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ELROD V. BURNS: CHIPPING AT THE ICEBERG OF POLITICAL PATRONAGE

Political patronage has been defined as "the appointive positions in government awarded either for past political services or in expectation of future work."[1] The term also covers governmental benefits and services distributed by office-holders. The practice in America predates the Constitution, although its popularization occurred later, during the administrations of Presidents Jackson, Lincoln and Franklin Roosevelt.[2] The practice became so pervasive that a politician's success virtually hinged on his ability to dispense patronage. Officials who did not understand or use patronage well were invariably ineffective administrators.[3]

Eventually public concern over the excesses of patronage led to reform. The Pendleton Act[4] created a federal civil service where hiring and firing was done on a non-partisan basis. The Hatch Act[5] sharply curtailed the political activity of most federal employees, further removing politics from government administration. Despite these legislative efforts to reduce the scope of patronage, judicial challenges to the system historically have met with little success.[6]

In *Elrod v. Burns*,[7] the Supreme Court faced for the first time a constitutional challenge to the venerable institution of political patronage. In December, 1970, several employees of the Cook County, Illinois, Sheriff's Department were dismissed from their jobs after a change in the political administration.[8] None of the discharged em-

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[1] F. SORAUF, POLITICAL PARTIES IN THE AMERICAN SYSTEM 82 (1964) [hereinafter cited as SORAUF]. Another commentator defines patronage jobs 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." Wilson, *The Economy of Patronage*, 69 J. POL. ECON. 369, 370 n.4 (1961).

[2] For a brief but fascinating history of patronage from the ancient Chinese to the present, as well as a more extensive treatment of the practice in modern politics, see M. TOLCHIN & S. TOLCHIN, TO THE VICTOR (1971) [hereinafter cited as TOLCHIN].

[3] *Id.* at 91.

[4] Jan. 16, 1883, ch. 27, 22 Stat. 403 (codified in scattered sections of 5, 18, 40 U.S.C.).

[5] Aug. 2, 1939, ch. 410, 53 Stat. 1147 (codified in scattered sections of 5, 18 U.S.C.).

[6] *See* notes 50, 51, 53, 61 and 62 *infra*.

[7] 96 S. Ct. 2673 (1976).

[8] In 1970, Richard Elrod, a Democrat, was elected to replace a Republican as sheriff of Cook County. All of the respondents were Republicans. When Elrod assumed office he began to replace all non-civil service employees of the department according to the custom with members of his own party. 96 S. Ct. at 2678-79.

ployees held policy-making positions, and none was protected by civil service or other legislation against summary dismissal. They were given the "opportunity" to retain their jobs by switching party allegiance or obtaining the support of a party official.[9] Failure to make an acceptable choice resulted in termination of employment. The dismissed employees brought suit in federal district court, but their request for an injunction against further dismissals was denied.[10] The Seventh Circuit reversed,[11] finding that the employees stated a valid claim for relief,[12] and ordered that the appropriate injunction be granted.

Before affirming the court of appeals, the Supreme Court considered whether patronage, or the "spoils system,"[13] violated first amendment rights; whether those rights were absolute; and whether any compelling state interests would justify a restraint on those rights. The Court concluded that dismissal of non-policymaking employees solely because of political affiliation impermissibly infringed their first amendment rights of free political association.[14]

In declaring dismissal of non-policymaking employees solely for their political affiliation unconstitutional, the Court readily identified the restraints that the practice imposed on freedoms of political belief and association. Direct infringement resulted from pressure on the employee to pledge or switch his allegiance to the party in power in order to retain his job.[15] Requiring the employee to work for the

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[9] *Id.* at 2679.

[10] Burns v. Elrod, No. 71-C-607 (N.D. Ill. May 31, 1972). Plaintiffs alleged that their dismissals on the basis of political affiliation violated their rights of association under the first and fourteenth amendments. The grounds for denial of the injunction were failure to show irreparable injury from the loss of the jobs and the existence of an adequate remedy at law. Subsequent to the denial, the judge granted defendant's motion to dismiss for failure to state a claim upon which relief could be granted.

[11] Burns v. Elrod, 509 F.2d 1133 (7th Cir. 1975).

[12] The memorandum opinion stated that it recognized a cause of action under the authority of Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied,* 410 U.S. 943 (1973). *See* note 55 *infra.* In *Lewis,* the same court had held that non-civil service employees cannot be dismissed solely on the basis of their political affiliations. "If . . . a discharge is motivated by considerations of race, religion, or punishment of constitutionally protected conduct, it is well settled that the State's action is subject to federal judicial review." *Id.* at 568.

[13] The term is generally considered to have orginated with William L. Marcy, a United States Senator from New York, in an 1832 speech in which he declared "to the victor belong the spoils of the enemy." IX ENCYCLOPAEDIA BRITANNICA MICROPAEDIA 433 (15th Ed. 1974).

[14] 96 S. Ct. at 2689. *See* text accompanying note 20 *infra.*

[15] *Id.* at 2681. The spoils system can thereby "chill" the exercise of free speech. "If [the employee] is inclined to surrender his right to associate freely with the party

election of party candidates and contribute a portion of his wages imposed an additional restraint. Since his position rarely enabled the employee to contribute time and money to two parties, his forced support of one diminished his voluntary support of the other.[16] Furthermore, if an individual pledged allegiance to retain his job, he compromised his beliefs. The Court found the electoral process affected by these requirements even as to individual employees, since the incumbent party could tip the balance of power in its own favor with this coerced support. Where the scope of the patronage practice is substantial relative to the size of the electorate, the impact on the operation of the democratic system could well be significant.[17]

The optimal functioning of the democratic system depends upon freedom of political belief, and any practice which coerces this belief is abhorrent to the Constitution.[18] Freedom of belief in all areas, particularly politics, includes the correlative freedom to associate with others for the advancement of those beliefs.[19] To the extent,

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of his choice in order to retain government employment, it is also quite likely that he will tend to suppress speech which is critical of the new incumbent party and its elected representatives." Note, *A Constitutional Analysis of the Spoils System—The Judiciary Visits Patronage Place,* 57 IOWA L. REV. 1320, 1333 (1972) [hereinafter cited as *Patronage Place*].

[16] 96 S. Ct. at 2681. The advantages of this system to the political parties were tremendous. The party often "maced" the patronage payroll for compulsory party contributions. Furthermore, the appointee often had a great deal of free time to spend in party work. Patronage blessed the party with jobs for the worker, free labor for the party, and contributions for the party coffers from the public treasury. SORAUF, *supra* note 1, at 90.

