against them in violation of their constitutional rights. Cases that were “easy” involved the dismissals of employees with jobs like cleaning person or waiter. In those cases, it was clear that the job was neither policymaking nor confidential and that party affiliation was not an appropriate requirement for the job. Most cases involving government lawyers or directors of public information were also easy because those were clearly policymaking or confidential jobs, and courts found a requirement of party affiliation to be appropriate.

So many cases arose, however, because most descriptions of actual duties performed by the plaintiff employees made it difficult to tell whether their jobs required particular party affiliations and, therefore, whether or not they were protected. In response, some lower courts created tests with criteria they could apply to determine on which side of

79. Id. at 65, 78.
80. Id. at 71 n.5.
81. See, e.g., Vazquez Rios v. Hernandez Colon, 819 F.2d 319, 324–25 (1st Cir. 1987) (holding that cleaning women, waiters, and a domestic services supervisor employed at a governor’s mansion were not “‘confidential’ public employee[s]” and were therefore protected against politically motivated discharge).
82. See id.
83. See, e.g., Brown v. Trench, 787 F.2d 167, 169–70 (3d Cir. 1986) (holding that the politically motivated dismissal of a county’s assistant director of public information was constitutional); Livas v. Petka, 711 F.2d 798, 800–01 (7th Cir. 1983) (holding that the politically motivated dismissal of an assistant state’s attorney was constitutional). But see Tavano v. Cnty. of Niagara, 621 F. Supp. 345, 350 (W.D.N.Y. 1985) (holding that an assistant county attorney’s political affiliation was irrelevant to effective discharge of duties in family court), aff’d, 800 F.2d 1128 (2d Cir. 1986).
the protection barrier each job fell. After Rutan, lower courts also had to decide whether actions other than firing, hiring, promoting, transferring, refusing to transfer, and failing to rehire were sufficiently severe deprivations to “press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy.” Once again, some courts created tests to determine whether specific negative employment actions were severe enough to pressure employees to change their political views or affiliations, or so minor that employees could be expected to bear them with relative equanimity.

The U.S. Court of Appeals for the First Circuit decided many of the early patronage employment cases. In doing so, the court devised a two-step test to determine whether party affiliation was an appropriate requirement for efficient job performance. First, the court would determine whether the position from which the plaintiff-employee was dismissed involved “decisionmaking on issues where there is room for political disagreement on goals or their implementation.” Second, if the answer to the first part was “yes,” then the court would examine the particular duties of the position’s job description to determine if the position was that of a policymaker, confidant, communicator, or other whose function made party affiliation an appropriate requirement. If the answer to the second part was “yes,” then the employee fell under the Elrod/Branti exception, did not have First Amendment protection, and could be dismissed for his or her political affiliation. The Fourth Circuit also adopted this test.

While Rutan was pending, the First Circuit also devised a test to determine what kind of job actions infringed employees’ First Amendment rights. Infringement occurs “when the employer’s challenged actions result in a work situation ‘unreasonably inferior’ to the norm for that position.” The court offered examples of when its standard would not

85. See, e.g., Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 241–42 (1st Cir. 1986) (en banc) (surveying test employed in numerous cases from various jurisdictions).
87. See, e.g., Vazquez Rios, 819 F.2d at 320. Many of the cases arose out of the change in administrations after the 1984 gubernatorial election in Puerto Rico. Id.
88. Jimenez Fuentes, 807 F.2d at 241–42. The court’s emphasis was on the duties in the job description of the position itself, not on the duties in fact performed by the person who held the position. Id. at 242.
89. Id.
90. Id. at 241–42.
92. Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209, 1218 (1st Cir. 1989).
be met by plaintiffs, reflecting its view that the government should be given some leeway in excluding those with different political affiliations from policymaking and independently performed tasks. The court also determined that plaintiffs would have to prove that their work conditions were unreasonably inferior by clear and convincing evidence. This very high standard of proof allowed government officials to make policy and implement it as voters presumably elected them to do. On the other hand, if plaintiffs met this standard, they would then have to prove by a mere preponderance of the evidence that the negative changes in their working conditions or responsibilities were caused by their political affiliations. This low standard of proof was designed to preserve the employees’ First Amendment rights.

