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Jaimie Johnson

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O’HARE TRUCK SERVICE, INC. V. CITY OF NORTHLAKE: FURTHER LIMITING THE SPOILS OF THE VICTOR

INTRODUCTION

American society has considered political patronage an inherent element of federal, state, and local government for nearly 200 years. Presidents Washington, Jefferson, Jackson, and Lincoln, to name only a few, used patronage in their respective administrations. Often patronage practices represent an opportunity for both incumbents and challengers to “mobilize powerful resources on their behalf,” promote government efficiency and a spirit of common purpose by selecting politically like-minded employees, and promote general political discourse. More frequently, however, patronage is abused. “Opponents... contend that patronage: (1) causes substantial disruption when a large turnover occurs; (2) ignores experience; (3) provides a disincentive to work hard; and (4) results in losses to political parties and policy information.” Whether viewed as an important, even necessary, feature of our two-party political system, or conversely as the very root of corruption and evil in


4. Cammarosano, supra note 2, at 104.

5. See O’Hare Truck Serv., Inc. v. City of Northlake, 116 S. Ct. 2353, 2357 (1996); see also Cammarosano, supra note 2, at 103.


7. See Cammarosano, supra note 2, at 103 (stating that patronage bolsters the political party system by enabling political parties to encourage and entice their supporters to participate in the political process); see also Rutan v. Republican Party, 497 U.S. 62, 93 (1990) (Scalia, J., dissenting) (stating that political leaders “complain of the helplessness of elected government, unprotected by ‘party discipline’ as a result of Supreme Court decisions outlawing patronage dismissals).
government, patronage has played an important role in the development of America's political society.

For over a century, the constitutionality of patronage was not questioned. Since the 1960s, however, the Supreme Court has slowly abandoned patronage as First Amendment principles have come to predominate the legal debate over the long-standing tradition. Initially, only public employees were protected by these First Amendment principles, but recently the protection has been extended to public contractors. This extension brings with it a mandate for changes in the individual politician's conduct and in the expectations of his supporters. In the past it had been "well understood that the victor will reap the harvest," but "to the victor belongs the spoils" shall no longer echo in the hearts and minds of election winners.

8. See Frank J. Sorauf, Patronage and Party, 3 MIDWEST J. POL. SCI. 115, 115-16 (1959) (noting reactions to patronage parallel the instinctive negative reactions to "slavery, aggressive war, and divine right monarchy").

9. See generally Cammarosano, supra note 2.

10. See Board of County Comm'r's v. Umbehrr, 116 S. Ct. 2361, 2362-63 (1996) (Scalia, J., dissenting). Justice Scalia's dissent is a lengthy joint dissent addressed to O'Hare and its companion case, Umbehrr. "There can be no dispute that, like rewarding one's allies, the correlative act of refusing to reward one's opponents . . . is an American political tradition as old as the Republic." Id. at 2362. Patronage practices have been "unchallenged since the beginning of the Republic; and those that have been objected to have not been objected to on constitutional grounds." Id. at 2363.

11. See Keyishian v. Board of Regents, 385 U.S. 589 (1967); see also Rutan, 497 U.S. 62 (holding that Elrod/Branti rule applies to hiring, promotions, transfers, and recalls); Branti v. Finkel, 445 U.S. 507 (1980), Elrod v. Burns, 427 U.S. 347 (1976) (both holding that patronage dismissals are unconstitutional as a violation of the First Amendment unless the employee's private political beliefs would interfere with the discharge of his public duty).

12. See O'Hare Truck Serv., Inc. v. City of Northlake, 116 S. Ct. 2353 (1996) (holding that independent contractors working for government are afforded same Elrod/Branti First Amendment protections from politically motivated employment decisions as public employees).

13. See generally Umbehrr, 116 S. Ct. 2361 (1996) (Scalia, J., dissenting). "It is profoundly disturbing that the varying political practices across this vast country, from coast to coast, can be transformed overnight by an institution whose conviction of what the Constitution means is so fickle." Id. at 2362.


15. Although the origins of this phrase are uncertain, it symbolizes the philosophy of government officials who appoint loyal party supporters to government positions. See generally Martin, supra note 1 (setting forth a discussion of the history of patronage and a break-down of individual circuit court's treatment of patronage cases).

This Note will review and discuss the history of political patronage in the United States, including the Supreme Court's increased hostility toward patronage since the 1970s and the recent Supreme Court ruling in *O'Hare Truck Service, Inc. v. City of Northlake*, which extended First Amendment protection to independent contractors in patronage dismissals. Next, this Note will discuss the soundness of the *O'Hare* decision as well as possible problems created by the extension of First Amendment protection to contractors. Finally, it will consider future implications for government officials in the wake of the *O'Hare* decision and proposals for the government official interested in avoiding constitutional liability as it relates to patronage and employment decisions involving independent contractors.

I. HISTORY OF PATRONAGE IN THE UNITED STATES

As a rather accurate reflection of society's attitude, one scholar defined patronage as "all those posts, distributed at the discretion of political leaders, the pay for which is greater than the value of the public services performed." Webster's Dictionary, however, defines patronage less humorously as "the power to make appointments to government jobs especially for political advantage." Although American political patronage practices date back to the administration of George Washington, politically motivated dismissals have always been controversial. Traditional justifications for patronage "include: (1) efficiency of public employees; (2) accountability and responsiveness to the public; (3) preservation of the democratic process; (4) strengthening of political parties; (5) performance of quasi-welfare functions; and (6) helping minorities obtain social acceptance." But blatant abuse of the patronage system