[17] 96 S. Ct. at 2681. Injunctions against political activities by patronage employees have been granted on the grounds that such activities impaired the interests of voters in an equal voice in elections where use of public employees to perform partisan political tasks could create substantial, and perhaps massive, political effort in favor of "ins," against "outs." Shakman v. Democratic Organization, 435 F.2d 267 (7th Cir. 1970). Injunctions were also granted where such activity acted as a state subsidy in favor of endorsed candidates, discriminating against non-endorsed candidates. White v. Snear, 313 F. Supp. 1100 (E.D. Pa. 1970).

[18] Regardless of the nature of the inducement, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). In *Barnette,* the Court held that requiring school children to salute the American flag infringed their first amendment freedom of religion, when to salute violated their religious beliefs. *Id.*

[19] Kusper v. Pontikes, 414 U.S. 51 (1973). A state statute, which forbade a citizen to vote in a political primary if he has voted in the primary of another party within the prior twenty-three months, was held unconstitutional as an undue restriction on freedom of association. The Court stated: "The right to associate with the political

then, that patronage required or prohibited certain beliefs, the Court found the practice harmful to the democratic process,[20] and contradictory to decisions of the Court forbidding government action that conditioned public employment on political faith.[21]

The Court cited three cases in particular as authority for its holding that patronage dismissals of non-policymaking employees are unconstitutional: *United Public Workers v. Mitchell*;[22] *Wieman v. Updegraff*;[23] and *Cafeteria & Restaurant Workers v. McElroy*.[24] All three cases involved conditions imposed upon public employment,[25] and dicta in all three state that political affiliation is not a valid prerequisite.[26] In each case, however, the final decision to uphold or

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party of one's choice is an integral part of this basic constitutional freedom." *Id.* at 57:

[20] 96 S. Ct. at 2682. Although freedom of speech is the only right expressly mentioned in the first amendment, other rights have been found to be implicit in the concept of free speech. Freedom to associate with others of similar beliefs is a right without which freedom of belief would mean very little. Therefore, the first amendment protects orderly activities related to beliefs, including membership in organizations through which one may express his beliefs. United States v. Robel, 389 U.S. 258 (1967); NAACP v. Button, 371 U.S. 415 (1963); and Thomas v. Collins, 323 U.S. 516 (1945). The trend expanding the protection of the first amendment is consistent with the broad view that "[t]he very purpose of the first amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." Thomas v. Collins, 323 U.S. 516, 545 (Jackson, J., concurring). Protection of association in the context of patronage is a logical extension of this view.

[21] 96 S. Ct. at 2682. *E.g.*, Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961); Wieman v. Updegraff, 344 U.S. 183 (1952); and United Public Workers v. Mitchell, 330 U.S. 75 (1947).

[22] 330 U.S. 75 (1947). In *Mitchell*, federal employees unsuccessfully challenged the constitutionality of the Hatch Act, *see* note 5 *supra*, which forbade active participation by federal employees in political campaigns.

[23] 344 U.S. 183 (1952). The *Wieman* Court held unconstitutional an Oklahoma statute which required every state employee to sign an oath that he did not belong either to a Communist front organization or a subversive group.

[24] 367 U.S. 886 (1961). The Court held that summary revocation of the security clearance of a civilian employee on a Naval installation did not violate her right to due process.

[25] The statute in *Mitchell* required employees to refrain from active political involvement. All applicants for state jobs had to sign the loyalty oath in *Wieman*, and proper security clearance was a prerequisite to the job in *Cafeteria Workers*.

[26] In Mitchell, "[a]ppellants urge[d] that federal employees are protected by the Bill of Rights, and that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office'. . . . None would deny such limitations. . . ." 330 U.S. at 100. The Court assumed in *Cafeteria Workers* that ". . . Rachel Brawner could not constitutionally have been excluded from the Gun Factory . . . because she was a Democrat or a Methodist." 367 U.S. at 898. The

invalidate the challenged condition rested upon a determination that the condition was or was not arbitrary and discriminatory.[27] The *Elrod* Court appeared to read *Mitchell, Wieman*, and *Cafeteria Workers* as holding that political affiliation is always an arbitrary and invalid criterion. A closer review of these cases indicates that any criterion upon which government benefits are conditioned will be held unconstitutional if the criterion bears no logical relationship to the benefit and if it results in an unjustified infringement of a fundamental right.[28]

The doctrine of "unconstitutional conditions,"[29] applied in

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Wieman Court quoted the language from *Mitchell* with approval. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), contained similar language. Reversing the decision of the New Mexico Board of Bar Examiners which refused petitioner's application to take the bar exam, the *Schware* Court stated that the petitioner obviously "could not be excluded merely because he was a Republican or a Negro or a member of a particular church." *Id.* at 239.

[27] The Court sustained the revocation of the security clearance in *Cafeteria Workers* although no grounds for the revocation were given. The result would have been different, however, "if the announced grounds for her exclusion had been patently arbitrary or discriminatory. . . ." 367 U.S. at 898. The loyalty oath in *Wieman* fell "as an assertion of arbitrary power" because it indiscriminately classified "innocent with knowing activity." 344 U.S. at 191. Even where the standards are permissible, "officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." Schware v. Board of Bar Examiners, 353 U.S. at 239. The condition imposed on plaintiffs in *Mitchell* was found to be a reasonable means to avoid the "evil of political partisanship by classified employees of government." 330 U.S. at 96.

[28] The purpose of the oath in *Wieman* was to insure the trustworthiness and loyalty of state employees. But there was no requirement that the employee actually be shown to be disloyal in his beliefs and actions. Mere association was sufficient condemnation. The condition limited innocent as well as guilty association and therefore bore no real relation to the purpose. The Court found the statute "patently arbitrary and discriminatory" and therefore unconstitutional. 344 U.S. at 192. Where no rights are infringed, however, and the "government action has [not] operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity" the action will be upheld. Cafeteria Workers v. McElroy, 367 U.S. at 898. Although some infringement was allowed in *Mitchell,* the restraint imposed was seen as necessary to avoid greater impairment of other rights, such as the right of the people to an efficient public service and the right of the employees to believe as they choose without feeling that "political rather than official effort may earn advancement." 330 U.S. at 98.

