

constitutional federalism as recognized by both Hamilton and Madison—the preservation of the States' sovereignty over their respective spheres of authority.

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Constitutional Law — Freedom of Speech and Association — Government Employees—*Elrod v. Burns*.¹ In December, 1970, petitioner Richard Elrod, a Democrat, replaced Republican Joseph Woods as Sheriff of Cook County, Illinois.² The Sheriff's Office is staffed by approximately three thousand employees, half of whom are "merit employees" protected from discharge without cause.³ After taking office as Sheriff, Elrod continued the long-standing local practice of discharging the vast majority of noncivil service opposition party employees and replacing them with employees who shared his political affiliations. When Elrod instituted this practice, three discharged employees and one employee threatened with discharge brought suit in the United States District Court for the Northern District of Illinois, seeking declaratory and injunctive relief.⁴ They alleged that the patronage system of employment as practiced by Sheriff Elrod in combination with Mayor Richard J. Daley,⁵ the Democratic Organization of Cook County, and the Democratic Central Committee of Cook County⁶ violated their first and fourteenth amendment rights, and

tional Labor Relations Act, see 29 U.S.C. § 152 (2) (1970), are constitutionally suspect in light of *National League of Cities*. Such a direct federal regulation of State and local governmental employer-employee relationships might be considered by the Supreme Court more intrusive of state sovereignty than the congressional extension of the minimum wage and maximum hour provisions in the 1974 FLSA amendments. See ABA, SECTION OF LABOR RELATIONS LAW, *Labor Relations Law in the Public Sector, Part I: Federal Regulation of the Public Sector* (Jan. 1977) for a more extensive discussion of the implications of *National League of Cities* on proposed federal regulation of state public sector labor relations.

¹ 427 U.S. 347 (1976).

² *Id.* at 350.

³ See *id.* at 377 (Powell, J., dissenting).

⁴ *Id.* at 349-350. The discharged respondents included the Chief Deputy of the Process Division, who supervised various departments of the office, a bailiff and a security guard at the juvenile court, and an "employee." *Id.* at 350-51.

⁵ Mayor Daley's involvement was grounded in part upon his position as leader of the party organization in Cook County. Appendix at 6. *Elrod v. Burns*, 427 U.S. 347 (1976).

⁶ Plaintiffs alleged a conspiracy on the part of all the defendants to carry out the unlawful firings. Defendants allegedly effectuated the conspiracy

(a) By screening the political party affiliation of the members of plaintiff class. (b) By soliciting members of plaintiff class to meet the conditions [for continuing employment, such as obtaining sponsorship letters, shifting party affiliation and the like]. (c) By supplying letters of recommendation or approval, commonly known as patronage letters, to certain members of

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contravened 42 U.S.C. §§ 1983, 1985, 1986 and 1988.⁷ The district court denied injunctive relief,⁸ and subsequently dismissed respondents' complaint for failure to state a claim upon which relief could be

plaintiffs class who have been coerced into meeting the conditions [for continuing employment]. (d) By screening and/or supplying patronage letters to replacements or potential replacements of the employees who are members of plaintiffs class who have been or are about to be unlawfully fired. (e) By actively encouraging and soliciting Defendant Richard J. Elrod to pursue the unlawful practices described [earlier in the complaint]. Appendix at 6, *Elrod v. Burns*, 427 U.S. 347 (1976).

⁷ 427 U.S. at 350. 42 U.S.C. § 1983 (1970) provides, in pertinent part:

Every person who, under color of any . . . custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985(3) (1970) provides, in pertinent part:

If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . or . . . to prevent by force, intimidation or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property or account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1986 (1970) provides, in pertinent part:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . . for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented

42 U.S.C. § 1988 (1970) provides, in pertinent part:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause

⁸ *Burns v. Elrod*, Civil No. 71 C 607 (N.D. Ill. 1971). The district court opinion is unpublished.

granted.⁹ On appeal, the Seventh Circuit reversed¹⁰ and held that plaintiffs' allegations that they had been the victims of patronage dismissals¹¹ stated a valid claim. The court further instructed the district court to enter preliminary injunctive relief.¹² In so doing, the court of appeals followed its earlier decision in *Illinois State Employees Union, Council 34 v. Lewis*,¹³ where it had held that patronage dismissals of nonpolicymaking public employees impermissibly violated first amendment freedoms.¹⁴

The Supreme Court, in a plurality decision, affirmed the Seventh Circuit's decision and HELD: Patronage dismissals of nonpolicymaking public employees constitute an impermissible infringement on the first amendment freedoms of expression and association, for which injunctive relief is an appropriate remedy.¹⁵ The Court reached this decision first by disposing of petitioners' claims that the case was not justiciable, then by balancing the extent to which patronage dismissals inhibit the exercise of first amendment freedoms against legitimate state objectives advanced to justify such dismissals. Invoking this traditional balancing test,¹⁶ the Court concluded that patronage dismissals of nonpolicymaking public employees neither sufficiently advanced vital state objectives to outweigh the loss to freedoms of expression and association nor constituted the least restrictive means to the state ends involved.¹⁷

This note will focus on three facets of the Court's decision in *Elrod*. First, this note will examine the Court's disposition of the threshold questions posed by the political question, separation of

⁹ *Burns v. Elrod*, Civil No. 71 C 607 (N.D. Ill. 1972).

¹⁰ *Burns v. Elrod*, 509 F.2d 1133, 1136-37 (7th Cir. 1975).

¹¹ "Patronage dismissals," for the purposes of this note, are defined as the discharge of public employees for partisan political reasons—either to make room for replacements who are affiliates of another political party, or to penalize the employee's failure to support sufficiently the partisan political activities of the employee's superiors.

¹² 509 F.2d at 1136.

¹³ 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973); *cert. denied sub nom Lewis v. Illinois State Employees Union, Council 34*, 410 U.S. 928 (1973).

¹⁴ 473 F.2d at 574. *Illinois State Employees Union* was decided after the dismissal of the respondents' complaint by the district court. In *Illinois State Employees Union*, plaintiffs including building employees, clerical workers and license examiners employed in the office of the Illinois Secretary of State alleged that they had been dismissed from their positions because they had refused to affiliate with or support the Republican party. *Id.* at 563. The court held that patronage dismissals infringed first amendment freedoms, *id.* at 576, and were impermissible where the dismissals involved positions in which neither "considerations of personal loyalty . . . [nor] determination of policy" was involved. *Id.* at 574. See Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 315-317 (1974).

¹⁵ 427 U.S. at 372-74. Justice Brennan, joined by Justices White and Marshall, authored the plurality opinion. Justice Stewart, joined by Justice Blackmun, filed an opinion concurring in the result. Justice Powell, joined by Justice Rehnquist and the Chief Justice, filed a dissenting opinion, and the Chief Justice added a separate dissent. Justice Stevens took no part in the decision.

¹⁶ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam); *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973).

¹⁷ 427 U.S. at 364-69.

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powers and waiver doctrines. Then, the note will analyze the Court's determination that patronage dismissals of nonpolicymaking public employees impermissibly constrain first amendment freedoms. Finally, the note will discuss the impact of *Elrod* on patronage practices at all levels of American government, and will conclude that while the precise holding in *Elrod* is not likely to weaken significantly the institution of patronage or the party structure, it may well serve as a springboard from which to attack a variety of patronage practices at all levels of government.

I. THRESHOLD QUESTIONS: JUSTICIABILITY AND WAIVER

Before proceeding to a consideration of the merits in *Elrod*, the Court summarily disposed of two threshold objections to the justiciability of the controversy raised by petitioners, founded on the political question doctrine and on the theory of the separation of powers.¹⁸ Petitioners also raised a third objection to the Court's consideration of the controversy, arguing that respondents had waived their right to object to patronage dismissals. This section will first consider the Court's disposition of the justiciability questions, and then will analyze the Court's discussion of waiver.

