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THE SPOILS SYSTEM IN CHECK? PUBLIC  
EMPLOYEES' RIGHT TO POLITICAL AFFILIATION  
& THE BALKANIZED POLICYMAKING EXCEPTION  
TO § 1983 LIABILITY FOR WRONGFUL  
TERMINATION

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INTRODUCTION

Today, most state and local government employees are protected from dismissal for their political affiliation; employees found to be “policymakers,” however, are excepted from this protection. Thus, while a newly elected or appointed public official cannot replace every employee under his control with party loyalists, he may legally replace policymaking employees with his people.<sup>1</sup>

Historically, employees not protected by the civil service laws—exempt employees—were also vulnerable to political discrimination.<sup>2</sup> A government job was not viewed as a right but as a privilege; thus, employees had no property interest in their jobs, and no standing to challenge their dismissal. Moreover, political patronage—particularly the use of jobs to compensate political loyalists—has played a

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<sup>1</sup> Private employees, not under contract with their employers, operate under the traditional “at will” employment scheme, where the employer may terminate the relationship at any time without cause, subject to a few exceptions such as discrimination based upon race or gender, or if the court finds the termination to be against “public policy.” The majority of public employees, on the other hand, are protected by state and federal civil service laws which limit the grounds upon which employees may be terminated—including protections against discrimination based on political beliefs or associations—and establish procedural protections for employees subject to dismissal. LEX K. LARSON, 10 EMPLOYMENT DISCRIMINATION § 171.08[3] (2d ed. 2008) (analyzing potential extension of political discrimination doctrine to private employment through the “public policy exception” to employment at will).

<sup>2</sup> Exempt employees typically hold management, advisory, or confidential positions in bureaucratic agencies, but the category can also include “deputy sheriffs,” a title which includes a broad range of job responsibilities, from clerical to policy-setting officers. For a review of litigation involving a mid-level manager, see *infra* note 16. For a discussion of the position of deputy sheriff, see *infra* Part II.A.

significant role in the development of political parties in American democracy.<sup>3</sup>

Thirty years ago, the Supreme Court in *Elrod v. Burns*<sup>4</sup> and *Branti v. Finkel*<sup>5</sup> extended protection against political patronage dismissals to the class of employees who were not already protected by civil service laws.<sup>6</sup> Today, public employees who contend they were fired for their political affiliation may bring a federal action, under *Elrod* and *Branti*, against their government employers.<sup>7</sup> In the Third Circuit,<sup>8</sup> for example, in order to make out a prima facie case, the employee must demonstrate that: (i) she was engaged in constitutionally protected conduct; (ii) her position was not one for which political affiliation is an appropriate requirement; and, (iii) her political affiliation was the motivating factor for her dismissal.<sup>9</sup> The second requirement, that her

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<sup>3</sup> Political patronage has been defined as “the allocation of the discretionary favors of government in exchange for political support.” MARTIN TOLCHIN & SUSAN TOLCHIN, TO THE VICTOR . . . : POLITICAL PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE 5 (Random House 1971). It serves to

cement a politicians’ loyalty to his party leaders, to whom he is indebted for past favors and from whom he seeks future favors, while at the same time they help him earn the loyalty of those beneath him in the party structure who are in turn indebted to him for favors. . . . The patronage system thrives as one of the occupational hazards of our democracy. . . . [P]ublic officials who do not know how to use patronage are invariably poor administrators . . . . The patronage system also ensures that ideology plays a relatively small role in the decisions of government. . . . Patronage power is a necessary and legitimate extension of the power of elected officials. It is more human, in one sense, than a meritocracy in which individuals advance solely on merit without regard to years of service or personal loyalties. But it can be cruel, too.

*Id.* at 6-10. The real hazard of political patronage is “that it encourages public officials to compromise the public interest for private gain, and to sacrifice the national interest for the needs of their regional constituencies.” *Id.* at 10.

The phrase “to the victor go the spoils” is commonly associated with the phenomenon of political patronage. There are many theories as to the source of this phrase. A widely accepted version traces it to New Yorker William L. Marcy, an Associate Justice of the State Supreme Court, United States Senator, and Governor who said during a Congressional debate in 1831: “They see nothing wrong in the rule, that to the victor belong the spoils of the enemy.” JON MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE 83 (2008); SUSAN J. STAFFA, SCHENECTADY GENESIS: HOW A DUTCH COLONIAL VILLAGE BECAME AN AMERICAN CITY, CA. 1661-1800, VOL. I: THE COLONIAL CRUCIBLE, CA. 1661-1774 at xvii (2004).

<sup>4</sup> *Elrod v. Burns*, 427 U.S. 347 (1976).

<sup>5</sup> *Branti v. Finkel*, 445 U.S. 507 (1980).

<sup>6</sup> Patronage dismissal is the practice where a newly elected official fires employees under his control merely because of their political beliefs or associations. That is, the employee failed to adequately support the newly elected or appointed employer, and is replaced with someone who did. Until the 1970s, exempt employees could be dismissed, without recourse, for their political affiliation.

<sup>7</sup> See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (“[N]either a State nor its officials acting in their official capacities are ‘persons’ under § 1983.”).

<sup>8</sup> See, e.g., *Stephens v. Kerrigan*, 122 F.3d 171, 176 (3d Cir. 1997).

<sup>9</sup> *Id.* Once this showing has been made, the burden shifts, and the government may avoid liability by proving by a preponderance of the evidence that the same employment decision would have been made in the absence of the protected activity. *Id.*; see also *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). The requirement of constitutionally protected

position did not require a certain political affiliation, is known as the “policymaking exception” to the protection.

The principle of *Elrod* and *Branti* is that in order to justify a political patronage dismissal, the government must demonstrate a significant interest in replacing public employees with individuals who are politically loyal to their employer.<sup>10</sup> In the interest of preventing the obstruction of the electorally sanctioned policies of a new administration, the Court held that public employees may be lawfully terminated based upon their political affiliation if their position could be characterized as “policymaking” or “confidential.”<sup>11</sup> In short, termination of public employees because of their political affiliation fails under heightened scrutiny and violates the First Amendment,<sup>12</sup> unless the position at issue involves policymaking.<sup>13</sup>

Due to weak language in the *Elrod* plurality opinion and the misleading dicta of *Branti*,<sup>14</sup> the policymaking exception has received

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conduct allows a plaintiff to prevail if she demonstrates she was dismissed solely for her affiliation with a certain party.