18. See id.
weakened traditional justifications and precipitated the beginning of the decline of patronage.

A. Statutory Limits on Political Patronage

Although public employees did not successfully challenge the constitutionality of patronage in the courts until the 1970s,23 patronage practices in many jurisdictions had already begun to decline.24 Long associated with corruption and misappropriation of power in public office, patronage drew increasing political and societal opposition.25 As a result, reforms in public employment procedures, such as civil service laws, merit systems, low-bid laws in public contracting, and other statutory patronage limits, gained popularity in the states.26 Federal legislative attacks on patronage began as early as 1883, when corruption in the Grant administration and Garfield's assassination by an unsuccessful office-seeker27 prompted the passage of the Pendleton Act.28 The Act provided a nonpartisan basis for the dismissal and hiring of government employees by requiring competitive examinations.29 The Hatch Act,30 passed in 1939, restricted the political activities of most federal government employees thus

23. See Elrod v. Burns, 427 U.S. 347 (1976). Elrod is the landmark case where a plurality of the Supreme Court recognized that public employees have First Amendment protection against government employment decisions based upon an employee's political association. See id.

24. See Frank J. Sorauf, The Silent Revolution in Patronage, 20 PUB. ADMIN. REV. 28, 30 (1960) (stating that, even though patronage has become ingrained in American political society as tradition, it has grown into public disfavor and become unnecessary for political parties).


27. See Goodman, supra note 25, at 739.


further reducing the incidence of patronage practices at the federal level.\textsuperscript{31} State "Hatch Acts" soon followed.\textsuperscript{32} Such statutory provisions, however, covered only specific positions and political activities, and did not curtail patronage practices across the board.\textsuperscript{33}

B. Constitutional Limits

Prior to the 1970s no one doubted the constitutionality of patronage.\textsuperscript{34} Courts considered government employment a privilege, not a right, and allowed the government to condition the receipt of that privilege on waiver of First Amendment rights.\textsuperscript{35} One commentator has described this approach as a "specific application of the larger view that no one has a constitutional right to government largess."\textsuperscript{36} Put more simply, the courts allowed the government "broader discretion in denying privileges that it bestows than in denying constitutional rights that it must recognize."\textsuperscript{37}

Since then, however, the Court has "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"\textsuperscript{38} In \textit{Perry v.}
Sindermann\(^39\) the Court held that government employment could not be denied for exercising First Amendment rights. The Court stated that:

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 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.\(^40\)

By the beginning of the 1970s, the stage was set for the Supreme Court to take a decided stance against patronage.\(^41\)

1. Elrod v. Burns: Patronage Dismissals Held Illegal

The Supreme Court first addressed the constitutionality of patronage in the case of Elrod v. Burns.\(^42\) In Elrod, a newly-elected Democratic sheriff fired a group of non-civil service employees\(^43\) due to their lack of affiliation with the Democratic Party.\(^44\) The plaintiffs brought suit against the Cook County, Illinois sheriff alleging violations of their First and Fourteenth Amendment rights.\(^45\) Addressing the constitutionality of patronage dismissals, a divided Court held that patronage practices violate the First Amendment because they restrain a public employee's freedom of political belief and association.\(^46\)

\(^39\) 408 U.S. 593 (1972).
\(^40\) Id. at 597.
\(^41\) See Elrod v. Burns, 427 U.S. 347, 359 (1976) (stating that constitutionally provided right of association of individuals far outweighs traditional justifications for patronage dismissals); Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967) (holding that political association cannot constitute an adequate ground for denying public employment under an overly broad New York state statute); see also Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (uniformly rejecting practice of attaching conditions to government employment).
\(^42\) 427 U.S. 347 (1976).
\(^43\) See id. at 350. The employees were not "civil service" and therefore, no statute, ordinance, or regulation prohibited their arbitrary discharge. Id.
\(^44\) See id. at 351.
\(^45\) See id. at 350.
\(^46\) See id. at 372-73. Courts derive an individual's right to freedom of association
The Supreme Court provided two reasons for its decision. First, the threat of dismissal for failure to provide political support "unquestionably inhibits protected belief and association" under the First Amendment. Second, continued patronage allows the government to indirectly impose political beliefs on individuals by conditioning employment on political affiliation. The First Amendment expressly prohibits government imposition of beliefs and associations on citizens, including public employees, whether accomplished directly or indirectly.

The Court recognized that while First Amendment protection is not unrestricted or absolute, any substantial impairment of First Amendment rights must survive an "exactng scrutiny" analysis. The governmental interest advanced must be compelling and "of vital importance, and the burden is on the government to show the existence of such an interest."

from the First Amendment. See Kusser v. Pontikes, 414 U.S. 51, 56-57 (1973). Although the First Amendment does not expressly mention freedom of association, the Supreme Court has held that the First Amendment's enumerated rights imply a right to join with others to exchange ideas and promote causes. See id.; see also Democratic Party of United States v. Wisconsin, 450 U.S. 107, 121 (1981) (stating that First Amendment rights are protected by the Fourteenth Amendment from infringement by any state).

47. See Elrod, 427 U.S. at 359.
48. See id.
49. See id.
50. See id.
51. See id. at 359-60. When an employer threatens to fire an employee as a result of the employee's political affiliation, the employee must choose between exercising a constitutional right or keeping his job. See Branti v. Finkel, 445 U.S. 507, 514-16 (1980); Elrod, 427 U.S. at 356-61. Courts refer to this choice as an "unconstitutional condition." Rutan v. Republican Party, 497 U.S. 62, 78 (1990).