A. *The Political Question Doctrine and the Separation of Powers*

The Court has generally invoked the doctrines of political question and separation of powers to determine whether the legislative or executive branch of government rather than the judiciary ought to resolve the issue in question.¹⁹ The Court's refusal to resolve issues deemed to involve political questions or the separation of powers is grounded in the Court's unwillingness to encroach upon the legitimate prerogatives of other branches of government.²⁰ Petitioners argued that the political question doctrine barred the Court's consideration of the controversy because patronage dismissals involved the State's electoral process.²¹ Therefore, petitioners claimed that the legislative branch, rather than the judiciary, should resolve the question of the permissibility of the dismissals.²² In addition, petitioners maintained that the theory of separation of powers also precluded judicial review because judicial oversight of patronage dismissals would impede the executive's prompt fulfillment of his duties by forc-

¹⁸ The Court, recognizing the close relationship between these two justiciability issues, has observed that the "nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). See *Powell v. McCormack*, 395 U.S. 486, 518 (1969).

¹⁹ See notes 25-27 *infra*.

²⁰ Cf. P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 233 (2d ed. 1973) ("the political departments or the electorate ought to have the final say.").

²¹ See 427 U.S. at 351-52.

²² *Id.* at 352.

ing the executive to allow undesirable subordinates to continue in public employment.²³

The Court concluded that neither doctrine precluded judicial review.²⁴ In each case, the Court noted that respondents challenged the actions of *state* officials whereas both the political question²⁵ and separation of powers doctrines have traditionally applied only in situations involving an allocation by the Constitution of decisionmaking authority to a coordinate branch of the federal government.²⁶ The Court further suggested that even if the case had involved federal officials, it nevertheless would be justiciable because it presented the question whether public officials had exceeded their constitutional authority.²⁷

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* The Court distinguished the political question doctrine which renders a case nonjusticiable, from cases simply implicating the elective process. *Id.* The Court has frequently considered "political" cases which involve the electoral process. *See, e.g.,* *Baker v. Carr*, 369 U.S. 186, 217 (1962) (state legislative reapportionment); *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (damage action brought against State Judges of Election for denial of right to vote). Political questions arise in certain clearly-defined situations:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217 (1962).

²⁶ 427 U.S. at 352. When the constitutionality of actions of *state* officials is challenged, the Court has repeatedly rejected the applicability of the political question doctrine. *See, e.g.,* *Williams v. Rhodes*, 393 U.S. 23, 28 (1968); *Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964); *Baker v. Carr*, 369 U.S. 186, 226-27, 229 (1962); *McPherson v. Blacker*, 146 U.S. 1, 23-24 (1892).

The Chief Justice, in dissent, objected that the decision in *Elrod* constituted judicial encroachment on state prerogatives inconsistent with the Tenth Amendment and the Court's recent direction in *National League of Cities v. Usery*, 426 U.S. 833 (1976). *Elrod*, 427 U.S. at 375-76 (Burger, C.J., dissenting). The objections raised by the Chief Justice, however, are founded not in the separation of powers, but in considerations of federalism which he maintains should be considered whenever limitations of state activity are in issue. *Id.* at 376. The Chief Justice takes the position that "the issue is not so much whether the patronage system is 'good' or 'bad,' . . . but whether the choice of its use in the management of . . . [State] government . . . was . . . 'reserved to the States . . .'" *Id.* In light of the Court's conclusion that the question is whether a public official has exceeded his constitutional authority, it is difficult to see how the Court should conclude that considerations of federalism, taken alone, ought to preclude review. *See* note 27 *infra* and accompanying text.

²⁷ 427 U.S. at 352-53. *See* *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969), *citing* *Marbury v. Madison*, 5 U.S. 137 (1803) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution.")

Thus, even where the authority to dismiss subordinates has been committed to a coequal branch of the federal government, the Court has reviewed the question

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B. Waiver

Petitioners raised an added threshold question by arguing that when respondents accepted their patronage positions they had waived their right to object when discharged by a new administration.²⁸ The dissent agreed, and would have held that these respondents were not the proper plaintiffs to challenge the constitutionality of the patronage system.²⁹ Addressing the waiver argument in a footnote, the plurality concluded that a finding of waiver would be totally unacceptable.³⁰ The Court reasoned that to allow a finding of waiver necessarily presupposes the permissibility of that to be waived. The waiver of privilege against self-incrimination³¹ or the right to counsel,³² for example, is founded on the recognition that a citizen may constitutionally incriminate himself or appear in a criminal action without counsel if he so chooses. Here, however, a finding of waiver would operate to allow the State to condition public employment on party affiliation, in the face of the Court's holding that a partisan job qualification impermissibly infringes first amendment freedoms.³³

The plurality's resolution of the waiver issue seems reasonable, since reliance on the doctrine of waiver to preclude challenges to patronage dismissals would raise several conceptual and concomitant factual difficulties. For example, the waiver argument depends on the premise that each respondent accepted his public employment position with the understanding that the employment depended in large

whether the coequal branch has exceeded its constitutional authority, despite claims that the political questions or separation of power doctrines preclude review. *See, e.g.,* Powell v. McCormack, 395 U.S. 486, 520-21, 548-49 (1969) (The Court may determine whether the refusal of the House of Representatives to seat a Congressman violated U.S. CONST. art. I, § 2, cls. 1 and 2); *Humphrey's Ex'r. v. United States*, 295 U.S. 602, 629 (1935) (Congressional limitation of President's power to remove quasi-legislative or quasi-judicial officers did not infringe constitutional powers of the President under U.S. CONST. art. II, §§ 1 and 2). *But cf. Myers v. United States*, 272 U.S. 52, 176 (1926) (Congressional limitation of President's powers to remove purely executive officers infringed constitutional powers of the President under U.S. CONST. art. II, §§ 1 and 2).

²⁸ 427 U.S. at 380-81 (Powell, J., dissenting).

The Pennsylvania Supreme Court in *American Fed'n of State, County and Mun. Employees v. Shapp*, 443 Pa. 527, 280 A.2d 375 (1971), applied a similar argument to refuse equitable relief to dismissed nonpolicymaking state employees who had benefitted from the patronage system. There the court concluded that "[t]hose who . . . live by the political sword must be prepared to die by the political sword." *Id.* at 536, 280 A.2d at 378. *See Nunnery v. Barber*, 503 F.2d 1349, 1358 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975). *But cf. Illinois State Employees Union*, 473 F.2d at 573-74.

²⁹ 427 U.S. at 381 & n.4 (Powell, J., dissenting). The dissent suggests that those initially denied employment for partisan reasons might more legitimately assert the constitutional claims. *Id.* See notes 107-112 *infra* and accompanying text.

³⁰ 427 U.S. at 359-60 n.13.

³¹ *See, e.g.,* *Smith v. United States*, 337 U.S. 137, 150 (1949).

³² *See, e.g.,* *Johnson v. Zerbst*, 304 U.S. 458, 465-66 (1938).

³³ 427 U.S. at 359-60 n.13. *See Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (The state may not "coerce a waiver of the immunity [from self-incrimination] it confers on penalty of the loss of employment"); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926) (The state may not "compel the surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold").

part upon partisan concerns, and was likely to terminate if a new party assumed power.³⁴ The implications of such a general premise, however, may not be warranted in all factual circumstances. For example, in *Elrod*, respondents were Republicans who took office during a Republican administration rather than at its inception. When they were later dismissed by Democrats for failure to change their party affiliation, it is arguable that their discharges in fact resulted from their *refusal* to waive their first amendment rights.³⁵ An added conceptual difficulty would emerge from a finding that the doctrine of waiver prevents public employees from asserting their first amendment rights, since it would seem to ignore the possibility that a citizen has the right to revoke a waiver of constitutional rights.³⁶ A majority of the Court thus found that the state could not circumvent the constitutional impermissibility of patronage dismissals by claiming that the victims of such dismissals had waived their right to object. By adopting this result-oriented approach, the Court seems to have foreclosed the defense of waiver even where the facts of a case might clearly justify a finding of knowing and intelligent waiver.³⁷

II. FIRST AMENDMENT INFRINGEMENT

This section will discuss three aspects of the Court's consideration of the first amendment concerns in *Elrod*. Initially, it will examine the Court's determination that patronage dismissals infringe the first amendment freedoms of expression and association. Then it will discuss the standard of review the Court formulates to judge the permissibility of this infringement. Finally, this section will evaluate the Court's application of its standard of review, balancing the first

³⁴ In *Illinois State Employees Union*, the court noted that "[t]he particular factual basis for a waiver defense may vary as between different plaintiffs and . . . job[s], and may, at best, limit the scope of relief rather than foreclosing the claim altogether." 473 F.2d at 573 (footnote omitted). See *Nunnery v. Barber*, 503 F.2d 1349, 1358 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975) (Court noted that plaintiff, offered a choice between a patronage position and a civil service position, voluntarily accepted the patronage job "with a full realization of its conditions and hazards.")