<sup>10</sup> *Elrod v. Burns*, 427 U.S. 347 (1976).

[I]f conditioning the retention of public employment in the employee’s support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

*Id.* at 363; *Branti*, 445 U.S. at 515-16. After establishing that the First Amendment afforded public employees protection against patronage dismissals, the Court held that “unless the government can demonstrate an ‘overriding interest’ ‘of vital importance,’ requiring that a person’s private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him.” *Id.* (citations omitted).

<sup>11</sup> Party affiliation may be an acceptable requirement “if an employee’s private political beliefs would interfere with the discharge of his public duties.” *Branti*, 445 U.S. at 517.

The reason is self-evident. High-level officials must be permitted to accomplish their organizational objectives through key deputies who are loyal, cooperative, willing to carry out their superiors’ policies, and perceived by the public as sharing their superiors’ aims; this is true whether or not those officials are elected. In the case of key patronage appointments, this government interest is protected because of the presumption that these individuals are compatible with the elected officials they serve. As they belong to the same party, they may be presumed to share common interests and goals, which cannot be said of members of an opposition party. But regardless of whether a key policy level deputy is appointed from among the ranks of party members, the need for compatibility remains.

*Hall v. Ford*, 856 F.2d 255, 263 (D.C. Cir. 1988).

<sup>12</sup> “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. Amend. I.

<sup>13</sup> *Galli v. N.J. Meadowlands Comm’n*, 490 F.3d 265, 270 (3d Cir. 2007). The holdings of *Elrod* and *Branti*, which are the focus of this Note, are explored in further detail. See *infra* Part II.B. For now, it is important to recognize that while *Elrod* permitted patronage dismissals of employees who were “policymakers,” the opinion in *Branti* looked to whether or not political affiliation was an appropriate requirement for the position at issue.

<sup>14</sup> See *infra* Part II.B. Where the plurality in *Elrod* prohibited the politically motivated discharge of a non-policymaking, non-confidential employee, the majority in *Branti* attempted to refine the policymaking exception by focusing on whether political affiliation is an appropriate requirement for the position. The *Branti* majority’s purported attempt to alter the standard,

disparate treatment among the circuits—some eschewing the term “policymaking” entirely and others identifying a set of factors to be applied in determining whether a position is a policymaking position or not.<sup>15</sup> This has led to a doctrinal vacuum, left by the Supreme Court, allowing the lower courts to develop standards which lead to inconsistent results.

Furthermore, no judicial deference is shown when a legislative body identifies a position as policymaking. In other words, the legislature’s characterization of a position as a policymaking one does not create a legal presumption that the position is exempt from *Elrod-Branti* protection. Thus, employees are not consistently given notice when hired that they may be subject to dismissal for their political affiliation.

In the wake of this uncertainty created by under-developed and varying standards, and the lack of incentive for state and local governments to notify employees that they may be subject to patronage dismissal, the First Amendment rights of public employees are inconsistently and inefficiently vindicated. This outcome can disqualify long-tenured and proficient employees from socially valued employment, and also requires government resources to be expended (perhaps unnecessarily) on litigating wrongful termination suits.<sup>16</sup>

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however, this language was dicta. Thus, the Court has left development and application of the so-called “policymaking exception” to the lower courts.

<sup>15</sup> See *infra* Part II.C.

<sup>16</sup> A Third Circuit decision, *Galli v. N.J. Meadowlands Commission*, 490 F.3d 265 (3d Cir. 2007), provides an example of the events that give rise to political discrimination actions, and demonstrates how public employees might be in jeopardy of losing their jobs to the political whims of their superiors. In 1984, Anne Galli was hired to serve as Acting Director of Environmental Operations on the New Jersey Meadowlands Commission during the Republican administration of then-Governor Thomas Kean. *Id.* at 268. The Commission, an affiliate of the New Jersey Department of Community Affairs, is responsible for environmental protection, economic development, and solid waste management in northern New Jersey. *Id.* The Commission oversees a district of some 20,000 acres or 30 square miles in Bergen and Hudson Counties. *Id.* Approximately 8,400 acres of the Commission’s District consist of open space, waterway and wetlands, which is now home to more than 265 different species of birds and is recognized as a major migratory fly-over and resting preserve. *Id.*

The Chair of the Commission described the goal of the Commission’s 2004 Master Plan as “a synthesis between redevelopment and environmental restoration.” NEW JERSEY MEADOWLANDS COMMISSION, 2004/2005 ANNUAL REPORT: A MEADOWLANDS RENAISSANCE 4 (2005), available at [http://www.njmeadowlands.gov/doc\\_archive/NJMC%20Doc%20Archive/NJMC%20Annual%20Report%202004-2005%20Part%201.pdf](http://www.njmeadowlands.gov/doc_archive/NJMC%20Doc%20Archive/NJMC%20Annual%20Report%202004-2005%20Part%201.pdf).

Galli was extremely well-qualified for her work—she held “degrees in biology, environmental science, and ecology, and [had] worked as a naturalist and professor of ornithology” prior to taking the position with the Commission, and she subsequently rose through the ranks of the Commission over 17 years of employment. *Galli*, 490 F.3d at 268. By 2002, she had become the Commission’s Director of Environmental Education, earning more than \$100,000 annually. Although Galli was hired during the tenure of a Republican governor, she never “registered with a political party and kept her lack of political affiliation private.” *Id.*

Despite her expertise and years of dedicated service, the landscape changed for Galli in

The *Elrod* and *Branti* case law highlights an effort to strike an appropriate balance between the interests of the state<sup>17</sup> and those of the

November 2001 when Democrat James McGreevey was elected Governor. Galli's qualifications for a position she had held for 17 years were suddenly inadequate, for the simple reason that she had not supported McGreevey's campaign. She was a casualty of political patronage.

