SUPREME COURT OF THE UNITED STATES

Nos. 88-1872 AND 88-2074

CYNTHIA RUTAN, ET AL., PETITIONERS
v.
REPUBLICAN PARTY OF ILLINOIS ET AL.

88-1872

MARK FRECH, ET AL., PETITIONERS
v.
CYNTHIA RUTAN ET AL.

88-2074

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 21, 1990]

JUSTICE BRENNAN delivered the opinion of the Court.

To the victor belong only those spoils that may be constitutionally obtained. Elrod v. Burns, 427 U. S. 347 (1976), and Branti v. Finkel, 445 U. S. 507 (1980), decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. Today we are asked to decide the constitutionality of several related

politi-
cal patronage practices--whether promotion, transfer, recall, and
hiring decisions involving low-level public employees may be con-
stitutionally based on party affiliation and support. We hold
that they may not.

I

The petition and cross-petition before us arise from a lawsuit
protesting certain employment policies and practices instituted
by Governor James Thompson of Illinois.
On November 12, 1980, the Governor issued an executive order pro-
claiming a hiring freeze for every agency, bureau, board, or com-
mission subject to his control. The order prohibits state offi-
cials from hiring any employee, filling any vacancy, creating any
new position, or taking any similar action. It affects approxi-
mately 60,000 state positions. More than 5,000 of these become
available each year as a result of resignations, retirements,
deaths, expansion, and reorganizations. The order proclaims that
``no exceptions'' are permitted without the Governor's ``express
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permission after submission of appropriate requests to [his] of-
fice.'' Governor's Executive Order No. 5 (Nov. 12, 1980), Brief
for Petitioners 11 (emphasis added).

Requests for the Governor's ``express permission'' have alleged-
ly become routine. Permission has been granted or withheld
through an agency expressly created for this purpose, the
Governor's Office of Personnel (Governor's Office). Agencies
have been screening applicants under Illinois' civil service sys-
tem, making their personnel choices, and submitting them as re-
quests to be approved or disapproved by the Governor's

Office.
Among the employment decisions for which approvals have been required are new hires, promotions, transfers, and recalls after layoffs.

By means of the freeze, according to petitioners, the Governor has been using the Governor's Office to operate a political patronage system to limit state employment and beneficial employment-related decisions to those who are supported by the Republican Party. In reviewing an agency's request that a particular applicant be approved for a particular position, the Governor's Office has looked at whether the applicant voted in Republican primaries in past election years, whether the applicant has provided financial or other support to the Republican Party and its candidates, whether the applicant has promised to join and work for the Republican Party in the future, and whether the applicant has the support of Republican Party officials at state or local levels.

Five people (including the three petitioners) brought suit against various Illinois and Republican Party officials in the United States District Court for the Central District of Illinois. They alleged that they had suffered discrimination with respect to state employment because they had not been supporters of the State's Republican Party and that this discrimination violates the First Amendment. Cynthia B. Rutan has been working for the State since 1974 as a rehabilitation counselor. She claims that since 1981 she has been repeatedly denied promotions to supervisory positions for which she was qualified because she had not

worked for or supported the Republican Party. Franklin Taylor, who operates road equipment for the Illinois Department of Transportation, claims that he was denied a promotion in 1983 because he did not have the support of the local Republican Party. Taylor also maintains that he was denied a transfer to an office nearer to his home because of opposition from the Republican Party chairmen in the counties in which he worked and to which he requested a transfer. James W. Moore claims that he has been repeatedly denied state employment as a prison guard because he did not have the support of Republican Party officials.

The two other plaintiffs, before the Court as cross-respondents, allege that they were not recalled after layoffs because they lacked Republican credentials. Ricky Standefer was a state garage worker who claims that he was not recalled, although his fellow employees were, because he had voted in a Democratic primary and did not have the support of the Republican Party. Dan O'Brien, formerly a dietary manager with the mental health department, contends that he was not recalled after a layoff because of his party affiliation and that he later obtained a lower paying position with the corrections department only after receiving support from the chairman of the local Republican Party.