The Seventh Circuit’s test to determine whether or not a government employee could be dismissed for political reasons focuses on whether the particular position allows “room for principled disagreement on goals or their implementation” and meaningful input into the decisionmaking process. Factors that the court listed as indicative of a position’s authorization for decisionmaking input included responsibility for many employees, high salary, and broad duties.

The Seventh Circuit has also held that although a statutory assertion that a particular job is a policymaking one is not absolutely determinative, statements by a state legislature to that effect are “entitled to great weight.”

Similarly, the Fourth Circuit concluded more than twenty years ago that when governors designate jobs as exempt from civil service law, they create a presumption that adverse employment actions may be taken against those job holders solely because of political affiliation. The court was skeptical about having courts make decisions about whether

93. Id. at 1219. Among those employer actions that are permissible: removing an employee’s perks; removing some responsibilities and excluding an employee from policymaking meetings, but allowing the employee to keep supervisory authority; requiring an employee to report to others instead of working independently; and temporarily assigning inferior tasks to an employee. Id.

94. Id. at 1220.

95. Id.

96. Id.

97. Id.

98. Tomczak v. City of Chicago, 765 F.2d 633, 641 (7th Cir. 1985) (quoting Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981)) (internal quotation marks omitted).

99. Id. at 642.

100. Lohorn v. Michal, 913 F.2d 327, 334 (7th Cir. 1990) (citing IND. CODE ANN. §§ 36-8-3-4(m), 36-8-1-12 (West 2006)) (stating that an assistant chief of police holds an upper level policymaking position and is therefore exempt from procedural requirements for dismissal, demotion, or discipline).

particular government positions should be part of the merit system or part of the political patronage system.102

2. Recent Federal Court Decisions Arising from Elrod/Branti/Rutan

It has been more than thirty-five years since the U.S. Supreme Court decided Elrod v. Burns, and yet there have been more than three hundred reported court opinions in patronage employment cases in the last five years. Some of the early patronage employment cases arose out of the 1984 gubernatorial election in Puerto Rico and were decided by the First Circuit.103 One might think that at least those kinds of cases would have been resolved, and yet, in 2011, the First Circuit had to decide cases with the same issues arising out of the 2008 election of Puerto Rico’s Governor. In one of the early cases, Vazquez Rios v. Hernandez Colon, the First Circuit held that cleaning workers, janitors, and supervisors in the governor’s mansion were protected from patronage dismissals.104 Twenty-four years later, the court had to decide, once again, whether maintenance and domestic workers in the governor’s mansion were unconstitutionally terminated because of their membership in the Popular Democratic Party.105 In 2011, the First Circuit was presented with a similar case in which the plaintiff was discharged from her job as a receptionist in an annex of the governor’s mansion when the governorship changed political parties.106 Patronage employment cases were also litigated after the 2000 gubernatorial elections in Puerto Rico.107 Even employment situations that would seem to have been settled in the courts keep arising in new litigation.

102. Id. at 141.
103. See, e.g., Rosario-Torres v. Hernandez-Colon, 889 F.2d 314 (1st Cir. 1989); Figueroa-Rodriguez v. Lopez-Rivera, 878 F.2d 1488 (1st Cir. 1988); Donate-Romero v. Colorado, 856 F.2d 384 (1st Cir. 1988); Santiago-Correa v. Hernandez-Colon, 835 F.2d 395 (1st Cir. 1987); Vazquez Rios v. Hernandez Colon, 819 F.2d 319, 320 (1st Cir. 1987).
104. 819 F.2d at 321–23.
105. Ocasio-Hernández v. Fortúño-Burset, 640 F.3d 1 (1st Cir. 2011). The court stated that the employees had not held policymaking positions, did not have access to confidential information about policy, and pleaded adequate facts that their political affiliations were in opposition to their employers, that their employers knew it, and that their affiliations were the cause of their dismissals. Id. at 6–8.
107. See, e.g., Cortés-Reyes v. Salas-Quintana, 608 F.3d 41, 45 (1st Cir. 2010) (holding that the political affiliation First Amendment rights of ranger cadets of the Puerto Rico Department of Natural and Environmental Resources were violated); Torres-
In 1988, the Eleventh Circuit held in Ray v. City of Leeds that a director of social services for the city was subject to discharge for political reasons. The court reasoned that because the position required decisions about the allocation of scarce resources, it was a policymaking position. Therefore, political affiliation was an appropriate job requirement, and the social services director was not entitled to First Amendment protection from dismissal.