In March 2002, the newly installed Executive Director and Chair of the Commission met to discuss operations and personnel changes. *Id.* at 269. "As a result of that meeting . . . Galli and ten other employees [were fired]—all of whom had been hired during Republican administrations." *Id.* According to Galli, the Executive Director informed her that the "Commission was going in a 'different direction,' . . . mak[ing] no reference to either the poor job performance or Commission-wide reorganization . . . later [cited] by the Commission [as the reasons] for Galli's termination." *Id.* Galli also testified that she contacted a Republican board member of the Commission who "acknowledged that the Commission was 'letting Republicans go,' . . . that 'some Democrat [obviously] wants the spot,' and that one has to 'pay to play with this administration.'" *Id.*

Galli had never before received negative feedback from her superiors and, in fact, had helped the Environmental Education Division earn an award of excellence shortly before her termination. The Commission alleged that the eleven employees, including Galli, "were fired as part of a 'reorganization' [plan] to make the Commission more efficient and cost-effective." *Id.* Yet, the Commission proceeded to hire eighteen new employees in the year following Galli's termination. The new hires, Galli contended, "were almost all political patrons of the [new] Democratic administration," and many "were unqualified" for their positions. Specifically, Galli's replacement was "a tax attorney with no background in environmental science or education." *Id.* Galli would later assert that her replacement, Linda Mercurio, "had strong ties to the Democratic Party, having previously run for office twice on a Democratic ticket, which . . . explain[ed] Mercurio's hiring." *Id.*

"In February 2003, Galli filed a complaint under 42 U.S.C. § 1983, against both the Commission [itself and its Chair], alleging that her termination amounted to political patronage discrimination in violation of her First Amendment rights." *Id.* In August 2005, the United States District Court for the District of New Jersey granted defendants' motions for summary judgment, "holding that Galli could not establish that she had engaged in constitutionally protected activity because she was unaffiliated with any political party and disinclined to be active politically." *Id.*

Typically, a claim for political patronage discrimination arises where an employee's party registration or support of a losing candidate is at odds with the preferences of her employer. *See, e.g.,* *Goodman v. Pa. Turnpike Comm'n*, 293 F.3d 655, 663-64 (2002) (describing the second prong as a showing "that the employee maintained an affiliation with a political party"); *Robertson v. Fiore*, 62 F.3d 596, 600-01 (3d. Cir. 1995) (plaintiff can meet the second prong if she suffers because of active support for a losing candidate within the same political party). *But see* *Bennis v. Gable*, 823 F.2d 723, 731 (3d Cir. 1987) (the First Amendment also protects an employee from discrimination for failure to support the winning candidate).

The District Court "concluded that Galli had no constitutional interest at stake because she was . . . apolitical"; that her "silence was not a form of expression [but] 'simply a lack of interest' in politics"; and that she "was neither compelled to participate in the Democratic Party nor forced to keep her true beliefs [secret]." *Galli*, 490 F.3d at 273. Ultimately, a divided panel of the Third Circuit reversed, holding that *Elrod*, *Branti* and its own political patronage jurisprudence stood for the proposition that the protection for non-policymaking public employees extended to those who failed to support the political party or candidate in power. *Id.* at 274 ("[A] public employee, not in a policymaking position, may not be fired for failing to support the political party or candidate in power.").

Since Galli "presented some evidence that she did not politically support the New Jersey Democratic Party or Governor McGreevey," it did not matter whether that failure to support was based on a decision to support another candidate or party or on a decision to be apolitical and support not candidate or party. *Id.* Regardless of the basis for her decision, her choice was a constitutionally protected one. *Id.*

<sup>17</sup> The state interest, in this context, is to be interpreted in terms of government efficiency in

individual. The courts are striking a policy tradeoff between administrative efficiency (the benefit of loyal employees) and individual liberty (the right to political affiliation).<sup>18</sup> This is a struggle to reconcile the dual roles of political patronage in American democratic government. On one hand, patronage sustains political parties and ensures party loyalty, but on the other, it allows for corruption, cronyism, government profiteering, and nepotism.<sup>19</sup> Appropriately defining the contours of the policymaking exception is critical to managing the effects of political patronage in American democracy.

This Note argues that many of the circuit courts of appeals have strayed from the path laid out by the Supreme Court in *Elrod* and *Branti*, and proposes that the Court revisit the policymaking exception to public employees' right to political affiliation in order to clarify a uniform standard. The weak plurality opinion of *Elrod* left an unsettled field which the dicta of *Branti* failed to sufficiently define for application by the lower courts. Part I of this Note provides context for understanding political patronage by examining its historic role in American democracy. Part II demonstrates the inconsistency of the policymaking exception among the circuits by review of their respective treatment of the position of deputy sheriff. Part II goes on to review the opinions in *Elrod* and *Branti* to find the source of that inconsistency, and it examines each of the circuit court's application of the resulting *Elrod-Branti* principles. Part III then evaluates both the federal executive method of handling employee turnover during a change in administrations and whether this method has potential to assist state and local government employers give courts guidance in identifying a policymaking position. Part IV proposes a solution after arguing that many courts have misread *Elrod* and *Branti* and come to the wrong conclusions about political patronage protection and the policymaking exception. This Note advocates for the adoption of the Sixth Circuit's standard for analyzing the policymaking exception.<sup>20</sup> This standard

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administration of the laws, or in effective implementation of the popularly sanctioned policies of elected leaders. This is the view commonly associated with the Public Administration theory of regulatory efficiency. JEFFREY L. HARRISON ET AL., REGULATION AND DEREGULATION 32-34 (2d ed. 2004).

<sup>18</sup> See generally DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING (rev. ed. 2002) (outlining a framework for conducting policy analysis through the prism of four fundamental values—equity, efficiency, security and liberty—and their resulting trade-offs).

<sup>19</sup> For an overview of the history of political patronage and its role in American government, see generally TOLCHIN & TOLCHIN, *supra* note 3; FRANK J. SORAUF, POLITICAL PARTIES IN THE AMERICAN SYSTEM (1964); DAVID H. ROSENBLUM, FEDERAL SERVICE AND THE CONSTITUTION (1971); CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE (1905).

<sup>20</sup> The Sixth Circuit's test is superior because it incorporates the essential elements of the holdings of the patronage cases—*Elrod*, *Branti*, and *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (extending the rule of *Elrod* and *Branti* to promotion, transfer, recall, and hiring decisions based on party affiliation and support without further discussion of the "policymaking

provides lower courts with a predictable framework while striking the appropriate balance between insulating government from partisan pressures and maximizing responsiveness to electoral mandates.

### I. POLITICAL PATRONAGE IN AMERICAN DEMOCRACY

In order to understand how courts should properly deal with patronage dismissals, it is important to recognize the role of political patronage in American history. Political patronage is a practice “as old as the American Republic.”<sup>21</sup> It is a means of ensuring the loyalty of public servants (employees) to elected or appointed leaders (employers) and serves to bolster the strength of political parties by rewarding their respective supporters. It is a practice that includes, but is by no means limited to, rewarding supporters of a political regime with employment in a newly elected administration. Patronage sustains political parties and can promote efficiency in government by ensuring that public employees with different views than their employers will not undercut the policies of their superiors. Patronage has costs as well, including depriving government of experience and institutional knowledge and depriving individuals of their employment and the freedom of belief and association.