The District Court dismissed the complaint with prejudice, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted. 641 F. Supp. 249 (CD Ill. 1986). The United States Court of Appeals for the Seventh Circuit initially issued a panel opinion, 848 F. 2d 1396 (1988), but then reheard the appeal en banc. The court affirmed the

Dis-
trict Court's decision in part and reversed in part. 868 F.
2d
943 (1989). Noting that this Court had previously
determined
that the patronage practice of discharging public employees
on
the basis of their political affiliation violates the
First
Amendment, the Court of Appeals held that other patronage
prac-
tices violate the First Amendment only when they are the
``sub-
stantial equivalent of a dismissal.'' Id., at 954. The court
ex-
plained that an employment decision is equivalent to a
dismissal
when it is one that would lead a reasonable person to
resign.
Id., at 955. The court affirmed the dismissal of Moore's
claim
because it found that basing hiring decisions on political
affil-
iation does not violate the First Amendment, but remanded
the
remaining claims for further proceedings.

Rutan, Taylor, and Moore petitioned this Court to review
the
constitutional standard set forth by the Seventh Circuit and
the
dismissal of Moore's claim. Respondents cross-petitioned
this
Court, contending that the Seventh Circuit's remand of four
of
the five claims was improper because the employment decisions
al-
leged here do not, as a matter of law, violate the First
Amend-
ment. We granted certiorari, 493 U. S. ---- (1989), to
decide
the important question whether the First Amendment's
proscription
of patronage dismissals recognized in Elrod, 427 U. S.
347
(1976), and Branti, 445 U. S. 507 (1980), extends to
promotion,
transfer, recall, or hiring decisions involving public
employment
positions for which party affiliation is not an appropriate

re-
quirement.

II

A

In Elrod, supra, we decided that a newly elected Democratic sheriff could not constitutionally engage in the patronage practice of replacing certain office staff with members of his own party ``when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party.'' Id., at 351, and 373 (plurality opinion) and 375 (Stewart, J., with BLACKMUN, J., concurring in judgment). The plurality explained that conditioning public employment on the provision of support for the favored political party ``unquestionably inhibits protected belief and association.'' Id., at 359. It reasoned that conditioning employment on political activity pressures employees to pledge political allegiance to a party with which they prefer not to associate, to work for the election of political candidates they do not support, and to contribute money to be used to further policies with which they do not agree. The latter, the plurality noted, had been recognized by this Court as ``tantamount to coerced belief.'' Id., at 355 (citing Buckley v. Valeo, 424 U. S. 1, 19 (1976)). At the same time, employees are constrained from joining, working for or contributing to the political party and candidates of their own choice. Elrod, supra, at 355-356. ``[P]olitical belief and association constitute the

core of those activities protected by the First Amendment,'' the plurality emphasized. 427 U. S., at 356. Both the plurality and the concurrence drew support from Perry v. Sindermann, 408 U. S. 593 (1972), in which this Court held that the State's refusal to renew a teacher's contract because he had been publicly critical of its policies imposed an unconstitutional condition on the receipt of a public benefit. See Elrod, supra, at 359 (plurality opinion) and 375 (Stewart, J., concurring in judgment); see also Branti, supra, at 514-516.

The Court then decided that the government interests generally asserted in support of patronage fail to justify this burden on First Amendment rights because patronage dismissals are not the least restrictive means for fostering those interests. See Elrod, supra, at 372-373 (plurality opinion) and 375 (Stewart, J., concurring in judgment). The plurality acknowledged that a government has a significant interest in ensuring that it has effective and efficient employees. It expressed doubt, however, that ``mere difference of political persuasion motivates poor performance'' and concluded that, in any case, the government can ensure employee effectiveness and efficiency through the less drastic means of discharging staff members whose work is inadequate. 427 U. S., at 365-366. The plurality also found that a government can meet its need for politically loyal employees to implement its policies by the less intrusive measure of

dismiss-
ing, on political grounds, only those employees in
policymaking
positions. Id., at 367. Finally, although the plurality
recog-
nized that preservation of the democratic process ``may in
some
instances justify limitations on First Amendment freedoms,''
it
concluded that the ``process functions as well without the
prac-
tice, perhaps even better.'' Patronage, it explained,
``can
result in the entrenchment of one or a few parties to the
exclu-
sion of others'' and ``is a very effective impediment to the
as-
sociational and speech freedoms which are essential to a
meaning-
ful system of democratic government.'' Id., at 368-370.