[29] The doctrine was most clearly stated in a commerce clause case, Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926). A California statute required that private carriers obtain from the railroad commission a certificate of public convenience and necessity, which in effect made the private carriers public ones subject to all commission regulations. The Court held the statute unconstitutional because it accomplished indirectly what the fourteenth amendment forbids directly. If the State may demand surrender of one right as a condition of its favor, it may demand surrender of all. Constitutional guarantees could thus be made meaningless. *Id.* at 593-94.

Mitchell, Wieman and *Cafeteria Workers*, declared that whatever an express constitutional provision prevents the government from doing directly it equally prevents the government from doing indirectly.[30] Therefore, the government may not deny a benefit so as to infringe constitutionally protected interests.[31] While the doctrine has been applied to invalidate conditions imposed upon the right to vote,[32] the receipt of welfare[33] and unemployment benefits,[34] tax exemptions,[35] the ability to serve on a jury,[36] and the grant of radio-telegraph licenses,[37] its most frequent application has been to protect first amendment rights.[38] The principle, therefore, is particularly applicable to patronage dismissals.

The Court also cited two cases which applied the unconstitutional conditions doctrine to restraints on public employment that infringed

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[30] Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1446 (1968) [hereinafter cited as Van Alstyne]. At least one commentator has dared to ask why the government should not be allowed to do indirectly what it may not do directly. French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961) [hereinafter cited as French]. Professor French argued that the doctrine assumes its conclusion, that "exactly the same effects will flow from [indirect action] as from direct action." *Id.* at 242.

[31] Perry v. Sindermann, 408 U.S. 593, 597 (1972). Other cases in which the doctrine of unconstitutional conditions has been applied to invalidate denials of public employment include: Pickering v. Board of Educ., 391 U.S. 563 (1968) (plaintiff's dismissal from teaching job for criticism of school administration violated freedom of speech); Baggett v. Bullitt, 377 U.S. 360 (1964) (loyalty oath required of state employees held overbroad and an unconstitutional condition upon employment); and Torcaso v. Watkins, 367 U.S. 488 (1960) (state could not deny appellant office to which he was appointed on basis of his refusal to declare belief in God).

[32] Kusper v. Pontikes, 414 U.S. 51 (1973) (state statute which prevented citizen from voting in political primary if he had voted in primary of another party within prior 23 months declared unconstitutional); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (state poll tax struck down as unconstitutional condition upon right to vote).

[33] Graham v. Richardson, 403 U.S. 365 (1971) (state statute which denied welfare benefits to aliens who had not resided in United States for specified number of years held unconstitutional).

[34] Sherbert v. Verner, 374 U.S. 398 (1963) (decision that plaintiff was ineligible to receive unemployment benefits because she refused to accept available job which required her to work on Sabbath day of her faith infringed upon her religious freedom).

[35] Speiser v. Randall, 357 U.S. 513 (1958) (taxpayers could not be required to sign declaration that they did not believe in or advocate violent overthrow of federal or state governments to qualify for tax exemption).

[36] Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947) (plaintiff's dismissal from teaching job because of her absence while serving on federal jury held unconstitutional).

[37] Homer v. Richmond, 292 F.2d 719 (D.C. Cir. 1961) (Commandant of Coast Guard station could not deny license to appellants because of former membership in Communist party).

[38] *See* cases cited note 31 *supra*.

first amendment rights: *Keyishian v. Board of Regents*[39] and *Perry v. Sindermann*.[40] *Keyishian* held New York's loyalty oath requirement unconstitutional for overbreadth, finding that it "chilled" the exercise of first amendment rights. In *Perry*, the Supreme Court held that one's first amendment rights are violated if he is dismissed from his teaching job because of his criticism of the college administration. The *Elrod* Court determined that together *Keyishian* and *Perry* indicate that the government may not deny a benefit such as public employment merely on the basis of political affiliation. To do so would allow an indirect penalty on the exercise of a constitutional right.[41] Patronage operates exactly in this manner because it indirectly penalizes the employee for exercising the right to believe and speak as he wishes, and pressures him to conform to beliefs endorsed by the political party in power. The result is unconstitutional, and under *Keyishian* and *Perry*, the condition is invalid.

Under traditional unconstitutional conditions analysis, no justification would have been accepted. If the Court found that the condition infringed a specific right,[42] the condition was held unconstitutional. Since there was no weighing or balancing, the appearance of judicial objectivity was preserved.[43] The basic flaw of the doctrine, however, was the inflexibility of application. The doctrine assumes that attaching certain conditions to government-connected activity results in the same evil as does imposing such conditions on activities not connected with government.[44] Often the condition may be quite

[39] 385 U.S. 589 (1967). Appellants, faculty members and employees of a New York state university, sought a declaratory judgment that New York's loyalty laws were unconstitutional. All employees were required to sign a statement that they were not members of the Communist party and did not advocate the violent overthrow of governments, as a condition of their continued employment. The Court held the statutes unconstitutional because they potentially stifle the exercise of first amendment rights. *Id.* at 604.

[40] 408 U.S. 593 (1972). In *Perry* respondent was employed in a state college system under a series of one year contracts, but with no formal tenure. When the Regents decided not to renew his contract, he filed suit alleging that the decision was based upon his public criticism of the college administration and thus violated his first amendment rights. The Court held that if his statements were the basis for dismissal, his rights had been infringed. Respondent was entitled to a hearing at which he could offer proof of an impermissible basis for his dismissal. *Id.* at 597.

[41] 96 S. Ct. at 2683:

[42] Although United Public Workers v. Mitchell, 330 U.S. 75 (1947) found that state interests justified infringements on first amendment rights, *see* note 28 *supra*, it did not involve an express constitutional right.

[43] Van Alstyne, *supra* note 30, at 1442.

[44] *Id.* at 1448.

reasonable under the circumstances.[45] In other cases, the condition may not involve an express constitutional right but may be a more unreasonable restraint in the particular situation.[46] Accommodation of these situations and others where strong governmental and individual interests conflict requires a more flexible approach.