Patronage began with the founding fathers,<sup>22</sup> but it was drastically

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exception”). This framework also provides an incentive to legislatures to define whether a position is policymaking or not, thus putting employees on notice that they may be subject to patronage dismissal, by showing deference to such determinations.

<sup>21</sup> *Boyle v. County of Allegheny Pa.*, 139 F.3d 386, 394 (3d Cir. 1998).

<sup>22</sup> When George Washington assumed the Presidency in 1789, the influence of party in public service was still in its infancy. Questions of qualification for offices were left entirely up to Washington, who refused to make public office a reward for military service or prior relationships. Rather, he judged men on their fitness for office. He determined such fitness by their ability to perform the functions of the post. He strived for balance in geographic representation, recruited those with prior public service experience and those who supported the new system of government, and listened to feedback from his fellow citizens. In many ways, public appointments were easier for Washington than his successors because he had no holdovers from the prior administration to deal with. On the whole, Washington’s appointments were highly successful, and the country accepted the civil service during those formative years. FISH, *supra* note 19, at 6-10.

By the time John Adams became president in 1797, the country had become more divided between Republicans and Federalists. The civil service, being well-established and staffed by a predecessor of the same party, was largely left intact; he dealt with appointments only as positions became vacant. Adams also left minor appointments up to his cabinet. He was accused of nepotism by his opponents for his appointments of Colonel Smith (his son-in-law) and John Quincy Adams (his son). Overall, Adams did not create a system like Washington’s, but rather yielded to influence, time and circumstance. *Id.* at 16-19.

When Thomas Jefferson came into office in 1801, nearly all of the offices were held by his opponents. He was the first president to take power from an incumbent. He was largely concerned with satisfying the people, pleasing his followers, and not alienating the opposition to a significant degree. Jefferson expressed concern with the political activities of federal employees.

changed and expanded with the rise of President Andrew Jackson and Jacksonian populism.<sup>23</sup> The predominant view of patronage in the nineteenth century was reflected in *Ex parte Hennen*,<sup>24</sup> where the Supreme Court held that a clerk in the Eastern District of Louisiana had no right to his office and therefore could be removed for any reason at any time by any authority.<sup>25</sup> For much of the nineteenth century, continuing in full swing through the Civil War,<sup>26</sup> political patronage was the norm in state and federal government until a reform movement began to grow following the War.<sup>27</sup> In the late nineteenth and early

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The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions active parts in elections of the public functionaries, whether of the General or of the State governments. Freedom of elections being essential to the mutual independence of governments and of the different branches of the same government, so vitally cherished by most of our constitutions, it is deemed improper for officers depending on the Executive of the Union to attempt to control or influence the free exercise of the elective right. The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.

McCormick v. Edwards, 646 F.2d 173, 176 (5th Cir. 1981) (citing 10 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 98-99 (1897)).

He focused his dismissals on illegally appointed officers and perceived misbehavior. Technically, Jefferson was the first president to introduce the spoils system into the civil service, wherein party service was cause for appointment and dismissal. FISH, *supra* note 19, at 29-31.

<sup>23</sup> See generally MEACHAM, *supra* note 3, at 82-84 (Jackson "turned-out" 10% of the government.). The spoils system was inaugurated along with President Andrew Jackson in 1829 and consisted of two major elements: "rotation in office and a highly politicized bureaucracy." ROSENBLOOM, *supra* note 19, at 47. Jackson was the first president since Jefferson to defeat an incumbent in winning the presidency. Also like Jefferson, he defeated a President Adams who served only one four year term.

As a practical matter, the spoils system rationalized the many dismissals of holdover employees, but Jackson also sought to install the common man into office, removing notions of property and status from American politics. *Id.* at 48. Although in 1834 the Whigs attempted to check Jackson's removal power after the dismissal of Secretary of the Treasury Duane, the removal power of the president remained unchecked until after the Civil War. *Id.* at 51-52.

<sup>24</sup> *Ex parte Hennen*, 38 U.S. 225, 230 (1839).

<sup>25</sup> *Id.*

<sup>26</sup> It is estimated that Jackson removed approximately 252 out of 610 federal officers, while Lincoln removed 1,457 out of 1,520 federal officers. ROSENBLOOM, *supra* note 19, at 65. Note that these numbers do not reflect total turnover, including resignations in anticipation of change in party control, and do not include non-presidential employees. *Id.* at 64-65.

<sup>27</sup> Civil service reform efforts prior to 1860 largely failed for two reasons: those efforts attempted to hinder removals rather than regulating appointments and tried to move power from the president to the senate. FISH, *supra* note 19, at 209. The civil reform movement began toward the end of the Civil War in response to the spoils system, which had brought about major change under Jackson. ROSENBLOOM, *supra* note 19, at 70. Jackson was openly hostile to a civil service composed mainly of the upper class. *Id.* at 56. It was a movement joined by many former anti-abolitionists, who would later become anti-imperialists. *Id.* at 71-72. The reformers were largely Protestant, northeastern intellectual and social leaders. *Id.* Their goal was not the improvement of the quality of the federal bureaucracy *per se*, but rather to re-establish a place in federal government for members of their class—a place which they held prior to the changes

twentieth centuries, prominent supporters like Presidents McKinley<sup>28</sup> and Theodore Roosevelt<sup>29</sup> helped bring about a national wave of civil service reform at both the federal and state level.

Under the reformed civil service system, the twentieth century has seen the role of patronage appointments and political discrimination ebb and flow with each successive administration.<sup>30</sup> As the Obama

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brought about under the Jacksonian spoils system. *Id.*

After years of debate, momentum built for civil service reform in 1881 when President Garfield was shot by a job seeker and public hostility grew toward the patronage system. Then, in 1882, the Republican Party lost many seats, including several anti-reform Republicans, and those remaining in power sought to limit the inevitable retribution under the succeeding Democrats. *Id.* at 80-81.

On January 16, 1883 President Chester A. Arthur, “a spoilsman par excellence,” signed the Civil Service Act, 22 Stat. 403 (1883) (also known as the Pendleton Act) into law. The act established a three-member commission which was charged with promulgating regulations in the enforcement of, among other things: competitive examinations, selection of high scorers, a probationary period for competitive employees, a prohibition on requiring public employees to contribute or participate in campaigns, and a ban on the use of a public office for political purposes. ROSENBLOOM, *supra* note 19, at 82.