Four years later, in Branti, supra, we decided that the
First
Amendment prohibited a newly appointed public defender, who was
a
Democrat, from discharging assistant public defenders
because
they did not have the support of the Democratic Party. The
Court
rejected an attempt to distinguish the case from Elrod,
deciding
that it was immaterial whether the public defender had
attempted
to coerce employees to change political parties or had
only
dismissed them on the basis of their private political
beliefs.
We explained that conditioning continued public employment on
an
employee's having obtained support from a particular
political
party violates the First Amendment because of ``the coercion
of
belief that necessarily flows from the knowledge that one
must
have a sponsor in the dominant party in order to retain
one's
job.'' 445 U. S., at 516. ``In sum,'' we said, ``there is no
re-
quirement that dismissed employees prove that they, or other
em-

ployees, have been coerced into changing, either actually or os-
tensibly, their political allegiance.'' Id., at 517. To prevail,
we concluded, public employees need show only that they were
discharged because they were not affiliated with or sponsored by
the Democratic Party. Ibid.

employees. In Elrod, we suggested that policymaking and confi-
dential employees probably could be dismissed on the basis of
their political views. Elrod, supra, at 367 (plurality), and 375
(Stewart, J., concurring in judgment). In Branti, we said that a
State demonstrates a compelling interest in infringing First
Amendment rights only when it can show that ``party affiliation
is an appropriate requirement for the effective performance of
the public office involved.'' Branti, supra, at 518. The scope
of this exception does not concern us here as respondents concede
that the five employees who brought this suit are not within it.

B

We first address the claims of the four current or former em-
ployees. Respondents urge us to view Elrod and Branti as inap-
plicable because the patronage dismissals at issue in those cases
are different in kind from failure to promote, failure to
transfer, and failure to recall after layoff. Respondents ini-
tially contend that the employee petitioners' First Amendment
rights have not been infringed because they have no entitlement
to promotion, transfer, or rehire. We rejected just such an ar-
gument in Elrod, 427 U. S., at 359-360 (plurality opinion)

and
Perry, 408 U. S., at 596-598, we held explicitly that the plaintiff teacher's lack of a contractual or tenure right to reemployment was immaterial to his First Amendment claim. We explained the viability of his First Amendment claim as follows:

> ``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. This would allow the government to `produce a result which [it] could not command directly.' Speiser v. Randall, 357 U. S. 513, 526 [1958]. Such interference

with
constitutional rights is impermissible.'' Perry, id., at 597 (emphasis added).

Likewise, we find the assertion here that the employee petitioners had no legal entitlement to promotion, transfer, or recall beside the point.

Respondents next argue that the employment decisions at issue here do not violate the First Amendment because the decisions are not punitive, do not in any way adversely affect the terms of employment, and therefore do not chill the exercise of protected belief and association by public employees. This is not credible. Employees who find themselves in dead-end positions due to their political backgrounds are adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.

The same First Amendment concerns that underlay our decisions in Elrod, supra, and Branti, supra, are implicated here. Employees who do not compromise their beliefs stand to lose the

consider-
able increases in pay and job satisfaction attendant to
promo-
tions, the hours and maintenance expenses that are consumed
by
long daily commutes, and even their jobs if they are not
rehired
after a ``temporary'' layoff. These are significant
penalties
and are imposed for the exercise of rights guaranteed by
the
First Amendment. Unless these patronage practices are
narrowly
tailored to further vital government interests, we must
conclude
that they impermissibly encroach on First Amendment
freedoms.
See Elrod, supra, at 362-363 (plurality opinion) and
375
(Stewart, J., concurring in judgment); Branti, supra, at 515-
516.

We find, however, that our conclusions in Elrod, supra,
and
Branti, supra, are equally applicable to the patronage
practices
at issue here. A government's interest in securing effective
em-
ployees can be met by discharging, demoting or
transferring
staffmembers whose work is deficient. A government's interest
in
securing employees who will loyally implement its policies can
be
adequately served by choosing or dismissing certain high-
level
employees on the basis of their political views. See
Elrod,
supra, at 365-368; Branti, supra, at 518, and 520, n. 14.
Like-
wise, the ``preservation of the democratic process'' is no
more
furthered by the patronage promotions, transfers, and rehires
at
issue here than it is by patronage dismissals. First,
``politi-
cal parties are nurtured by other, less intrusive and equally
ef-
fective methods.'' Elrod, supra, at 372-373. Political