Twenty or more years later, the Fourth Circuit decided cases about directors and assistant directors of social services, and those cases are highly illustrative of why prior job classification should be determinative of the constitutional protections the position deserves. In Nader v. Blair, the court concluded that an assistant director of the Baltimore Department of Social Services was a policymaker, noting that Maryland law gives the person in that position power to shape local policy and specifically states that that position was one from which an employee could be dismissed “for any reason, solely in the discretion of the appointing authority.” The following year in Fields v. Prater, the court held that an applicant for the position of director of a county department of social services in Virginia could not be refused the job based on her political affiliation because, under Virginia law, local directors do not have significant policymaking authority. The court noted that the local director position was specifically designated as “non-partisan,” and the job application form the plaintiff filled out stated that political affiliation would not be taken into account in hiring. The court acknowledged that it considered how the state classified a particular

Martínez v. P.R. Dep’t of Corr., 485 F.3d 19, 22–23 (1st Cir. 2007) (holding political affiliation First Amendment rights of a Department of Corrections worker were not violated because she did not show that her working conditions were “‘unreasonably inferior’ to the norm for that position” (quoting Rosario-Urdaz v. Velazco, 433 F.3d 174, 178 (1st Cir. 2006)))

109. Id.

110. 549 F.3d 953, 956–62 (4th Cir. 2008) (quoting Md. Code Ann., State Pers. & Pens. § 11-305 (Supp. 2004)) (internal quotation marks omitted); see also Freebery v. Coons, 355 F. App’x 645, 649 (3d Cir. 2009) (holding that a general manager of the Department of Special Services in Delaware could not demonstrate that his position did not require political affiliation and he was therefore not constitutionally protected from termination).


113. Fields, 566 F.3d at 388.
position, although it would not consider the classification “dispositive of the constitutional issue.”\textsuperscript{114}

In 2009, the Fourth Circuit admitted that applying the 1980 \textit{Branti} decision was “conflicting and confusing,”\textsuperscript{115} and that “it is not always easy to say that there is a clearly drawn line between those positions for which consideration of political affiliation is allowed and those for which it is not.”\textsuperscript{116} It is not reasonable that after thirty years the problem is still so difficult for government officials and courts. Taxpayers are not getting the efficient government they deserve when so much time and so many resources are spent on relitigating the same issues every time public offices change political parties. These suits get very little attention in the media, so newly elected politicians do not have bad publicity as an incentive for avoiding them. Personal liability is also often not a disincentive because governments often provide insurance for civil liability damages to protect public officials and employees even in their individual capacities.\textsuperscript{117} In fact, because the law is still so unclear, courts continue to hold in many patronage employment cases that government employers have qualified immunity and, therefore, are not liable for violating employees’ First Amendment rights.\textsuperscript{118} In 2010, the Seventh Circuit asserted that “[g]iven the uncertainty that litigants encounter in this somewhat murky area of the law, it is difficult for a