<sup>28</sup> In 1897, President William McKinley issued an order amending the civil service rules, requiring that no removal shall be made from a position subject to competitive examination, except for just cause and open written charges of which the accused shall have full notice and an opportunity to make defense. *The Civil Service Rules*, N.Y. TIMES, Aug. 4, 1897, at 2 (quoting George McAneny, Secretary of the National Civil Service Reform League). Excepted from these protections were “officers confirmed by the Senate, certain attorneys in the Department of Justice, a few private secretaries, and the common laborers.” *Id.*

<sup>29</sup> In 1907, President Theodore Roosevelt, a longtime civil service reformer, issued an executive order which commanded that federal civil servants “shall take no active part in political management or in political campaigns.” Henry Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510, 510 (1962) (citing Exec. Order No. 642 (June 3, 1907)).

Though this was not the first admonition to federal employees against political activity, it marked the first time the distinction was made between classified and unclassified employees for this purpose, and it centralized administration somewhat by giving the Civil Service Commission power to investigate all cases of political activity by members of the competitive classified service. Previously, department heads were charged with the responsibility for implementation of the restrictions, and enforcement, insofar as there was any, lacked uniformity.

*Id.* at 510-11 n.2 (citations omitted).

<sup>30</sup> In 1939, Congress passed the Hatch Political Activity Act, a comprehensive scheme regulating the political activity of federal employees. One of its provisions barred federal employees from “taking an active part in political management or in political campaigns.” Hatch Political Activity Act, ch. 410, § 9, 53 Stat. 1147, 1148 (1939) (current version at Hatch Act Reform Amendments of 1993, 5 U.S.C. § 7324). Excepted from this provision are federal employees appointed by the President with the advice and consent of the Senate, who determine policies to be pursued by the federal government in foreign relations or administration of federal law. *Id.*

“After the high-water mark of the merit system was reached in the 1940s, the pendulum reversed directions” under Truman. James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57 (1987) [hereinafter Pfiffner, *Political Appointees*]. Truman’s political patron was the legendary Pendergast family of Kansas City, one of the powerhouse city party machines of the early 20th Century. DAVID MCCULLOUGH, TRUMAN 151-61 (1992). One of the Chairmen of the Democratic Party while Truman was president, Bill Boyle (an old friend of Truman’s from

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Kansas City), was investigated along with other old friends of Truman's from his days in Missouri politics for influence peddling in federal agencies. *Id.* at 862-70. In 1951, under mounting criticism for charges of corruption at the IRS, Truman dismissed 113 employees including six regional collectors and determined that collectors of the IRS would no longer be patronage jobs but put under the civil service. *Id.* at 871.

The movement away from the merit system accelerated with the transition to Republican Dwight Eisenhower in 1952. Eisenhower came to office after 20 years of Democratic Party rule under Roosevelt and Truman. Pfiffner, *Political Appointees*, *supra* note 30, at 58. Under Eisenhower, Schedule C positions were created to place Republicans at lower levels in the bureaucracy. *See infra* Part III.A (analyzing the current federal system under the Office of Personnel Management, the successor to the original Civil Service Commission). Eisenhower came to office distrustful of the career bureaucracy, an attitude that has prevailed during the twentieth century, and has increased over time. Pfiffner, *Political Appointees*, *supra* note 30, at 57-58.

President Kennedy thought the federal bureaucracy would be too slow to respond to his policies and "get the country moving again." *Id.* at 58. He formed "temporary task forces [instead of] relying exclusively on" federal bureaucracies, and similarly consolidated control over policymaking in the White House rather than delegating power to cabinet secretaries. *Id.*

"Lyndon Johnson was an exception" among recent presidents and "the trend of distrust toward the bureaucracy," although he did continue centralization of policy control in the White House. Nixon had a legendary distrust and hostility toward the bureaucracy and launched "guerilla warfare" with it. *Id.* For example, the Administration established a White House "counter-bureaucracy" in an effort to reorganize the executive branch, to "place political appointees as 'spies' in the . . . agencies, and to [make] illegal political placements" in the civil service. *Id.*

"Jimmy Carter ran as an outsider" and saw the establishment as a "horrible Bureaucratic mess." *Id.* Carter and his appointees tended to carry "an attitude of moral superiority toward Congress and the bureaucracy." *Id.*

"Reagan also ran as an outsider," claiming that "government was part of the problem, not the solution." He "forced severe cutbacks" in the agencies and reduced nonmilitary employment by 92,000 employees in the domestic agencies between 1981 and 1983. Reagan appointees "systematically exclude[d] career executives from policymaking" discussions, believing that they would attempt to "undercut the Administration's policies." *Id.*

George H.W. Bush "was the first president elected to succeed a predecessor of his own party since 1928 and the first sitting Vice-President to be elected in his own right since 1836." James P. Pfiffner, *Establishing the Bush Presidency*, 50 PUB. ADMIN. REV. 64, 64 (1990) [hereinafter Pfiffner, *Establishing*]. One difficulty posed by the "friendly takeover" was that many incumbent policymakers "were loyal Republicans and had supported George Bush, many hoped and expected to stay on into a Bush Administration. . . . But the Bush people felt that substantial turnover was needed to ensure that the new Administration would be Bush's and not merely an extension of the Reagan Administration." *Id.* at 67-68. One major hiring criterion for the Bush Administration was personal loyalty—rather than partisan or ideological loyalty—"mitigated with a heavy dose of respect for competence." *Id.* at 68. In contrast with his predecessor, Bush considered career employees for high-level positions, where the Reagan administration "saw government as part of 'the problem' and distrusted career civil servants." *Id.* Ultimately, the Bush Administration recognized the patronage pressures and instructed appointees to reserve half of Schedule C positions (those serving at the pleasure of agency heads, *see infra* note 108) for "campaign workers and key supporters." Pfiffner, *Establishing*, *supra* note 30, at 69.