Generally, the viability of a claim of waiver of constitutional rights depends on factual considerations which include the state of mind, background and conduct of the person claimed to have waived his rights. Every reasonable presumption will be indulged against finding a waiver. See, e.g., *Smith v. United States*, 337 U.S. 137, 150 (1949) (privilege against self-incrimination); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (right to counsel). But see *Schnecko v. Bustamonte*, 412 U.S. 218, 237 (1973) (requirement of knowing and intelligent waiver limited to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial; a "diluted form" of waiver sufficient to uphold consent search).

³⁵ Appendix at 41. *Elrod v. Burns*, 427 U.S. 347 (1976).

³⁶ *Stevens v. Marks*, 383 U.S. 234, 243-44 (1966), quoted in *Illinois State Employees Union*, 473 F.2d at 574 n.25. But see *Stevens v. Marks*, 383 U.S. 234, 248 (1966) (Harlan, J., dissenting in part). *Stevens* seems to be the only statement of the Court on the revocability of a waiver of constitutional rights.

³⁷ 427 U.S. at 359-60 n.13. But see *Nunnery v. Barber*, 503 F.2d 1349, 1358 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975).

amendment rights of the individual against the interests of the State.

A. *Patronage Dismissals Infringe First Amendment Freedoms*

Starting from the premise that patronage dismissals in fact impede the exercise of first amendment freedoms by limiting the public employee's freedom to express himself in the area of governmental affairs,³⁸ the Court sought to identify both the character and the extent of the infringement on expression and association.³⁹ In assessing the character of first amendment infringement, the Court found that respondents were required to support actively the incoming party in order to maintain their public employment.⁴⁰ The Court further found that even where an employee continued surreptitiously to support his own party,⁴¹ the coerced support of the party in power abridged his freedom of association and limited his freedom to act according to his beliefs. These restrictions, in turn, were viewed by the Court as impeding the free functioning of the electoral process by depriving the party out of power of potentially substantial sources of support.⁴² Furthermore, in delineating the extent of the infringement, the Court concluded that these constraints upon the freedoms of expression and association were not constitutionally insignificant simply because the restraints denied a benefit—public employment—rather than a constitutional right.⁴³ Relying on *Perry v. Sindermann*,⁴⁴ the Court repeated in *Elrod* its traditional position that whether the employee had a right to a government position was irrelevant to the

³⁸ 427 U.S. at 355. See also *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam).

³⁹ The Court recognized that patronage dismissals themselves could be characterized as an exercise in freedom of association by public officials, but dismissed the claim in a public employment context. 427 U.S. at 371 & n.27. See note 86 *infra*.

⁴⁰ The necessary "active support" included affiliation with the party, "working for the election of" party candidates, and financial contributions to the party. 427 U.S. at 355.

⁴¹ The Court observed that the average public employee is not in a position either to work for or contribute to more than one political party. *Id.* Furthermore, even for the public employee with sufficient time and money to contribute to two parties, changing party affiliation might impede his ability to vote for his preferred candidates. See note 52 *infra* and accompanying text.

⁴² 427 U.S. at 356.

⁴³ See note 44 *infra*. Additionally, petitioners sought to trivialize the constitutional impact of patronage dismissals by arguing that because no person has a right to public employment, that benefit may be denied for any reason. 427 U.S. at 360. Petitioners relied in large part upon *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided court*, 341 U.S. 918 (1951), despite both the absence of precedential value of such an affirmance, see *Neil v. Biggers*, 409 U.S. 188, 192 (1972), and the outright repudiation of the *Richardson* rationale in *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1458-64 (1968).

⁴⁴ 408 U.S. 593 (1972). In *Perry*, the Court conclusively dismissed an argument similar to that advanced in *Elrod*, holding that a college professor who had been employed at the same institution under a series of one-year contracts might be able to demonstrate a "property" interest in continued employment under the due process clause through proof of a de facto tenure system at the school. *Id.* at 602-03.

question whether the state could dismiss an employee from the government position for the exercise of that employee's first amendment freedoms.⁴⁵ Noting that "[r]ights are infringed both where the Government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason," the Court observed that the conditions imposed by the Government need not be quantitatively severe in order to be constitutionally significant.⁴⁶ Furthermore, as the ratio of public to private employment increases, the Court noted that both the number of individuals affected and the degree of inhibition felt by the individual increases.⁴⁷ The Court thus concluded that patronage dismissals are constitutionally significant limitations on first amendment freedoms of expression and association⁴⁸ which have adverse implications for the operation of the electoral process.⁴⁹

The dissent, on the other hand, attempted to minimize the conceded infringement of first amendment rights by advancing two arguments. First, the dissent observed that the infringement denied no public employee his right to vote freely.⁵⁰ Second, the dissent asserted that despite the infringement on their freedom of expression, public

⁴⁵ 427 U.S. at 360-61. In *Perry*, the Court had observed:

For at least a quarter-century, this Court has made it 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 of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

408 U.S. at 597.

⁴⁶ 427 U.S. at 359-60 n.13.

⁴⁷ See *id.* The Court's concern, however, with the economic realities of unemployment seems to cloud the basic constitutional issue rather than to clarify it. If, as the Court maintains, the government may not impose even quantitatively minor unconstitutional conditions on a benefit, there seems to be no reason for the Court to examine the issue of coercion in pragmatic terms. Moreover, by discussing the constitutional significance of these concerns in the same footnote with its discussion of waiver, the Court appears to recognize the analytical similarity between these issues. *Id.* In the context of waiver, any coercion felt by the individual need not be particularly significant to render the waiver inoperative. See, e.g., *Gardner v. Broderick*, 392 U.S. 273, 279 (1968). Cf. notes 28-37 *supra* and accompanying text.

⁴⁸ The freedom of association has consistently been held to include the unfettered "right to associate with the political party of one's choice . . ." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). See *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (*per curiam*); *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); cf. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). See generally *Fellman, Constitutional Rights of Association*, 1961 THE SUP. CT. REV. 74, 104-108.

⁴⁹ 427 U.S. at 356.

⁵⁰ 427 U.S. at 388 (Powell, J., dissenting).

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employees may continue to speak freely on "some political issues."⁵¹

Neither of these arguments, however, appears to comport with political realities. Coerced party affiliation may directly affect the public employee's voting rights in states holding closed primaries.⁵² Furthermore, even where coerced active support of the incumbent does not impinge on a narrowly-conceived voting right, it effectively negates the public employee's vote for the party out of power by soliciting added votes for the incumbent. Thus, the dissent's position that the practice of patronage dismissals does not infringe on voting rights seems unrealistic. Moreover, the dissent's assertion that public employees remain free to speak freely on "some political issues" is misleading. The employee's "active support" of the party in power required to maintain his employment effectively forecloses his discussion of most *partisan* issues, since any expression of opposition—or even neutrality—to positions taken by the party in power may likely result in the termination of the patronage employee's position.⁵³ While an employee still may discuss nonpartisan political issues, in practice these are relatively insignificant.⁵⁴ Thus, the dissent's position would appear to allow the state to foreclose the public employee's right to speak freely on the very issues which may concern him most. Moreover, the arguments raised by the dissent do not address the conclusion of the Court that any infringement on protected associational freedoms may be constitutionally impermissible, but concentrate instead on the quantitative aspects of that infringement.⁵⁵

B. *Formulation and Application of the Standard of Review*

Having identified significant encroachments on first amendment freedoms, the Court in *Elrod* then formulated the appropriate standard of review to assess the permissibility of these encroachments. The Court noted that while the first amendment freedoms are not

⁵¹ *Id.*

⁵² The Supreme Court has recognized a State's right to hold closed primaries. *Nader v. Schaffer*, 417 F. Supp. 837, 850 (D. Conn. 1976), *aff'd*; 97 S.Ct. 516 (1976) (mem.).