52. Elrod, 427 U.S. at 362. The standard set out in Elrod and again in Branti appears at first glance to be "strict scrutiny" and some scholars have incorrectly labeled it as such. See, e.g., Bradford S. Moyer, Note, The Future of Rutan v. Republican Party of Illinois: A Proposal for Insulating Independent Contractors from Political Patronage, 28 Val. U. L. Rev. 375, 390 (1993). The Court, however, failed to expressly set out the boundaries of the standard. Elrod, 427 U.S. at 362. Since Branti, circuit courts have categorized the Elrod/Branti standard as more demanding than the Pickering balancing test used in free speech cases, but not as tough as strict scrutiny; the standard, however, has been used almost exclusively in patronage cases. See, e.g., Shahar v. Bowers, 70 F.3d 1218, 1224 (11th Cir. 1995), rev'd en banc, 114 F.3d 1097 (11th Cir. 1997); McCabe v. Sharrett, 12 F.3d 1558, 1567 (11th Cir. 1994).

53. Elrod, 427 U.S. at 362; see NAACP v. Alabama, 357 U.S. 449, 463 (1958) (stating that in order to overcome infringement of First Amendment rights "a subordinating interest of the State must be compelling") (quoting Sweezy v. New
In weighing the government's interest in patronage employment practices, the Court rejected the government's claims that patronage was necessary to ensure effective government and efficient public employees. The Court did, however, recognize that a new administration would need to bring in its own people to help implement political policies and held that "policymaking positions" are the only positions subject to patronage dismissals. The Court reasoned that "[n]onpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the party in power. Justice Brennan acknowledged that "[n]o clear line can be drawn between policymaking and nonpolicymaking positions" and courts should consider the nature of an employee's responsibilities and "whether the employee acts as an adviser or formulates plans for the implementation of broad goals."

2. Branti v. Finkel

In Branti, two assistant public defenders filed suit after being threatened with discharge because of their Republican political affiliation. The district court applied the Elrod test and concluded that the plaintiffs were not "policymakers" and therefore, the government could not terminate them solely on the basis of party affiliation without violating the First Amendment.

The Supreme Court affirmed the district court's conclusion, but altered the Elrod "policymaker" rule. The Court found the ultimate question to be "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."
Furthermore, the Court stated that whether the employee holds a policymaking position is one factor to be considered, but is no longer dispositive as it was under Elrod.65

3. Rutan v. Republican Party: Extending Elrod and Branti to Other Employment Decisions

In Rutan,66 low-level employees and a job applicant filed suit against the Governor of Illinois for using patronage in hiring, transfers, and promotions.67 Applying an exacting scrutiny analysis, the Court concluded that the First Amendment concerns present in Elrod and Branti (that patronage imposes restraints on an individual’s First Amendment freedoms of speech and association) were present in Rutan.68 The Court found that patronage, in cases such as Rutan,69 “chill[s] the exercise of protected belief and association”—activities protected by the First Amendment.70 The Court then expanded First Amendment protection to include not only politically motivated dismissals, but also promotions, transfers, and recalls, holding that such employment actions serve to illegally condition the receipt of a government benefit upon the surrender of a constitutionally guaranteed right.71

In applying exacting scrutiny, the Court concluded that the government’s interests were not “vital” and therefore, did not outweigh the fundamental First Amendment rights impinged by the use of political patronage in hiring, promoting, and recalling public employees.72 The Rutan decision left unanswered,

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65. See id.
67. See id. at 65-68. The Republican Governor of Illinois had issued an executive order imposing a hiring freeze on positions within his administration subject to his control. See id. at 65. In implementing the freeze, the Governor considered whether the applicant voted in Republican primaries in the past, provided financial support to the Republican party or its candidates, and promised to join and work for the Republicans in the future. See id. at 66.
68. See id. at 73-74. The Court rejected the argument that the employment decisions at issue did not violate the First Amendment because they were not punitive, did not “adversely affect the terms of employment, and therefore [did] not chill the exercise of protected belief and association . . . .” Id. at 73.
69. See id. at 62.
70. Id. at 73.
71. See id. at 75. The Court stated that the First Amendment does not act as a “tenure provision, protecting public employees from actual or constructive discharge,” but prevents the government from “interfer[ing] with its employees’ freedom to believe and associate.” Id. at 76.
72. See id. at 78. The Court found meritless the argument that only a “substantial
however, whether First Amendment protection from politically motivated dismissals extends to independent contractors providing goods or services to government. Following Rutan, the circuit courts declined to extend such protection, and independent contractors were left out in the cold.

4. Barriers to Extending Protection to Independent Contractors

Circuit courts relied on tradition and the doctrine of stare decisis in refusing to extend constitutional protection to non-public employees working for the government. Those courts' justifications for not extending protection include the following: (1) the belief that contractors have access to other work because the government is only one customer for the contractor, whereas a government employee relies exclusively on the government for his livelihood; (2) the notion that since independent
contractors do not "work" for the government, they will not feel the pressure to conform to the controlling political party; the potential flood of litigation from the possibility that "every disappointed bidder for a public contract . . . [would] bring a federal suit against the government," and the lower court's general belief that the Supreme Court should be responsible for extending First Amendment protection from patronage to independent contractors. In *O'Hare Truck Service, Inc. v. City of Northlake*, both the district court and the Seventh Circuit refused to extend First Amendment protection to an independent contractor who provided towing service to the City of Northlake. The Supreme Court granted certiorari to address and resolve the issue.