parties
have already survived the substantial decline in patronage employment practices in this century. See Elrod, 427 U. S., at 369, and n. 23; see also L. Sabato, Goodbye to Good-time Charlie 67 (2d ed. 1983) (``The number of patronage positions has significantly decreased in virtually every state''); Congressional Quarterly Inc., State Government, CQ's Guide to Current Issues and Activities 134 (T. Beyle ed. 1989-1990) (``Linkage[s] between political parties and government office-holding . . . have died out under the pressures of varying forces [including] the declining influence of election workers when compared to media and money-intensive campaigning, such as the distribution of form letters and advertising''); Sorauf, Patronage and Party, 3 Midwest J. Pol. Sci. 115, 118-120 (1959) (many state and local parties have thrived without a patronage system). Second, patronage decidedly impairs the elective process by discouraging free political expression by public employees. See Elrod, 427 U. S., at 372 (explaining that the proper functioning of a democratic system ``is indispensably dependent on the unfettered judgment of each citizen on matters of political concern''). Respondents, who include the Governor of Illinois and other state officials, do not suggest any other overriding government interest in favoring Republican Party supporters for promotion, transfer, and rehire.

We therefore determine that promotions, transfers, and recalls after layoffs based on political affiliation or support are

an impermissible infringement on the First Amendment rights of public employees. In doing so, we reject the Seventh Circuit's view of the appropriate constitutional standard by which to measure alleged patronage practices in government employment. The Seventh Circuit proposed that only those employment decisions that are the ``substantial equivalent of a dismissal'' violate a public employee's rights under the First Amendment. 868 F. 2d, at 954-957. We find this test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. See Elrod, supra, at 356-357 (plurality opinion); ----- ----- West Virgina Bd. of Education v. Barnette, 319 U. S. 624, 642 ---- ------- -- -- --------- -------- (1943). The First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge. The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its em-ployees' freedom to believe and associate, or to not believe and not associate.

Whether the four employees were in fact denied promotions, transfers, or rehire for failure to affiliate with and support the Republican Party is for the District Court to decide in the first instance. What we decide today is that such denials are irreconcilable with the Constitution and that the allegations of the four employees state claims under 42 U. S. C. 1983

(1982 ed.) for violations of the First and Fourteenth Amendments. Therefore, although we affirm the Seventh Circuit's judgment to reverse the District Court's dismissal of these claims and remand them for further proceedings, we do not adopt the Seventh Circuit's reasoning.

C

Petitioner James W. Moore presents the closely related question whether patronage hiring violates the First Amendment. Patronage hiring places burdens on free speech and association similar to those imposed by the patronage practices discussed above. A state job is valuable. Like most employment, it provides regular paychecks, health insurance, and other benefits. In addition, there may be openings with the State when business in the private sector is slow. There are also occupations for which the govern-ment is a major (or the only) source of employment, such as so-cial workers, elementary school teachers, and prison guards. Thus, denial of a state job is a serious privation.

Nonetheless, respondents contend that the burden imposed is not of constitutional magnitude. Decades of decisions by this Court belie such a claim. We prem-ised Torcaso v. Watkins, 367 U. S. 488 (1961), on our understand-

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ing that loss of a job opportunity for failure to compromise one's convictions states a constitutional claim. We held that Maryland could not refuse an appointee a commission for the posi-tion of notary public on the ground that he refused to declare his belief in God, because the required oath ``unconstitutionally invades the appellant's freedom of belief and religion.'' Id.,

at
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496. In Keyishian v. Board of Regents of Univ. of New York, 385
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U. S. 589, 609-610 (1967), we held a law affecting appointment
and retention of teachers invalid because it premised employment
on an unconstitutional restriction of political belief and asso-
ciation. In Elfbrandt v. Russell, 384 U. S. 11, 19 (1966), we
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struck down a loyalty oath which was a prerequisite for public
employment.

Almost half a century ago, this Court made clear that the
government ``may not enact a regulation providing that no Repub-
lican . . . shall be appointed to federal office.'' Public Work-
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ers v. Mitchell, 330 U. S. 75, 100 (1947). What the First Amend-
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ment precludes the government from commanding directly, it also
precludes the government from accomplishing indirectly. See Per-
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ry, 408 U. S., at 597 (citing Speiser v. Randall, 357 U. S. 513,
-- ------- -------
526 (1958)); see supra, at ----. Under our sustained precedent,
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conditioning hiring decisions on political belief and association
plainly constitutes an unconstitutional condition, unless the
government has a vital interest in doing so. See Elrod, 427

U. S., at 362-363 (plurality opinion), and 375 (Stewart, J., con-
curring in judgment); Branti, 445 U. S., at 515-516; see also
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Sherbert v. Verner, 374 U. S. 398 (1963) (unemployment bene-
fits); Speiser v. Randall, supra (tax exemption). We find no
such government interest here, for the same reasons that we found
the government lacks justification for patronage promotions,
transfers or recalls. See supra, at ----.