⁵³ See 427 U.S. at 359.

⁵⁴ See *United Public Workers v. Mitchell*, 330 U.S. 75, 107 n.4 (1947) (Black, J., dissenting). Justice Black, dissenting from the majority opinion upholding the Hatch Act, ch. 410, 53 Stat. 1147 (1939), prohibitions on political activity of civil service employees, noted that the statutory exception permitting participation in campaigns involving questions not specifically identified with any political party, Act of July 19, 1940, ch. 640, 54 Stat. 767, 772, excepted political issues whose "importance and number . . . are obviously very small." 330 U.S. at 107 n.4 (Black, J., dissenting). The Hatch Act is presently codified at 5 U.S.C. §§ 7321-7327 (1970).

⁵⁵ The dissent maintains that "[t]his intrusion, while not insignificant, must be measured in light of the limited role of patronage hiring in most government employment." 427 U.S. at 388 (Powell, J., dissenting). The Court's comment on the role of government employment in the American economy, *id.* at 359-60 n.13, may be viewed as an attempted rebuttal to this argument. See notes 46-47 *supra* and accompanying text.

absolute,⁵⁶ any significant impairment of these freedoms must survive exacting scrutiny.⁵⁷ When the exacting scrutiny standard of review is invoked, the government must demonstrate that the challenged practice furthers vital government objectives, that the gain to these objectives outweighs the loss to the protected freedoms, and that there are no alternative means for the satisfaction of the government objectives which are less restrictive of first amendment rights.⁵⁸ In *Elrod*, both the plurality and the dissent claimed that in balancing the interests of the State against the interests of the individual, they intended to weigh the challenged government practice against first amendment freedoms without regard for their views on the desirability of patronage as a political institution.⁵⁹ Maintenance of such normative objectivity, however, seems problematic when the test requires the determination whether the *benefit to vital* government objectives outweighs the *loss* to individual freedoms and is the *least restrictive* means to the government ends. The subjectivity inherent in a test with such imprecise and value-laden variables has long been recognized.⁶⁰ The perceived value of patronage, therefore, will in large measure determine the outcome of the balancing test.⁶¹

⁵⁶ 427 U.S. at 360. See, e.g., *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75, 95 n.30 (1947).

⁵⁷ 427 U.S. at 362. See *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam); *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 460-61 (1958).

⁵⁸ 427 U.S. at 363. This is the standard most frequently applied in first amendment cases. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). See generally *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 598 (1973) (Douglas, J., dissenting); *Dennis v. United States*, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring). But cf. *United States v. Robel*, 389 U.S. 258, 268 n.20 (1967) (Declining to weigh individual freedom of association against state interest in national security, the Court struck down the challenged statute as overbroad).

⁵⁹ See 427 U.S. at 354. See generally, *id.* at 377 n.1, 381-82 (Powell, J., dissenting) (Justice Powell, recognizing that the difficulty in formulating judicial standards may bar justiciability, suggests that the inability to delineate standards was not present in the context of patronage dismissals.).

⁶⁰ See *Illinois State Employees Union*, 473 F.2d at 570. This is particularly true where the challenged government practice is patronage, an institution which has always evoked ambivalent responses. See note 61 *infra*.

Much of the commentary on the balancing process employed in the first amendment area has focused on the subjectivity of the test. See, e.g., Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975); Frantz, *The First Amendment in the Balance*, 71 YALE L. J. 1424, 1440-43 (1962); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 747-49 (1963). But cf. Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825-26 (1962); Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479, 481-2 (1964) (upholding the rationality of the balancing test).

⁶¹ Both the plurality and the dissent, for example, feel obligated to discuss the role of political patronage in American history. 427 U.S. at 353-55, 377-380.

Generally, political patronage has been condemned for its contribution to government inefficiency and its tendencies toward corruption. 427 U.S. at 354, 379. See notes 63-69 *infra* and accompanying text. On the other hand, from its inception the sys-

To offset the weighty interests of first amendment freedoms of expression and association, petitioners maintained that the practice of patronage dismissals served three vital government objectives, the advancement of which justified encroachment on first amendment freedoms.⁶² They contended that patronage insured effective government and the efficiency of public employees; that it guaranteed the political loyalty of public employees; and that it operated to preserve the democratic process of the American political system. Recognizing the significance of these State objectives, the Court nonetheless found in each case that patronage dismissals either did not advance the State objective sufficiently to outweigh the encroachment on first amendment rights, or it did not constitute the least restrictive means to the end sought.

1. The Need for Government Effectiveness and Public Employee Efficiency.

Petitioners maintained that patronage dismissals were necessary to promote government effectiveness and employee efficiency because employees who do not share the political persuasion of the party in power have no motivation to perform efficiently,⁶³ and that the employees who actively support the in-party have a positive incentive to perform well.⁶⁴ The Court conceded that government efficiency was a legitimate State interest,⁶⁵ but concluded that mere party

tem of patronage has played a democratizing role in American politics by providing access to the political system for groups which otherwise had been excluded. See A. SCHLESINGER, *THE AGE OF JACKSON* 45-47 (1945); C. FISH, *THE CIVIL SERVICE AND THE PATRONAGE* (1904 ed.). But see M. & S. TOLCHIN, *TO THE VICTOR* 73-76 (1971) (tokenism in black patronage). Moreover, through its distribution of material and psychological rewards, the patronage system has tended to fill very real social needs, including compensation for deficiencies in government income maintenance programs. See Merton, *The Latent Functions of the Machine*, reprinted in E. BANFIELD, *URBAN GOVERNMENT* 223-233 (1969); Cf. W. RIORDAN, *PLUNKITT OF TAMMANY HALL* 91-98 (1963) (case study of one political boss in action). For a comprehensive discussion of the institution of political patronage, see UNITED STATES CIVIL SERVICE COMMISSION, *HISTORY OF THE FEDERAL CIVIL SERVICE, 1789 TO THE PRESENT* (1941); C. FISH, *THE CIVIL SERVICE AND THE PATRONAGE* (1904 ed.).

⁶² Petitioners also argued that the employer's freedom of speech should be added to the balance on the side of upholding patronage dismissals, relying on *Thomas v. Collins*, 323 U.S. 516, 537-38 (1944), and *N.L.R.B. v. Virginia Elec. and Power Co.*, 314 U.S. 469, 477 (1941). Brief for Petitioners at 26-28. The Court considered the argument briefly and dismissed it, distinguishing between the rights of private employers and public employers. 427 U.S. at 371 & n.27. See note 86 *infra*. The Court might also have added that even in a private employment context, *Collins* and *Virginia Electric Power* would have provided questionable support for petitioners in *Elrod*, since the Court in *Collins*, after recognizing in a labor context the first amendment rights of employers, added in dictum: "When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed." *Collins*, 323 U.S. at 537-38. Since the Court in *Elrod* had already found coercion, presumably it could also have found that the "limit" had been passed in *Elrod*. See notes 38-55 *supra* and accompanying text.

⁶³ 427 U.S. at 364.

⁶⁴ *Id.* at 366.