\begin{itemize}
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id. at 389 (quoting Jenkins v. Medford, 119 F.3d 1156, 1160 (4th Cir. 1996)) (internal quotation marks omitted).
\item \textsuperscript{116} Id.
\item \textsuperscript{117} See, e.g., N.C. GEN. STAT. § 160A-485 (2009) (providing authorization for cities and counties to provide insurance for themselves and any of their employees against civil liability for damages, including employees sued in their individual capacities); Anita R. Brown-Graham, \textit{Civil Liability of the Local Government and Its Officials and Employees, in COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA} art. 12, at 18 (2008), available at http://sogpubs.unc.edu/cmg/cmg12.pdf.
\item \textsuperscript{118} See, e.g., Moss v. Martin, 614 F.3d 707, 712 (7th Cir. 2010); Randall v. Scott, 610 F.3d 701, 716 (11th Cir. 2010); Cortés-Reyes v. Salas-Quintana, 608 F.3d 41, 51–53 (1st Cir. 2010); \textit{Fields}, 566 F.3d at 389; Peterson v. Dean, No. 3:09-cv-628, 2010 WL 5184794, at *8–9 (M.D. Tenn. Dec. 14, 2010). Government officials may receive a qualified immunity from liability when performing discretionary functions if their conduct “does not violate clearly established statutory or constitutional rights about which a reasonable person would have known” at the time the action took place. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For a discussion of the qualified immunity concept and problems arising from its current formulation, see generally John C. Jeffries, Jr., \textit{What’s Wrong With Qualified Immunity?}, 62 FLA. L. REV. 851 (2010).
\end{itemize}
plaintiff to avoid a qualified immunity defense in a case of first impression unless she occupies a low rung on the bureaucratic ladder.\textsuperscript{119}

A Ninth Circuit case provides another illustration of the difficulty in knowing what the law requires in many of these cases. In \textit{Diruzza v. County of Tehama}, the circuit court reversed a decision of the U.S. District Court for the Eastern District of California in which the lower court granted a summary judgment motion by the county, sheriff, and undersheriff defendants accused by a former deputy sheriff of violating her First Amendment rights by firing her because of her political support for the sheriff’s opponent.\textsuperscript{120} The district court was guided by cases in North Carolina, Alabama, and Illinois in which deputy sheriffs were deemed policymakers subject to termination for their political affiliations.\textsuperscript{121} The Ninth Circuit concluded, however, that a blanket rule about deputy sheriffs was not appropriate.\textsuperscript{122}

First, the Ninth Circuit cited cases in three other circuits in which political affiliation was deemed not an appropriate job requirement for deputy sheriffs.\textsuperscript{123} Then the court noted that even in the cases cited by the district court, the decisions were not based on the job title of “deputy sheriff,” but rather on the actual functions performed by people holding that position.\textsuperscript{124} The court concluded that under California law the title “deputy sheriff” did not clearly indicate job responsibilities; there were deputies who were high-level employees and deputies who were low-level employees and, therefore, the district court had to make an individual assessment about whether or not the plaintiff’s duties established her as a policymaker for whom political affiliation was an appropriate requirement.\textsuperscript{125}

A Tenth Circuit case, \textit{Poindexter v. Board of County Commissioners}, similarly involved the problem of determining from a job title what the job holder’s actual duties were.\textsuperscript{126} The position at issue was that of road

\textsuperscript{119} Moss, 614 F.3d at 712 (emphasis added). But see Gann v. Cline, 519 F.3d 1090, 1093 (10th Cir. 2008) (holding that a county commissioner was not entitled to qualified immunity because it was clearly established that “[d]iscrimination based on political non-affiliation is just as actionable as discrimination based on political affiliation”).

\textsuperscript{120} 206 F.3d 1304, 1315 (9th Cir. 2000).

\textsuperscript{121} Id. at 1309 (citing Jenkins v. Medford, 119 F.3d 1156, 1156 (4th Cir. 1997); Upton v. Thompson, 930 F.2d 1209, 1218 (7th Cir. 1991); and Terry v. Cook, 866 F.2d 373, 373 (11th Cir. 1989)).

\textsuperscript{122} Id. at 1311–13.