II. *O'Hare Truck Service, Inc. v. City of Northlake*

In June 1996, the Supreme Court extended the First Amendment protection recognized in *Elrod, Branti*, and *Rutan* to independent contractors in *O'Hare Truck Service, Inc. v. City of Northlake*. The City of Northlake coordinated towing services through its police department and maintained a rotation list of available towing companies. The plaintiff, John Gratianna, owned O'Hare Truck Service (O'Hare) and had performed towing services at the city's request since 1965. Gratianna was not working under a direct contract, and the city's policy was to remove a tow truck operator from the rotation list only for

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& n.5, 589 n.6 (7th Cir. 1989); see also Horn, 796 F.2d at 673-75.
79. *O'Hare Truck Service, Inc. v. City of Northlake*, 47 F.3d 883, 885 (7th Cir. 1995), rev'd 116 S. Ct. 2353 (1996) (stating that "compared to the impact on governmental employees, there was little chance that a contractor's freedom would be impinged."); *LaFalce v. Houston*, 712 F.2d 292, 293 (7th Cir. 1983).
80. *O'Hare*, 47 F.3d at 885.
81. See id.; see also Umbhr v. McClure, 44 F.3d 876, 883 (10th Cir. 1995) (stating that Tenth Circuit is in agreement "with the Seventh and the Third Circuits that . . . Supreme Court guidance is particularly needed" in patronage cases involving contractors); *Downtown Auto Parks*, 938 F.2d at 709.
85. Id.
86. See *id.* at 2356.
87. See *id.*
88. See *id.*
cause.\textsuperscript{89} Gratianni and the former mayor agreed that so long as satisfactory towing service was provided, O'Hare would remain on the list.\textsuperscript{90}

In 1989 the city elected a new mayor, Reid Paxton, who assured Gratianni that O'Hare would remain on the list so long as acceptable service was provided.\textsuperscript{91} Four years later, Paxton's campaign committee solicited Gratianni for a campaign contribution, but Gratianni refused and actively supported Paxton's opponent.\textsuperscript{92} After being re-elected, Paxton removed O'Hare from the rotation list.\textsuperscript{93}

Gratianni filed suit in federal court alleging violation of his First Amendment right to freedom of association and belief.\textsuperscript{94} The district court dismissed Gratianni's First Amendment claim with prejudice for failure to state a claim,\textsuperscript{95} and the Seventh Circuit affirmed, holding that the protection afforded under \textit{Elrod} and \textit{Branti} covered only public employees, not independent contractors.\textsuperscript{96}

The Supreme Court reversed and remanded, holding that Gratianni had stated a viable claim under the First Amendment.\textsuperscript{97} The Court held that "[l]though the government has broad discretion in formulating its contracting policies, we hold that the protections of \textit{Elrod} and \textit{Branti} extends to an instance like the one before us, where government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance."\textsuperscript{98} The Court concluded that First Amendment rights are impinged equally regardless of whether an employee or a contractor suffers the adverse employment decision.\textsuperscript{99} The Court stated that the distinction traditionally drawn between contractors and employees can serve as a valid basis for differential treatment in certain areas.\textsuperscript{100} Recognizing

\begin{itemize}
\item \textsuperscript{89} See id.
\item \textsuperscript{90} See id.
\item \textsuperscript{91} See id.
\item \textsuperscript{92} See id.
\item \textsuperscript{93} See id.
\item \textsuperscript{94} See id.
\item \textsuperscript{95} See O'Hare Truck Serv., Inc. v. City of Northlake, 843 F. Supp. 1231, 1234 (N.D. Ill. 1994), aff'd 47 F.3d 883 (7th Cir. 1995), rev'd 116 S. Ct. 2353 (1996).
\item \textsuperscript{96} See O'Hare, 47 F.3d at 885.
\item \textsuperscript{97} See O'Hare, 116 S. Ct. at 2355.
\item \textsuperscript{98} Id.
\item \textsuperscript{99} See id. at 2355.
\item \textsuperscript{100} See id. at 2359 (noting that distinction is mainly "a creature of the common
the distinction in patronage cases, however, would allow government to avoid constitutional liability simply by contracting work out to private companies or by attaching different labels to particular jobs.\textsuperscript{101} The Court rejected the City of Northlake's argument that contractors are not agents of the government, and therefore, the threat of losing business would not be strong enough to have a coercive effect on contractors' fundamental rights.\textsuperscript{102} This argument failed because it requires the courts “to inquire into the extent to which the government dominates various job markets as employer or as contractor.”\textsuperscript{103} This argument would also require the Court to determine the economic dependence of each claimant.\textsuperscript{104} Both are tasks for which the Court stated it was “not well suited”.\textsuperscript{105} The more fundamental concern that independent contractors be entitled to protection of their rights of speech and association from wrongful government interference was the central issue.\textsuperscript{106} The Court focused on the coercive government action taken against contractors who choose not to “adjust to their precarious position [of each in-coming politician possibly refusing to renew the contract] by currying favor with diverse political parties,” not on whether the contractor is in a better position than a public employee to “mitigate governmental overreaching.”\textsuperscript{107}

The Court addressed the argument that a decision in favor of O'Hare would open the floodgates to litigation, thus consuming precious government resources and interfering with the administration of government contracting.\textsuperscript{108} The O'Hare majority noted that the same concerns were raised after Rutan was decided,\textsuperscript{109} yet only a small number of such cases were actually filed against public officials in Illinois in the six years following the Rutan decision.\textsuperscript{110}

\textsuperscript{101} See id.
\textsuperscript{102} See id.
\textsuperscript{103} Id. at 2360.
\textsuperscript{104} See id.
\textsuperscript{105} Id.
\textsuperscript{106} See id.
\textsuperscript{107} Id.
\textsuperscript{108} See id.
\textsuperscript{110} See O'Hare, 116 S. Ct. at 2360 (citing amicus brief filed on behalf of O'Hare,
Cities and other governmental entities still retain discretion to contract for goods and services so long as the employment decision is not motivated by political affiliation. The Court discussed several avenues that government could use to justify contracting decisions. The Court found that "interests of economy" may provide sufficient justification for a "governmental entity to retain existing contractors." These "economic" considerations can be utilized to "allow the government to maintain stability, reward good performance, deal with known and reliable persons, or ensure the uninterrupted supply of goods or services." The government can justify terminating one contractor in favor of another without bearing the costs of competitive bidding if done for the purpose of "stimulat[ing] competition, encourag[ing] experimentation with new contractors, or avoid[ing] the appearance of favoritism."