The *Elrod* Court found such a flexible approach in *Shelton v. Tucker*.[47] *Shelton* involved an Arkansas statute requiring teachers to disclose the names of all organizations in which they were members. Teachers who had refused to supply the required list and whose contracts had not been renewed as a result filed a suit challenging the requirement. The teachers' valid interest in freely associating to exchange ideas was balanced against the State's valid concern about the moral and professional fitness of its teachers.[48] When the two sides appeared to be of equal importance, the Court considered whether the condition furthered the governmental interest by the least restrictive means possible.[49] The condition in *Shelton* did not meet that test, and the Court held the statute unconstitutional. Had the individual interest outweighed that of the state, the same result would have been reached without the second inquiry. However, had the statute related to a "clear public interest, threatened not doubtfully or remotely, but by clear and present danger,"[50] the infringe-

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[45] *E.g.*, Hollon v. Pierce, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (1967), where a school bus driver was dismissed because of his membership in a religious sect which advocated burning schools and murdering students. Requiring him to relinquish either his beliefs or his job was not found to be an unconstitutional burden in view of the overwhelming state interest in the safety of school children. 64 Cal. Rptr. at 814.

[46] For example, a statutory requirement that all elementary school teachers have brown hair would not infringe a specific constitutional right, but would clearly be an arbitrary and unreasonable condition to impose upon governmental employment.

[47] 364 U.S. 479 (1960).

[48] Mr. Justice Frankfurter defended the statute in a dissenting opinion, 364 U.S. at 490. The number of organizations to which the teacher belonged was relevant because they could "consume his time and energy and interest at the expense of his work." *Id.* at 494. Disclosure also revealed persons with whom a teacher associated outside of his work who could shed light on the teacher's conduct. *Id.* at 494.

[49] *Id.* at 488. The statute did not require that the disclosures be kept confidential, nor did it restrict the membership of the organizations which must be disclosed to those which might bear in some way on the teacher's moral and professional fitness. If the concern was that the teacher over-extend himself to the detriment of his job, the nature of the organizations would not seem as important as the number. *Id.* at 486.

[50] Thomas v. Collins, 343 U.S. 516, 530 (1945). Governmental interests which have been found sufficient to overcome individual rights include: prevention of actual and apparent corruption of the political process, Buckley v. Valeo, 424 U.S. 1 (1976); stability of state's political system, Stover v. Brown, 415 U.S. 724 (1974); integrity of government employment system, Broadrick v. Oklahoma, 413 U.S. 601 (1973); na-

ment of individual rights it imposed would have been justified. In *Elrod*, the individual interests in free association were of great importance. The Court would thus allow patronage dismissals to continue only upon a showing by the government that they furthered a more compelling interest by the least restrictive means.

The *Elrod* defendants argued, however, that no such justification was necessary if the employees waived the rights infringed by patronage dismissals.[51] The defendants contended that a waiver could be implied from the circumstances under which the employee obtained the job.[52] Acceptance of a patronage job, knowing it to be such, might constitute a waiver of one's first amendment rights so that dismissal would afford no grounds for objection.[53] The Court, however, found little merit in this argument and summarily dismissed it.[54] Since no qualification may be constitutionally imposed absent an appropriate justification, no waiver may be constitutionally accepted.

The difficulty that courts have experienced in dealing with the

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tional security, Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); competence and fitness of teachers, Shelton v. Tucker, 364 U.S. 479 (1960); fitness and suitability for public service, Garner v. Board of Pub. Works, 341 U.S. 716 (1951); prevention of political strikes, American Communications Ass'n v. Douds, 339 U.S. 382 (1950); and efficiency of the public service, Singer v. C.S.C., 530 F.2d 247 (9th Cir. 1976).

Governmental interests which have been found insufficient include: regulation of labor unions, Thomas v. Collins, 323 U.S. 516 (1945); taxation, Bates v. City of Little Rock, 361 U.S. 516 (1960); administration of the welfare system, Graham v. Richardson, 403 U.S. 365 (1971); integrity of the legal system, NAACP v. Button, 371 U.S. 415 (1963); and prevention of friction within the educational process, Pickering v. Board of Educ., 391 U.S. 563 (1968).

[51] Waiver is the relinquishment of or refusal to accept a known right. Bennecke v. Insurance Co., 105 U.S. 355, 361 (1881).

[52] *Compare* Nunnery v. Barber, 503 F.2d 1349 (4th Cir. 1974) (plaintiff accepted patronage position with full realization of its conditions and hazards) *with* Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa. 1973) (plaintiff began work unaware that his position was a patronage job). *See also Patronage Dismissals, Fourth Circuit Review*, 33 WASH. & LEE L. REV. 505 (1976).

[53] Judicial attitude on the subject was expressed by the Pennsylvania Supreme Court in American Fed'n of State, County & Mun. Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971). "Those who, figuratively speaking, live by the political sword must be prepared to die by the political sword." *Id.* at 378.

[54] 96 S. Ct. at 2683 n.13. The Court stated:

> Since the qualification [of political conformity] may not be constitutionally imposed absent an appropriate justification, to accept the waiver argument is to say that the Government may do what it may not do. A finding of waiver in this case, therefore, would be contrary to our view that a partisan job qualification abridges the first amendment.

Id.

waiver theory[55] should now be resolved by the Supreme Court's rejection of waiver as a defense. The position taken in *Elrod* is entirely consistent with judicial recognition of valid waivers of other constitutional rights.[56] Waivers of constitutional rights are accepted only if they were knowingly and voluntarily made.[57] The actions of persons seeking government jobs could never be termed "voluntary" in the sense the law requires due to the "increasingly pervasive nature of public employment,"[58] which may constitute such a powerful inducement as to amount to coercion. Particularly in times of high unemployment, the citizen nay feel that he has no alternative to submitting to the infringement and to changing his political affiliation in order to secure or maintain a job.

Although first amendment rights may not be validly waived in

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[55] Prior judicial treatment of the waiver theory had been inconsistent. The Pennsylvania Supreme Court had adopted the waiver theory and denied relief to the employees. American Fed'n of State, County & Mun. Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971). *Accord,* Nunnery v. Barber, 503 F.2d 1349 (4th Cir. 1974). The Seventh Circuit rejected the waiver theory in Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972). Presaging the result in *Elrod,* the Court in *Lewis* held that non-policymaking state employees not protected by civil service could not be discharged solely for refusing to transfer their political allegiance from one political party to another. However, the Court did hold that because the plaintiffs accepted the jobs as patronage they had no entitlement to them. Therefore, the government was not required to afford the employees a hearing before dismissal in order to comply with due process. Note, *The Spoils System: Ripe for Justiciability?* 34 U. PITT. L. REV. 699, 704 (1973).