\textsuperscript{123} Id. at 1311 (citing Hall v. Tollett, 128 F.3d 418, 429 (6th Cir. 1997); Burns v. Cnty. of Cambria, 971 F.2d 1015, 1022 (3d Cir. 1992); and Dickeson v. Quarberg, 844 F.2d 1435, 1443–44 (10th Cir. 1988)).

\textsuperscript{124} Id. at 1311–12.

\textsuperscript{125} Id. at 1312–13.

\textsuperscript{126} Poindexter v. Bd. of Cnty. Comm’rs, 548 F.3d 916, 920 (10th Cir. 2008).
foreman in an Oklahoma county. The court held that the plaintiff’s First Amendment rights were not violated when he was demoted in favor of the county commissioner’s political supporter because the position of road foreman had a “significant political dimension and sufficient discretionary authority.” The court cited other circuit courts that had come to similar conclusions. Most telling about the confusion rampant in these cases was the Tenth Circuit’s description of a Fifth Circuit case, Wiggins v. Lowndes County. In that case, the court concluded that a road foreman did not have policymaking or discretionary duties and did not require confidentiality and, therefore, political affiliation was not an appropriate requirement for the job. What distinguished Wiggins from Poindexter was that Wiggins involved a road foreman in Mississippi, where there was also the more senior position of road manager. The Tenth Circuit concluded that an Oklahoma road foreman held a position similar to a Mississippi road manager, not a Mississippi road foreman.

The following brief descriptions of cases before courts throughout the United States within the last five years suggest that the current system of protecting workers is not working for government employees, who may have been treated wrongfully, for government employers, who may be sued wrongfully, or for taxpayers, who have to fund continual litigation on these issues. First, in Indiana, plaintiffs who held positions as an entry-level garbage man, dump truck driver, snow plower, and facility cleaner sued the city and the mayor for retaliating against them for their political activities by not rehiring them after they were terminated to cut costs. Next, in New York, the U.S. District Court for the Southern District of New York held that the mayor could fire the plaintiff city fire commissioner for his political associations because the fire commissioner was a policymaker. Finally, in Tennessee, the U.S. District Court for the Middle District of Tennessee held that election commission members

127. Id. at 918.
128. Id. at 920.
129. Id. at 920–21 (citing Langley v. Hot Spring Cnty., 393 F.3d 814, 818 (8th Cir. 2005); Gentry v. Lowndes Cnty., 337 F.3d 481, 487 (5th Cir. 2003); and Hoard v. Sizemore, 198 F.3d 205, 213–14 (6th Cir. 1999)).
130. Id. at 921 (citing Wiggins v. Lowndes Cnty., 363 F.3d 387 (5th Cir. 2004)).
131. Id. (citing Wiggins, 363 F.3d at 389–90).
132. Id. (citing Wiggins, 363 F.3d at 390).
133. Id.
were entitled to qualified immunity when they were sued by county administrators of elections who had been terminated allegedly because of their political party affiliation. The court asserted that “[i]n fact, the only thing clear now is that the law on [whether the position of administrator of elections was one to which political affiliation lacked a valid relation] remains unclear.”

IV. SOLVING THE PATRONAGE LITIGATION MESS

It is surprising and, particularly in poor economic times, burdensome on taxpayers that governmental resources have to be used year after year on these same cases. Clearly, the current state of the law makes the courts a very inefficient place to resolve these patronage employment issues. It just is not working.

Patronage employees and their political party bosses should not be able to have it both ways: receiving patronage jobs based on political connections, not on merit, but being protected from adverse politically motivated employment actions including dismissal, as though they were civil service workers. There has been much discussion about whether the patronage system or the civil service system is better at serving the interests of the citizen-taxpayer, and a reasonable conclusion is that some combination is probably best, but it is unreasonable to think that the best combination is patronage for hiring and civil service for firing. That arrangement results in governments hiring employees who are not necessarily qualified for their responsibilities, having a difficult time firing them, and then having a good chance of incurring litigation expenses for doing so. This arrangement is tilted much too far in the direction of the patronage employee—but, oddly enough, away from political organizations that cannot get rid of holdover patronage employees from a prior administration—and away from the expertise and efficiency that is in the interest of the citizen-taxpayer.

Perhaps it is time for the Supreme Court to revisit its Elrod/Branti/Rutan decisions. If it did, there is a good chance that the outcome would change the law and eliminate many of these patronage employment cases. None of the five Justices who were in the majority in Rutan remains on the Court. Two of the four dissenters, Justices Scalia and Kennedy, are currently on the Court. In the Court’s 2009–2010 term,

137. Id. at *9.
139. Id. (Scalia, J., joined by Rehnquist, C.J., Kennedy & O’Connor, JJ., dissenting).
Justices Scalia and Thomas voted together ninety-two percent of the time.\textsuperscript{140} Justice Kennedy was in the majority ninety-three percent of the time.\textsuperscript{141} The same was true for Justice Kennedy during the 2008–2009 term.\textsuperscript{142} Since the 2005–2006 term, Justice Kennedy “has been in the majority in more five-to-four decisions than any other Justice,” and in those decisions he has sided with the conservatives—currently Chief Justice Roberts and Justices Scalia, Thomas, and Alito—more than twice as often as with the liberals.\textsuperscript{143}

In light of the foregoing statistics and with more than twenty years of hindsight, parts of Justice Scalia’s dissenting opinion in \textit{Rutan} are still true and instructive.\textsuperscript{144} Justice Scalia noted then that it “is anybody’s guess” what is meant by asking whether “party affiliation is an appropriate requirement for the effective performance of the public office involved.”\textsuperscript{145} He also observed that the circuit courts devised a variety of tests for figuring it out, but the formulations “are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision.”\textsuperscript{146}

A few years later, the Sixth Circuit did devise a test for identifying some positions that would never receive First Amendment protection: positions that a statute specifically designates as having a patronage exception, positions that have discretionary authority, positions that involve confidential advising, and positions filled specifically for balancing out party representation.\textsuperscript{147} The Sixth Circuit has also routinely given presumptive deference to state legislatures when they determine that a position is not political and therefore entitled to First Amendment protection from adverse employment decisions.\textsuperscript{148} Nevertheless, Justice Scalia’s observation about the uselessness of such tests is borne out by recent cases within the Sixth Circuit.

\textsuperscript{141} Id.
\textsuperscript{142} Id. at 580–81.
\textsuperscript{143} Id. at 581.
\textsuperscript{144} \textit{Rutan}, 497 U.S. at 92–115.
\textsuperscript{145} Id. at 111 (quoting Branti v. Finkel, 445 U.S. 507, 518 (1980)).
\textsuperscript{146} Id.
\textsuperscript{147} McCloud v. Testa, 97 F.3d 1536, 1557 (6th Cir. 1996).
\textsuperscript{148} See, e.g., Back v. Hall, 537 F.3d 552, 556 (6th Cir. 2008); Rice v. Ohio Dep’t of Transp., 14 F.3d 1133, 1143 (6th Cir. 1994).
For example, in 2011, the Sixth Circuit heard a case in which the plaintiff, a former town director of constituent services, sued the town and the town’s supervisor for violating his First Amendment political association rights when she fired him, allegedly because of his support for the supervisor’s political opponent in the last election. The court had to decide whether the employee’s position was entitled to an Elrod/Branti exemption from First Amendment protection because political affiliation was a requirement for effective job performance. In the opinion, the court used the term “unclear” ten times. For instance, it was “unclear whether the Township distinguishes between political and nonpolitical employees, or whether some or all of the Township’s employees are considered to be part of the civil service.” It was also “unclear whether . . . the Director served as a confidential employee,” and it was “unclear about how much authority, if any, the Director had to implement or craft public policy.” Because of all the factual ambiguity, the court declined to grant summary judgment to the defendant supervisor based on a qualified immunity defense. If, after thirty-five years of the right being recognized for government employees to be protected from employment retaliation for choosing and acting on their political affiliation, courts still have a difficult time determining to whom that right applies, it is clear that the process is not working.

An example of a position that should have been but was not part of the New York civil service system was at issue in the 2010 Second Circuit case of Morin v. Tormey. The plaintiff, Bobette Morin, had been chief clerk of the Onondaga County Family Court since 1994, when she was appointed by a statewide panel of five people. New York law specifically prohibited her from engaging in political activity at work. When Morin refused to engage in political activities at the behest of the district administrative judge, she was demoted and forced to give up her position.

149. O’Connor v. Twp. of Redford, 428 F. App’x 600, 601–03 (6th Cir. 2011).
150. Id. at 604–05.
151. Id. at 603–08, 608 n.1. The court also used the terms “not clearly defined,” id. at 606, “vague,” id., “not even clear,” id., “ambiguous,” id. at 607, “lack of clarity,” id., and “ill-defined,” id. at 608.
152. Id. at 606.
153. Id. at 607.
154. Id. at 608; see also Wuopio v. Brandon Bd. of Educ., No. 08-11371, 2009 WL 2872718, at *7 (E.D. Mich. Sept. 2, 2009) (holding that a school district did not satisfy its burden of proving that the plaintiff was a confidential or policymaking employee and denying summary judgment on qualified immunity grounds).
155. 626 F.3d 40 (2d Cir. 2010).
156. Complaint with Jury Demand at 6, Morin, 626 F.3d 40 (No. 5:07-cv-00517-DNH-GJD).
as chief clerk.\textsuperscript{158} She sued the judge and others at the court, claiming that she was not a policymaker and therefore could not be demoted as a result of her refusal to engage in political activity.\textsuperscript{159} The Second Circuit agreed and concluded that she was entitled to First Amendment protection.\textsuperscript{160}

Three-and-a-half years of ongoing litigation—costing taxpayers litigation expenses and distracting a district administrative judge, a second judge, an executive assistant to the administrative judge, and a law clerk to the second judge—could have been avoided if Morin’s position had been part of the civil service system. If she cannot be fired or demoted because of her political actions or lack of political actions, then keeping her position outside the civil service system is not serving the usual patronage purpose of providing support for a political party. Her position is merely creating ambiguity and litigation.

V. CONCLUSION

As a practical matter, someone who receives a government job from a political patron, whether policymaking or menial, would feel a sense of loyalty to that person and his or her political party. That, after all, is the purpose of patronage—to create party loyalty. It therefore makes sense that a political appointee in any job might try to sabotage or spy on an incoming opposition administration. From that, it follows that the new administration would want to clean house upon taking office.

The best solution for the citizen-taxpayer is to have patronage employment positions be those for which, by definition, party affiliation is a requirement for effective job performance, and for all other positions to be part of civil service systems. Then the title, patronage or civil service, would define the protections from adverse employment decisions to which the employee would be entitled. All positions declared by courts as protected should by state legislation become civil service jobs. Such an arrangement would require the exertion of tremendous political will, an extremely unlikely turn of events.

It is more likely that one of these cases will be appealed to the Supreme Court, and the Court will overturn the \textit{Elrod/Branti/Rutan} opinions because the current formulation is unworkable. Instead, the Court might conclude that it will respect the decisions made in the political process.

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158. \textit{Id.} at 42.
159. \textit{Id.} 41–42.
160. \textit{Id.} at 46.
\end{footnotesize}
so that all workers in positions designated by elected officials as civil service will have First Amendment protection against negative employment decisions, whereas all other workers will be deemed to have patronage appointments and will be subject to politically motivated dismissals, demotions, and the like, just as their hiring was politically motivated. With such an arrangement, each state, city, and town can devise for itself the proper balance of civil service and patronage employees. Most Elrod/Branti/Rutan litigation would be eliminated, a benefit for cash-strapped taxpayers. New administrations would not be saddled with patronage appointees from opposition party administrations, better reflecting the will of the electorate.