The court below, having decided that the appropriate inquiry in
patronage cases is whether the employment decision at issue is
the substantial equivalent of a dismissal, affirmed the trial
court's dismissal of Moore's claim. See 868 F. 2d, at 954. The
Court of Appeals reasoned that ``rejecting an employment applica-
tion does not impose a hardship upon an employee comparable to
the loss of [a] job.'' Ibid., citing Wygant v. Jackson Bd. of
Education, 476 U. S. 267 (1986) (plurality opinion). Just as we
reject the Seventh Circuit's proffered test, see supra at ----,
we find the Seventh Circuit's reliance on Wygant to distinguish
hiring from dismissal unavailing. The court cited a passage from
the plurality opinion in Wygant explaining that school boards at-
tempting to redress past discrimination must choose methods that
broadly distribute the disadvantages imposed by affirmative ac-
tion plans among innocent parties. The plurality said that
race-based layoffs placed too great a burden on individual
members of the nonminority race, but suggested that discriminato-

ry hiring was permissible, under certain circumstances, even
though it burdened white applicants because the burden was less
intrusive than the loss of an existing job. Id., at 282-284.
See also id., at 294-295 (WHITE, J., concurring in judgment).

Wygant has no application to the question at issue here. The
plurality's concern in that case was identifying the least harsh
means of remedying past wrongs. It did not question that some
remedy was permissible when there was sufficient evidence of past
discrimination. In contrast, the Governor of Illinois has not
instituted a remedial undertaking. It is unnecessary here to
consider whether not being hired is less burdensome than being
discharged because the government is not pressed to do either on
the basis of political affiliation. The question in the patronage context is not which penalty is more acute but whether
the government, without sufficient justification, is pressuring
employees to discontinue the free exercise of their First Amendment rights.

If Moore's employment application was set aside because he chose
not to support the Republican Party, as he asserts, then Moore's
First Amendment rights have been violated. Therefore, we find
that Moore's complaint was improperly dismissed.

III

We hold that the rule of Elrod and Branti extends to promotion,

transfer, recall, and hiring decisions based on party affiliation and support and that all of the petitioners and cross-respondents have stated claims upon which relief may be granted. We affirm the Seventh Circuit insofar as it remanded Rutan's, Taylor's, Standefer's, and O'Brien's claims. However, we reverse the Circuit Court's decision to uphold the dismissal of Moore's claim. All five claims are remanded for proceedings consistent with this opinion.

It is so ordered.

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JUSTICE STEVENS, concurring.

While I join the Court's opinion, these additional comments are prompted by three propositions advanced by JUSTICE SCALIA in his dissent. First, he implies that prohibiting imposition of an unconstitutional condition upon eligibility for government employment amounts to adoption of a civil service system. Second, he makes the startling assertion that a long history of open and widespread use of patronage practices immunizes them from constitutional scrutiny. Third, he assumes that the decisions in Elrod

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v. Burns, 427 U. S. 347 (1976), and Branti v. Finkle, 445 U. S.

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507 (1980), represented dramatic departures from prior precedent.

Several years before either Elrod or Branti was decided, I had

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occasion as a judge on the Court of Appeals for the Seventh Circuit to evaluate each of these propositions. Illinois State Em-

ployees Union, Council 34, Am. Fed. of State, County, and Municipal Emp., AFL-CIO v. Lewis, 473 F. 2d 561 (1972), cert. denied, 410 U. S. 928 (1973). With respect to the first, I wrote:

> ``Neither this court nor any other may impose a civil service system upon the State of Illinois. The General Assembly has provided an elaborate system regulating the appointment to specified positions solely on the basis of merit and fitness, the grounds for termination of such employment, and the procedures which must be followed in connection with hiring, firing, promotion, and retirement. A federal court has no power to establish any such employment code.
>
> ``However, recognition of plaintiffs' claims will not give every public employee civil service tenure and will not require the state to follow any set procedure or to assume the burden of explaining or proving the grounds for every termination. It is the former employee who has the burden of proving that his discharge was motivated by an impermissible consideration. It is true, of course, that a prima facie case may impose a burden of explanation on the State. But the burden of proof will remain with the plaintiff employee and we must assume that the trier of fact will be able to differentiate between those discharges which are politically motivated and those which are not. There is a clear distinction between the grant of tenure to an employee--a right which cannot be conferred by judicial fiat--and the prohibition of a discharge for a particular im-

permissible reason. The Supreme Court has plainly identified that distinction on many occasions, most recently in Perry v. Sindermann, 408 U. S. 593 (1972).