The California Supreme Court did not take a clear position either way. In Bogacki v. Board of Supervisors, 5 Cal. 3d 771, 489 P.2d 537, 97 Cal. Rptr. 657 (1971), *noted in* 12 SANTA CLARA LAW. 599 (1972), the court affirmed the government employer's right to dismiss an employee summarily, but qualified the holding by stating that public employment may not be conditioned upon a waiver of constitutional rights absent a showing of compelling interest by the State. 489 P.2d at 545. However, since the employee failed to show that his dismissal resulted from exercise of his constitutional rights, the State was not required to show a compelling interest.

[56] Rights which may be waived include: the privilege against self-incrimination, Lee v. County Court, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452, *cert. denied,* 404 U.S. 823 (1971); right to counsel, Escobedo v. Illinois, 378 U.S. 478 (1964); and right to trial by jury, Hallinger v. Davis, 146 U.S. 314 (1892).

[57] Brady v. United States, 397 U.S. 742, 748 (1970); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[58] 96 S. Ct. at 2683 n.13. As of 1974, roughly 14 million people occupied government jobs at all levels, comprising some 19% of all employed persons in the United States. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S., 265, 351 (1974). The growing size of the job market filled by the government has facilitated a gradual change in judicial attitude toward patronage, making courts less tolerant of the practice. O'Neil, *Politics, Patronage and Public Employment,* 44 U. CIN. L. REV. 725, 727 (1975) [hereinafter cited as O'Neil].

this situation, they are not absolute. Restraints have been permitted for "appropriate reasons."[59] The state may rebut the "presumptive prohibition on infringement"[60] by showing strong countervailing interests.[61] Absent evidence of the state interests, the presumption arises that any condition imposed on public employment is an infringement.[62]

To circumvent the presumption, the *Elrod* defendants argued that since no right to public employment exists, employment may be burdened or denied as the government sees fit.[63] The defendants relied on *Bailey v. Richardson*,[64] which held that a government employee could be dismissed for any or no reason without violating the Constitution. The *Elrod* majority rejected the reasoning of *Bailey*, that the government may dismiss an employee for any reason because it is not obliged to hire anyone, stating that "the right-privilege distinction furnishes no ground on which to justify patronage."[65] *Bailey* had been tacitly overruled in *Board of Regents v. Roth*,[64] a 1972 case

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[59] 96 S. Ct. at 2683. In United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), the Court held that limits on political activities of federal employees imposed by the Hatch Act, *see* note 5 *supra*, were justified to assure the impartial execution of the laws and the appearance of impartiality, prevent one party's using the machinery and coffers of the government "to build an invincible and perhaps corrupt political machine," *id.* at 565, and "to further serve the goal that employment and advancement in the Government service not depend on political performance. . . ." *Id.* at 566. *See* note 50 *supra*.

[60] 96 S. Ct. at 2683.

[61] *See* text accompanying note 50 *supra*.

[62] *See* discussion of unconstitutional conditions accompanying notes 29-41 *supra*.

[63] The theory that the distinction between rights and privileges somehow affects the application of constitutional safeguards resulted from the expansion of Justice Holmes' famous epigram: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892). The Massachusetts Supreme Court dismissed the complaint of a policeman who had been discharged for expressing political opinions contrary to those of his superior. Similar reasoning was tentatively approved by the Supreme Court in 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).

[64] 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951). The appellant in *Bailey* was a civil service employee dismissed without a hearing on grounds of suspected disloyalty. The court of appeals sustained the dismissal and held that Bailey was essentially serving at will and could be dismissed for any reason. 182 F.2d at 58. The court stated that the Constitution "does not prevent Republican Presidents from dismissing Democrats, and Democrat Presidents from dismissing Republicans." *Id.* at 59. The courts considering claims by government employees that their dismissals for political reasons violated first amendment rights relied on that reasoning to deny relief. *See* Nunnery v. Barber, 503 F.2d 1349 (4th Cir. 1974); Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972);

dealing with denial of public employment for the exercise of first amendment rights. Since the notion apparently remained after *Roth* that *Bailey* was still valid precedent, the *Elrod* Court was obliged to overrule it expressly.

The fatal difficulty with the right-privilege analysis is that the conclusion is derived from a faulty syllogism. The fallacy may be seen when the syllogism[67] is stated:

> Major premise: A benefit may be excluded altogether.
> Minor premise: Government employment is a benefit.
> Conclusion: Government employment may be *subjected to any burden whatsoever.*

The conclusion does not follow from the premises because a fourth term, not included in either premise, has been inserted. Logically, something which may be denied absolutely is not the same as a thing which may be burdened, although the imposition of a burden would be regarded as less onerous than exclusion of the benefit. "The 'power of absolute exclusion' is a term not identical with the 'power of relative exclusion.' "[68] Therefore, if the government chooses to bestow a

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Norton v. Blaylock, 409 F.2d 772 (8th Cir. 1969); Moldawsky v. Lindsay, 341 F. Supp. 1393 (S.D.N.Y. 1972); American Fed'n of State, County & Mun. Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971); Scott v. Philadelphia Parking Auth., 402 Pa. 151, 166 A.2d 278 (1960). There have been, however, a growing number of recent exceptions. Calo v. Paine, 521 F.2d 411 (2d Cir. 1975); Indiana State Employees Ass'n v. Negley, 501 F.2d 1239 (7th Cir. 1974); Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973); Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa. 1973).

One difficulty with the right-privilege doctrine is its basic premise—that the individual is free to choose between employment by the government, or any other benefit, and the exercise of his constitutional rights. Comment, *Political Patronage and Unconstitutional Conditions*, 14 WM. & MARY L. REV. 720, 724 (1973) [hereinafter cited as *Unconstitutional Conditions*]. Indeed, he may be free to choose. However, that fact, "deemed ritual by privilege theorists," does not render it inappropriate to ask "whether, given the total impact of the state action in question, it is constitutional to require the individual to make such a choice." French, *supra* note 30, at 248.

[65] 96 S. Ct. at 2684. The Court cited three cases which dealt with conditions imposed upon government benefits: Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Sherbert v. Verner, 374 U.S. 398 (1963). In each case the condition was held to be invalid because of its unconstitutional effect. The Court "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'." 96 S. Ct. at 2684, n.15, *quoting* Graham v. Richardson, 403 U.S. at 374.

[66] 408 U.S. 564 (1972).

[67] *Unconstitutional Conditions, supra* note 64, at 724. Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99, 111 (1916) [hereinafter cited as Powell].

[68] Powell, *supra* note 67, at 111. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

benefit at all it must do so in an equitable and impartial manner.