At the end of the Bush Administration, there were 2,403 employees in Schedule C and non-career SES positions; by 1994, two years into the Clinton Administration, that number had dropped to 2,317. Patricia W. Ingraham et al., *Political Management Strategies and Political/Career Relationships: Where Are We Now in the Federal Government?*, 55 PUB. ADMIN. REV. 263, 269 (1995); *see also infra* note 107 for discussion of SES. An early review of Clinton's first term revealed "no evidence of any attempt to politicize the central staff agencies." *Id.* By 2000, only "1,896 political appointees were on board . . . . The falloff probably reflects

Administration assumes control of the federal government, it will make approximately 8,000 appointments—only 3,000 of which are directly under the President’s control—with the vast majority of federal employees remaining protected by civil service.<sup>31</sup>

Although civil service reform dramatically changed the nature of government, in limiting the political activities of public officeholders and the discretion of officials in making hiring and firing decisions, there remained a class of unprotected employees, and tactics which elected officials could employ to increase their influence over the bureaucracy. One such unprotected employee, who is dismissed for his political affiliation more often than all others, is the deputy sheriff.

## II. THE CASE LAW

### A. *Inconsistent Application of the Policymaking Exception to Deputy Sheriffs*

The position of deputy sheriff, one which exists in various forms in nearly every county in the United States, is at issue with more frequency

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what happens in most second terms: Political appointees depart, and presidents do not have enough time to fill vacancies, in part because of paperwork requirements and a confirmation process that can exceed six months.” Stephen Barr, *Appointees Everywhere, But Try to Count Them*, WASH. POST, Oct. 17, 2004, at C2.

The George W. Bush administration developed a reputation for hiring primarily based upon ideology and conservative credentials. *See, e.g.*, Paul Krugman, *Bigger Than Bush*, N.Y. TIMES, Jan. 2, 2009, at A23 (“If the Bush administration became a byword for policy bumbles, for government by the unqualified, well, it was just following the advice of leading conservative think tanks: after the 2000 election the Heritage Foundation specifically urged the new team to ‘make appointments based on loyalty first and expertise second.’”); Shankar Vedantam, *Who Are the Better Managers—Political Appointees or Career Bureaucrats?*, WASH. POST, Nov. 24, 2008, at A6. (“Loyalty and ideology were valued over expertise, and policy and management suffered as a result.” (quoting political scientist Donald Moynihan, of the University of Wisconsin)). Toward the end of this Bush administration, several political appointees were “burrowed” into the civil service. Juliet Eilperin & Carol D. Leonnig, *Administration Moves to Protect Key Appointees: Political Positions Shifted to Career Civil Service Jobs*, WASH. POST, Nov. 18, 2008, at A1 (“Between March 1 and Nov. 3, according to the federal Office of Personnel Management, the Bush administration allowed 20 political appointees to become career civil servants.”).

<sup>31</sup> The “Plum Book” a

209-page paperback, officially titled ‘The United States Government Policy and Supporting Positions,’ is exciting reading for people coveting jobs in the incoming Obama administration. It details the positions—some high-level, some almost comically obscure—that are likely to change hands as a Democrat moves into the White House after eight years of Republican rule. . . . About one-third of the jobs are strictly presidential appointments—that is, patronage positions that will go largely to Democrats who know how to network.

Lyndsey Layton & Lois Romano, *‘Plum Book’ Is Obama’s Big Help-Wanted Ad*, WASH. POST, Nov. 13, 2008, at A1; *see also* Paul Musgrave, *In Praise of Patronage: The Executive Branch Needs More of It, Not Less*, SLATE.COM, Dec. 2, 2008, <http://www.slate.com/id/2205848/> (disputing the accuracy of a 7,000 figure and arguing for a more politicized federal government).

than any other in patronage dismissal litigation. It is an example which demonstrates that similarly situated employees may or may not be protected against patronage dismissal depending on the jurisdiction in which they were employed and the nature of the policymaking exception in that jurisdiction.

A review of the case law reveals the contrast. Some circuit courts have held that deputy sheriffs or deputy police chiefs can be subject to political patronage dismissal.<sup>32</sup> At the same time, other circuits have found that a discharge of a deputy sheriff for political reasons would be inappropriate because party affiliation could not be a requirement for effective performance of the position.<sup>33</sup>

It is true, as some courts have stressed, that a *per se* rule is not appropriate in this context and that the policymaking determination should be made in a case-by-case manner.<sup>34</sup> The wide variation of job responsibilities among the thousands of state and local positions that exist across the country demand a standard, rather than a rule. However, as the disparate treatment of the position of deputy sheriff demonstrates, such case-by-case determinations can lead to contradictory results when that determination is not made using one uniform standard.

If the courts are to make individualized assessments of the appropriateness of political affiliation for public positions using balkanized interpretations of a federal constitutional standard, it is not surprising that consistent outcomes are not to be found. The root of the

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<sup>32</sup> See, e.g., *Hadfield v. McDonough*, 407 F.3d 11 (1st Cir. 2005), *cert. denied*, 546 U.S. 961 (2005) (political affiliation was an appropriate requirement for a sheriff's deputy in charge of the department's training program, since training was central to implementing the sheriff's agenda); *McEvoy v. Spencer*, 124 F.3d 92 (2d Cir. 1997) (holding that Deputy Chief of Police is a policy position analogous to Deputy Sheriff); *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991) (a sheriff may use political considerations when determining who will serve as deputy sheriff); *Dimmig v. Wahl*, 983 F.2d 86 (7th Cir. 1993) (the sheriff could have concluded that the deputy's refusal to campaign on his behalf could hinder the effective performance of the department; deputy sheriffs operate with enough discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies, and such considerations did not offend the First Amendment); *Cutcliffe v. Cochran*, 117 F.3d 1353 (11th Cir. 1997) (relying on its own opinion in *Terry v. Cook*, and applying the *Elrod-Branti* standard, the court held that deputy sheriffs may be hired and fired on political grounds).

<sup>33</sup> See, e.g., *Burns v. County of Cambria, Pa.*, 971 F.2d 1015 (3d Cir. 1992) (defendants county officials failed to demonstrate that firing plaintiffs deputy sheriffs for their political affiliation or activities came within the narrow exception for political dismissals); *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981) (deputy sheriffs were not confidential policymakers for whom political allegiance was essential to job performance); *Fuerst v. Clarke*, 454 F.3d 770 (7th Cir. 2006) (the position of sergeant in the Milwaukee sheriff's department was not a policymaking position; sergeants were supervisory employees, one grade above deputy sheriffs).

<sup>34</sup> *Heggen v. Lee*, 284 F.3d 675 (6th Cir. 2002) (the determination must be made on a case-by-case basis; in the instant case the job responsibilities of the deputy sheriff did not constitute a policymaking position); *Diruzza v. County of Tehama*, 206 F.3d 1304 (9th Cir. 2000) (whether an individual who is called a sheriff's deputy is protected from patronage dismissal cannot be based on the job title alone, but depends on the individual's specific job responsibilities).

problem can be traced to the failure of the Supreme Court to adequately define a framework for application in the lower courts.