⁶⁵ See *id.*

affiliation, without more, was an insufficient barometer of either actual or projected performance.⁶⁶ The Court added that wholesale patronage dismissals may in fact contribute to government inefficiency by removing most of the experienced government employees from service before trained replacements are available.⁶⁷ In addition, the Court noted that there was a less restrictive means of achieving government efficiency through public employee dismissals because the right to dismiss for cause remained available to remove any employee whose performance was inadequate.⁶⁸ The Court thus determined that patronage dismissals may not advance the State objective of government efficiency at all, let alone advance the objective sufficiently to offset the loss to individual freedoms.⁶⁹

2. The Need to Insure the Political Loyalty of Public Employees

In addition to maintaining government efficiency, petitioners argued that patronage dismissals were essential to insure the political loyalty of employees. They distinguished the need for employee political loyalty from the need for government efficiency on the theory that since the electorate had sanctioned a change in administration, the policies of the new officeholders should not be impeded by hold-overs from the previous administration.⁷⁰ Conceding the significance of this justification, the Court determined that limiting patronage dismissals to the discharge of *policymaking* public officials was sufficient to advance the state interest,⁷¹ because only policymakers exercise suf-

⁶⁶ The Court analogized this conclusion to its refusal to assume that simple membership in an association evidences an individual's intent to further its illegitimate aims. *Id.* at 365-66. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 606-08 (1967) (membership in the communist party).

⁶⁷ 427 U.S. at 364 n.18. Even the dissenters conceded that political patronage in general and patronage dismissals in particular have not been shown to advance the cause of government efficiency. *Id.* at 379 (Powell, J., dissenting). Historically, the inefficiency which political patronage introduced into any level of government was a major motivation for the introduction of civil service and merit systems of public employment. *Id.* But see C. FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 151-56 (1904 ed.).

This negative impact of patronage upon government efficiency was used by the Court to distinguish *Elrod* from cases upholding the validity of the Hatch Act, see note 54 *supra*, which, in the Court's view, advanced government efficiency. *United Public Workers v. Mitchell*, 330 U.S. 75, 99 (1947); *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 555 (1973).

⁶⁸ 427 U.S. at 366.

⁶⁹ *Id.*

⁷⁰ *Id.* at 367.

⁷¹ *Id.* The Court did not discuss the question whether positions which might require the personal rather than the political loyalty of employees would justify dismissals for partisan reasons. In his concurring opinion, however, Justice Stewart noted that the Court's holding referred only to dismissal from "nonpolicymaking, nonconfidential" positions. *Id.* at 375 (emphasis added). In addition, earlier cases might support the proposition that dismissals from confidential positions should fall outside the *Elrod* rule. See *Burns v. Elrod*, 509 F.2d 1133, 1136 (7th Cir. 1975); *Illinois State Employees Union*, 473 F.2d at 574; cf. *Pickering v. Board of Education*, 391 U.S. 563, 570 n.3 (1968) (noting that completely correct public statements might furnish a permissible ground for dis-

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ficient responsibility to be able to impede the incoming party's policies.⁷² The Court in *Elrod* sought to provide guidelines to facilitate the classification of particular positions by indicating that a position in which the duties are broad and poorly defined, and in which the employee is required to act as an advisor or to formulate plans for the implementation of broad goals is more likely to be a policymaking position.⁷³ Where the employee has nondiscretionary duties with well-defined and limited objectives, the position is more likely to be considered a nonpolicymaking position.⁷⁴

By adopting these criteria, the Court has placed all public employment positions on a policymaking continuum.⁷⁵ At one end of the continuum are the purely menial positions clearly covered by the holding in *Elrod*.⁷⁶ At the other end are the purely executive positions clearly *outside* the holding in *Elrod*.⁷⁷ As a particular position approaches the center of the continuum, however, the standards become more difficult to apply.⁷⁸ In *Elrod*, the Court indicated that it is the

missal from positions in which there is a great need for confidentiality); *Sprague v. Fitzpatrick*, 412 F. Supp. 910, 915-19 (E.D. Pa. 1976) (court dismissed complaint brought by first assistant district attorney challenging nonpatronage dismissal following plaintiff's public criticism of the district attorney). *But cf.* *Ramsey v. Allen*, 501 F.2d 1090, 1098-99 (10th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975). It is not clear, however, to what extent the confidential-nonconfidential distinction mirrors the line between policymaking and nonpolicymaking positions.

⁷² 427 U.S. at 367.

⁷³ *Id.* at 368.

⁷⁴ *Id.* at 367-68.

⁷⁵ These criteria were first enunciated by the Seventh Circuit in *Illinois State Employees Union*, 473 F.2d at 578 (Campbell, J., concurring). *See* *American Fed. of State, County and Mun. Employees v. Shapp*, 443 Pa. 527, 542, 280 A.2d 375, 381-82 (1971) (Barbieri, J., dissenting).

⁷⁶ *See Illinois State Employees Union*, 473 F.2d at 563, 574 (building employees, clerical workers, license examiners, janitors, elevator operators or school teachers); *American Fed. of State, County & Mun. Employees v. Shapp*, 443 Pa. 527, 543, 280 A.2d 375, 382 (1971) (Barbieri, J., dissenting) (highway workers).

⁷⁷ *See Mitchell v. King*, 537 F.2d 385, 391 (10th Cir. 1976) (museum regent); *Indiana State Employees Ass'n v. Negley*, 365 F. Supp. 225 (S.D. Ind. 1973), *aff'd* 501 F.2d 1239, 1244 (7th Cir. 1974). In *Negley*, plaintiffs were "consultants" and "coordinators" in the Indiana Department of Public Instruction, Supervisor of Adult Education, and Director of the Neighborhood Youth Corps Program, and were all found by the district court to be "either . . . policy-making employees or . . . exercising the public functions of the Department." 365 F. Supp. at 227-30, 232.

⁷⁸ The characterization of some positions as policymaking or nonpolicymaking may be extremely difficult in some cases. Would, for example, an assistant district attorney be a policymaker? A deputy sheriff? Both positions may entail a number of responsibilities, and the occupants may occasionally act as advisors, but the area of responsibilities and advice may be quite limited. *Cf.* 427 U.S. at 367-68. Each case may thus present unique factual considerations requiring close analysis of prior judicial, legislative and administrative determinations. *See, e.g., Nunnery v. Barber*, 503 F.2d 1349, 1357, 1359 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975) (upholding dismissal of manager of State Liquor Store); *Gould v. Walker*, 356 F. Supp. 421, 425 (N.D. Ill. 1973) (mem.) (upholding dismissal of an executive assistant).

Previous analogous federal classifications may be helpful. Thus, section 701(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (Supp. V 1975) defines "employee" as not including "any person chosen by [a public official] to be on [that

nature, rather than the number of responsibilities which is critical to a finding that a particular position is a "policymaking" position.⁷⁹ Thus, mere characterization of a position as "supervisory" may not be sufficient to remove it from the interdiction of patronage dismissals.⁸⁰ The Court in *Elrod* has mitigated some of these difficulties in drawing the distinction between policymaking and nonpolicymaking positions for the individual employee by requiring the state to prove that the position was a policymaking position once the employee has demonstrated a political foundation for his discharge.⁸¹ This allocation of the burden of proof follows from the Court's position that the government had the initial burden of demonstrating "an overriding interest . . . to validate an encroachment on protected interests . . ."⁸² Thus the Court has concluded that those who are responsible for making or implementing policy may be dismissed for political reasons, but has provided only broad guidelines for determining whether a particular position falls within those categories.

3. The Need to Preserve the Democratic Process of the American Political System.

Petitioners advanced the preservation of the democratic process as a third justification for patronage dismissals.⁸³ The Court, while granting the constitutional significance of this goal, questioned whether patronage dismissals were inherently necessary to its preservation. The Court observed first that patronage practice was not widespread prior to Andrew Jackson's administration,⁸⁴ and second, that

official's] personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office." See, e.g., *Gearhart v. Oregon*, 410 F. Supp. 597, 598-601 (D. Ore. 1976) (Deputy Legislative Counsel was not an exempt employee); *Kyles v. Calcasieu Parish Sheriff's Dep't*, 395 F. Supp. 1307, 1310 (W.D. La. 1975) (Deputy Sheriff not "employee"). See 5 C.F.R. § 213.3301 *et seq.* (1976). (Civil Service classification scheme identifying "[p]ositions of a confidential or policy-determining character").