Unable to overcome the presumption against the infringement of first amendment rights, the state in *Elrod* argued that it did have legitimate interests furthered by the spoils system. The defendants asserted that the interests in effective government and employee efficiency is served by incentives inherent in patronage. The state reasoned that employees will perform their work zealously to insure the party's incumbency and thus their jobs. That zeal makes employees and hence the government more accountable to the public. Moreover, when government administration does change hands, dismissal of employees of opposite political persuasion eliminates the possibility of bureaucratic sabotage.[69]

The Court was not convinced that patronage actually served those interests best, because other interests of a political nature oppose the maintenance of patronage. Responsiveness to public wishes is guaranteed by the ability of elected officials to discharge employees for cause.[70] The interest in efficiency could not possibly be served by the wholesale dismissals that occur each time political office changes hands. The certainty of a present employee that he will be replaced when the new administration takes office can destroy the incentive to perform to the best of one's ability during the transition period. Moreover, there is no assurance that the replacement will be better qualified.[71]

However logical it may be to assume that a "lame-duck" employee will perform poorly, the *Elrod* Court objected to the assumption that mere differences of political persuasion motivate inferior performance.[72] Prior cases dealing with such a notion regarding membership in the Communist party[73] required evidence of actual inclination to what the Court terms "ill-willed conduct."[74] Membership in

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[69] 96 S. Ct. at 2686. Examples of such "sabotage" can be found in a criticism of the civil service system which sounds remarkably similar. "Civil servants, considered by some to be 'human paperweights,' can sabotage an administration through laziness, inefficiency, or by being just plain ornery. Unaccountable to anyone, they can easily thwart those who are accountable to the electorate." TOLCHIN, *supra* note 2, at 102.

[70] *See* note 85 *infra*.

[71] 96 S. Ct. at 2686. For a thorough discussion of both the state and individual interests involved in the patronage situation, reflecting the reasoning of the Court, see *Patronage Place, supra* note 15, at 1322-28 and *Unconstitutional Conditions, supra* note 64, at 720.

[72] 96 S. Ct. at 2685.

[73] *E.g.*, United States v. Robel, 389 U.S. 258 (1967); Wieman v. Updegraff, 344 U.S. 183 (1952).

[74] In Wieman v. Updegraff, 344 U.S. 183 (1952), the Court struck down an Oklahoma statute because it attached "a conclusive presumption of disloyalty to a person

traditional political parties is deserving of at least as much protection.

The defendants articulated a further state interest in the political loyalty of employees so that policies sanctioned by the electorate can be carried out effectively. The Court held that this interest can be protected by limiting dismissals to policymaking positions.[75] The employees most frequently dismissed are those with little if any opportunity to exercise discretion.[76] As long as the policymaking personnel are chosen for ideological compatibility with elected officials, responsiveness to the wishes of the voters can be assured.

Finally, the state maintained that patronage is essential to the democratic process because patronage keeps political parties viable, and viable political parties maintain the system. The Court pointed out, however, that the system existed before patronage became prevalent and has survived substantial inroads into patronage by merit systems.[77] Thus, the demise of the system without patronage was not at all certain.[78] Party loyalty and participation is encouraged to some extent by the possibility of appointment, but because the jobs

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solely on the basis of membership or association" without evidence that the person actively embraced the disruptive doctrines of the organization. *Patronage Place, supra* note 15, at 1343. Where the "ill-willed conduct" consisted of instigating political strikes, the danger to interstate commerce and indirectly to the national security of the United States was strong enough to justify infringement of first amendment rights. American Communications Ass'n v. Douds, 339 U.S. 382 (1950), upheld a prohibition against a member of the Communist party holding an office in a labor union.

[75] 96 S. Ct. at 2687. The validity of political affiliation as a criterion for the dismissal of policymaking officials is generally recognized. *See, e.g.*, Indiana State Employees Ass'n, Inc. v. Negley, 501 F.2d 1249 (7th Cir. 1974); Jafree v. Scott, 372 F. Supp. 264 (N.D. Ill. 1974). Such a person is hired to translate his beliefs into governmental action. Inability to dismiss that person, and thereby change the policy behind government, would result in "a constitutionalized system of tenure for government policymakers." Note, *The First Amendment and Public Employees*, 37 GEO. WASH. L. REV. 409, 422 (1968). *Accord*, Schoen, *Politics, Patronage and the Constitution*, 3 IND. LEGAL FORUM 35, 63 (1969).

[76] Justice Douglas, dissenting in United Pub. Workers v. Mitchell, 330 U.S. 75, 115 (1947), noted that the typical civil servant has no more opportunity to make policy than the average citizen. His work, wholly ministerial, is unaffected by his political views. *Id.* at 125 n.13, *quoting* Morstein Marx, *Public Management in the New Democracy*, 205-206 (1940). *See also, Patronage Place, supra* note 15, at 1344.

[77] As of 1967, approximately 92% of federal civilian employees were covered by civil service. Macy, *New Challenges in Civil Service*, GOOD GOVERNMENT, Fall 1967, at 11.

[78] 96 S. Ct. at 2687. Even if the demise of the two-party system were substantially threatened, the existence of two or any set number of political parties is not essential to the democratic system. In Williams v. Rhodes, 393 U.S. 23 (1968), a statutory system which provided a virtual oligarchy to the two major political parties was held

available are generally unskilled, poorly paid and less desirable, the incentive has lost much of its force.[79] Thus, the Court held that none of the justifications offered was sufficiently compelling to warrant continuing the practice in view of its inhibiting effect on first amendment rights.[80]

The Court did not consider the constitutionality of the spoils system against the background of the Equal Protection Clause. Nevertheless, such an analysis provides further support for the ultimate result. The essence of an equal protection violation is an "impermissible classification of persons with respect to the laws of the state."[81]

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to be unconstitutional. Referring later to the *Williams* case, the Court stated that "[n]o discernible state interest justified the burdensome and complicated regulations that in effect made impractical any alternative to the major parties." Storer v. Brown, 415 U.S. 724, 746 (1974).