The Court noted that although protection from patronage-based employment decisions applies to freedom of speech infringement as well as to freedom of association infringement, the two inquiries require different tests. While Branti utilizes the "political affiliation as a reasonable requirement" test for freedom of association cases, Pickering v. Board of Education directs the courts to employ a balancing test when free speech is clearly at issue. Although Gratzianna claimed only a violation of the First Amendment right of association, the Court indicated that the case may also involve a violation of free speech. The Supreme Court instructed the lower court to determine on remand whether to apply the Pickering balancing test or the reasonable requirement inquiry of Elrod and Branti.

which presented statistics showing that only eighteen employment-related suits alleging First Amendment violations were filed against Illinois state officials in the six years since Rutan was handed down.

111. See id.
112. Id.
113. Id.
114. Id.
115. See id. at 2357-58.
118. See O'Hare, 116 S. Ct. at 2357-58. Because this Note does not focus on the violation of the First Amendment right to free speech in the context of patronage based employment decisions, the Pickering balancing test will not be discussed.
119. See id. at 2358.
120. See id. at 2361. "This case-by-case process will allow the courts to consider the necessity of according to the government the discretion it requires in the
Justice Scalia wrote a separate fourteen page dissent which addressed O’Hare and its companion case, Board of County Commissioners v. Umbehr. Scalia based his opposition to the ruling on a multi-factored “if it ain’t broke, don’t fix it” approach. He stated that the long-standing tradition of patronage validates the practice and asked “[i]f that long and unbroken tradition of our people does not decide these cases, then what does?” Further, the American people addressed any concerns they have in this area, as is evidenced by the fact that “government contracting is subject to the most extraordinary number of laws and regulations at the federal, state, and local levels.” In true textualist form, Scalia argued that when a practice, such as patronage, is not expressly prohibited under the Constitution and has a long tradition of unchallenged use, the Court has no proper basis for striking it down. Scalia predicted that political practices across the country will be “transformed overnight” as a result of the Court’s attempt to “get rid of a few bad apples.”

III. THE O’HARE DECISION: PROS AND CONS

After O’Hare, the government can no longer discharge or refuse to hire, promote, or recall a public employee or independent contractor based upon political affiliation unless “party affiliation is an appropriate requirement for the effective performance of the public office” or contract involved.

A. O’Hare: Sound Judicial Reasoning

Changes in the law and society have made the prohibition of patronage practices in regard to independent contractors long...
overdue. Traditional arguments distinguishing independent contractors from public employees lose their force in cases involving patronage dismissals and constitutional violations.\textsuperscript{129} Traditional distinctions between the two are based on the common law of agency and tort, not constitutional law.\textsuperscript{130} The Court, in \textit{Elrod}, \textit{Branti}, and \textit{Rutan}, condemned governmental attempts to coerce and control public employees' beliefs and associations.\textsuperscript{131} A case involving an independent contractor instead of a public employee in no way changes the nature of the coercive government action forbidden by those decisions.\textsuperscript{132}

Many tasks traditionally performed by municipalities or other governmental entities are now contracted out to private industry.\textsuperscript{133} Drawing a distinction between an employee and an independent contractor would allow the government to limit its liability for violating an individual's First Amendment rights by simply contracting work out so it could practice political patronage.\textsuperscript{134} In many areas, such as garbage collection or vehicle registration, the government controls the employment market as the exclusive employer or the major employer.\textsuperscript{135} While not dispositive of First Amendment claims in patronage cases, exclusivity of control illustrates that the availability of individual First Amendment protection should not be based upon

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\textsuperscript{129} See Moyer, \textit{supra} note 52, at 395 (stating that First Amendment protections afforded public employees should be extended to independent contractors, "who are ultimately in a position tantamount to that of a public employee in terms of receiving government benefits"); L. S. Rogers, Annotation, \textit{Who Are "Employees" of the United States Within the Federal Tort Claims Act}, 57 A.L.R.2d 1448, 1451 (1958) (noting that contractors may be held to be "employees," depending on the amount of control the government retains over the job contracted out).

\textsuperscript{130} See generally \textit{Webster v. Reproductive Health Servs.}, 492 U.S. 490, 518 (1989) ("[S]tare decisis is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes.").


\textsuperscript{132} See \textit{Dagger, supra} note 26, at 558 (noting that a comparison of the First Amendment concerns in patronage cases involving public employees and those involving independent contractors reveals no reason to limit the latter).

\textsuperscript{133} Examples include solid waste disposal and management, vehicle registration centers, and school district accounting and auditing. See, e.g., \textit{Umehr v. Board of County Comm'rs}, 44 F.3d 876, 883 (10th Cir. 1995), aff'd, 116 S. Ct. 2342 (1996) ("With the increasing 'privatization' of government, more and more of the government's work is accomplished through independent contractors, thereby increasing both the number and variety of such contractual arrangements.").

\textsuperscript{134} See \textit{O'Hare Truck Serv., Inc. v. City of Northlake}, 116 S. Ct. 2353, 2359 (1996).

\textsuperscript{135} See Moyer, \textit{supra} note 52, at 408; \textit{Rutan}, 497 U.S. at 77.
\end{flushleft}
the premise that independent contractors hold a financially superior position to public employees. Once it is established that a First Amendment right is impermissibly infringed, the exacting scrutiny of Elrod and Branti is triggered. The governmental interests in practicing patronage cannot survive such scrutiny because those interests do not outweigh an individual's interests in fundamental First Amendment rights.

B. Potential Problems With the Decision

The patronage exception carved out in the Elrod, Branti, and Rutan line of cases lacks clear definition. The Supreme Court declined to set forth instructions on how to apply the test and instead noted that a case-by-case analysis would be the best approach in ensuring fair and just results. While some contracting work will fall neatly under the Branti exception, such as a Governor's public relations manager, or well out of its range, such as a towing contractor, other duties will lie somewhere in between. The lower courts' determinations of which public employee positions fall within the Branti exception have been inconsistent. For example, even though the Supreme Court found First Amendment protection for the deputy

138. See Branti, 455 U.S. at 515-16; Elrod, 427 U.S. at 372-73; Bowman, supra note 77, at 362.
139. See Brown v. Trench, 787 F.2d 167, 169 (3d Cir. 1986) ("While Branti provides us with a 'test' the Supreme Court has not specified the particular factors which indicate that a position falls within the Branti test.").
140. See Branti, 445 U.S. at 518; O'Hare Truck Serv. v. City of Northlake, 116 S. Ct. 2353, 2358 (1996).
141. See Branti, 445 U.S. at 518.
142. See generally O'Hare Truck Serv. v. City of Northlake, 116 S.Ct. 2353 (1996). The O'Hare Court apparently did not consider the Branti reasonable requirement rule to be an issue in the case. While the Court did not expressly address the issue of whether O'Hare's towing services fell under the Branti exception, the Court's decision is clearly based upon the premise that such services do not fall under the exception. See id.
sheriffs in *Elrod*,[144] and the Third, Fourth, Fifth, and Tenth Circuits followed suit,[145] other circuits refused to extend patronage protection to deputy sheriffs.[146]

As a practical matter, however, many contractual positions and duties will not fall under the *Branti* exception. Municipalities are increasingly contracting out ‘traditional’ governmental functions[147] such as trash collection, motor vehicle licensing,[148] sewage treatment, custodial work, inspection,[149] and towing operations,[150] to name only a few. Independent contractors who perform those functions are “ultimately in a position tantamount to that of a public employee,”[151] and party affiliation has historically never been considered “an appropriate requirement”[152] of obtaining such a contract.[153] For less clear cut cases, however, the courts are likely to struggle through the often inconsistent process of doctrinal development that is inherent in our judicial system.

In both *Rutan*,[154] and *O'Hare*,[155] Justice Scalia’s dissenting opinions predicted that the Court’s decisions extending First Amendment patronage protection would open the litigation floodgate.[156] He envisioned every disgruntled employee and contractor running to federal court, depleting precious governmental resources, and decreasing governmental

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146. See Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991), cert. denied, 503 U.S. 906 (1992); Terry v. Cook, 866 F.2d 373 (11th Cir. 1989).
147. See Umehr v. McClure, 44 F.3d 876, 883 (10th Cir. 1995) (noting the increased “privatization” of government work); Bowman, supra note 77, at 351.
148. See Bowman, supra note 77, at 352.
149. See Moyer, supra note 52, at 377 n.9 (providing examples of more traditional governmental jobs).
150. See *O'Hare Truck Serv. v. City of Northlake*, 116 S. Ct. 2353 (1996).
151. Moyer, supra note 52, at 395.
153. See Moyer, supra note 52, at 415.
156. See *Rutan*, 497 U.S. at 114 (Scalia, J., dissenting) (stating that the imprecise standard set forth would cause courts to be “flooded with litigation”).
efficiency.\textsuperscript{157} His gloomy predictions, however, failed to become reality.

First, as the majority observed in \textit{O'Hare}, "only 18 suits alleging First Amendment violations in employment decisions have been filed against Illinois state officials"\textsuperscript{158} in the six years since \textit{Rutan}.\textsuperscript{159} Not considering eighteen cases to be a flood of litigation, the Court saw no reason why governments could not bear the burden of defending against suits alleging violation of First Amendment freedoms of public contractors.\textsuperscript{160}

Second, a plaintiff is deterred from filing such a lawsuit because he or she carries a heavy burden of proof.\textsuperscript{161} A plaintiff’s case includes proof that (1) the plaintiff suffered an adverse employment decision, which was based upon her political affiliation,\textsuperscript{162} and (2) the position or contract held is not one that "reasonably requires" a specific political allegiance.\textsuperscript{163} The government is still free, however, to dismiss at-will employees on grounds not protected by the First Amendment, and is also free to make necessary efficient operating decisions.\textsuperscript{164} Clearly, if the government can point to sufficiently credible evidence that an employee’s inadequate performance or the government’s financial condition dictated the adverse employment decision, the plaintiff will lose the case.\textsuperscript{165}

\textsuperscript{157} \textit{See} \textit{Umbehr}, 116 S. Ct. at 2367 (expressing fear that the decision will force all municipalities to engage in "detailed and cumbersome procedures" in awarding contracts). Justice Scalia was also troubled by the Court’s application of the \textit{O'Hare} ruling to contractors having a "pre-existing commercial relationship with the government." \textit{Id.} at 2372-73. Scalia feared that because a "pre-existing commercial relationship" lacks the formalities of a contractual relationship, the \textit{O'Hare} ruling would extend to the large numbers of contractors who had conducted informal business with the government body in question. \textit{Id.}

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} \textit{Id.} "[W]e doubt that our decision today will lead to the imposition of a more extensive burden" than the government already carries. \textit{Id.}

\textsuperscript{161} \textit{See} H. Scott Plouse, \textit{Note}, \textit{Branti v. Finkel: Spoiling the Spoils System}, 10 \textit{CAP. U. L. REV.} 871, 884 (1981) ("Absent patronage practices which are so blatant and arbitrary that they would shame Tammany Hall, anyone challenging a patronage dismissal faces a rather heavy burden of proof.").

\textsuperscript{162} \textit{See} \textit{O'Connor}, \textit{supra} note 143, at 671-72.


\textsuperscript{164} \textit{See} \textit{O'Hare}, 116 S. Ct. at 2360-61; \textit{Elrod v. Burns}, 427 U.S. 347, 366 (1976); \textit{Bowman, supra} note 77, at 362.

\textsuperscript{165} \textit{See} \textit{O'Hare}, 116 S. Ct. at 2360; \textit{Elrod}, 427 U.S. at 366; \textit{Martin, supra} note 1, at 57.
Third, the government may dismiss a contractor "without further ado (unlike an employee, who may enjoy substantial due process, civil service, or union protection)"\textsuperscript{166} if the demands of the contract are not met or if the services are not satisfactorily provided.\textsuperscript{167}

Scholars have argued that extending First Amendment protection to independent contractors will serve to deter private businessmen from becoming involved in politics.\textsuperscript{168} However, it will likely deter only those business people expecting government contracts in return for financial backing.\textsuperscript{169} The interests at issue in such situations are those of political parties, not of government itself.\textsuperscript{170} Individual political parties' interests in using their governmental power to gain financial support are clearly not "compelling governmental interests" and, therefore, those interests fail the exacting scrutiny analysis of \textit{Elrod} and \textit{Branti}.\textsuperscript{171}

IV. FUTURE IMPLICATIONS AND PROPOSALS:
SOME QUESTIONS AND ANSWERS

A. \textit{How Can Government Officials Keep Out of Constitutional Hot Water?}

Government officials should perform adequate research and maintain thorough documentation before making contract employment decisions.\textsuperscript{172} This is important especially when

\begin{footnotesize}
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\item \textsuperscript{166} Bowman, \textit{supra} note 77, at 362.
\item \textsuperscript{167} See \textit{id}.
\item \textsuperscript{168} See Dagger, \textit{supra} note 26, at 546 (stating that any contributions from contractors are generally expected to be in the form of financial assistance and contributing contractors generally expect some reward in return).
\item \textsuperscript{169} See \textit{id}.
\item \textsuperscript{170} See Branti v. Finkel, 445 U.S. 507, 517 n.12 (1980); Elrod v. Burns, 427 U.S. 347, 362 (1976) (both discussing difference between interests of government and political parties in patronage system and determining that former is only meaningful inquiry in First Amendment patronage cases); see Bowman, \textit{supra} note 77, at 362 (stating that awarding contracts helps candidates pay for their campaign television advertisements).
\item \textsuperscript{171} Horn v. Kean, 796 F.2d 668, 684-85 (3d Cir. 1986) (en banc) (Gibbons, J., dissenting) (expressing disbelief that our Founding Fathers would have allowed one party to use economic power of state to prevent other groups from competing effectively to replace them).
\item \textsuperscript{172} See Martin, \textit{supra} note 1, at 56-57.
\end{itemize}
\end{footnotesize}
government officials are aware of a contractor's affiliation with an opposing political party.\textsuperscript{173}

\textit{Landry v. Farmer},\textsuperscript{174} a case decided by the United States District Court in Rhode Island, outlines a useful procedure for newly elected officials to follow before terminating public employees.\textsuperscript{175} In \textit{Landry}, the plaintiffs claimed they were dismissed by the newly elected Secretary of State because of their political affiliation.\textsuperscript{176} After taking office, the new Secretary of State designed a plan to improve the efficiency and effectiveness of the department.\textsuperscript{177} The plan included extensive reorganization and reclassification of various positions, elimination of some of the plaintiffs' positions, and a survey of all employees' qualifications.\textsuperscript{178} The court compared the qualifications of the new employees with the qualifications of the plaintiffs and found that "though political considerations played a role in the hiring process for replacements, the need for changes, the qualifications of the respective parties, and the study and consideration given to the problem belie the plaintiffs' allegations."\textsuperscript{179}

Under the \textit{Landry} procedure, an elected official should avoid constitutional hot water if the dismissals are part of a comprehensive plan to improve the efficiency or effectiveness of the department, branch, or office.\textsuperscript{180} It is important that the official ensure valid and comprehensive documentation of the following: (1) a need for the proposed changes; (2) evidence that the qualifications of all individuals affected have been reviewed and that merit was a substantial factor in the employment decisions made; and (3) the studies and consideration given the problems to be solved and all available options.\textsuperscript{181} Under the \textit{Landry} approach, "political considerations" can play a role in the employment decision, but it is unclear how large that role may be.\textsuperscript{182} After \textit{O'Hare}, we know that the "rules of the game" are

\begin{footnotesize}
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\item See id. at 57.
\item 564 F. Supp 598 (D.R.I. 1983).
\item See Martin, supra note 1, at 56-57.
\item See Landry, 564 F. Supp. at 599.
\item See id. at 600-01.
\item See id. at 600-02.
\item See Martin, supra note 1, at 57-58 (quoting Landry, 564 F. Supp. at 607).
\item See generally id. at 55-58.
\item See id. at 57-58.
\item Id.
\end{enumerate}
\end{footnotesize}
the same for independent contractors and public employees.\textsuperscript{183} Therefore, the \textit{Landry} procedure will be an effective tool for government officials engaged in contracting decisions as well as employment decisions.

Government officials should also look to the options laid out in \textit{O'\textsc{H}are}.\textsuperscript{184} The Supreme Court made it clear that government retains the discretion to make politically motivated employment decisions in certain instances.\textsuperscript{185} Such decisions, however, cannot be driven by the political affiliation of its contractors or employees.\textsuperscript{186}

Notably, patronage practices have been “dying away as a result of [the] more or less inevitable laws of economics” and politics.\textsuperscript{187} The “vote-maximizing politician” will strive for the appropriate mix of patronage and merit.\textsuperscript{188} Put another way, the “social costs attached to the practice [of patronage] now outweigh the social benefits involved.”\textsuperscript{189}

The danger of impermissibly violating an individual’s First Amendment rights may be addressed through state legislation.\textsuperscript{190} Proactive legislatures should pass state statutes identifying those positions subject to patronage employment practices to prevent confusion or misconduct.\textsuperscript{191} Statutory systems of hiring and dismissal based on the merit of the employee would also increase “the incentive and efficiency of the public servant and end[ ] the fear of dismissal every time election year comes around.”\textsuperscript{192}

\textsuperscript{183} O'Hare Truck Serv., Inc. v. City of Northlake, 116 S. Ct. 2353, 2355 (1996).
\textsuperscript{184} See id. at 2360.
\textsuperscript{185} See id. at 2360-61.
\textsuperscript{186} See id.
\textsuperscript{187} Bowman, supra note 77, at 359 (discussing studies in which analysts applied public choice theory to the study of patronage practices).
\textsuperscript{188} Hasen, supra note 3, at 1320-21. Hasen states that the mix of merit and patronage will change with the “organizational benefits [available through the use of patronage], the costs of appearing corrupt [in the eyes of the public], and the costs of government inefficiency [especially when the work at issue demands competency and efficiency].” Id. at 1321.
\textsuperscript{189} Bowman, supra note 77, at 360.
\textsuperscript{190} See Dugan, supra note 6, at 300 (suggesting that a statutory scheme is one solution to patronage abuses and to the difficulty courts have in distinguishing a legitimate cause of action from those in which a plaintiff cannot claim the “political affiliation” exemption).
\textsuperscript{191} See Simses, supra note 31, at 235-36.
\textsuperscript{192} Id. at 236.
B. How Should the Courts Handle the Difficulty of Applying a “Test” That Has No Instructions?

Courts first must keep in mind the following twin aims of the patronage cases: (1) to allow government the use of political affiliation in employment decisions when the reasons for such use are compelling or of “vital importance”, and (2) to protect individuals’ First Amendment right to freedom of association. Allowing courts the flexibility of case-by-case analysis best serves these competing goals. Additionally, courts have recognized that governmental entities contract out traditionally governmental functions more now than ever before.

That which appears to be an inconsistent application of the Branti exception may, on closer examination, reflect the realistic differences among segments of American society. The sheriff’s deputy example discussed earlier illustrates the point perfectly. A deputy position in a large urban sheriff’s department is unlikely to entail politically driven functions. Such an officer will be responsible only for law enforcement. Conversely, a deputy in a small rural town may also be required to perform politically based duties. The case-by-case approach allows the courts to assess more fairly the realistic structural, cultural, and financial differences among American cities and municipalities. The end result is the court’s full consideration of all relevant factors, leading to a ruling that protects the First Amendment rights of individuals and respects the government’s legitimate interests.

CONCLUSION

Although the Supreme Court stated in O’Hare that “[i]t was by no means self-evident” whether First Amendment protections applied in patronage cases involving independent contractors, a
different outcome would have contradicted the Court's First Amendment decisions condemning viewpoint-based suppression and coercion of association. Given the increasing practice of contracting out governmental functions and the corresponding increase in the number of Americans that depend solely on the government for income, First Amendment protection had to be extended. Governmental entities otherwise have too great an opportunity to escape constitutional liability by simply contracting out, or fee servicing functions traditionally performed by government employees.

Patronage, however, has not met its demise; it has survived, although on a limited scale. The Branti "test" gives courts room to determine what positions "require" political affiliation. Recall the sheriff's deputy example where some circuits found the position to fall within the Branti exception while other circuits did not. The reasonable requirement determination of Branti is one within the discretion of the court.

The avenues enumerated in O'Hare provide suggestions for avoiding constitutional liability while making necessary employment decisions, and indicate that the Court is not willing to strictly limit governmental contracting decisions. Even though patronage-based contracting is now prohibited, reality dictates that both legitimate governmental interests and political or patronage-based concerns are woven into many contracting employment decisions. Therefore, determination of any overriding governmental motive will often be very difficult for the courts. In such close cases, courts will tend to find for the government rather than expanding First Amendment protection into uncharted territory.

Some courts, out of nostalgia or respect for a long-standing practice may limit the effect of the Branti line of cases. Justices Powell and Scalia discussed the importance of the time honored tradition and admonished the Court for hastily abolishing

200. See O'Hare, 116 S. Ct. at 2359; Moyer, supra note 52, at 396 n.112; Bowman, supra note 77, at 351. The plaintiff in O'Hare did not have a direct contract with the City of Northlake, but was paid on a fee service basis of payment per vehicle towed. See O'Hare, 116 S. Ct. at 2359.
201. See O'Hare, 116 S. Ct. at 2360 (discussing ways in which government can make contracting decisions without violating the First Amendment rights of individuals and the governmental interests involved in justifying such valid contracting decisions).
patronage. Many lower court judges hold a similar view. Patronage once had a strong and well-defined role in American political society. Today, however, only those who approve of favoritism and are indifferent to governmental inefficiency and corruption will mourn the institution. The rest will applaud the reasonable and long-overdue limitations placed upon patronage in favor of the First Amendment. While one can certainly expect a “gap . . . between the articulation of a constitutional right and its reception and implementation, . . . local governments will eventually accept and adjust” to the patronage cases.

Jaimie Johnson


203. See Horn v. Kean, 796 F.2d 668, 684 (3d Cir. 1986) (en banc) (Gibbons, J., dissenting) (discussing majority's misplaced reliance on “a sentimental attachment to the supposed virtues of the patronage system”); see also Bowman, supra note 77, at 349-53 (discussing lower courts' treatment of patronage cases after Rutan).

204. Bowman, supra note 77, at 359.