### B. *The Patronage Cases*

In *Elrod v. Burns*<sup>35</sup> and *Branti v. Finkel*,<sup>36</sup> the Supreme Court first examined the extent to which incoming public officials may fire existing employees because of their political affiliation. These cases rejected the proposition that a public employee has no right to a government job and therefore has no cause to allege that termination violated her First Amendment rights.<sup>37</sup>

In *Elrod*, Justice Brennan's plurality opinion<sup>38</sup> identified two reasons for its finding that political discharges were prohibited by the First and Fourteenth Amendments:<sup>39</sup> first, the inherent coercive effect of the practice of patronage dismissals;<sup>40</sup> and second, the unconstitutional

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<sup>35</sup> *Elrod v. Burns*, 427 U.S. 347 (1976). In *Elrod*, the Court held that the newly elected Democratic Sheriff of Cook County, Illinois, violated the First and Fourteenth Amendment rights of non-civil service employees by discharging them for failure to support the Democratic Party and for failure to obtain sponsorship of one of its leaders. *Id.* at 351 ("because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders").

<sup>36</sup> *Branti v. Finkel*, 445 U.S. 507 (1980). In *Branti*, the Court held that a newly appointed Democratic Public Defender of Rockland County, New York, had violated the constitutional rights of two Assistant Public Defenders who were dismissed solely for their political affiliation. *Id.* at 517 ("[T]here is no requirement that dismissed employees prove that they . . . have been coerced into changing, either actually or ostensibly, their political allegiance.").

<sup>37</sup> *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996). The now-rejected doctrine was famously captured by Justice Holmes, who admonished that although a policeman "may have a constitutional right to talk politics . . . he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

<sup>38</sup> Justice Brennan's opinion was joined by Justices White and Marshall. *Elrod*, 427 U.S. at 349.

<sup>39</sup> *Id.* at 355-61.

<sup>40</sup> The first was an analysis of the impact of a political patronage system on freedom of belief and association. *Id.* at 355. Justice Brennan noted that in order to retain their jobs, these employees were required to pledge their allegiance to the Democratic Party, work for or contribute to the party's candidates, or obtain a Democratic sponsor. He concluded that such a system would ultimately coerce employees into compromising their true beliefs, and that political patronage inhibits the functioning of the electoral process by tipping the balance in favor of the incumbent party. *Id.* at 355-56.

This conclusion brought the practice within the rule of cases like *West Virginia State Board of Education v. Barnette*, which condemned the use of governmental power to prescribe what the citizenry must accept as orthodox opinion. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Specifically, the Court found that the action of the State Board of Education in requiring public school pupils to salute the flag of the United States while reciting a pledge of allegiance, under penalty of expulsion entailing a liability of both pupil and parents to be proceeded against for unlawful absence, "transcends constitutional limitations . . . and invades the sphere of intellect and spirit of which it is the purpose of the First [and Fourteenth Amendments of the] Constitution to reserve from all official control." *Id.* at 642.

conditioning of a government benefit on protected conduct.<sup>41</sup> Justice Stewart's concurrence, did not discuss the coercive effect, but joined in the unconstitutional conditioning reasoning.<sup>42</sup>

Since the practice of political patronage had the effect of imposing an unconstitutional condition on the receipt of a public benefit—the doctrine of unconstitutional conditions<sup>43</sup>—it fell within the rule of cases exemplified by *Perry v. Sindermann*<sup>44</sup> and *Keyishian v. Board of Regents*.<sup>45</sup> These cases limited the permissible grounds for the denial of a government benefit based upon the exercise of constitutionally protected conduct. Justice Brennan reasoned that, based upon *Perry* and *Keyishian*, “[i]f the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from

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<sup>41</sup> *Elrod*, 427 U.S. 347. An article cited by Justice Brennan, *id.* at 355, which no doubt had a profound effect on his opinion, discusses the status of the debate before *Elrod*. In 1971, a court upheld the firing of 2,000 Republican employees by the newly elected Democratic governor of Pennsylvania. In 1970, another court upheld the firing of a registered Democrat who lost her social work position for failing to change her affiliation to Republican. Neither court made an inquiry into whether dismissing non-policymaking employees was justified by any significant government interest. The author claimed that discharge of a public employee for political affiliation affects their constitutional rights in two ways: it indirectly abridges their right of association, and it establishes distinctions based upon political allegiance that deny employees equal protection of the laws. Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 297 (1973). Although Justice Brennan does not explore the latter concept, it is apparent that he has seized on the article's discussion of the “doctrine of unconstitutional conditions.” *Elrod*, 427 U.S. 347.

<sup>42</sup> *Elrod*, 427 U.S. at 374 (Stewart and Blackmun, J.J., concurring).

<sup>43</sup> “[C]onditioning public employment on the employee's political affiliation ‘must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the infringement.’” Craig D. Singer, Comment, *Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U. CHI. L. REV. 897, 902 (1992) (quoting *Elrod*, 427 U.S. at 363).

<sup>44</sup> *Perry v. Sindermann*, 408 U.S. 593 (1972). In *Perry*, the Court reiterated its finding that although a person may not have a right to a valuable governmental benefit, and the government may deny that person a 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.’ Such interference with constitutional rights is impermissible.

*Id.* at 597 (citation omitted); see also *Speiser v. Randall*, 357 U.S. 513 (1958) (a California statute, which required an oath of loyalty on tax exemption applications in order to deny tax exemption status to those who advocated the unlawful overthrow of the government, violated plaintiffs First Amendment rights by depriving them of due process under the Fourteenth Amendment); *Shelton v. Tucker*, 364 U.S. 479 (1960) (invalidating an Arkansas statute, which required teachers at state-sponsored colleges and universities to file an annual affidavit listing without limitation every organization to which he had belonged or regularly contributed within the preceding five years, as an unlawful restriction on First and Fourteenth Amendment rights).