[79] Sorauf, *The Silent Revolution in Patronage,* 20 PUBL. ADMIN. REV. 28, 30 (1959). Increasing criticism of patronage has deprived the practice of its respectability as well. The same author suggests in a later work that because "most patronage jobs did not demand especially high skill or ability levels—no patronage system can by its definition expect widespread occupational expertise and experience—it recruited men whose political skills were also middling . . ." SORAUF, *supra* note 1, at 90-91. Those it attracted were generally locally oriented and less concerned with contesting an election than with collecting their political spoils. "At the same time that patronage was thus declining in value to the party, it was being reduced in quantity by the spread of civil service and merit systems of public employment." *Id.* at 91.

[80] Cases in which restraints on first amendment rights of public employees have been allowed, especially C.S.C. v. Letter Carriers, 413 U.S. 548 (1973), and United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), were distinguished by the Court in that the restraints imposed in those cases did serve to promote governmental efficiency by eliminating political coercion. Elrod v. Burns, 96 S. Ct. 2673, 2686. The activities forbidden, active pressure by employers on their co-workers or subordinates to support a certain party or candidate, were characteristic of patronage practices.

[81] Note, *Public Employees,* 17 VILL. L. REV. 750, 760 (1972). A state's power to classify persons is "limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary." Phillips Chem. Co. v. Dumas Indep. School Dist., 361 U.S. 376, 380 (1960). To be permissible, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). "In determining whether or not a state law violates the Equal Protection Clause," courts must consider "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." Williams v. Rhodes, 393 U.S. 23, 30 (1968). Furthermore, the boundaries of the doctrine are not easily defined or rigidly fixed. The reasonableness of legislative classification can be measured against no absolute rule, but must be determined on a case-by-case basis. Puget Sound Power & Light Co. v. King County, 264 U.S. 22 (1924).

Although patronage is not officially approved by statute, the pervasiveness of the practice can amount to a de facto legislative classification which violates the Equal Protection Clause by protecting some employees from improper discharge and denying that protection to others.[82]

The basic inquiry is whether political affiliation constitutes a reasonable basis for granting or denying the privilege of government employment.[83] If the end to be furthered is efficiency and responsive-

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Examples of legislative actions found reasonable and therefore not a denial of equal protection include: a city ordinance which taxed the gross income of employed persons and the net income of self-employed persons, Walters v. City of St. Louis, 347 U.S. 231 (1954); a separate classification, for tax purposes, of utilities which are regulated heavily, protected from competition and have fairly stable revenues, New York Rapid Transit Corp. v. City of New York, 303 U.S. 573 (1938); a state statute which allowed producers of goods identified by brand names or trademarks to contract with a buyer that the buyer will not resell the goods at less than a certain price, Old Dearborn Co. v. Seagram Corp., 299 U.S. 183 (1936); a state statute which taxed dividends received from foreign corporations and exempted dividends received from domestic corporations in proportion to the amount of tax paid by the domestic corporation, Colgate v. Harvey, 296 U.S. 404 (1935); and a statute which made advocacy of a resort to violent and unlawful methods of social and political change a crime, if the penalty applied to all persons. Whitney v. California, 274 U.S. 357 (1927).

Examples of legislative actions found unreasonable and hence denials of equal protecton include: a statute which denied to an illegitimate child the right of recovery for the wrongful death of his parents, Levy v. Louisiana, 391 U.S. 68 (1968); a state statute which made a member of the armed forces ineligible to vote in any but the county where he resided at the time he entered the service, Carrington v. Rash, 380 U.S. 89 (1965); a state statute which required an unsuccessful appellant to repay the cost of the transcript used in preparing his appeal only if he were incarcerated, Rinaldi v. Yeager, 384 U.S. 305 (1966); a state statute which forbade a licensed currency exchange from doing business on premises other than its own, but which specifically exempted American Express from the restriction, Morey v. Doud, 354 U.S. 457 (1957); action of city officials in denying to several Jehovah's Witnesses a permit to hold "Bible talks," where no standard for granting or denying permits existed and similar permits had been granted before, Niemotko v. Maryland, 340 U.S. 268 (1951); and, a state statute forbidding stock companies which wrote fire, casualty, and other types of insurance to act through agents who were salaried employees but permitting this to mutual companies that performed essentially the same services, Hartford Steam Boiler Inspection and Ins. Co. v. Harrison, 301 U.S. 459 (1937).

[82] Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 306 (1974). The statutory classification makes two classes of public employees—those protected by civil service laws and those who are not—who are treated differently with respect to their protection from summary dismissal. Such classifications are vulnerable to attack under equal protection analysis. O'Neil, *supra* note 58, at 731.

[83] *Patronage Place, supra* note 15, at 1347. *Cf.*, Reed v. Reed, 404 U.S. 71 (1971) (invalidating Idaho probate statute which gave arbitrary preference to males over females in selection of estate administrators, regardless of qualifications of individu-

ness, mere political affiliation is not a sufficient indication of an employee's willingness or ability to do the job, at least as to those in non-policymaking positions.[84] Moreover, if preservation of the two-party system is the goal, patronage has been shown to be inimical rather than helpful to the system.[85] Thus, political affiliation as a criterion for dismissal in most cases furthers no purpose that could not be served by other, more rational, criteria.[86]

Perhaps the Court rejected the equal protection analysis to avoid the conclusion that political affiliation had been made a "suspect classification."[87] Such a holding would make the justification of dis-

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als); and Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (reversing board ruling excluding petitioner from New Mexico Bar exam where reasons for exclusion had no rational connection with fitness to practice law).

[84] *E.g.*, United States v. Robel, 389 U.S. 258 (1967), held invalid a federal statute which made "willful employment" at a "defense facility" unlawful for a member of the Communist party. The statute established guilt by association alone, and no showing was made that the defendant's political affiliation made him a security risk. *Cf.* Shelton v. Tucker, 364 U.S. 479 (1960), (striking down an Arkansas statute which required teachers to disclose all organizations to which they belonged as a condition of employment.) "[I]f the information gathered by the required affidavits is used to further a scheme of terminating the employment of teachers solely because of their membership in unpopular organizations, that use will run afoul of the Fourteenth Amendment." *Id.* at 496 (Frankfurter, J., dissenting). *See also* cases cited in note 50, *supra.*

[85] Shakman v. Democratic Organization, 435 F.2d 267 (7th Cir. 1970). In *Shakman,* democratic patronage practices, which forced support of the party as a condition of employment, so as to create a substantial political effort in favor of "ins" and against "outs," was held to result in an unconstitutional inequality in election procedures. *See also* White v. Snear, 313 F. Supp. 1100 (E.D. Pa. 1970).