``Unlike a civil service system, the Fourteenth Amendment to the Constitution does not provide job security, as such, to public employees. If, however, 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. There is no merit to the argument that recognition of plaintiffs' constitutional claim would be tantamount to foisting a civil service code upon the State.'' Id., at 567-568 (footnotes omitted).

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Denying the Governor of Illinois the power to require every state employee, and every applicant for state employment, to pledge allegiance and service to the political party in power is a far cry from a civil service code. The question in this case is simply whether a Governor may adopt a rule that would be plainly unconstitutional if enacted by the General Assembly of Illinois.

Second, JUSTICE SCALIA asserts that ``when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.'' Post, at 4; post, at

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11 (a ``clear and continuing tradition of our people'' deserves ``dispositive effect''). The argument that traditional practices

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are immune from constitutional scrutiny is advanced in two

plu-
rality opinions that JUSTICE SCALIA has authored, but not by
any
opinion joined by a majority of the Members of the Court.
In the Lewis case, I noted the obvious response to this
posi-
tion: ``if the age of a pernicious practice were a
sufficient
reason for its continued acceptance, the constitutional attack
on
racial discrimination would, of course, have been doomed
to
failure.'' 473 F. 2d, at 568, n. 14. See, e. g., Brown v.
Board
of Education, 347 U. S. 483 (1954).

I then added this comment on the specific application of that
ar-
gument to patronage practices:

> ``Finally, our answer to the constitutional question is
> not
> foreclosed by the fact that the `spoils system has been
> en-
> trenched in American history for almost two hundred
> years.'
> Alomar v. Dwyer, 447 F. 2d 482, 483 (2d Cir. 1971). For
> most
> of that period it was assumed, without serious question or
> de-
> bate, that since a public employee has no constitutional
> right
> to his job, there can be no valid constitutional objection
> to
> his summary removal. See Bailey v. Richardson, 86 U. S.
> App.
> D. C. 248, 182 F. 2d 46, 59 (1950), affirmed per curiam by
> an
> equally divided Court, 341 U. S. 918; Adler v. Board of
> Educa-
> tion, 342 U. S. 485 [(1952)]. But as Mr. Justice Marshall
> so
> forcefully stated in 1965 when he was a circuit judge,
> `the
> theory that public employment which may be denied
> altogether
> may be subjected to any conditions, regardless of how
> unreason-
> able, has been uniformly rejected.' Keyishian v. Board of

Re-
gents, 345 F. 2d 236, 239 (2d Cir. 1965). The development
of
constitutional law subsequent to the Supreme Court's
unequivo-
cal repudiation of the line of cases ending with Bailey
v.
Richardson and Adler v. Board of Education is more
relevant
than the preceding doctrine which is now `universally
reject-
ed.' '' Lewis, 473 F. 2d, at 568 (footnotes and citations
omit-
ted).

With respect to JUSTICE SCALIA's view that until Elrod v.
Burns
was decided in 1976, it was unthinkable that patronage could
be
unconstitutional, see post, at 5, it seems appropriate to
point
out again not only that my views in Lewis antedated Elrod
by
several years, but, more importantly, that they were
firmly
grounded in several decades of decisions of this Court. As
ex-
plained in Lewis:

``[In 1947] a closely divided Supreme Court upheld a
statute
prohibiting federal civil service employees from taking an
ac-
tive part in partisan political activities. United
Public
Workers v. Mitchell, 330 U. S. 75. The dissenting
Justices
felt that such an abridgment of First Amendment rights
could
not be justified. The majority, however, concluded that
the
government's interests in not compromising the quality of
pub-
lic service and in not permitting individual employees to
use
their public offices to advance partisan causes were
sufficient

to justify the limitation on their freedom.

``There was no dispute within the Court over the proposition that the employees' interests in political action were protected by the First Amendment. The Justices' different conclusions stemmed from their different appraisals of the sufficiency of the justification for the restriction. That justification--the desirability of political neutrality in the public service and the avoidance of the use of the power and prestige of government to favor one party or the other--would condemn rather than support the alleged conduct of defendant in this case. Thus, in dicta, the Court unequivocally stated that the Legislature could not require allegiance to a particular political faith as a condition of public employment:

`Appellants urge 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, or that no federal employee shall attend Mass or take any active part in missionary work.' None would deny such limitations on Congressional power but, because there are some limitations it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid.' 330 U. S. 75, 100.

``In 1952 the Court quoted that dicta in support of its holding that the State of Oklahoma could not require its employees to profess their loyalty by denying past association with Communists. Wieman v. Updegraff, 344 U. S. 183, 191-192. That decision did not recognize any special right to public

employ-
ment; rather, it rested on the impact of the requirement on
the

citizen's First Amendment rights. We think it unlikely
that
the Supreme Court would consider these plaintiffs' interest
in
freely associating with members of the Democratic Party
less
worthy of protection than the Oklahoma employees' interest
in
associating with Communists or former Communists.

``In 1961 the Court held that a civilian cook could be
sum-
marily excluded from a naval gun factory. Cafeteria and
Res-
taurant Workers Union, Local 473, AFL- CIO v. McElroy,
367
U. S. 886. The government's interest in maintaining the
secu-
rity of the military installation outweighed the cook's
in-
terest in working at a particular location. Again,
however,
the Court explicitly assumed that the sovereign could not
deny
employment for the reason that the citizen was a member of
a
particular political party or religious faith--`that she
could
not have been kept out because she was a Democrat or a
Metho-
dist.' 367 U. S. at 898.

``In 1968 the Court held that `a teacher's exercise of
his
right to speak on issues of public importance may not
furnish
the basis for his dismissal from public employment.'
Pickering
v. Board of Education, 391 U. S. 563, 574. The Court
noted
that although criminal sanctions `have a somewhat different
im-
pact on the exercise of the right to freedom of speech
from
dismissal from employment, it is apparent that the threat
of
dismissal from public employment is nonetheless a potent
means
of inhibiting speech.' Ibid. The holding in Pickering was
a

natural sequel to Mr. Justice Frankfurter's comment in dissent in Shelton v. Tucker that a scheme to terminate the employment of teachers solely because of their membership in unpopular organizations would run afoul of the Fourteenth Amendment. 364 U. S. 479, 496 [(1960)].

``In 1972 the Court reaffirmed the proposition that a non-tenured public servant has no constitutional right to public employment, but nevertheless may not be dismissed for exercising his First Amendment rights. Perry v. Sindermann, 408 U. S. 593. The Court's explanation of its holding is pertinent here:

`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 act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to `produce a result which [it] could not command directly.' Speiser v. Randall, 357 U. S. 513, 526. Such interference with constitutional rights is impermissible.

`We have applied this general principle to denials of tax exemp-

tions, Speiser v. Randall, supra, unemployment benefits, Sherbert
v. Verner, 374 U. S. 398, 404-405 [(1963)], and welfare pay-
ments, Shapiro v. Thompson, 394 U. S. 618, 627 n. 6 [(1969)];
Graham v. Richardson, 403 U. S. 365, 374 [(1971)]. But, most
often, we have applied the principle to denials of public employ-
ment. United Public Workers v. Mitchell, 330 U. S. 75, 100
[(1947)]; Wieman v. Updegraff, 344 U. S. 183, 192; Shelton v.
Tucker, 364 U. S. 479, 485-486; Torasco v. Watkins, 367 U. S.
488, 495-496; Cafeteria and Restaurant Workers, etc. v. McElroy,
367 U. S. 886, 894 [(1961)]; Cramp v. Board of Public Instruc-
tion, 368 U. S. 278, 288 [(1961)]; Baggett v. Bullitt, 377 U. S.
360 [(1964)]; Elfbrandt v. Russell, 384 U. S. [11,] 17 [(1966)];
Keyishian v. Board of Regents, 385 U. S. 589, 605-606 [(1967)];
Whitehill v. Elkins, 389 U. S. 54 [(1967)]; United States v.
Robel, 389 U. S. 258 [(1967)]; Pickering v. Board of Education,
391 U. S. 563, 568 [(1968)]. We have applied the principle re-
gardless of the public employee's contractual or other claim to a
job. Compare Pickering v. Board of Education, supra, with Shel-
ton v. Tucker, supra.