<sup>45</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). In *Keyishian*, the Court, reviewing a New York statute that barred employment on the basis of membership in “subversive” organizations, held that political association alone could not be sufficient grounds for denying public employment. *Id.*

discharge based on what he believes.”<sup>46</sup>

This triggered heightened scrutiny analysis: unless the government could demonstrate “an overriding interest”<sup>47</sup> “of vital importance”<sup>48</sup> requiring that a person’s private beliefs conform to those of the hiring authority, his beliefs cannot be the *sole* basis for depriving him of continued public employment.<sup>49</sup>

Justice Stewart’s narrower opinion did not see the need to consider the broad contours of the so-called patronage system.<sup>50</sup> He saw the single substantive question as whether a non-policymaking, non-confidential employee can be discharged solely upon the ground of his political beliefs.<sup>51</sup>

Both opinions, then, recognized that party affiliation may be an acceptable requirement for some types of government employment—positions where the government can show that it has a vital interest.<sup>52</sup> The only interest sufficient to warrant an exception to this protection, however, was that political loyalty of an employee would ensure that she would not obstruct the popularly mandated policies of her superior.<sup>53</sup> Thus, both opinions accepted that limiting patronage dismissals to policymaking positions was sufficient to achieve that end.<sup>54</sup> The government could never justify dismissal of a non-policymaking official because they had little responsibility and therefore could not thwart the policies of the sanctioned representative of the electorate.<sup>55</sup>

Problematically, neither Justice Brennan nor Stewart elucidated

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<sup>46</sup> *Branti v. Finkel*, 445 U.S. 507, 515 (1980).

<sup>47</sup> *Elrod*, 427 U.S. at 368.

<sup>48</sup> *Id.* at 362.

<sup>49</sup> If the public employer can demonstrate that it has an independent reason for terminating the employee, the employee’s political affiliation or lack thereof is not relevant. *See, e.g., Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (plaintiff must show that her constitutionally protected conduct was a motivating or substantial factor in failure to rehire).

<sup>50</sup> *Elrod*, 427 U.S. at 375 (Stewart & Blackmun, J.J., concurring) (“The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot.”) (citing *Perry v. Sinderman*, 408 U.S. 593, 597-98 (1972)).

<sup>51</sup> *Id.*

<sup>52</sup> *Branti v. Finkel*, 445 U.S. 507, 517 (1980) (discussing *Elrod* and concluding that “if an employee’s private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State’s vital interest in maintaining governmental effectiveness and efficiency”).

<sup>53</sup> *Elrod*, 427 U.S. at 367. Justice Brennan discussed, and rejected as insufficient, the government’s interest in effective government and efficiency of public employees. Justice Brennan found inefficiency would result from wholesale replacement, and that less drastic means to insuring efficiency were available. Where employees of the party in power had incentive to perform well so that they could retain their jobs, he found that the civil service system and the ability to dismiss for cause could achieve accountability and effectiveness. *Id.* at 366.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

what a “policymaking” position actually is in their respective opinions in *Elrod*.<sup>56</sup> Picking up where *Elrod* left off, Justice Stevens’ majority opinion<sup>57</sup> in *Branti* clarified the “policymaking” exception, while removing the focus from the label “policymaker” or “confidential.”<sup>58</sup> The *Elrod* decision applied to public employees *coerced* into changing their political affiliation to keep their jobs; the *Branti* Court stated that claimants could prevail in an action if they were discharged solely for the reason they were *unaffiliated* with the employer’s party.<sup>59</sup>

*Branti* reaffirmed *Elrod*’s common holding—that a non-policymaking, non-confidential employee may not be dismissed for her political affiliation—but modified the standard. It focused the inquiry on whether the hiring authority could demonstrate that party affiliation was an appropriate requirement for the effective performance of the position.<sup>60</sup> This clarification, however, was not intended to substantively alter the *Elrod* policymaking analysis.<sup>61</sup>

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<sup>56</sup> “No clear line can be drawn between policymaking and nonpolicymaking positions.” *Id.* at 367.

While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. *An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration would also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.* Thus, the political loyalty “justification is a matter of proof, or at least argument, directed at particular kinds of jobs.”

*Id.* at 367-68 (emphasis added) (citation omitted).

<sup>57</sup> Justice Stevens was joined by Chief Justice Burger and Justices Brennan, White, Marshall and Blackmun. Justices Stewart, Powell and Rehnquist dissented. *Branti*, 445 U.S. at 508.

<sup>58</sup> “Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character.” *Id.* at 518. “It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position.” *Id.*

<sup>59</sup> LARSON, *supra* note 1, at § 171.01[1][a].

<sup>60</sup> “In sum, the ultimate inquiry is not whether the label ‘policymaker’ or ‘confidential’ fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.” *Branti*, 445 U.S. at 518.

<sup>61</sup> See LARSON, *supra* note 1, at § 171.01[a][1] (“The *Branti* court was unwilling to contradict the *Elrod* decision, but recognized the difficulty in subjectively defining policymaking or confidential positions. In addition, it was determined to place further limitations on the policymaking exception.”); Singer, *supra* note 43, at 903-04 (“Aside from this clarification, the Court in *Branti* did not purport to alter the analysis or holding of the plurality in *Elrod*.”); James Kimmell, Jr., Note, *Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 COLUM. L. REV. 558, 562 (1985) (“Although this reformulation established a less definitive standard than that announced in *Elrod*, it did not represent an abandonment of *Elrod*’s categorical approach.”); Brent C. Eckersley, Note, *Constitutional Law: Board of County Commissioners v. Umbehr and O’Hare Truck Service v. City of Northlake—The Extension of First Amendment Protection to Independent Contractors—The Garbage Man Can Now Talk Trash!*, 50 OKLA. L. REV. 557, 561 (1997) (“Although this reformulation established a less definitive standard, it did not represent an abandonment of the

Moreover, the text from *Branti* which professes to alter the policymaking inquiry is dicta. It was not essential to the holding and is therefore not binding. It is a basic canon of interpretation that language in a decision which is not necessary to the holding may be accorded less weight in subsequent cases.<sup>62</sup> The facts of *Branti* did not raise the issue of a policymaking employee. The District Court had found that assistant public defenders were not engaged in a policymaking function.<sup>63</sup> The Supreme Court agreed.<sup>64</sup> Furthermore, the opinion did not consider the reasons why a policymaker exception might be important.<sup>65</sup>

Thus, what remains is the weak plurality of *Elrod* and the conflating dicta of *Branti*.<sup>66</sup> In this vacuum, the lower courts have been

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approach in *Elrod*.”). *But see* Louis Cammarosano, Note, *Application of the First Amendment to Political Patronage Employment Decisions*, 58 FORDHAM L. REV. 101, 107 (1989) (suggesting that the “Court, in reformulating the test, distanced itself from *Elrod*” and applied a “new test”); Bryan A. Schneider, