COURTS, A PROTECTED BUREAUCRACY, AND REINVENTING GOVERNMENT

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I. Introduction

In 1990, the Supreme Court in *Rutan v. Republican Party of Illinois*,[1] prohibited hiring, recalls after layoffs, promotion, transfers, and terminations based on party affiliation for most government positions.[2] In this opinion, the Court extended earlier prohibitions against political dismissals that were outlined in *Elrod v. Burns* [3] and *Branti v. Finkel*.[4] As argued by the majority in *Rutan*, these patronage practices were not only impermissible infringements on the First Amendment rights of government employees, but the government's interest in securing a loyal, productive workforce could be served by less restrictive alternatives, such as "choosing or dismissing certain high-level employees on the basis of their political views" and by the "constructive discharge" of lower-level employees.[5] The Court's ruling in *Rutan* has been interpreted as signaling the end of the spoils system, an institution with few friends in law reviews, political histories, or the popular press, where it is portrayed as inherently evil.[6] Indeed, this negative view of patronage is explicit in the Second Circuit's opinion in *Alomar v. Dwyer*,[7] where the spoils system

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1. 497 U.S. 62 (1990).

2. For a discussion of *Rutan*, see Louis Cammarosano, *Application of the First Amendment to Political Patronage Employment Decisions*, 58 FORDHAM L. REV. 101 (1989); Steven G. Heinen, *Political Patronage and the First Amendment:* Rutan v. Republican Party of Illinois, 14 HARV. J.L. & PUB. POL'Y 292 (1991); Barry N. Johnson, Rutan v. Republican Party of Illinois: *Another Attempt to Eliminate Political Patronage*, 27 WILLAMETTE L. REV. 405 (1991).

3. 427 U.S. 347 (1976).

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

5. 497 U.S. 62 at 74–76.

6. For the claim that the courts were ending an era of patronage, see Martin H. Brinkley, *Despoiling the Spoils:* Rutan v. Republican Party of Illinois, 69 N.C. L. REV. 719 (1991); Heinen, *supra* note 2; Johnson, *supra* note 2; Pamela Rogers, Elrod v. Burns: *Chipping at the Iceberg of Political Patronage*, 34 WASH. & LEE L. REV. 225 (1977); Ellyn S. Weisbord, *The Influence of the Rutan Decision on Civil Service Patronage*, 43 LAB. L.J. 290 (1992); For a critical evaluation of patronage, see Cynthia Grant Bowman, *"We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago*, 86 NW. U. L. REV. 57 (1991). Among political histories, see ARI HOOGENBOOM, OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865–1883 (1968); PAUL VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE (1958).

7. 447 F.2d 482 (2d Cir. 1971).

was claimed to have a "devastating effect" on the "orderly administration of government."[8]

In this paper, we argue that the Court's rulings have been ill conceived, based on misconceptions of patronage and of the options available to elected officials in the control and motivation of government employees. In contrast to the view adhered to by the Court, job termination is not a personnel management tool that is readily available to supervisors in the public sector. Civil service rules, which have been installed as alternatives to patronage employment, make it difficult for supervisors either to reward productivity or to punish poor performance.[9] Their myriad webs of workplace rules, ironclad job protections, and strict salary schedules that reward seniority rather than productivity limit the options available to make the bureaucracy more accountable and effective. Indeed, under civil service systems, the government workforce is largely shielded from direct political control by elected officials, a condition not recognized by the Court. The development of civil service rules has been greatly influenced by public sector unions who are involved in drafting personnel policies.[10] Moreover, through the extension of broad collective bargaining rights and extensive political activity, unions are in a position to help elect the very officials with whom they must negotiate. The political power of public sector unions makes it unlikely that important changes in civil service rules will be adopted to grant elected officials the options for managing government employees that the Court seems to believe that they have.[11] In striking at patronage powers, the Court has served to make the bureaucracy more autonomous and, unwittingly, has contributed to the current state of discontent with the performance of government.

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8. *Id.* at 483.

9. The difficulty of disciplining public sector workers who do not perform is widely acknowledged.

> [M]any of the current systems demonstrate the worst of two worlds: The hiring process can be ponderous, frustrating both managers and highly qualified candidates for government jobs, and at the same time the mechanism for releasing poor performers can be even more daunting. Many managers are so stymied by the process that they would rather promote a poor performer into a new, useless job than initiate termination proceedings.

THE NATIONAL COMMISSION ON THE STATE AND LOCAL PUBLIC SERVICE, HARD TRUTHS/TOUGH CHOICES: AN AGENDA FOR STATE AND LOCAL REFORM 33 (1993).

The adoption of civil service systems at the state and local level is discussed in Pamela S. Tolbert & Lynne G. Zucker, *Institutional Sources of Change in the Formal Structure of Organizations: The Diffusion of Civil Service Reform, 1880–1935*, 28 ADMIN. SCI. Q. 22 (1983). For a history of the development of civil service reform at the federal level and how and why extensive protections were granted to federal workers, see RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE (1994).

10. JOHNSON & LIBECAP, *supra* note 9, discuss the role of federal employee unions as a lobbying group in the development of the federal civil service system. Discussion of the problems associated with public sector unions in the management of the government labor force and the provision of government services is provided in R. Theodore Clark, Jr., *Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 U. CIN. L. REV. 680 (1975) and in Robert M. O'Neil, *Politics, Patronage and Public Employment*, 44 U. CIN. L. REV. 725 (1975).

11. Public sector unions are widely recognized as being a major obstacle to institutional change. *See, e.g.*, THE NATIONAL COMMISSION ON THE STATE AND LOCAL PUBLIC SERVICE, *supra* note 9, at 25; Constance Horner, *Deregulating the Federal Service: Is the Time Right?*, *in* J. DIIULIO, DEREGULATING THE PUBLIC SERVICE 95 (1993).

There is widespread dissatisfaction with the performance of the bureaucracy.[12] Many citizens view government workers as being unresponsive to their demands, unproductive, and unaccountable. There is doubt as to whether the government work force, under the current set of incentives and protections, can deliver its expanded responsibilities.[13] The low standing of the bureaucracy in the eyes of the general electorate contributes to the suspicion that government has gotten too big, too costly, and bound by red tape.[14]

Because politicians have a direct interest in the effective provision of government services and more satisfied constituents, an effective campaign strategy for aspiring office holders is to denounce the bureaucracy and demand reform.[15] Indeed, various reform efforts have been mounted to make the bureaucracy more accountable and effective as part of the movement to "reinvent government."[16] Among these are open-meeting laws, increased access to public records, decentralization of government functions, and administrative rules requiring citizen notification and involvement prior to adoption of major new policies.[17] But more germane to personnel issues are programs to integrate business concepts, such as total quality management and the empowerment of workers, into government operations at the local, state and federal levels. Some of these are well-publicized, like the Gore Initiative for the federal government.[18] If the stakes are large in the reform of the federal government bureaucracy, they are even larger for local and state governments. In the face of high federal budget deficits, increasingly Congress mandates programs that

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12. A recent poll conducted for Business Week indicated that only six percent of those surveyed thought that the federal government performed well. BUS. WK., Jan. 23, 1995, at 41. Moreover, the national election results of 1994 can, in part, be attributed to the dissatisfaction the electorate has with government in general. Further evidence is the popularity of the book by DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT (1992). Their book outlines many of the problems with government and extends the promise of reform through the empowerment of public sector workers and the dismantling of red tape.

13. For discussion, see Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942 (1976).

14. The size and influence of government has, indeed, been expanding over time. In 1961, total government expenditures (federal, state and local) amounted to 32% of Gross National Product (GNP). In the same year, government civilian employment accounted for 13% of the total labor force. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 219, 323, 417, 435 (1961). By 1991, government expenditures were 42% of GNP, and government employment made up 15% of the work force. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 293, 318, 394, 445 (1993). But when addressing the issue of the size of government, the discussion should not be restricted to only budget items. According to a study by Thomas D. Hopkins, *The Cost of Federal Regulation*, 2 J. REG. & SOC. COSTS 5 (1992), federal environmental and other regulations end up costing consumers roughly 400 billion dollars annually over and above the agency management costs that appear in the budget.

15. James Q. Wilson has noted, "No politician ever lost votes by denouncing the bureaucracy." JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 235 (1989).

16. The theme of reinventing government has been promoted by OSBORNE & GAEBLER, *supra* note 12, and VICE PRESIDENT AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS, REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993).

17. See the citations in Frug, *supra* note 13, at 944; Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 432 (1989).

18. *See* GORE, *supra* note 16. *See also* JOHN J. DIIULIO ET AL., IMPROVING GOVERNMENT PERFORMANCE: AN OWNER'S MANUAL (1993).

must be funded and implemented by state and local governments. Moreover, personnel costs account for a larger share of state and local government expenditures, where voters are particularly aware of what they receive or fail to receive for their tax dollars.[19]

But if reinventing government is to occur, it must begin with fundamental changes in personnel rules to instill incentives for performance and to provide mechanisms for accountability to voters and their elected representatives. Ironically, the political hiring and firing of a portion of the government labor force historically provided for accountability and flexibility in staffing. Moreover, it helped to insure that government workers would be responsive to new electoral mandates. Those employees whose political allegiance differed from a new administration could be replaced by those who would implement its policies. And those employees who did not perform could be fired. Unfortunately, as civil service rules have replaced patronage and a "non-political" bureaucracy installed, politicians have been left with few tools for managing and directing the bureaucracy.[20] Hence, in a very real sense, by prohibiting the remaining controls available to elected officials through political patronage, the Court in *Elrod*, *Branti*, and *Rutan* has contributed to the problem of bureaucracy.

In the following section, a history of the involvement of the courts in the final demise of patronage is presented. In Section III, we consider why most of the political hiring and dismissal cases were brought by state and local employees, not federal. Next is considered the Court's rationale for prohibiting patronage practices. The majority of the Court appears to have accepted the premise that patronage is inherently evil, with few, if any, redeeming characteristics. Moreover, much of the dissenting argument offered in the various Supreme Court cases focused on issues other than the implications of a protected and insulated bureaucracy for the performance of government. Finally, in conclusion, we argue that meaningful change in the way government functions requires fundamental alterations in the government labor contract. Personnel changes must include greater flexibility in firing employees at all levels who do not perform or who oppose the policy agenda of the elected administration. Further, incentives for performance, such as merit pay and performance-based promotion, must be adopted. To accomplish these reforms, personnel issues must be returned by the courts to legislatures. Additionally, the courts must recognize that patronage-related practices can have positive value for the operation of government and the well-being of its citizens.

II. The Courts and the Demise of Patronage

Although patronage is a general term referring to the awarding of government benefits to individuals based on political affiliation, the focus in

19. In 1991, total federal civilian employment was 3.1 million. Expenditures for wages and salaries amounted to 10.4% of total expenditures. Total state and local employment in 1991 was substantially greater, 15.4 million. The corresponding figure for state and local expenditures on wages and salaries as a percent of total expenditures was 34.4%. U.S. BUREAU OF THE CENSUS (1993), *supra* note 14, at 293, 317.

20. For discussion of the inability realistically to separate politics from bureaucracy, see Terry Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213 (1990); and Terry Moe, *Politics and the Theory of Organization*, 7 J.L. ECON. & ORG. 106 (1991).

this paper is on the more narrow, partisan assignment of government jobs.[21] By its very nature, patronage assigns control over the government bureaucracy to elected officials, and thereby avoids many of the problems of motivation, performance, and flexibility that currently face elected officials. Patronage has a long history as part of labor relations in the United States for local, state, and federal governments, and indeed, in the nineteenth century, patronage was the principal means of allocating government jobs. The shift from patronage at the federal level began with the Pendleton Act of 1883 that authorized merit hiring for a small portion of the federal labor force.[22] In 1884, slightly over ten percent of the total federal civilian labor force of 131,208 was placed within the merit system.[23] Formal examinations were required before one could be hired into the merit service. Gradually, the merit system was extended and modified, and rules barring arbitrary dismissal were adopted. Patronage, however, remained more common at the local and state level. It was a popular institution among elected officials for the delivery of services to constituents, the mobilization of votes, a means of rewarding party faithful and the politically influential, and a source of campaign funds.[24]

Under patronage, individuals were granted government jobs by political mentors. These positions ranged from rank and file employment, such as garbage collectors, postal clerks, liquor store clerks, and park employees to more senior and confidential policymaking positions, such as Assistant County Clerk or Assistant Attorney General.[25] Patronage workers were expected to be politically active on behalf of their mentors, engage in campaign work, mobilize the electorate, deliver government services to key constituents, and contribute a part of their salaries in the form of political assessments. They did not have job tenure. Patronage employees expected their jobs to be short term, with removal a possibility upon the electoral defeat of their mentor, or if other political conditions dictated a change in employment. They were hired, fired, transferred, or promoted as necessary to advance the political fortunes of elected officials.

Hence, so long as patronage was effective in providing government services and as a means of securing votes, it was popular among politicians. Under patronage, government employees were accountable to the politician for whom they worked, and politicians used patronage employees as a means of securing re-election.[26] Accordingly, patronage practices provided a means for

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21. The definition could be extended to other grants of government benefits, such as government contracts, on strictly partisan criteria, but that extension is not necessary for our purposes.

22. 22 Stat. 403 (1883).

23. U.S. HOUSE OF REPRESENTATIVES, HISTORY OF CIVIL SERVICE SYSTEMS OF THE UNITED STATES AND SELECTED FOREIGN COUNTRIES 305 (1976) [hereinafter U.S. HOUSE].

24. *Id.* at 63–111. *See also* CARL R. FISH, THE CIVIL SERVICE AND THE PATRONAGE (1905); VAN RIPER, *supra* note 6; Tolbert & Zucker, *supra* note 9.

25. James Q. Wilson, *The Economy of Patronage*, 69 J. POL. ECON. 369 (1961).

26. Patronage studies include FISH, *supra* note 24; ERNEST S. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE CONSPICUOUS FAILURE, 1870–1900 (1974) [hereinafter GRIFFITH, 1870–1900]; ERNEST S. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE PROGRESSIVE YEARS AND THEIR AFTERMATH, 1900–1920 (1974); THOMAS M. GUTERBOCK, MACHINE POLITICS IN TRANSITION: PARTY AND COMMUNITY IN CHICAGO (1980); HOOGENBOOM, *supra* note 6; JOHNSON & LIBECAP, *supra* note 9; JACK H. KNOTT & GARY J. MILLER, REFORMING BUREAUCRACY: THE POLITICS OF INSTITUTIONAL

addressing problems of accountability and performance that currently plague the government labor force.

Recent court rulings, however, have eliminated patronage as a management option. Until the late 1960s, the courts were not involved in a major way in government employment issues. Indeed, the courts upheld the importance of removal power for the executive and flexibility for the legislature in creating and altering the terms of government employment.[27] Government employers were allowed to place restrictions on the First Amendment rights of their employees in order to promote the efficient delivery of government services. Patronage practices were considered a legitimate part of the labor contract for many employees who owed their jobs to political benefactors. Beginning in the late 1960s, however, a change in the way the courts perceived First Amendment rights and patronage practices led to the gradual rejection of politically-based dismissals, hiring, promotions, and transfers. By the 1990s, none of the key attributes of patronage remained unchallenged by court rulings.

Early case law essentially supported patronage practices. This support was based on the right-privilege doctrine that applied to all government employees and a waiver theory that applied to patronage appointees. Under the right-privilege doctrine, government employment was viewed as a state-granted privilege that could be withdrawn or conditioned as the public employer decided, rather than a right held by the individual. The waiver theory assumed that patronage workers surrendered some of their First Amendment rights as a condition for their political appointment and therefore, could not assert constitutional protection from patronage dismissal.[28]

For example, in 1951 in *Bailey v. Richardson*,[29] an equally divided United States Supreme Court affirmed a 2-1 appellate ruling that upheld the firing of a government employee for her political beliefs, noting that there was no constitutional guarantee of government employment. Twenty years later, in *American Federation of State, County, and Municipal Employees v. Shapp*,[30] the Pennsylvania Supreme Court refused to grant relief to dismissed non-policymaking state employees who had benefited from the patronage system, concluding that "[t]hose who...live by the political sword must be prepared to

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CHOICE (1987); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1982); MARTIN TOLCHIN & SUSAN TOLCHIN, TO THE VICTOR...POLITICAL PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE (1971); U.S. CIVIL SERVICE COMMISSION, HISTORY OF THE FEDERAL CIVIL SERVICE, 1789 TO THE PRESENT (1941); VAN RIPER, *supra* note 6; Joseph D. Reid, Jr. & Michael M. Kurth, *Public Employees in Political Firms: Part A, the Patronage Era*, 59 PUB. CHOICE 253 (1988); Joseph D. Reid, Jr. & Michael M. Kurth, *Public Employees in Political Firms: Part B, Civil Service and Militancy*, 60 PUB. CHOICE 41 (1989); Wilson, *supra* note 25.

27. Frug, *supra* note 13, at 970.

28. For discussion of the right-privilege doctrine and the waiver theory, see Frug, *supra* note 13, at 971; Marita K. Marshall, *Will the Victor Be Denied the Spoils? Constitutional Challenges to Patronage Dismissals*, 4 HASTINGS CONST. L. Q. 165, 170 (1977); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *A Constitutional Analysis of the Spoils System—The Judiciary Visits Patronage Place*, 57 IOWA L. REV. 1320, 1328 (1972).

29. 34 U.S. 918 (1951), *aff'g* 182 F.2d 46 (D.C. Cir. 1950).

30. 280 A.2d 375, 536 (Pa. 1971).

die by the political sword." Similarly, in a 1975 ruling, *Nunnery v. Barber*,[31] the Fourth Circuit refused to block the discharge of a patronage liquor store manager, noting that the plaintiff had been offered a choice between a patronage position and civil service job and had voluntarily accepted the former.

At the same time, precedents were being established for limitations on the executive's power of removal and rejection of the right-privilege doctrine and waiver theory. For example, in a 1952 opinion, the Supreme Court in *Wieman v. Updegraff*[32] held that certain constitutional rights of government employees were retained and could not be waived as a condition of employment.[33]

As the cases summarized here reveal, over the next twenty years, the courts expanded the First Amendment protections held by government employees, weakening patronage privileges, and creating a more autonomous bureaucracy in the process. The right-privilege doctrine and waiver theory gave way to a doctrine of unconstitutional conditions and the equal protection clause. The doctrine of unconstitutional conditions declared that whatever the Constitution prohibited government from doing directly, it also prohibited government from doing indirectly. Under this doctrine government employees could challenge restrictions on First Amendment rights as a condition for employment.[34] The equal protection clause forbade arbitrary classifications of individuals in determining who could be eligible for government employment.[35]

Two important cases that later were cited in rulings against political terminations of government employees were *Keyishian v. Board of Regents*[36] and *Perry v. Sindermann*[37] in 1967 and 1972, respectively.[38] *Keyishian* involved a constitutional challenge to New York state's teacher loyalty laws. Those faculty who failed to sign the loyalty oath were subject to termination. The Supreme Court ruled that public employment could not be conditioned upon the surrender of First Amendment rights of political association. In *Perry*, the Supreme Court upheld an appeals court ruling that a failure to renew the contract of a non-tenured faculty member because of criticism of the college administration was a violation of his rights under the First and Fourteenth Amendments:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number

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31. 503 F.2d 1349 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975).
32. 344 U.S. 183, 191–92 (1952).
33. In *Wieman*, the court ruled that a state statute requiring a broad loyalty oath as a condition of government employment violated the employee's rights of free association under the First and Fourteenth Amendments. Susan Lorde Martin, *A Decade of* Branti *Decisions: A Government Official's Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11, 17–18 (1989). For other discussions of the *Wieman* case, see Frug, *supra* note 13, at 972–93; Note, *supra* note 28, at 1343.
34. Van Alstyne, *supra* note 28, at 1446–49.
35. This reasoning had been used in the *Wieman* ruling. 344 U.S. at 192. *See* Van Alstyne, *supra* note 28, at 1454–57.
36. 385 U.S. 589 (1967).
37. 408 U.S. 593 (1972).
38. For instance, the Supreme Court in Elrod v. Burns, 427 U.S. 347, 359–60 (1976), cited *Perry* and *Keyishian* in ruling that patronage dismissals severely restricted political belief and association.

> 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.[39]

Other cases followed that directly addressed patronage practices and evaluated their standing with respect to First and Fourteenth Amendment rights. A characteristic of many of the rulings was a pronounced negative view of patronage. For example, in *Pickering v. Board of Education*,[40] the Court attempted to balance the state's interest in promoting the efficiency of government with an employee's interest in free expression, and held that the employee's rights were paramount, unless there was a justifiable state end. The government could not dismiss an employee for engaging in an activity that was not relevant to job performance and was otherwise constitutionally protected.[41]

Nevertheless, in *Alomar v. Dwyer*,[42] the Second Circuit ruled that Daisy Alomar could be discharged by the City of Rochester, New York, from her non-civil service position as an Assistant Neighborhood Service Representative for her refusal to change political parties. In the opinion, however, the court voiced a jaundiced view of patronage that was repeated in subsequent rulings that struck at patronage powers:

> The spoils system has been entrenched in American history for almost two hundred years. The devastating effect that such a system can wreck upon the orderly administration of government has been ameliorated to a large extent by the introduction of the various Civil Service laws.[43]

Similarly, in *American Federation of State, County, and Municipal Employees v. Shapp*,[44] the Pennsylvania Supreme Court stated:

> Regretfully for many of us, who believe that policies and political influence or patronage should be greatly limited and greatly reduced, and that able State employees, whose livelihood will be jeopardized should not be discharged for political reasons, we are compelled to hold that the Governor of Pennsylvania has the power and authority to hire and fire at will any and all employees who are not Constitutionally or statutorily protected—irrespective of their ability, their politics or their political connections.[45]

In 1972, in *Illinois State Employees Union v. Lewis*,[46] the Seventh Circuit not only ruled for the first time that partisan terminations as part of a patronage system violated First Amendment guarantees, but also stated that "[w]hile the patronage system is defended in the name of democratic tradition,

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39. 408 U.S. at 597. *See also* Steven A. Goodman, *Constitutional Law—Political Patronage*, 11 CUMB. L. REV. 735, 745 (1980).

40. 391 U.S. 563 (1968).

41. Note, *An Objective and Practical Test for Adjudicating Political Patronage Dismissals*, 35 CLEV. ST. L. REV. 277, 282 (1987).

42. 447 F.2d 482 (2d Cir. 1971).

43. *Id.* at 483. See reference to this quote from *Alomar* on the so-called "devastating effect" of patronage in Nunnery v. Barber, 503 F.2d 1349, 1351 (4th Cir. 1974) and in Illinois State Employees Union v. Lewis, 473 F.2d 561, 575 (7th Cir. 1972).

44. 280 A.2d 375 (Pa. 1971).

45. 280 A.2d at 378.

46. 473 F.2d 561 (7th Cir.), *cert. denied*, 410 U.S. 928 (1972).

its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment."[47]

In 1971 in *Graham v. Richardson*,[48] the Court rejected the concept that receipt of a government benefit depended on whether it was a right or a privilege. Although patronage was not an issue in the case, the position taken by the court later led to the rejection of the argument that patronage employees waived their rights to political affiliation as a condition of employment.[49]

In 1972, in *Shakman v. Democratic Organization*,[50] a district court provided additional constraints on patronage hiring and firing.[51] The court held that patronage intruded to disadvantage independent candidates and perpetuated political control by the dominant party through coercing political activity by patronage workers that affected voters and candidates alike.[52]

By the mid–1970s the judiciary had initiated major changes in permissible patronage practices. No longer could constitutional guarantees be waived as a condition for government employment. Further, the need to insure government efficiency through patronage's ability to secure accountability and loyalty was no longer seen as paramount.

A milestone in the movement against patronage practices was *Elrod v. Burns*.[53] This case represented the first time that the Supreme Court directly ruled on a central patronage practice, the firing of government employees upon a change in administrations. Patronage workers often were dismissed as part of a new administration's efforts to replace previous employees with those who were loyal to the newly elected officials and their administrative agenda. The removal of old employees also made way for elected officials to reward those who had supported them in the previous election and to prepare the ground for the next political campaign. *Elrod* signaled a more interventionist court that would take a more skeptical view of patronage, and the ruling was to fundamentally change patronage practices.

The case involved the constitutionality of patronage firing and whether dismissal for political reasons violated that employee's rights under the First

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47. 473 F.2d at 576. This passage was amplified and quoted in part by the Supreme Court in Elrod v. Burns. *See* 427 U.S. 347, 357 (1976). *See also* Glen S. Howard, Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297 (1974); Note, *supra* note 41.

48. 403 U.S. 365 (1971).

49. *Graham* was a welfare case involving a Mexican national. *Id.*

50. 356 F. Supp. 1241 (N.D. Ill. 1972).

51. The case was later overturned in 481 F. Supp. 1315 (N.D. Ill. 1979), *cert. denied*, 484 U.S. 1065 (1979), and a hiring plan was put into place. *See* Bowman, *supra* note 6.

52. Moreover, the court ruled that: "Political considerations in public employment are forbidden where those considerations affect voter-candidate-taxpayer rights...." 356 F. Supp. at 1242. Patronage hiring and firing for partisan reasons were permissible under other circumstances. However, the circumstances under which patronage practices would be allowed were not clear. In this sense, *Shakman* was the beginning of court opinions where the judiciary, rather than the executive or legislature, would take an active role in deciding just when patronage practices would be acceptable, and when they would not.

53. 427 U.S. 347 (1976). For discussion, see Garza Baldwin III, *Constitutional Law—* Elrod v. Burns: *Patronage in Public Employment*, 13 WAKE FOREST L. REV. 175 (1977); Leah M. Bishop, *Patronage and the First Amendment After* Elrod v. Burns, 78 COLUM. L. REV. 468 (1978); Rogers, *supra* note 6; Rosalind Ribyat Silverstein, *The Unconstitutionality of Patronage Dismissals of Public Employees:* Elrod v. Burns, 427 U.S. 347 (1976), 9 CONN. L. REV. 678 (1977).

Amendment. Upon a new election, where a change in parties occurred, it had been the practice in Cook County, Illinois, and elsewhere to fire those non-civil service government employees who were members of the other party if they did not change parties or obtain sponsorship from a member of the party organization. In December 1970, Richard Elrod, a Democrat, became Sheriff of Cook County, and he sought to replace four Republicans, who were non-civil service employees, with members of his own party. The respondents charged that their dismissals were based solely on their political affiliation and were violations of their First Amendment rights. One of the employees was Chief Deputy of the Process Division, another was a security guard and bailiff at the Cook County juvenile court, a third was a process server, and the fourth, an office employee.[54] In a plurality decision, the Supreme Court affirmed the holding of the Court of Appeals that the complaint was a valid one.[55] Moreover, the Court ruled that patronage dismissals violated the employees' constitutional rights under the First and Fourteenth Amendments.

In the opinion, the waiver theory was rejected. The Court held that any conditions on public benefits, including jobs, that dampened the exercise of First Amendment rights was prohibited. According to the ruling, government employment could not be conditioned on party affiliation. Further, the opinion stated that the threat of dismissal for failure to support the favored political party severely restricted political beliefs and association.[56] Patronage dismissals were held to impede the electoral process by depriving political support to the party that was out of power.[57] Hence, the justices concluded that patronage "is inimical to the process which undergirds our system of government and is at 'war with the deeper traditions of democracy embodied in the First Amendment.'"[58]

In contrast, the petitioners maintained that patronage served three vital government objectives that justified encroachments on First Amendment rights: patronage insured effective, efficient government by providing motivated employees; patronage guaranteed the loyalty of government employees to electoral wishes; and patronage preserved democratic processes by rewarding political activity.[59] But the plurality opinion, delivered by Justice Brennan and joined by Justices White and Marshall, rejected these arguments.[60] The efficiency arguments for maintaining patronage were dismissed. Party affiliation was seen as an insufficient barometer of performance, and inefficiencies were cited that would result from the wholesale replacement of public employees after an election with those that might not be more qualified than those they replaced.[61] The justices also questioned the importance of political loyalty for non-policymaking, non-confidential employees. Importantly, the Court suggested that there was a *less restrictive* means of achieving government efficiency through the dismissal of employees for

54. 427 U.S. at 350–51.
55. *Id.* at 350 (*aff'g* 509 F.2d 1133 (7th Cir. 1975)).
56. *Id.* at 355–60.
57. *Id.* at 356.
58. *Id.* at 357 (quoting Illinois State Employees Union v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972)).
59. *Id.* at 364, 367, 368.
60. *Id.* at 349.
61. *Id.* at 365–66. Evidence of "wholesale" dismissals in contrast to selective dismissals was not presented. We address the issue of dismissals in Section V.

cause.[62] As a result, the Court held that patronage dismissals might not advance the objective of government efficiency, let alone do so sufficiently to offset the loss of First Amendment rights. With regard to the issue of political loyalty to a new administration, the plurality held that a focus on policymaking officials was sufficient to advance the State's interest, and tried to provide guidelines for classifying positions into policymaking and non-policymaking.[63]

Although the justices recognized that no clear line separated policymaking from non-policymaking, they suggested that the nature of the position's responsibilities rather than the number of responsibilities determine whether the job is a policymaking one.[64] This vague standard not only insured subsequent confusion, but a central role for the courts in deciding whether a position was policymaking and hence, subject to patronage removal. Finally, the opinion went on to reject the argument that patronage was key for maintaining the democratic process, asserting that "political parties are nurtured by other less intrusive and equally effective methods."[65]

Justice Powell dissented, arguing that patronage employment democratized American politics by broadening political participation and preventing the rise of an elite, insulated bureaucracy.[66] Further, he asserted that patronage strengthened political parties and encouraged an "institutional responsibility to the electorate on a permanent basis."[67] Justice Powell claimed that the plurality "seriously underestimates the strength of the government interest especially at the local level in allowing some patronage hiring practices, and it exaggerates the perceived burden on First Amendment rights."[68] The dissent went on to describe the critical role patronage played in promoting and rewarding political involvement by citizens and to argue "that elected representatives of the people are better equipped than we to weigh the need for some continuation of patronage practices...."[69]

Following *Elrod* there was a series of cases that attempted to wrestle with the policymaking, non-policymaking distinction.[70] Because *Elrod* prohibited the firing of non-policymaking, non-civil service employees and because of the vagueness of the criteria involved, the courts, rather than the executive or

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62. *Id.* at 366 (emphasis added). The argument we pursue in this paper is that the Court was mistaken in asserting that "less restrictive" management options through firing government employees for cause were readily available to elected officials. As we emphasize throughout this paper, under civil service rules, government workers have virtually iron-clad tenure, making dismissals for any reason extremely difficult. Moreover, in terms of rewards or promotion based on performance, civil service rules provide few actual options. Promotions are based on seniority and the passage of time, rather than on productivity.

63. *Id.* at 368.

64. *Id.* at 367.

65. *Id.* at 372–73. Again as we argue here, the Court did not spell out what "less intrusive "alternatives were available for maintaining political parties. Just how political parties might reward loyalty and campaign support in the absence of patronage job possibilities was not addressed.

66. *Id.* at 379 (Powell, J., dissenting).

67. *Id.*

68. *Id.* at 382.

69. *Id.* at 386.

70. The problems of defining a criteria for policymaking/non-policymaking positions, along with early cases where the issue was addressed, are discussed in Kenneth G. Yalowitz, Comment, *Patronage Dismissals and Compelling State Interests: Can the Policymaking/Nonpolicymaking Distinction Withstand Strict Scrutiny?*, 1978 S. ILL. U. L.J. 278 (1978).

legislative branches of state and local government, necessarily were central in determining whether or not certain patronage practices would be allowable.

The problem of distinguishing between policy and non-policymaking positions was addressed in the Supreme Court ruling in *Branti v. Finkel.*[71] In this case, the Supreme Court modified the criteria it established in *Elrod* regarding when patronage dismissals might be constitutional. Rather than focusing on the question of whether the individual held a policymaking or confidential position, under *Branti*, the hiring authority was required to demonstrate that party affiliation was an appropriate requirement for the effective performance of the public position involved.[72] This new position shifted more of the responsibility for justifying patronage practices to elected officials and opened the way for further legal challenges by government employees.

The issue in *Branti* was whether Aaron Finkel and Alan Tabakman, two of six Assistant Public Defenders in Rockland County, New York, could be discharged in early 1978 by the new Democratic Public Defender, Peter Branti, who retained or appointed only Democrats. They had been hired by a Republican, and had held their positions since 1971 and 1975, respectively. The District Attorney urged Finkel to change his party registration to Democrat in order to be reappointed. Finkel and Tabakman sought a temporary restraining order and preliminary injunction to enjoin Branti from terminating them or otherwise altering their employment status solely because they were Republicans. Branti, relying on the *Elrod* guidelines, argued that they held confidential, policymaking posts. The district court issued a temporary restraining order.[73] Branti was permanently enjoined from dismissing them because of their political affiliation. The lower court found that both were fulfilling their jobs adequately according to job performance reports.[74]

On appeal, the Supreme Court found that patronage dismissals were constitutional only when the hiring authority demonstrated party membership to be an appropriate requirement for the effective execution of an employee's duties.[75] Justice Stevens presented the opinion of the Court, joined by Justices Burger, Brennan, White, Marshall and Blackmun. Justice Stevens noted that some government employees who occupied confidential positions could be subjected to a party affiliation requirement. Thus, if a public employee's private political beliefs interfered with his public duties, his or her First Amendment rights might yield to the state's interest in maintaining government efficiency and effectiveness.[76] The majority of the Court, however, held that Assistant Public Defenders were not policymakers and partisan political

71. 445 U.S. 507 (1980).

72. *See* Martin, *supra* note 33; Steven L. Murray, *Patronage Dismissals Under a First Amendment Analysis: The Aftermath of* Branti v. Finkel, 25 ST. LOUIS U. L.J. 189 (1981); Richard M. Simses, *The First Amendment Implications of Political Patronage Dismissals*, 27 LOY. L. REV. 219 (1981); Ashutosh Bhagwat, Comment, *Patronage and the First Amendment: A Structural Approach,* 56 U. CHI. L. REV., 1369 (1989); Kathleen M. Dugan, Note, *An Objective and Practical Test for Adjudicating Political Patronage Dismissals*, 35 CLEV. ST. L. REV. 277 (1987); David W. Steed, Note, *Does the First Amendment Incorporate a National Civil Service System?*, 14 IND. L. REV. 985 (1981).

73. Finkel v. Branti, 457 F. Supp. 1284 (S.D.N.Y. 1978).

74. 445 U.S. at 510; 457 F. Supp. at 1292.

75. 445 U.S. at 507.

76. *Id.* at 517.

interests were not at stake. In this divided opinion, the Supreme Court sustained the plaintiffs' arguments that their terminations would violate the First and Fourteenth Amendments of the Constitution.[77]

The Court majority continued to take a negative view of patronage, pointing to the arguments made by Justice Brennan in the *Elrod* decision.[78] The ruling set a new standard for patronage dismissals. Such dismissals were prohibited when the hiring authority could not demonstrate that political party affiliation was an appropriate requirement for the effective performance of the office involved.[79]

In dissent, Justice Stewart argued that Public Defenders were confidential employees and thereby, subject to patronage dismissal.[80] Also dissenting, Justice Powell criticized the majority for overlooking the potential contribution of patronage: "With scarcely a glance at almost 200 years of American political tradition, the Court further limits the relevance of political affiliation to the selection and retention of public employees."[81] Justice Powell argued that the ruling set a "constitutionalized civil service standard that will affect the employment practices of federal, state, and local governments."[82] Moreover, the standard was vague, gave the courts too great a legislative role in personnel decisions, and was certain to create vast uncertainty.[83] Justice Powell also argued that the First Amendment did not prohibit party membership as a condition for government employment when it furthered important government interests.[84] He asserted that patronage helped to build stable political parties by rewarding those who contributed time and money, and strong political parties served a variety of government interests. Further, patronage helped to promote government effectiveness by providing government employees who were sympathetic to the political views of the administration, and patronage dismissals helped to insure accountability to the wishes of voters.[85] Justice Powell concluded that, "In sum, the effect of the Court's decision will be to decrease the accountability and denigrate the role of our national political parties."[86]

Once again, given the broad criteria involved, both lower courts and the Supreme Court would have to play a central role in determining the extent and nature of patronage that could be allowed.[87] For example, further prohibitions

77. *Id.* at 519.
78. *Id.* at 516–18.
79. *Id.* at 520.
80. *Id.* at 521 (Stewart, J., dissenting).
81. *Id.* (Powell, J., dissenting).
82. *Id.*
83. *Id.* at 525.
84. *Id.* at 527.
85. *Id.* at 530.
86. *Id.* at 531.
87. In a case shortly after *Branti*, Garretto v. Cooperman, 510 F. Supp. 816 (S.D.N.Y. 1981), the district court criticized the new criteria for political dismissals and concluded that it would be hard to find a case where party affiliation would be indispensable to the effective performance of government duties. Hence, according to the court, the *Branti* test might rule out any patronage, an outcome that was opposed to the principles of a democratic electoral process. Other courts held that the *Branti* test modified the *Elrod* ruling to limit the political dismissal of policymaking and confidential public employees, and hence, attempted to decide whether party affiliation was an appropriate requirement for the effective performance of the public office involved. For discussion see Goodman, *supra* note 39.

against patronage practices were added by the Fourth Circuit in *Delong v. United States*,[88] where the court stated that "the *Elrod–Branti* principle must be construed to provide protection against a wider range of patronage burdens than threatened or actual dismissals."[89] The circuit court went on to restrict those patronage practices "that can be determined to be the substantial equivalent of dismissal," or which "impose upon the employee such a Hobson's choice between resignation and surrender of protected rights as to be tantamount to outright dismissal."[90] According to the court, the test would turn on the reasonable expectations of the employee. Going beyond ordinary terminations, the court ruled that transfer could be tantamount to dismissal.[91]

In 1986, in *Avery v. Jennings*,[92] the Sixth Circuit continued to give some leeway to politicians on the extent of permissible patronage, but the range of possibilities was becoming quite narrow.[93] The circuit court heard the appeal as a challenge to an informal patronage hiring system, where political officials depended on a network of friends and associates to make hiring decisions. The court ruled that although the system was not based explicitly on political affiliation, it had the effect of favoring the incumbent's political party. In ruling against Avery, the court held that "[A]lthough the First Amendment [U.S.C.A. Const. Amend. 1] prohibits official hiring policies based solely on political affiliation, it does not constitutionalize civil service standards or establish...hard and fast employment...."[94]

The court ruled that, "[n]either Congress, a state legislature, nor a local administrator may 'enact a regulation' against hiring members of a particular political party or exacting a loyalty oath, but elected official[s] may weigh political factors such as party allegiance along with other factors in making subjective hiring judgments."[95] But a year later, in 1987, the Third Circuit in

88. 621 F.2d 618 (4th Cir. 1980).
89. *Id.* at 623.
90. *Id.*
91. The case involved the Maine State Director of the Farmers Home Administration in the Department of Agriculture. Following the election of Jimmy Carter in 1976, Delong was reclassified and transferred to Washington, D.C., with no loss of pay or grade but a substantial reduction in responsibility. Delong challenged the transfer as politically motivated. The district court dismissed Delong's claim because he was in a policymaking position. On appeal, the circuit court remanded the case for reconsideration in light of the recent *Branti* ruling, and it also examined whether a transfer could be unconstitutional. In 1980, in Loughney v. Hickey, 635 F.2d 1063 (3d Cir. 1980), the stricter *Branti* standard allowed the plaintiffs to refile with the Third Circuit their claim that they had been terminated for political reasons. Their case had been dismissed earlier under the *Elrod* criteria. Loughney was Superintendent of Public Highways and a co-plaintiff, Osborne, was Superintendent of the Bureau of Refuse. Both were dismissed after an election, and they challenged their termination as being politically motivated. The district court found that they were discharged from their positions because of their political affiliations, but denied them relief under *Elrod* because they held policymaking positions. *See* 480 F. Supp 1352 (M.D. Pa. 1979). After the *Branti* ruling, however, the plaintiffs refiled. Although the court vacated the lower court's ruling, the circuit judge issued a criticism of *Elrod* and *Branti* and the associated intervention of the courts into government employment issues. The opinion is one of the few that recognized some benefits to patronage. 635 F.2d at 1065.
92. 786 F.2d 233 (6th Cir. 1986).
93. Deborah Avery, a Democrat and unsuccessful applicant for government employment in Cincinnati, Ohio, sued the County Clerk, Jennings, who was a Republican. She argued that political affiliation was a substantial factor behind her inability to find employment. Her case initially was denied by the court. Avery v. Jennings, 604 F. Supp. 1356 (S.D. Ohio 1985).
94. 786 F.2d at 234.
95. *Id.*

Bennis v. Gable[96] took a harder line against patronage, extending restrictions beyond political dismissals to demotions and other actions.[97] The ruling appeared to extend *Elrod* to any disciplinary action that might affect the exercise of First Amendment rights. A *Bennis* rule was adopted whereby: "[w]henever unfavorable action is taken against a person on account of that person's political activities or affiliation, it raises First Amendment concerns."[98]

Some district courts extended the prohibitions on patronage even further. The district court ruled in 1986 in *Indiana State Employees Association v. Indiana Republican State Central Committee*,[99] that individuals could challenge a refusal to hire them for non-policymaking positions, if the refusal was based on political beliefs.[100]

The capstone of judicial actions regarding patronage came in *Rutan v. Republican Party*.[101] In that case, the Supreme Court extended prohibitions against political dismissals and hiring to promotions, transfers, and recalls after layoffs.[102] Through this ruling, there appeared to be little left for any elected official to construct and maintain a traditional patronage system that would withstand judicial scrutiny.

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96. 823 F.2d 723 (3d Cir. 1987).

97. The case involved the demotions of police officers in Allentown, Pennsylvania, who had supported the incumbent mayor's opponents in the two previous elections. The plaintiffs asserted that they had been demoted to make room for the mayor's political supporters. 823 F.2d 723.

98. Bhagwat, *supra* note 72.

99. 630 F. Supp 1194 (S.D. Ind. 1986).

100. Three other cases followed in the late 1980s that provided some support for patronage, but the courts' view, rather than a legislative one, remained the deciding factor in determining what patronage practices would be acceptable. In a challenge to patronage-based transfers in Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236 (1st Cir. 1986), regional directors of the Urban Development and Housing Corporation in Puerto Rico fought a transfer from their positions for political reasons, claiming that the moves were in violation of the First and Fourteenth Amendments. The district court ordered their reinstatement. In a rehearing, however, the Court of Appeals held that the employees' positions were ones for which party affiliation was an appropriate requirement for effective performance of office, and reversed the preliminary injunction. The circuit court seemed to recognize the role of patronage hiring and firing in obtaining loyalty, initiative, and performance. It ruled that the positions were ones for which party affiliation was an appropriate requirement for effective performance of office, but as a general rule in patronage cases, the court was to examine whether the position related to partisan political interests before deciding its policy role or confidentiality. The "court's function [then]...is...to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served." *Id.* at 242. In Messer v. Curci, 881 F.2d 219 (6th Cir. 1989), the Sixth Circuit supported patronage hiring under certain circumstances. The court ruled that the Kentucky Department of Parks did not violate the civil rights of applicants for seasonal maintenance work, who were rejected in favor of others allegedly given preferential treatment on the basis of their political affiliation. The court claimed that the state's interest, which was served by political patronage hiring, outweighed any possible First Amendment infringements. 881 F.2d at 220. Moreover, in a statement that made this ruling atypical of the general trend, the court pointed to rank and file positions in saying: "The success of an administration and its public posture may well be decided more by the demeanor and esprit of the office manager, garbage collector, and road foreman than by the loyalty of the 'policymaking' chief assistant to the assistant chief of some bureau." 881 F.2d at 223. In the dissent, however, the more general view was voiced: "Political patronage in employment practices is not an appropriate means to implement a democratic mandate." 881 F.2d at 227 (Martin, Jr., J., dissenting). Finally, in Rice v. Ohio Dept. of Transp., 887 F.2d 716 (6th Cir. 1989), the Sixth Circuit ruled that the First Amendment did not prohibit the defendants from refusing to promote Rice for political reasons.

101. 497 U.S. 62 (1990).

The case involved an action, initiated in 1985 by Cynthia Rutan and others against the Republican party and Governor James R. Thompson of Illinois for the failure to recall them after layoff. The plaintiffs alleged that state officials conspired to create a partisan employment system, whereby hiring decisions, promotions, transfers, and rehires from layoffs, involving the approximate 60,000 state employees in Illinois, were to be based on political considerations.[103]

The Supreme Court ruled that it was an impermissible infringement on the First Amendment rights of low-level public employees for officials to base their promotions, transfers and recalls after layoffs on political affiliation.[104] The majority opinion delivered by Justice Brennan and joined by Justices White, Marshall, Blackmun, and Stevens, stated that "a government's interest in securing employees who will loyally implement its polices can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views."[105] Moreover, the majority repeated the claim made in the 1976 *Elrod* decision that "political parties are nurtured by other less intrusive and equally effective methods" than patronage, and "patronage decidedly impairs the electoral process by discouraging free political expression by public employees."[106] Further, it was asserted that no vital government interest was advanced by conditioning hiring on political beliefs.

As in *Elrod* and *Branti*, there was a vigorous dissent, in this case led by Justice Scalia, joined by Justices Rehnquist and Kennedy and, in part, by Justice O'Connor. Scalia called for restraint by the Court in intervening into a political practice that was "not expressly prohibited by the text of the Bill of Rights" and "bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic."[107] Scalia criticized the majority opinion that government benefits from patronage could never outweigh its coercive effects, which "reflects a naive vision of politics and an inadequate appreciation of the systemic effects of patronage in promoting political stability and facilitating the social and political integration of previously powerless groups."[108] According to Scalia, patronage should be decided by the people's representatives, not the courts. Justice Scalia repeated the three benefits of patronage outlined by Justice Powell in his *Elrod* dissent, and called for the *Elrod* and *Branti* decisions to be overruled.[109] *Rutan* was the most sweeping judgment against patronage, and the ruling represented the culmination of Court opinions against patronage.

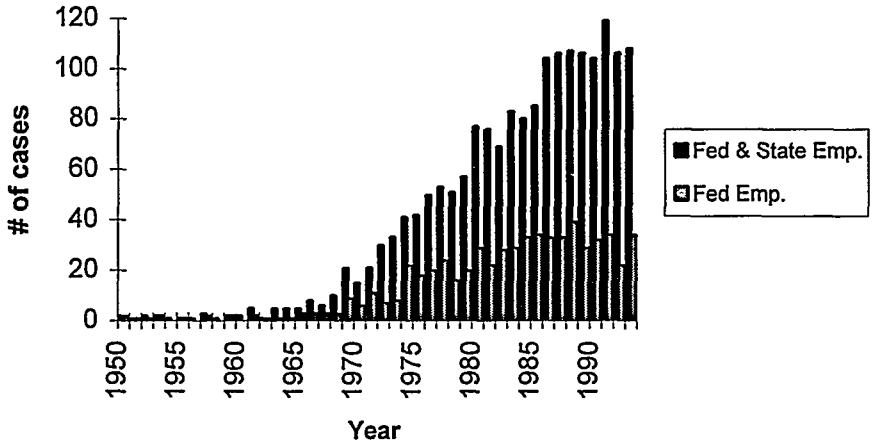
III. THE TIMING AND FOCUS OF FEDERAL COURTS ON STATE AND LOCAL PATRONAGE

Although cases challenging patronage practices involved all levels of government, *Elrod*, *Branti*, and *Rutan* addressed state or local government

102. *See* Cammarosano, *supra* note 2; Heinen, *supra* note 2; Johnson, *supra* note 2.
103. Rutan v. Republican Party, 641 F. Supp. 249 (C.D. Ill. 1986), *rev'd in part*, 868 F.2d 943 (7th Cir. 1989).
104. Rutan v. Republican Party, 497 U.S. at 75.
105. *Id.* at 74.
106. *Id.* at 74, 75. The reference is to *Elrod*, 427 U.S. 347, 372–73 (1976).
107. 497 U.S. at 95 (Scalia, J., dissenting).
108. *Id.* at 103–04 (Scalia, J., dissenting).
109. *Id.* at 110 (Scalia, J., dissenting).

employees, not federal. The emphasis by the courts on state and local cases involving challenges to patronage dismissals is demonstrated in Figure 1. The figure clearly shows a rise in judicial activity regarding patronage after 1970 and a dominance of state and local patronage cases over federal.[110]

Figure 1.
Number of Court Cases Pertaining to the Firing of a Government Employee by Year



Source: Lexis-Nexis MEGA Library (1950-1993)

One explanation for the focus on state and local employment relations is that in the mid–1970s the more egregious forms of patronage had long since disappeared at the federal level. Indeed, by 1950, close to ninety percent of the federal civilian labor force was within the competitive civil service.[111] Even that figure, however, overstates the amount of patronage available to politicians because of the limitations on political activity by government employees imposed by the Hatch Acts of 1939 and 1940.[112]

The Hatch Acts were the culmination of a gradual movement from patronage to an insulated and, ostensibly, politically-neutral federal civil service. Under the Hatch Acts most federal workers and state and local employees, funded by federal grants, were restricted from engaging in direct political activities. Because the Hatch Acts made government employees less available or valuable for partisan activities, the demand for patronage by politicians was greatly reduced. As a consequence, the number of positions that could be filled using political affiliation as a criterion declined to a minuscule proportion of total federal employment by the 1950s. Although exact numbers

110. The figure is drawn using a Lexis–Nexis search of a MEGA file for all available federal and state case law on patronage dismissals between 1950 and 1993. The four-fold increase in dismissal cases cannot be attributed simply to growth of government employment. Between 1970 and 1980, government employment increased 24%, with the bulk of the increase at the state and local level. U.S. BUREAU OF THE CENSUS (1993), *supra* note 14, at 317.

111. U.S. HOUSE, *supra* note 23, at 305.

112. 53 Stat. 1147; 54 Stat. 767. For discussion of the Hatch Acts, see JAMES R. ECCLES, THE HATCH ACT AND THE AMERICAN BUREAUCRACY (1981).

are not available, the federal civil service historian Paul Van Riper notes that, "[t]he number of civil offices easily available to the party in power at any one point in time had probably diminished to less than 15,000 by the end of 1952."[113] Total federal civilian employment in 1952 was just over two million, resulting in one patronage position per 133 federal employees.[114]

The proportion of patronage workers at the federal level declined even further after 1952. For example, by 1992, total federal civilian employment was slightly over three million, but only about 5,800 political appointments were available to the President.[115] The majority of the remaining political appointees were for top-level positions in the administration and would seemingly fall under the Court's exempt category for policymaking or confidential jobs.[116]

Many of the same pressures for reform that brought about the demise of patronage at the federal level also were present at the state and local level, but the response was more muted and not universal.[117] Civil service reform for state and city governments also began in the late nineteenth century. In general, the most populous states and cities with the corresponding largest government labor forces tended to be the earliest adopters of merit employment rules.[118]

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113. VAN RIPER, *supra* note 6, at 443.

114. U.S. HOUSE, *supra* note 23, at 305.

115. Total federal employment from U.S. BUREAU OF THE CENSUS (1993), *supra* note 14, at 343. This number does not include judicial appointments. Of the total slots available to the President about 1,500 are appointments that require the advice and consent of the Senate. Included in this category are department secretaries, federal commissioners, and agency directors and deputy directors. There are another 1,900 positions, including those on the White House staff, that the President can fill without the consent of the Senate. In addition, there about 700 non-career Senior Executive Service (SES) positions available to agency heads. No more than 10% of all SES positions can be filled by political appointees. Finally, there are some 1,800 Schedule C positions that are considered to be of a confidential or policy-determining character and are exempt from the competitive civil service. The selection of individuals for these positions is usually left to agency heads, although the President has the right to make the appointment. These figures were supplied to the authors by James Pfiffner of George Mason University and were derived from data obtain by him from the Executive Clerk to the President. James P. Pfiffner, *Political Appointees and Career Executives: The Democracy–Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57 (1987).

116. Branti v. Finkel, 445 U.S. 507, 517 (1980). *See* Martin, *supra* note 33, at 11. However, Justice Scalia, in his dissenting opinion, emphasized how the variety of tests adhered to after the *Branti* exception have produced "inconsistent and unpredictable results." Rutan v. Republican Party, 497 U.S. 62, 112 (1990).

117. GRIFFITH, 1870–1900, *supra* note 26, at 15, 98, 269–70, and ROBERT WIEBE, THE SEARCH FOR ORDER, 1877–1920, at 4–5 (1967), argue that civil service reform spread from the federal government to the major cities, where patronage was associated with corruption and inefficiency. The call for greater efficiency was at the center of urban reform efforts between 1870 and 1900. Competition among cities required greater efficiency that could not be provided through patronage—lower taxes, better services, professional police and fire protection, sanitation and transit. The efforts of early reformers to improve government efficiency through removal of bosses, machines, and patronage is discussed by Fred Greenstein, *The Changing Pattern of Urban Party Politics*, *in* THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE: CITY BOSSES AND POLITICAL MACHINES 1–13 (1964). Tolbert & Zucker, *supra* note 9, summarize other reasons for the adoption of civil service reforms.

118. According to the COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 223–25 (1941), seven of the 10 most populous states had adopted state-wide merit systems by 1941: New York, 1883; Illinois, 1905; Ohio, 1913; California, 1913; Michigan, 1937; Massachusetts, 1885; New Jersey, 1908. A notable exception was Pennsylvania. Raymond Wolfinger & John Field, *Political Ethos and the Structure of City Governments*, 60 AM. POL. SCI. REV. 321, 322 (1966), in an examination of the characteristics of cities that adopted civil service coverage for their employees in the early 1960s find a strong positive relationship

But even with progressive adoption of civil service rules, the proportion of employees covered by a merit system in the 1960s lagged far behind that at the federal level.[119] Moreover, even where merit systems were in place, numerous methods for circumvention existed.[120] For example, temporary workers usually were exempt from merit hiring procedures, and these positions could be extended repeatedly or renewed, keeping the same worker employed for long time periods. In addition, non-job-related tests and qualification standards were put in place to discourage the general public from seeking government jobs. In Chicago, under Mayor Richard Daley, job vacancies often were not well advertised.[121] Instead, they were listed with ward bosses, who would then direct their candidates to appear at the personnel office.

Through direct patronage hiring, where allowed, and through subterfuge where not, it is often claimed the Daley machine controlled over 30,000 patronage jobs.[122] Although Mayor Daley was also chairman of the Cook County Democratic Committee at the time, this figure represents an enormous number of patronage positions relative to that at the federal level. In 1967, the total number of local government employees in Cook County was 175,253, providing one patronage position per six employees.[123] Moreover, of the total number of government employees, 47,597 were in education, where the ability to use political influence in hiring was likely much reduced.[124] If even remotely correct, these numbers suggest that patronage appointees dominated most city and county departments under Mayor Daley. Pennsylvania is another example of widespread local patronage in the mid-twentieth century. It has been suggested that the Governor of Pennsylvania controlled over 50,000 jobs out of a total of 120,000.[125]

In general, although the availability of patronage positions varied widely across political jurisdictions, patronage practices were clearly a more

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between a city's size and the likelihood that its municipal employees will be under civil service rules.

119. It is generally recognized that merit system protections were less likely to be in place at the state and local level compared to the federal government. *See, e.g.*, JAMES RABIN ET AL., PERSONNEL: MANAGING HUMAN RESOURCES IN THE PUBLIC SECTOR 58 (1985). While the states of Iowa, New York, and Ohio require their cities to use merit systems, and in Massachusetts all local employees come under the jurisdiction of the state civil service commission, only 51% of the cities surveyed in the other states had complete coverage for their employees. Wolfinger & Field, *supra* note 118, at 314–15.

120. For discussion, see GUTERBOCK, *supra* note 26, at 15; O. GLENN STAHL, PUBLIC PERSONNEL ADMINISTRATION 47 (1976); Bowman, *supra* note 6.

121. Bowman, *supra* note 6, at 90.

122. *See, e.g.*, PETER KNAUSS, CHICAGO: A ONE PARTY STATE 98 (1972); TOLCHIN & TOLCHIN, *supra* note 26, at 41; Raymond E. Wolfinger, *Why Political Machines Have Not Withered Away and Other Revisionist Thoughts*, 34 J. POL. 365, 373 (1972).

123. U.S. DEPARTMENT OF COMMERCE, 1967 CENSUS OF GOVERNMENT, PUBLIC EMPLOYMENT, No. 2, at 209 (1967).

124. Teaching positions historically have been more permanent and less subject to patronage hiring and dismissal. This likely is due to the specialized training and certification requirements for teaching. Moreover, teachers unions have been more active than have been unions for other state and local employees. These unions have resisted patronage pressures on their members.

125. TOLCHIN & TOLCHIN, *supra* note 26, at 96. State employment figures, U.S. DEPARTMENT OF COMMERCE, *supra* note 123, at 70.

significant part of the political scene at the state and city level in the 1960s, than for the federal government.[126]

Another reason for the courts' focus on state and local patronage was the relatively rapid growth in government employment at those levels in the 1960s and 1970s, compared with that of the federal government. Between 1960 and 1970, state and local employment grew fifty-nine percent.[127] This rapid growth continued in the decade of the 1970s as employment expanded by thirty-one percent. In contrast, total federal civilian employment increased a mere nineteen percent over the entire period of 1960 through 1980, while the total population of the United States grew twenty-six percent.[128]

The rapid growth in state and local employment coincided with the rise of public sector unionism, a critical factor in the reaction against patronage. Indeed, as described here, public sector unions became leading opponents of patronage at the state and local level, where unions sought to replace patronage with civil service rules that they helped to draft. Although public sector unions were not new in the 1960s, much of their activity had been at the federal level. Creation of the merit civil service in 1883 raised the benefits and lowered the costs to federal employees of organizing into labor unions.[129] As such, federal employee unions and related lobby groups became a third party with an important stake in the further development of civil service systems. Those hired under merit provisions became a well-defined, distinct group among federal employees. As their positions became more permanent than under patronage, they had a greater interest in organizing to affect the nature of the federal labor contract in their behalf.[130] Further, under the civil service system, it became easier for federal employees to organize. Whereas under patronage, federal workers had identified with their political mentors and hence were fragmented,

126. Also see the comments by Wolfinger, *supra* note 122, at 365.

127. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 272 (1974).

128. *Id.*; U.S. BUREAU OF THE CENSUS (1993), *supra* note 14, at 8, 317.

129. Most of the early unions involved postal employees, the largest group of federal employees. Local assemblies of letter carriers were established through the Knights of Labor in New York, Chicago, and other cities in the late 1880s. In 1890 the National Association of Letter Carriers and the National Association of Post Office Clerks were formed. Railway postal clerks organized nationally in 1891 as the Railway Mail Association. As the classified service grew in the twentieth century, the unions that formed were general ones, such as the National Federation of Federal Employees (NFFE), organized in 1917, and the American Federation of Government Employees (AFGE), organized in 1932, both affiliated with the AFL. *See* JOHNSON & LIBECAP, *supra* note 9, at 77–81.

130. The growing interest among federal workers in forming labor unions after the Pendleton Act was passed was commented on by Sterling Spero, an early student of federal labor unions:

> Gradually, as the patronage of these lower positions disappeared, Congressmen and politicians generally began to lose interest in the post office clerks and carriers, and these workers, thus thrown on their own resources, soon found it necessary to unite among themselves in order to protect their interests and improve their lot. Besides, with their positions now made 'permanent', postal employees saw that they had a stake in the service and in good working conditions which they had not had before. Previously a man was in a government job one year and out of it the next, and it did not make very much difference if working conditions did leave much to be desired. But now these men began to feel that they were in the service to stay....The organized movement among postal workers was the natural outcome of this changed situation.

STERLING SPERO, THE LABOR MOVEMENT IN A GOVERNMENT INDUSTRY: A STUDY OF EMPLOYEE ORGANIZATION IN THE POSTAL SERVICE 61 (1927)

under the classified service, they began to identify themselves as a distinct and more unified group. This facilitated the successful formation of federal employee unions, which could then lobby Congress for legislative adjustments to the civil service system.[131]

By 1920 there were some fifty federal employee unions affiliated with the American Federation of Labor and between fifty percent and sixty percent of the federal civilian labor force belonged to those unions.[132] Membership temporarily declined following World War II, but recovered following President Kennedy's Executive Order 10,988, issued in January 1962. During the close 1960 presidential campaign, postal and other federal unions obtained a pledge from candidate John Kennedy that, if elected, he would back collective bargaining arrangements between federal workers and their agencies and departments.[133] Executive Order 10,988 established a labor-management program for federal executive branch employees, and contained provisions for the formal recognition of unions, an official status previously denied federal employee unions. Although the Lloyd–LaFollette Act of 1912 allowed federal employees to join unions without penalty of dismissal, that law did not formally recognize labor unions as bargaining units. With the 1962 executive order, federal unions were placed in a better position to represent their members' grievances over issues such as transfers, promotions, and discharge.

Executive Order 10,988 also contributed to the growth of state and local unions.[134] In 1959, collective bargaining at the state and local levels was almost non-existent. In that year, thirty-nine states had no public sector collective bargaining laws or policies on record and only one state required bargaining.[135] While numerous unions and public employee associations existed, only a small minority of workers at the state and local levels were organized. With the rapid employment growth in state and local governments, larger national unions began taking an interest in public employees. The American Federation of State, County and Municipal Employees (AFSCME), an affiliate of the AFL-CIO, undertook massive recruiting drives. Membership in the AFSCME increased rapidly in the 1960s, and by 1972 the union claimed 550,000 members, thus becoming the largest non-educational public sector union.[136] Other employee organizations also grew so that by 1970 over thirty percent of public sector employees were in unions or associations.[137]

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131. For example, the Lloyd–LaFollette Act, 37 Stat. 555 (1912), was passed during conflict between the Post Office Department and federal postal unions over pay legislation that was under consideration in Congress. The conflict between the Post Office Department and the postal unions, as well as related efforts of the unions to influence other legislation in the early twentieth century, illustrates the growing role of federal employees in defining the structure of the civil service system. For a more detailed discussion of how federal unions influenced legislation, see JOHNSON & LIBECAP, *supra* note 9, at 76–153.

132. *See* SPERO, *supra* note 130, at 45.

133. MURRAY B. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE 19 (1976); James L. Stern, *Unionism in the Public Sector*, *in* PUBLIC-SECTOR BARGAINING 55, 55–56 (Benjamin Aaron et al. eds., 1988).

134. Jack Stieber attributes Executive Order 10,988 as helping to spark the enactment of collective bargaining laws for state and local employees. JACK STIEBER, PUBLIC EMPLOYEE UNIONISM 117 (1973).

135. Richard B. Freeman, *Unionism Comes to the Public Sector*, 24 J. ECON. LIT. 41, 47 (1986).

136. STIEBER, *supra* note 134, at 2.

137. Freeman, *supra* note 135, at 45.

Commensurate with aggressive lobbying by AFL-CIO councils and other expanding public sector unions were changes in collective bargaining laws for state and local government employees. By 1969, only fourteen states had no explicit policy regarding collective bargaining, while eighteen had laws that required collective bargaining, and fifteen other states had provisions that encouraged dialogue between the unions and management.[138] This trend towards union recognition and collective bargaining continued into the 1970s as public sector unions became stronger and more militant. Increasingly, union demands were directed to a broad array of personnel issues, many of which collided with patronage practices.

Although wages and working conditions were ultimate union concerns, their bargaining strength depended on membership size and a sense of solidarity. Trade unions long pursued policies that would promote group cohesiveness without which "it is difficult to see how a union would be able to maintain its organizational strength...."[139] Equalizing wages among workers was seen as contributing to solidarity, and this objective became a public sector union goal. Further, all unions had to control the free rider problem if they were to be successful; that is, unions had to confront the incentive of individuals to remain outside the discipline of the union while receiving its benefits. Hence, unions attempted to organize an entire group of workers and obtain closed shop status. For public sector unions, the problem of establishing solidarity and maintaining union discipline was even more acute in the presence of a large patronage work force. As a result, a major objective of public sector unions was the elimination of patronage.

The inherent conflict between patronage and union membership is demonstrated in strikes. Work stoppages or strikes, where legal, are almost never in the interest of elected officials, but strikes are some of the strongest weapons in a union's arsenal. Patronage workers, however, owe their jobs and allegiance to their political benefactors, not to the union. If there is a large patronage work force that can perform the same tasks as unionized, non-patronage workers, then in the event of a strike, patronage workers can replace union workers. It follows that if unions were to present a strong credible threat to management, the size of the patronage work force would have to be reduced.

The benefits to reducing the size of patronage labor forces were recognized by public sector unions.[140] The AFSCME was especially active, and claimed that one of its primary objectives was "the extension of the merit system to all nonpolicy determining positions of all government jurisdictions."[141] At first, the AFSCME promoted the image of civil servants, who were often maligned, and lavished praise on the cities and states that adopted or improved civil service statutes.[142] Later, the union's tactics became more aggressive. Extension of merit system rules and protections to blue collar

138. Freeman, *supra* note 135, at 47.

139. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 80 (1984).

140. Eldon Johnson comments that "[n]o motivation of civil service unions is stronger than the desire to maintain and extend the merit system." Eldon Johnson, *General Unions in the Federal Service*, 2 J. POL. 23, 38 (1940).

141. LEO KRAMER, LABOR'S PARADOX–THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL–CIO 27 (1962).

142. STIEBER, *supra* note 134, at 115.

employees, particularly state highway department workers, became a major goal of the AFSCME and other public sector unions in the 1970s.[143]

In West Virginia, the highway work force had been considered a patronage plum. But when Republican Governor Moore took office in January of 1969, after eight years of Democratic rule, he was confronted by a newly-organized group of road workers who petitioned for union recognition.[144] The petition was turned down, and the highway workers went on strike. Following a blizzard that "caused mammoth traffic tie-ups and accidents which endangered lives," Governor Moore fired 3,400 highway workers.[145] Although the Governor had considerable public support, the unions had shown that they were capable of organizing patronage workers who were on the losing side of an election.[146] Similar events were transpiring elsewhere.

After the election of Republican William Scranton as Governor of Pennsylvania in the early 1960s, the state's Transportation Department dismissed some 7,800 Democrats and replaced them with Republicans.[147] In 1970 with the election of Democrat Milton Shapp as Governor, 3,500 Republican highway workers who were not protected by civil service rules were fired.[148] This time, however, the unions came to the support of the fired patronage workers. AFSCME Area Director Gerald W. McEntee stated that:

> [w]e feel strongly that an administration should be able to pick the people it wants in policymaking jobs. There you have every right to have men with compatible philosophies. But when you get down to road maintenance men, that's not necessary. In fact, it's ridiculous. And it has to stop somewhere.[149]

The AFSCME, on behalf of several thousand Pennsylvania highway workers, brought suit claiming that political affiliation was an improper ground for discharge and alleging a denial of due process.[150] But as noted in the previous section, the Pennsylvania Supreme Court held that the employees had failed to establish a constitutional right to continued employment.[151]

Despite the setback in Pennsylvania, the AFSCME continued to pursue the issue of patronage-related dismissals in the courts. In *Illinois State Employees Union v. Lewis*,[152] the union met with some success. John Lewis was the newly appointed Republican Secretary of State, and he had laid off or replaced half of the Democrats who held appointed positions. Lewis claimed in an affidavit that "the efficiency of the office was at such a low ebb that...it was vitally and immediately necessary to make large scale changes in the manner in

143. STIEBER, *supra* note 134, at 124.
144. *The Striker's Lonely Road*, BUS. WK., Sept. 27, 1969, at 54.
145. *Id.*
146. West Virginians were used to the spoils system and "[a]lmost everybody agrees that Moore had overwhelming public support for his action, including Kirker and Miles Stanley, president of the West Virginia Federation of Labor, who supported the strike." *Id.*
147. *Taking the Politics Out of the Paycheck*, BUS. WEEK, May 22, 1971, at 22.
148. *See id.*
149. *Id.* at 22.
150. American Fed'n of State, County and Mun. Employees v. Shapp, 280 A.2d 375, 376 (Pa. 1971). The AFSCME had obtained a temporary injunction from the lower court that prevented further firings. This victory was short-lived, but celebrated in the AFSCME publication, THE PUBLIC EMPLOYEE 1 (June 1971), with the headline, "AFSCME Puts Stop to Penn. Patronage."
151. 280 A.2d at 378.
152. 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).

which the office was being run and in the ranks of personnel that were then employed."[153]

A number of the dismissed employees, however, charged that they previously had been contacted and requested to change their party affiliation to the Republican Party. On behalf of the dismissed employees, the union argued that their firings had been based on political affiliation and thus, violated their rights under the First and Fourteenth Amendments. Although the district court entered summary judgment for the defendant, the Court of Appeals for the Seventh Circuit decided that non-policymaking state employees, even though not explicitly protected by civil service rules, could not be discharged solely for refusing to transfer political affiliation. The lower court ruling was reversed and remanded. This was the first decision to hold that patronage dismissals infringed First Amendment rights.

Public sector unions were explicitly involved in a number of other cases involving patronage dismissals that predate the plurality opinion in *Elrod*.[154] The record seems clear that unions were attempting to influence public opinion and the opinion of the courts regarding patronage, and these cases likely had an impact on the Supreme Court in *Elrod*.

Lawrence Friedman has argued that "the strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups."[155] Indeed, the social and political environment was changing in the post World War II period in ways that damaged the legal standing of patronage. The rights-privilege distinction was becoming blurred, and closely related civil rights issues occupied both the public's and the courts' attention, especially in the 1960s.[156] Public sector labor unions, as a well-organized pressure group, were able to take advantage of these new conditions. Moreover, public sector unions were aided in their efforts by popular negative views about patronage.

IV. THE BOGEY OF PATRONAGE

Throughout most of the nineteenth century, government workers were employed as political patronage. At that time, patronage was a popular institution with few of the negative connotations that are associated with it today. Under Andrew Jackson, it was viewed as a means for democratizing government service.[157] Paul Van Riper notes that "[i]n the eyes of the common man of Jacksonian persuasion, unquestionably the spoils system represented a 'reform' which tightened the bond between the people and their government."[158]

Misgivings began to rise after the Civil War as the size of patronage work forces grew and became more difficult to manage. With growing scandals and allegations of inefficiency that embarrassed politicians, especially at the

153. 473 F.2d at 564.
154. *See, e.g.*, Indiana State Employees Ass'n v. Negley, 357 F. Supp. 38 (S.D. Ind. 1973).
155. LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 14 (1973).
156. *See* Van Alstyne, *supra* note 28. *See also* the comments by Justice Brennan in Elrod v. Burns, 427 U.S. 347, 361–62 (1976).
157. *See* FISH, *supra* note 24, at 157; VAN RIPER, *supra* note 6, at 32–56.
158. VAN RIPER, *supra* note 6, at 56.

federal level, patronage came under attack, and gradually merit employment was implemented and expanded by elected officials.

Commentaries of the progressive era, however, have been extremely critical of patronage, portraying the shift to merit as a moral crusade.[159] According to this view, civic reformers fought corrupt politicians who used patronage to insure their own and their party's re-election and continued access to the spoils. The overriding goal of reformers described in these historical accounts was the de-politicalization of the federal work force. Achievement was thought possible through elimination of the tie between government employment and party affiliation and the creation of a politically neutral labor force, whereby policy administration could be based solely upon expertise and professionalism.

This view of patronage generally has not been challenged, and it has contributed to a perception, especially among academicians, that the institution is inherently evil. Frank Sorauf notes that "[i]t was not long ago that political scientists reacted instinctively against patronage much as they reacted against slavery, aggressive war, and divine right monarchy."[160] More importantly, this negative view of patronage has been incorporated into Supreme Court opinions.

In *Elrod v. Burns*, Justice Brennan, while noting that patronage had been popular during the Presidency of Andrew Jackson, went on to state that "[i]t has been used in many European countries, and in darker times, it played a significant role in the Nazi rise to power in Germany and other totalitarian states."[161] The opinion's message was clear: patronage was to be avoided at all costs. Although Justice Brennan provided the caveat that "[o]ur inquiry does not begin with the judgement of history," history, nonetheless, mattered in the Court's opinion. Justice Brennan stated: "[T]he actual operation of a practice viewed in retrospect may help to assess its workings with respect to constitutional limitations."[162] Indeed, the opinion stated that if patronage were "to survive constitutional challenge, it must further some vital government end."[163] But a positive role for patronage was rejected. According to the Court, patronage not only failed to advance the state's interests but was an obstacle: "[T]he prospect of dismissal after an election in which the incumbent party has lost is only a disincentive to good work."[164]

It is our view, however, that it is not enough for the Court simply to describe a practice as improper or repugnant. Some attempt should be made to discover why the institution survived, especially one as long standing as patronage, and to assess what would happen if it were made illegal.[165] Indeed, patronage has positive attributes, and the popular view that it is an evil institution is based on a number of myths or misconceptions.

One myth is that patronage was purely a partisan institution with little benefit to voters. The fact that patronage was, for many years, considered a

159. *See, e.g.*, HOOGENBOOM, *supra* note 6; VAN RIPER, *supra* note 6, at 538–39.
160. F. J. Sorauf, *Patronage and Party*, 3 MIDWEST J. POL. SCI. 115 (1959).
161. 427 U.S. 347, 353 (1976).
162. *Id.* at 354.
163. *Id.* at 363.
164. *Id.* at 364.
165. An insightful example of this type of questioning is contained in R.H. Coase, *Payola in Radio and Television Broadcasting*, 22 J. L. & ECON. 269 (1979).

valuable practice should cause reflection on those circumstances by the Court, not merely an acknowledgment of the fact. After all, the spoils system was popular for a long time. It was viewed as a means of promoting democratic access to government and insuring accountability between government employees and their political mentors. Those who strayed from the desires of politicians could be (and were) fired.[166]

Although politicians had the power of dismissal, that does not mean they used it indiscriminately. On occasions, wholesale firings did occur with the change of the political party holding office. Politicians, however, also recognized the need to have a well-functioning government. Paul Van Riper, commenting on the spoils system in the nineteenth century, noted that "there constantly remained a stratum of civil service which helped to maintain continuity and competence in administration. Even the most partisan of executives could comprehend the need to maintain a basic level of administrative efficiency by retaining a few key officials."[167]

The ability to pick staff and other employees not only allowed elected officials to insure loyalty in implementing policy, but it gave them the ability to reward highly efficient workers. In turn, elected officials were held directly responsible to the voters for the delivery of services by patronage workers. As long as this chain of responsibility was maintained, patronage would not be inconsistent with basic democratic principles.

A second myth is that politicians cannot be relied upon to modify or remove unacceptable aspects of patronage, and hence the courts must intervene. Although the prevailing historical account of patronage places blame for nineteenth century corruption on politicians and asserts that they were coerced in supporting merit reforms, proponents of this view have failed to recognize the central role of elected officials in establishing a limited civil service system to address the problems of patronage. Because they were subject to voter review, politicians had an incentive to replace those aspects of patronage that no longer generated electoral support, and they did. After 1883, federal politicians gradually reduced patronage practices and replaced them with merit hiring provisions for many federal government positions. Patronage was maintained for certain positions, especially at higher levels.[168] The reactions of federal politicians in responding to voter demands regarding changes in nineteenth century patronage practices suggests that the legislative process can adjust the government-labor contract as needed. In judicial rulings on patronage, however, this appreciation is lacking, and legislatures largely have been pushed aside in favor of the courts.

The case of nineteenth century civil service reform, however, indicates that politicians made significant changes in the government-labor contract without judicial involvement. Major political pressures for change came from urban business groups, who were well-organized and provided campaign funds. Business groups were particularly affected by inefficiencies and scandals in the large post offices and customs houses that were staffed by patronage employees.[169] More broadly, with the growth of the federal labor force in the

166. *See* JOHNSON & LIBECAP, *supra* note 9, at 14–16.
167. VAN RIPER, *supra* note 6, at 51.
168. For discussion, see JOHNSON & LIBECAP, *supra* note 9, at 12–75.
169. For an account of these events, see JOHNSON & LIBECAP, *supra* note 9, at 12–47.

nineteenth century came commensurate increases in the number of patronage positions, which raised the costs of negotiating and administering the distribution of the spoils and of monitoring the performance of patronage employees.[170] The President and Members of Congress were forced to devote more and more time to the allocation and monitoring of patronage appointments, including seeing that they were filled by individuals who would be both obliged to them and would advance their political goals. Federal politicians were facing growing complaints from voters that the expanding patronage labor force was not providing them with the services they desired from the federal government.[171]

The monitoring problem was made more difficult by the physical separation of politicians in Washington, D.C., from politicians at the state and local level, who worked directly with patronage employees. These two groups of politicians had different constituents and conflicting aims regarding the use of federal patronage workers. Scandals, inefficiencies, and corruption associated with patronage employment damaged national politicians in the eyes of business, commercial, and many voter groups, while the net benefits of patronage generally remained large for the local party machine.

Accordingly, federal politicians were increasingly motivated to replace patronage, at least for certain positions, and they responded with the Pendleton Act. This understanding contrasts with the common historical view that civil service changes were due to progressive reform groups succeeding over an unwilling Congress.[172] Indeed, according to this view, civic-minded reformers worked to deny the re-election of members of Congress, who were supporters of the spoils system and to replace them with members sympathetic to reform. But the voting record on the Pendleton Act reveals that the willingness to support reform had little to do with the ousting of patronage supporters.[173] Instead, support for reform was particularly strong among members who represented a locality with either a large post office or customshouse in the vicinity. These were the installations that had attracted the most complaints from user groups. Of the thirty-six members of the House who had such a federal establishment in their vicinity and who voted on the bill, thirty-five voted in favor of reform.[174] Additionally, the federal civil service reform associations, generally cited as the major proponents of the shift to merit employment, had largely withered away by the end of the nineteenth century, but the portion of merit employees continued to grow rapidly through 1930.[175] The shift from patronage primarily was accomplished through executive orders issued by the President, often with the strong support of Congress.

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170. The implications that growth of the government labor force had for the ability of politicians to control patronage workers was well-recognized at the time. *See* JOHNSON & LIBECAP, *supra* note 9, at 41.

171. *See* JOHNSON & LIBECAP, *supra* note 9, at 18–24.

172. Two key works that adopt this view are HOOGENBOOM, *supra* note 6, and VAN RIPER, *supra* note 6.

173. In the Senate, the bill was passed by a vote of 38 to 5, with 33 absent. 47 Cong. Rec. 661 (1882). The yea votes were provided by 23 Republicans, 14 Democrats, and 1 Independent. All 5 of the nays came from Democrats, 4 of whom were from the South. In the House, the bill was approved with a vote of 155 to 47, with 87 not voting. 47 Cong. Rec. 867 (1883). The votes in favor were cast by 102 Republicans, 49 Democrats and 4 Independents. Negative votes were cast by 7 Republicans, 39 Democrats, and 1 Independent.

174. JOHNSON & LIBECAP, *supra* note 9, at 35.

External reform groups also were active at the state and local level in the first half of the twentieth century, but the adoption of merit systems occurred later and in a more limited way than at the federal level.[176] Indeed, it appears that by the late 1960s, voters had a positive view of the job performance of patronage employees at the local level. Although published accounts of Mayor Daley's Chicago machine do not contain systematic analyses of the performance of his administration in the delivery of basic services, available evidence suggests that the city government "worked."[177] By contrast, the rise of public sector unionism, accompanied by a further decline in patronage in the 1970s, brought militancy and strikes.[178] Concomitantly, citizen perceptions of government performance have declined over the last two decades.[179]

Another myth about patronage is that its overt political nature could be avoided with the installation of a politically neutral bureaucracy. This notion was promoted by early students of public administration, who believed that the creation of a professional bureaucracy, largely independent of politicians, was not only possible, but desirable.[180] While a professional bureaucracy devoid of political interference in the administration of policy may still be viewed as an ideal by some, the resulting lack of control inherent in such a system has also allowed bureaucrats leeway to alter outcomes to fit their own political preferences.[181] Indeed, an independent bureaucracy that has job tenure, comparatively high salaries, and weak political controls is at the core of the problem of limited accountability and poor performance of government.[182]

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175. HOOGENBOOM, *supra* note 6, at 256–67.

176. Writing in 1960, Frank J. Sorauf comments that "[w]ith little fanfare and only quiet celebration the movement to install merit systems in place of the older patronage is well on its way to full victory." Frank J. Sorauf, *The Silent Revolution in Patronage*, 20 PUB. ADMIN. REV. 28 (1960). For a brief history, see KNOTT & MILLER, *supra* note 26, at 33–54.

177. *See, e.g.*, Bowman, *supra* note 6. Although Bowman does not investigate the actual provision of government services in Chicago, GUTERBOCK, *supra* note 26, at 236, notes that many thought of Chicago during the Daley era as "the city that works."

178. Freeman, *supra* note 135, at 66, notes that "between 1960–64 and 1976–80, the number of stoppages in the public sector rose from 32 per year to 500 per year." (citing U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS (1971 and 1983)).

179. Opinion survey results indicate a decline in Americans' perception of government. For example, in 1975, 27% of those surveyed thought government should do more relative to individuals and the private sector. By 1989, that figure had declined to 14%. *See* AN AMERICAN PROFILE—OPINIONS AND BEHAVIOR, 1972–1989, at 698 (Floris W. Wood ed., 1990). *See also* DENNIS A. GILBERT, COMPENDIUM OF AMERICAN PUBLIC OPINION 19 (1988) (survey results show that confidence in state and local government has declined).

180. For example, Woodrow Wilson conveyed the sense that a dichotomy between politics and administration not only was desirable, but achievable as well. In more recent work by political scientists and economists, it is generally accepted that politics and administration are inseparable. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887). *See, e.g.*, Terry Moe, *Politics and the Theory of Organization*, 7 J. L. ECON. & ORG. 106 (1991). Nevertheless, there remains among many historians and students of public administration the notion that effective administration requires protecting bureaucrats from the intervention of politicians so that they can perform their duties in a neutral, technical, and professional manner. *See, e.g.*, DONALD J. PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY, 1848–1902 (1992); B. Guy Peters & Donald. J Savoie, *Civil Service Reform: Misdiagnosing the Patient*, 54 PUB. ADMIN. REV. 418, 423 (1994).

181. *See* Terry Moe, *Political Institutions: The Neglected Side of the Story*, 6 J. L. ECON. & ORG. 263 (1990). For another criticism of the notion of a technical, independent bureaucracy, see Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

182. For a summary of the evidence indicating a substantial wage advantage for government workers, especially for federal employees, see DAVID A. WISE, PUBLIC SECTOR

Patronage has been all but eliminated, but few citizens would claim that government is performing well.

These myths about patronage not only have helped to shape the current institutional environment, but they are used by public sector unions in responding to criticisms of the performance of the bureaucracy. The fear of a return to patronage can be a convenient ploy for unions. Proposals to make dismissals less costly or to allow managers more discretion in determining promotions and performance pay have been portrayed as the politicalization of the civil service and a return to the evils of the spoils system.[183] Finally, these misconceptions about patronage have been incorporated into judicial discussions, and have contributed to the Supreme Court's denial that patronage could serve any vital government interest.

V. JUDICIAL INTERPRETATIONS OF THE EFFICIENCY ASPECTS OF PATRONAGE

In *Elrod v. Burns*, the Court decided that patronage practices compromised an employee's First Amendment rights: "The cost of the practice of patronage is the restraint it places on freedoms of belief and association."[184] In deciding whether this was sufficient to restrict the practice, the Court had to determine if patronage had other redeeming characteristics. As Justice Brennan explained, "[a]lthough the practice of patronage dismissals clearly infringes First Amendment interests, our inquiry is not at an end, for the prohibition on encroachment of First Amendment protections is not absolute."[185] If patronage practices were to survive strict scrutiny they would have to advance some "vital government end," and be the "least restrictive of freedom of belief and association in achieving that end...."[186] The opinions and dissents issued in *Elrod*, *Branti*, and *Rutan* reflect a disagreement over whether there are significant, offsetting benefits from patronage practices.

In *Rutan*, Justice Scalia, like Justice Powell before him in *Elrod* and *Branti*, argued that patronage practices should survive a constitutional ban because they served a democratizing function. One contribution claimed by Justice Scalia was that patronage "has been a powerful means of achieving the social and political integration of excluded groups."[187] Patronage hiring practices did facilitate the entry of some newer immigrant and lower socio-economic groups into the political process.[188] Justice Scalia also argued that

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PAYROLLS (1987); Ronald G. Ehrenberg & Joshua L. Schwarz, *Public Sector Labor Markets, in* O. ASHENFELTER AND R. LAYARD, 2 HANDBOOK OF LABOR ECONOMICS (1986); Steve D. Gold & Sarah Ritche, *Compensation of State and Local Employees: Sorting Out the Issues, in* FRANK J. THOMPSON, REVITALIZING STATE AND LOCAL PUBLIC SERVICE (1993). There is also considerable wage compression in the public sector. Hence, the public sector wage advantage is enjoyed mainly by rank and file workers who are also more likely to be members of unions than are higher ranking professional employees. *See* JOHNSON & LIBECAP, *supra* note 9, at 96–125. Evidence on the difficulties of dismissing public sector employees is also cited in JOHNSON & LIBECAP, *supra* note 9.

183. *See* JOHNSON & LIBECAP, *supra* note 9, at 182. *See also* Horner, *supra* note 11.

184. 427 U.S. 347, 355 (1976).

185. *Id.* at 360.

186. *Id.* at 363.

187. Rutan v. Republican Party, 497 U.S. 62, 108 (1990) (dissenting opinion).

188. *See* ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 72–77 (1949); Reid & Kurth, *supra* note 26.

patronage had contributed to the American party system because it offered rewards to rank and file party workers. Without such rewards, "[e]ven the most enthusiastic supporter of a party's program will shrink before such drudgery."[189] In rebuttal, Justice Brennan, citing the plurality opinion in *Elrod*, claimed that "political parties are nurtured by other, less intrusive and equally effective methods....Political parties have already survived the substantial decline in patronage employment practices in this century."[190]

Justice Brennan certainly is correct that political parties have not withered away with the decline of patronage. Whether parties are now nurtured by "less intrusive" means, however, is debatable. Justice Brennan did not explore alternative forms of campaign financing or what politicians are expected to do in exchange for contributions. Catering to the demands of special interest groups in order to obtain their financial support may, for example, intrude on the interests of taxpayers more than does patronage. Moreover, in a somewhat ironic twist, government workers continue to be major contributors to political campaigns through their labor unions' Political Action Committees (PACs). For example, during the 1989-90 election cycle, the American Federation of State, County and Municipal Employees contributed over 1.5 million dollars to federal candidates, ranking them fifth among all labor PACs in terms of contributions.[191] This lack of a comparison with real world alternatives is perhaps the most troubling aspect of the Court's opinions in *Elrod*, *Branti*, and *Rutan*. This concern is especially relevant in the Court's superficial consideration of any linkage between productivity and patronage.

The plurality in *Elrod* briefly considered and then rejected the potential for patronage to provide a more efficient work force.[192] The possibility that a public employee, who has the same political persuasion as the administration or who had made a commitment to support the incoming party, might work more diligently than one who has no such allegiance was dismissed outright. Instead, the argument was advanced that under patronage, the better qualified person for the job may not be hired "since appointment often occurs in exchange for the delivery of votes, or other party service, not job capability."[193] This response reflects an apparent adoption by the Court of the dichotomy between "partisan" patronage employees and "politically-neutral" civil servants who are guided solely by scientific, technical management principles. There is *no* empirical basis for this distinction. Highly protected career bureaucrats, who have strong ideological attachments to political causes or policies may also be motivated by partisan objectives, and these objectives can be inconsistent with

189. 497 U.S. at 104.
190. *Id.* at 74.
191. There are also numerous federal employee PACs, and one of those, the Committee on Letter Carriers Political Education, contributed even more, 1.7 million dollars. FEDERAL ELECTION COMMISSION, WASHINGTON, D.C., ANNUAL REPORTS (1990).
192. In delivering the opinion for the plurality, Justice Brennan noted that "[o]ne interest which has been offered in justification of patronage is the need to insure effective government and the efficiency of public employees." Elrod v. Burns, 427 U.S. 347, 364 (1976). While Justice Brennan did elaborate a bit more on this issue, he was "not persuaded" because "the prospect of dismissal after an election in which the incumbent party has lost is only a disincentive to good work." *Id.*
193. *Id.* at 365.

the goals of elected officials.[194] In reaching its conclusion, the Court ignores the agency problems faced by politicians in securing the compliance of government workers in molding and administering policy.

Agency problems occur because senior career civil servants often are involved in policy determination, and even lower-level career employees are in a position to channel the administration of policy toward particular constituents or to professional goals that can be inconsistent with the interests of politicians. In determining the effects of various programs, elected officials generally must rely on information provided by career civil servants. When the objectives of civil servants and elected officials clash, the information conveyed can be distorted. Indeed, the ability of one of the parties to distort information is at the heart of the agency problem and is the basis for some of the most noted complaints about the performance of bureaucracy.[195]

This point was clearly recognized by Justice Powell in his dissenting opinion in *Branti* when he pointed out that "implementation was just as important as policymaking," because public employees whose salaries and jobs were not at stake could resist policy changes that they did not agree with.[196] Nevertheless, the majority of the Court, both in *Branti* and *Rutan*, did not feel compelled to address Justice Powell's argument in any detail. In adopting the view that non-policymaking, public sector employees are politically neutral, the Court fails to consider both the incentives of government employees, even rank and file, to act opportunistically and the corresponding empirical evidence of such behavior.[197] The problems of managing a complex autonomous, protected, career bureaucracy are far greater than the Court's simplistic notion that public sector employees can be readily separated into policy and non-policymaking positions would suggest. The Court's rejection of the notion that career civil servants have both the ability and incentive to act opportunistically appears to hinge on the mistaken belief that public sector workers covered by civil service rules can be easily removed for poor job performance.

Consider again the statement by Justice Brennan, who delivered the majority opinion in *Rutan*: "A government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient."[198] The evidence is to the contrary. Over the years, civil servants have become a well-organized and powerful interest group. They have been successful in lobbying for employment rules that make dismissals very costly to politicians. Additionally, civil service rules call for promotions

194. For an example of "political" activity by career civil service employees, see the discussion of the conflict between the Reagan administration and EPA administrators over environmental policy in B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcement*, 82 AM. POL. SCI. REV. 213 (1988).

195. One of the most cited treatments of bureaucracy that also emphasizes the agency problem is that of WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

196. Branti v. Finkel, 445 U.S. 507, 530 (1979).

197. The volume edited by Wallace Sayre, THE FEDERAL GOVERNMENT SERVICE (1965), offers a number of articles pointing to the political autonomy of the federal bureaucracy and the associated reduced ability of politicians to make the bureaucracy accountable. Additional publications on this theme are JOHNSON & LIBECAP, *supra* note 9, at 154–76; KNOTT & MILLER, *supra* note 26; FREDERICK C. MOSHER, DEMOCRACY AND THE PUBLIC SERVICE (2d ed. 1982); NISKANEN, *supra* note 195.

198. Rutan v. Republican Party, 497 U.S. 62, 74 (1990).

that largely are based on seniority and the passage of time, rather than on productivity, and the use of merit pay is limited.[199]

By contrast, under patronage, elected officials were directly responsible for the behavior of their employees and could more readily remove them for poor performance. When Justice Scalia argued in *Rutan* that "[t]he whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives," he recognized that politicians will choose to reduce patronage when it no longer generates electoral support.[200] In 1883, the President and the Congress agreed to decrease patronage at the federal level without any prodding from the Court. So too have many state legislatures and municipal governments.

In the process of protecting public sector employees' First Amendment rights, the Court has denied the general electorate, through their elected officials, a voice in determining whether they are best served by patronage staffing procedures. The Court has also indirectly strengthened the hand of public sector unions, thus contributing to the development of a highly protected and influential interest group. This sequence of outcomes has reduced the ability of elected officials to effectively manage the affairs of government and to deliver its services, thus contributing to the current lack of confidence in the public sector.

VI. CONCLUDING REMARKS

In 1952 the Supreme Court first recognized that individuals retain certain constitutional rights even though they are employed by the government.[201] Over the next twenty years, the Court gradually expanded First Amendment protections for government employees and in the process not only virtually eliminated patronage, but contributed to the rise of an autonomous bureaucracy. The problems of accountability and performance associated with the bureaucracy are well known and are the subject of voter hostility toward politicians. Citizens no longer trust government to provide goods and services in an effective and timely manner. Instead, they view government as bloated, unresponsive, and costly. Because of voter disenchantment, politicians have engaged in a variety of activities to improve the performance of government through contracting to private suppliers, adoption of business concepts such as total quality management, and use of procedures requiring public involvement and open-meetings. These efforts are designed to "reinvent government."[202]

Clearly, some of the efforts at reinventing government have had a positive impact.[203] Allowing parents greater discretion in deciding the public school of their choice has forced school officials to be more cognizant of who their customers are. By contracting out basic services, such as garbage collection, governments have added an element of competition to the provision

199. For a list of citations that address this problem, see *supra* note 26.

200. 497 U.S. at 104.

201. *See* Wieman v. Updegraff, 344 U.S. 183, 191–92 (1952) (holding that a state statute requiring a broad loyalty oath a as condition of employment violated public employee's First and Fourth Amendment rights of free association).

202. For discussion of efforts to "reinvent government," *see, e.g.*, OSBORNE & GAEBLER, *supra* note 12. The Clinton Administration's plan for reforming the federal bureaucracy is contained in Vice President Al Gore's document, *supra* note 16.

203. OSBORNE & GAEBLER, *supra* note 12, offer numerous alleged success stories.

of government services. But one of the most touted means for reinventing government, the empowerment of public sector workers, has been almost impossible to implement in a meaningful manner.

With empowerment comes both reward and responsibility. Public sector unions, however, have historically fought against pay schemes that rely heavily on a supervisor's evaluation of the worker.[204] Unions have fought to limit performance pay and to base promotion on seniority, and they have also opposed any lessening of current protections against removals. They have been aided in their efforts by popular beliefs as to the evils of patronage. These beliefs have been reinforced by the court decisions discussed in this paper. As a consequence, efforts to assign greater control over the government labor force to elected officials is commonly associated with a return to patronage.[205] The misconceptions that exist about patronage limit the options that are available for making government more accountable and productive. Although there is considerable demand to change the way government functions, meaningful change will be difficult to achieve unless fundamental alterations are made in the government labor contract.

A complete return to patronage is, of course, not necessary to mitigate the problems of an autonomous and poorly performing bureaucracy. Rather, personnel changes must include greater flexibility in firing employees at all levels, who do not perform or who oppose the policy agenda of the elected administration, and adoption of incentives for performance, such as merit pay and performance-based promotion. To accomplish these reforms, personnel issues must be returned to legislatures to redefine and restructure the government labor contract. The courts, in turn, must recognize that patronage-related practices have positive value for the operation of government and the well-being of its citizens. In the meantime, given the court-imposed constraints faced by politicians, we should expect them to respond to the problem of bureaucracy, not by reinventing government, but rather by "downsizing" it.[206] Such actions, however, do not strike at the core of the problem of dissatisfaction with the performance of government. The problem lies with a personnel structure that provides few incentives for productivity or responsiveness to citizen demands.

204. *See, e.g.*, JOHNSON & LIBECAP, *supra* note 9, at 96–125.

205. Even Osborne and Gaebler, who recommend scrapping current civil service systems, also argue that there is an obvious need to protect against patronage abuses. They do not provide details as to where they would set the lines. OSBORNE & GAEBLER, *supra* note 12, at 130.

206. *Downsizing Government*, BUS. WK., Jan. 23, 1995, at 34.