⁷⁹ 427 U.S. at 367-68.

⁸⁰ *Id.* ("Employee supervisors . . . may have many responsibilities, but those responsibilities may have only limited and well-defined objectives.")

⁸¹ *Id.* at 368.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 353. In fact, the institution of political patronage in general and patronage dismissals in particular predate even the Articles of Confederation in American history, evident in New York and Pennsylvania prior to 1780 "where it became customary, at each election, for the victorious party to turn all adherents of the opposition party out of their positions." UNITED STATES CIVIL SERVICE COMMISSION, HISTORY OF THE FEDERAL CIVIL SERVICE, 1789 TO THE PRESENT 4 (1941). On the federal level, patronage dismissals gained acceptance somewhat later. President Washington abhorred patronage dismissals and made no such discharges, see L. WHITE, THE FEDERALISTS 287 (1948), though his hiring practices indicate a more favorable attitude toward patronage in general. See 427 U.S. at 378 (Powell, J., dissenting). Nonetheless, the practice gained currency during the administrations of Adams and Jefferson, see C. FISH, THE CIVIL SERVICE AND THE PATRONAGE 19-29 (1904 ed.), and after the accession of Jackson the

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the virtual abolition of patronage employment in some states with extensive merit systems has apparently not eroded the democratic process in those states.⁸⁵ Moreover, the Court indicated that the end of patronage dismissals may in fact *strengthen* the democratic process by encouraging the exercise of first amendment freedoms on the part of public employees.⁸⁶ The dissent, on the other hand, agreed with petitioners' contention that American party politics depends on political patronage. Recognizing that local parties generate support primarily through the distribution of rewards such as public employment, the dissenters concluded that patronage dismissals sufficiently advance the state interest in preserving the democratic process to justify the conceded encroachment on first amendment freedoms.⁸⁷ As in the Hatch Act cases, the political well-being of the republic, the dissent concludes, permits limitations on first amendment freedoms.⁸⁸

At bottom, the disagreement between the plurality and the dissent in the potential impact of patronage dismissals simply reflects their differing attitudes toward the value of political patronage, which has generated both desirable and undesirable forces in the American democratic process.⁸⁹ Faced with the necessity of subordinating some first amendment interests—patronage dismissals—to other first amendment interests—freedom of expression and association,⁹⁰ the balancing of the competing interests splits the Court. The plurality is not convinced that any of the three interests advanced in support of patronage dismissals is sufficient to outweigh the losses to first amendment freedoms. The dissent, on the other hand, envisions the possibility of sufficient political destabilization to tip the balance in favor of permitting patronage dismissals. In fact, the ultimate resolu-

patronage dismissal became commonplace. See A. SCHLESINGER, *THE AGE OF JACKSON* 45-47 (1945).

⁸⁵ 427 U.S. at 369.

⁸⁶ See *id.* The Court found that this conclusion was consistent with the cases sustaining the validity of the Hatch Act on the grounds that the "[s]ubordination of some First Amendment activity was permissible to protect [the core interests of individual belief and association]." See notes 54, 56 *supra*. In *Elrod*, the Court ruled that the subordination of "other First Amendment activity"—patronage dismissals—was "not only . . . permissible, but . . . mandated by the First Amendment." 427 U.S. at 371. This characterization of patronage dismissals themselves as the exercise of first amendment rights is not fully developed in *Elrod*. Arguably, the holding in *Elrod* impinges upon the public officials' freedom of association by enforced association with unwanted subordinates. The Court indicates, however, that the public employment context of the associational ties makes the patronage dismissal impermissible since the public official making the dismissal is acting not as an individual, but as the state. See *id.* at 368-71. See also *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564-65 (1973); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). The Court specifically refused to consider whether this judgment subordinating political management to employee associational interests might remain true *outside* the public employment context, where the employer would be acting as an individual. 427 U.S. at 371 n.27.

⁸⁷ 427 U.S. at 384-85 (Powell, J., dissenting).

⁸⁸ See notes 54, 56 *supra*.

⁸⁹ See note 61 *supra*.

⁹⁰ 427 U.S. at 371. See note 86 *supra*.

tion of this disagreement is likely to be found not in any of the abstractions or analysis of either the Court or the dissent, but in the operation of the rule in *Elrod* in the American political process. The next section of this analysis will explore the potential impact of *Elrod* on the institution of political patronage and on the American political process.

III. THE IMPACT OF *ELROD V. BURNS*

The *Elrod* decision has far-reaching potential consequences for the American political process. The Court's holding, especially if extended to other patronage practices such as patronage hiring patterns, may revolutionize employment practices at all levels of government and may substantially alter the means by which political parties reward their supporters. Furthermore, there remains the dissenters' fear that the end of patronage dismissals may have a destabilizing effect on the entire American party system through the disintegration of local party organizations. This section will examine the impact of *Elrod* on state and local employment practices, on federal employment practices, and on political parties and the democratic process in general.

A. *State and Local Government Employment Practices*

In addition to ending incoming administrations' wholesale dismissals of nonpolicymaking employees, *Elrod* seems likely to alter state and local employment practices in a variety of ways. First, it may curtail the attempts of outgoing administrations to protect their supporters in public positions. Second, it may cause state and local officials to make increased use of temporary or short fixed-term positions for subordinates. Third, it may cause incumbents to scrutinize public employee performance more closely. Finally, *Elrod* may cause major changes in state and local hiring practices.

Prior to *Elrod*, outgoing officeholders occasionally attempted to protect their supporters by extending civil service or merit system coverage to their supporters' positions before leaving office.⁹¹ In Illinois, for example, prior to 1972 all positions in the office of the Secretary of State were exempt from the provisions of the Illinois Personnel Code.⁹² The Secretary of State in 1972 attempted to extend Personnel Code coverage⁹³ to his employees after first dismissing all those belonging to the opposition party.⁹⁴ The Supreme Court of Illinois upheld his right to make such an extension against a constitu-

⁹¹ See *Boner v. Jones*, 60 Ill.2d 532, 535, 328 N.E.2d 548, 550 (1975); *New York Times*, 17 Nov. 1976 at A1, A14 col.1; *Chicago Sun Times*, March 17, 1972, quoted in *Amicus Brief for Public Citizen* at 5a, *Elrod v. Burns*, 96 S. Ct. 2673 (1976).

⁹² ILL. ANN. STAT. ch. 127, § 63b104c(2) (Smith-Hurd 1967).

⁹³ See ILL. ANN. STAT. ch. 127, § 63b104b (Smith-Hurd 1967).

⁹⁴ See *Boner v. Jones*, 60 Ill. 2d 532, 535, 328 N.E.2d 548, 550 (1975).

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tional challenge.⁹⁵ Since an incoming administration, under *Elrod*, may no longer make wholesale patronage dismissals, the outgoing administration would seem to have less incentive to extend merit system coverage.⁹⁶ Still, the uncertainty which surrounds the distinction between nonpolicymaking and policymaking employees seems to have caused outgoing officials to continue the practice of extending merit-system protection to some of their supporters as a precautionary measure.⁹⁷ Thus *Elrod* may have little practical effect on the extension of merit coverage to state employees.

Incoming officials, no longer able to discharge nonpolicymaking employees for partisan reasons, may attempt to circumvent the holding in *Elrod* through indirect means. *Elrod* involved nontenured public employees with no fixed term of employment who were dismissed for partisan reasons.⁹⁸ Thus, state and local officials might seek to eliminate indefinite-term positions, replacing them with fixed-term positions corresponding with the official's electoral term,⁹⁹ or constituting some fraction of the official's term.¹⁰⁰ Thus, when a new party assumed power, incoming officials would not need to dismiss the public employees, but would simply refrain from renewing their employment. Moreover, local parties controlling particular areas may actually prefer to distribute short-term positions, because such positions appear to maximize the political pressure felt by the individual employee.¹⁰¹ The political pressures felt by the individual employees also may not diminish over time, since temporary appointees, no matter how long they have occupied their positions, may not be able to assert a pattern of re-employment to avoid dismissal.¹⁰² The non-renewed employee

⁹⁵ *Id.* at 537-38, 328 N.E.2d at 551. However, the Court also invalidated an accompanying discriminatory examination system. *Id.* at 540-41, 328 N.E.2d at 552.

⁹⁶ Merit-protected employees, of course, will continue to have more protection than non-merit employees, since non-merit employees may still be discharged for any reason which does not infringe upon their constitutional rights. See 427 U.S. at 366.

⁹⁷ Fearing federal-level patronage dismissals by the incoming administration of President Carter, some federal supervisors apparently recently engaged in reclassifying federal employees into Civil Service positions. See *New York Times*, 17 Nov. 1976 at A1, A14 col. 1.

⁹⁸ See 427 U.S. at 350-51.

⁹⁹ See, e.g., *Kyles v. Calcasieu Parish Sheriff's Dep't*, 395 F. Supp. 1307, 1309 (W.D. La. 1975) (Deputy Sheriff).

¹⁰⁰ Short, fixed-term or "temporary" positions are already in use in a number of localities. In Chicago, for example, "temporaries" may hold their positions for renewable 180-day periods. Estimates indicate that nearly 40% of Chicago's public employees are temporaries, and that this constituted one of Mayor Daley's prime patronage tools. See M. & S. TOLCHIN, *TO THE VICTOR* 40-41 (1970).

While the use of temporaries might seem inconsistent with the attempts by local parties to cement their supporters in power, both major parties recognize the role of political patronage and historically have cooperated to perpetuate the institution. See W. RIORDAN, *PLUNKITT OF TAMMANY HALL* 37-40 (1963).

¹⁰¹ See M. & S. TOLCHIN, *TO THE VICTOR* 40-41 (1970) (In Chicago, "[s]ome politically active employees have held these 180-day temporary jobs for twenty years . . .").

¹⁰² See *Roberts v. Parker*, 52 App. Div. 2d 651, —, 381 N.Y.S.2d 556, 557 (1976) (mem.). But see *Gabriel v. Benítez*, 390 F. Supp. 988, 992-93 (D.P.R. 1975), *aff'd*, 541 F.2d 882 (1st Cir. 1976) (as modified on other grounds).

may face serious obstacles of proof in the absence of explicit political motivation for his discharge.¹⁰³ It would seem, then, that if local parties increasingly resort to short, fixed-term positions, partisan pressures may actually *increase* in the wake of *Elrod*.

In addition to changing the terms of public employment, public officials may attempt to circumvent *Elrod* by subjecting holdover employees affiliated with the party out of power to increased scrutiny in their job performance. The Court in *Elrod* explicitly upheld the right of public officials to dismiss subordinates for cause.¹⁰⁴ If increased scrutiny in fact occurs, its effect might be to *increase* government efficiency. Ironically, this serves one of the government objectives petitioners advanced in *Elrod* for the *continuation* of the practice of patronage dismissals.¹⁰⁵ In view of the Court's concern with government efficiency, it would seem that the employee rightfully dismissed for cause seeking equitable relief would gain little by asserting that he was subjected to greater scrutiny than other employees.¹⁰⁶ Thus the Court's holding in *Elrod* is likely to tempt public officials to examine more closely the performance of government employees. Regardless of motive this result may actually improve government operations since it is not likely to endanger the careers of competent public employees.

While not encompassed by the holding of *Elrod*, there is reason to believe that the Court is likely to hold patronage *hiring* practices equally impermissible. Significantly the court discussed each of the justifications advanced by petitioners in terms of patronage generally rather than specifically in terms of patronage dismissals.¹⁰⁷ Since an attack on patronage hiring practices by a person denied public employment seems likely to evoke the same government interests in response, the Court's ultimate resolution of the question in favor of those denied public employment for partisan reasons seems certain. Furthermore, the Court's position that the government may not deny a benefit to an individual for an impermissible reason¹⁰⁸ would seem to apply equally to the initial denial of public employment for partisan reasons, for the applicant for a government position will feel the same pressure to conform in his views that the Court struck down in *Elrod*.¹⁰⁹

Even the dissent conceded that individuals *denied* public employment as a result of their political affiliation could assert first amendment interests more legitimately than the plaintiffs in *Elrod* because, not

¹⁰³ One federal court has attempted to meet this problem by allowing circumstantial evidence of politically-motivated dismissals. *Gabriel v. Benitez*, 390 F. Supp. 988, 993 (D.P.R. 1975), *aff'd*, 541 F.2d 882 (1st Cir. 1976) (as modified on other grounds).

¹⁰⁴ 427 U.S. at 366.

¹⁰⁵ See notes 63-69 *supra* and accompanying text.

¹⁰⁶ *Cf.* 427 U.S. at 365-66.

¹⁰⁷ *Id.* at 364-69.

¹⁰⁸ *Id.* at 360-61. See notes 43-45 *supra* and accompanying text.

¹⁰⁹ See *The Supreme Court 1975 Term*, 90 HARV. L. REV. 56, 194-96 (1976). Even prior to *Elrod*, the Fourth Circuit had recognized this possibility. *Nunnery v. Barber*, 503 F.2d 1349, 1358 (4th Cir. 1974) *cert. denied*, 420 U.S. 1005 (1975).

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having accepted patronage employment, the State could not seek to invoke the doctrine of waiver against them.¹¹⁰ The dissent's analysis of the constitutional validity of patronage practices is sufficiently broad to include patronage hirings as well as dismissals, and it seems clear that the dissenters would have upheld patronage hiring had *Elrod* presented the question directly.¹¹¹ Justice Stewart, however, explicitly reserved consideration of the question in his concurrence.¹¹²

B. *Federal Employment Practices.*

The rationale of *Elrod* which invalidated state and local patronage dismissals seems equally applicable to the Federal Government.¹¹³ The plurality opinion seems to indicate that justiciability problems would not bar judicial review¹¹⁴ and that the Court would invalidate the patronage dismissals of nonpolicymaking federal employees if such a case came before it. The Court indicated that if in fact a partisan job restriction violates constitutional mandates, then that restriction must be struck down regardless of the level of government applying it.¹¹⁵ Such an extension, however, is likely to have but a negligible impact on actual federal employment practices, since most federal employees occupy policymaking positions or are covered by Civil Service regulations¹¹⁶ which both protect federal employees and prohibit much of the partisan political activity required of patronage employees in *Elrod*.¹¹⁷ Thus, the impact of *Elrod* upon federal employment practices is not likely to be large.

¹¹⁰ 427 U.S. at 381 n.4 (Powell, J., dissenting). See notes 28-37 *supra* and accompanying text.

¹¹¹ Indeed, the tenor of the dissent seems to assume that the plurality opinion includes an indictment of patronage hiring practice and phrases its justification in equally broad terms. See, e.g., 427 U.S. at 385-86. (Powell, J., dissenting).

¹¹² *Id.* at 374 (Stewart, J., concurring).

¹¹³ Chief Justice Burger analogized from the discretion which Congress has conferred on cabinet officers in the federal government over nontenured positions to argue that a similar discretion should protect state patronage practices from judicial interference. See *id.* at 376 (Burger, C.J., dissenting). Justice Powell's dissent explicitly reserved the question. *Id.* at 383 n.7.

¹¹⁴ See *id.* at 352.

¹¹⁵ *Id.* ("[T]here can be no impairment of executive power, whether on the state or federal level, where actions pursuant to that power are impermissible under the Constitution.") (emphasis added). Consistent with this position, the Court has traditionally limited the dismissal powers of federal officials on constitutional grounds. See note 27 *supra*.

¹¹⁶ One estimate has placed only 6,500 "patronage" jobs at the disposal of the President. M. & S. TOLCHIN, *TO THE VICTOR* 254 (1970). But see New York Times, 17 Nov. 1976 at A1.

¹¹⁷ The Court has twice upheld the Hatch Act restrictions on political activity by public employees. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75, 103-04 (1947). See note 54 *supra*. See, e.g., P. YOUNTS, 1 *POLITICAL ACTIVITY* REP. 12 (1941) (supervisor found to have selected employees for political reasons should be terminated from service); cf. C. MARTIN, JR., 2 *POLITICAL ACTIVITY* REP. 726, 733 (promotion or suspension for political reasons is impermissible). Some restrictions of the Hatch Act

C. *The Impact of Elrod on Political Parties and the Democratic Process*

The extent to which local politicians may be able to maintain their control over local organizations after *Elrod* may depend upon their ability to manipulate alternative patronage practices while avoiding further judicial intervention. The Court itself identified four alternative forms of political patronage: patronage hiring practices, government contract distribution, unequal distribution of services from locality to locality, and judicial patronage in receiverships, trusteeships and refereeships.¹¹⁸ The availability of alternative patronage practices suggests that, on balance, *Elrod* may not significantly weaken the institution of political patronage because local officials may be able to offset their losses with increased use of their remaining sources of patronage.

Local politicians retain, for example, powers sufficient to exercise indirect control over vast quantities of jobs in the private sector.¹¹⁹ Because local politicians retain power in such areas as dispensation of government contracts¹²⁰ and passage of municipal zoning regulations,¹²¹ they will continue to have substantial influence with private industry. While this influence is unlikely, as a practical matter, to produce hiring in private industry along ironclad party lines,¹²² enterprising local political organizations, in all likelihood, will be able to secure employment for many of their supporters in private industries hoping to curry favor with powerful local officials.¹²³

In addition to the fealty generated by tangible rewards offered in the form of employment, the continued availability of materials rewards other than employment suggests that local parties will not be

also apply to state and local employees "whose principal employment is in connection with an activity . . . financed in whole or in part by [federal] loans or grants . . ." 5 U.S.C. §§ 1501(4), 1502 (Supp. V 1975).

¹¹⁸ 427 U.S. at 353. The dissent indicated that "the inability to formulate judicial standards" may well preclude review of some of these patronage practices. *Id.* at 377 n.1 (Powell, J., dissenting). See note 25 *supra*.

¹¹⁹ See, e.g., M. & S. TOLCHIN, *TO THE VICTOR* 44 (1970 ed.).

¹²⁰ See, e.g., *id.* at 14-15, 273-77. Even competitive bidding regulations do not always prevent the dispensation of government contracts on a patronage basis. *Id.* at 43, 60-61.

To avoid judicial interference with patronage practices, government officials may make increasing use of their ability to "contract-out" to private industry services which heretofore have been performed by public employees. The public employees might then be dismissed with impunity since, so long as financial savings accrued to the state, dismissed employees would find it difficult to prove that the state was motivated by the desire to evade either *Elrod* or state civil service laws. See *State ex rel Sigall v. Aetna Cleaning Contractors of Cleveland, Inc.* 47 Ohio App.2d 242, —, 1 Ohio Op.3d 310, 313, 353 N.E.2d 913, 916 (1974), *aff'd* 45 Ohio St. 2d 308, 314-15, 74 Ohio Op.2d 471, 474-75, 345 N.E.2d 61, 65-66 (1976) (per curiam).

¹²¹ See M. & S. TOLCHIN, *TO THE VICTOR* 52-60, 68 (1970 ed.).

¹²² A more likely result is party-line hirings at particular times to fill openings—perhaps created by the award of a new contract. See notes 120-121 *supra*.

¹²³ An action seeking relief in the private employment context, without more, might reach an entirely different result, based on the involvement of private associational interests on both sides. See 427 U.S. at 371 & n.27. See also note 86 *supra*.

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powerless to command future political support. Local officials retain their control over the distribution of government services and local party organizations are still in a position to provide a wide range of material and psychological rewards for their members.¹²⁴ As an attempt to remain influential in the wake of *Elrod*, many local party organizations may actually increase their efforts to provide access to officeholders and to distribute social services.

Ultimately, the impact of *Elrod* on the American political party structure, and on the democratic process itself, may rest on the political abilities of state and local officeholders and political organizations. It may be true, as the dissent claims, that the plurality in *Elrod* has taken a myopic view of the net worth of political patronage to American politics,¹²⁵ but the dissenters may have seriously underestimated the resourcefulness of the local politician, who wishes to remain in office.¹²⁶ It seems likely for this reason that the Court can proscribe patronage dismissals for nonpolicymaking public employees without serious damage either to the fabric of American democracy or to the core of the patronage system. Clearly, the impact of *Elrod* upon both patronage and democracy must await further judicial determinations defining policymaking positions and subjecting alternative patronage practices to judicial scrutiny.¹²⁷

CONCLUSION

The prohibition of patronage dismissals of nonpolicymaking public employees has significantly enhanced the ability of the individual employee to withstand official encroachment on his freedoms of political expression and association. In extending this protection, however, the Court has placed a significant constraint on the ability of the local political party to distribute material rewards to its supporters. Whether the local political party can survive this loss without dissipating its base of support will depend in large measure both upon the talents of the local leadership and upon the depth and breadth of further judicial limitations on the parties' freedom to distribute rewards. If the local

¹²⁴ See note 61 *supra*.

¹²⁵ 427 U.S. at 383.

¹²⁶ See W. RIORDAN, *PLUNKITT OF TAMMANY HALL* 37-38 (1963).

¹²⁷ Petitioners had argued that one difficulty with a holding that patronage dismissals were impermissible would be a vast quantity of litigation brought by virtually every dismissed non-civil service public employee. Brief for Petitioners at 36-37. During the course of oral argument, at least Justice Powell seemed quite concerned that the holding in *Elrod* might lead to a "flood of litigation." *New York Times*, Nov. 17, 1976 at A1, A14, col. 1. In fact, however, experience in the Seventh Circuit in the wake of *Illinois State Employees Union* seems to belie this prediction. From the *Illinois State Employees Union* decision in 1972 to 1975, only four enforcement proceedings were brought. Brief for Respondents at 57. *Elrod v. Burns*, 427 U.S. 347 (1976). Given the relatively active role of patronage in Cook County, there is reason to believe that if an interdiction of patronage dismissals "can be effectively enforced in Cook County, Illinois, without a flood of litigation, a judgment [ending patronage dismissals] can be implemented anywhere." Brief for Respondents at 58.

political organizations are unable or are judicially prevented from manipulating alternative sources of rewards, the final result of *Elrod v. Burns* may be a major re-adjustment in American party politics. By removing the patronage dismissal from the hands of political bosses, however, the Court has reaffirmed its conviction that the health of the American polity is found more in the freedom of its members to speak and think as they choose than in the ability of politicians to grant favors in return for support.

RICHARD F. RINALDO

Securities Law—Constitutional Law—Implied Waiver of Eleventh Amendment Immunity under the Securities Acts—*Green v. Utah*.¹ In 1974 plaintiff Maxine Green brought suit² in federal district court against the State of Utah and its Commissioner of Financial Institutions (Commissioner) alleging violation of the antifraud provision of the Securities Exchange Act of 1934,³ arising out of the state's regulation of one of its chartered financial institutions.⁴ According to the complaint, Western States Thrift and Loan (WST) was an industrial loan corporation organized pursuant to Utah statutes,⁵ which issued securities in the form of thrift certificates, passbook accounts, and debenture bonds.⁶ Plaintiff alleged that due to a series of severe

¹ 539 F.2d 1266 (10th Cir. 1976).

² Plaintiff filed suit on behalf of herself and as a class action on behalf of all other persons similarly situated. *Id.* at 1268.

³ Securities Exchange Act of 1934, § 10, 15 U.S.C. § 78j (1970) and rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1976). 15 U.S.C. § 78j (1970) provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe . . .

Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

⁴ 539 F.2d at 1268.

⁵ *Id.* at 1267-68. See UTAH CODE ANN. §§ 7-8-1 *et seq.* (1968 Replacement Volume).

⁶ The court assumed *arguendo* that these were securities within the meaning of the Securities Acts. 539 F.2d at 1269. See 15 U.S.C. §§ 77b(1), 78c(a)(10) (1970).