[86] Criteria which would not violate the equal protection requirement are those generally considered under the broad heading of "cause". Incompetence, recalcitrance or insubordination are sufficient reasons for discharge which result in no deprivation of constitutional rights. Comment, *Political Affiliations of Non-Civil Service Employees,* 7 SUFFOLK L. REV. 1098, 1112 (1973). *See, e.g.,* Arnett v. Kennedy, 416 U.S. 134 (1974).

[87] The cases have held race, Brown v. Board of Educ., 347 U.S. 483 (1954); national origin, Hernandez v. Texas, 347 U.S. 475 (1954); and alienage, Graham v. Richardson, 403 U.S. 365 (1971), to be "suspect" classes for equal protection purposes. Dicta in other cases have come close to applying the label to classification based on sex, Reed v. Reed, 404 U.S. 71 (1971); illegitimacy, Levy v. Louisiana, 391 U.S. 68 (1968); and wealth, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). A label of "suspect" creates a presumption that the classification is not rationally related to any legitimate government ends, subjecting the class to rigid judicial scrutiny. Korematsu v. United States, 323 U.S. 214, 216 (1944). The state then must bear the "heavy burden of justification" of these classes. McLaughlin v. Florida, 379 U.S. 184 (1964). Pressing public necessity, such as war, may sometimes justify the existence of such categories, but those based on immutable characteristics such as race or sex most often cannot be adequately justified to survive.

missal of policymaking officials on a patronage basis virtually impossible. Although one case supports the contention that political affiliation was already a suspect class,[88] the Court did not treat it as such.[89] Considering the reluctance of the Court in prior cases to declare a class to be suspect,[90] such a declaration should not be lightly read into the *Elrod* opinion.

Although the result in *Elrod* was virtually compelled by prior treatment of first amendment rights, the decision should have little impact, since non-civil service jobs are only the tip of the patronage iceberg. Government largess which comprises the bulk of the iceberg includes money in the form of grants and subsidies; benefits such as parks; services such as streetlights, sewers and fire protection; supply and construction contracts; franchises and licenses.[91] These benefits are much more important because their direct impact covers many citizens at once, and for that reason are considered more desirable as rewards and incentives. While appointment to a government job may generate the gratitude of the appointee and his immediate family, securing a government contract for an industry generates hundreds of grateful workers among the politician's constituents.

Although dismissals for patronage reasons infringe protected rights, hiring may still be done on the basis of political affiliation. Without the ability to vacate hundreds of jobs at a sweep, however, politicians will find the importance of patronage hiring practices greatly reduced. But the classification which the Court deemed irrelevant as a basis for dismissal can hardly be relevant as a basis for hiring. Both are seemingly forbidden by the Constitution.[92] Between two equally qualified but politically opposite candidates for a nonpol-

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[88] Williams v. Rhodes, 393 U.S. 23 (1968), involved an Ohio election statute which required a new party to obtain the signatures of 15% of the voting population in order to place a candidate on the ballot. Substantially lesser burdens were placed on two established parties. Finding that the Ohio system did not merely favor a two-party system, but favored two particular parties, giving them an oligopoly, the Court held that the law creates an invidious discrimination based on political affiliation, which burdens voting and associational rights. *Id.* at 34.

[89] The Court began with a determination that first amendment rights were infringed by the process and then examined the justifications offered by the State. If political affiliation were a suspect class, plaintiffs need not have shown that specific rights were infringed. The burden is immediately upon the State to justify the classification. *See* Korematsu v. United States, 323 U.S. 214 (1944).

[90] Although the Court has considered many state classifications, they have held only three to be "suspect." *See* note 86 *supra*.

[91] Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[92] Schoen, *Politics, Patronage and the Constitution*, 3 IND. LEGAL FORUM 35, 63 (1969).

icymaking position, the toss of a coin is a more appropriate method of awarding the job.[93]

In spite of its limited immediate impact, *Elrod v. Burns* does extend the scope of first amendment coverage. *Elrod* protects every state government employee from action by the government which would penalize him for holding certain political beliefs. If used as a starting point for an attack on the spoils system as a whole, *Elrod* could force the development of a genuine alternative to patronage.[94] Such a development is desirable because the impact of patronage on policy constitutes a real danger with which the courts should deal. Allocations of government services and benefits based on the political makeup of communities rather than according to actual needs ignore the importance of rational planning in an effort to grasp political power.[95] The difficulty in dealing with the waste and abuse of power occasioned by the widespread dependence on patronage is that it primarily exists beneath the surface.[96] Reform in less visible areas, such as discretionary awards of government contracts, may be more difficult to achieve after the removal of the only available reminder of the system's existence.

One cannot realistically expect the legislatures, for whom political patronage is a way of life, to deal with the problem earnestly. The state courts, however, which now must recognize a cause of action for infringement of first amendment political rights in the area of public

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[93] *Id.* at 77. The prospect of a government job would no longer be an inducement to participation in the electoral process if this were the case. Other incentives, however, have grown so in importance that the loss of that one incentive will hardly be felt. People go into politics both as candidates and rank-and-file workers for a variety of reasons, including a desire for a political career, economic rewards, personal rewards (*e.g.*, upward mobility, fellowship, diversions), a desire to influence policymaking, and a strong adherence to ideology. SORAUF, *supra* note 1, at 87-90.

[94] American politics, in theory and in practice, has never had to develop an alternative to patronage. Developed to correct the worst abuses of patronage, civil service systems have never become a satisfactory replacement because they lack the clear-cut rewards for services and loyalty that patronage provided. Evidence of growing discontent with civil service has surfaced, particularly in large urban areas where the sluggishness of the system is a "detriment to effecting change quickly." TOLCHIN, *supra* note 2, at 62, 303-304. *Accord,* O'Neil, *supra* note 58, at 728.

[95] TOLCHIN, *supra* note 2, at 111.

[96] The best patronage "is subtle, hidden from public view, and protected from the difficulties that follow from public awareness." TOLCHIN, *supra* note 2, at 158. Most patronage power evades the reformers, therefore, because "its real rewards remain in the shadows of public awareness. As long as they can preserve the judgeships, clerkships, high-level jobs, subsidies, model cities grants, etc., political leaders cannot be too upset by the low-level clerks or middle-management bureaucrats that fall under civil service. . . ." *Id.* at 305.

employment, may be persuaded to find similar infringement in other public areas. In that event, the iceberg of patronage may be gradually chipped at until it no longer constitutes a hazard to the equitable distribution of public resources.

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