`Thus the respondent's lack of a contractual or tenure `right'
to reemployment for the 1969-1970 academic year is immaterial to
his free speech claim. 408 U. S. at 597.

``This circuit has given full effect to this principle.'' 473
F. 2d, at 569-572 (footnotes and citations omitted).

See also American Federation of State County and Municipal Em-

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ployees, AFL-CIO v. Shapp, 443 Pa. 527, 537-545, 280 A. 2d 375,
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379-383 (1971) (Barbieri, J., dissenting).

To avoid the force of the line of authority described in the foregoing passage, JUSTICE SCALIA would weigh the supposed general state interest in patronage hiring against the aggregated interests of the many employees affected by the practice. This defense of patronage obfuscates the critical distinction between partisan interest and the public interest.

precinct] for the other side''); Johnson, Successful Reform Litigation: The Shakman Patronage Case, 64 Chi.-Kent L. Rev. 479, 481

(1988) (the ``massive Democratic patronage employment system'' maintained a ``noncompetitive political system'' in Cook County in the 1960's).

Without repeating the Court's studied rejection of the policy arguments for patronage practices in Elrod, 427 U. S., at
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364-373, I note only that many commentators agree more with JUSTICE SCALIA's admissions of the systemic costs of patronage practices--the ``financial corruption, such as salary kickbacks and partisan political activity on government-paid time,'' the reduced efficiency of government, and the undeniable constraint upon the expression of views by employees, post, at 17-18--than
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with his belief that patronage is necessary to political stability and integration of powerless groups. See, e. g., G. Pomper,
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Voters, Elections, and Parties 282- 304 (1988) (multiple

causes of party decline); D. Price, Bringing Back the Parties 22-25 (1984) (same); Comment, 41 U. Chi. L. Rev. 297, 319-328 (1974) (same); Wolfinger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J. Pol. 365, 398 (1972) (absence of machine politics in California); J. James, American Political Parties in Transition 85 (1974) (inefficient and antiparty effects of patronage); Johnston, Patrons and Clients, Jobs and Machines: A Case Study of the Uses of Patronage, 73 Am. Pol. Sci. Rev. 385 (1979) (same); Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15 (1989) (same); Comment, 49 U. Chi. L. Rev. 181, 197-200 (1982) (same); Freedman, Doing Battle with the Patronage Army: Politics, Courts and Personnel Administration in Chicago, 48 Pub. Admin. Rev. 847 (1988) (race and machine politics).

Incidentally, although some might suggest that Jacob Arvey was ``best known as the promoter of Adlai Stevenson,'' post, at 13, ---- that connection is of interest only because of Mr. Arvey's creative and firm leadership of the powerful political organization that was subsequently led by Richard J. Daley. M. Tolchin & S. Tolchin, To the Victor 36 (1971).

It assumes that governmental power and public resources--in this case employment opportunities--may appropriately be used to subsidize partisan activities even when the political affiliation of the employee or the job applicant is entirely unrelated to his or her public service. The premise on which this position rests would justify the use of

public funds to compensate party members for their campaign work, or conversely, a legislative enactment denying public employment to nonmembers of the majority party. If such legislation is unconstitutional--as it clearly would be--an equally pernicious rule promulgated by the Executive must also be invalid.

JUSTICE SCALIA argues that distinguishing ``inducement and compulsion'' reveals that a patronage system's impairment of the speech and associational rights of employees and would-be employees is insignificant. Post, at 18. This analysis contradicts the harsh reality of party discipline that is the linchpin of his theory of patronage. Post, at 13-14 (emphasizing the ``link between patronage and party discipline, and between that and party success'').

ducements'' and ``influences'' is apparent from his own descriptions of the essential features of a patronage system. See, e. g., post, at 18 (the worker may ``urge within the organization the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless''); post, at 13 (quoting M. Tolchin & S. Tolchin, To the Victor, at 123 (reporting that Montclair, New Jersey Democrats provide fewer services than Cook County, Illinois Democrats, while ``the rate of issue participation is much higher among Montclair Democrats who are not bound by the fear displayed by the Cook County committeemen'')); post, at 13 (citing W. Grimshaw, The Political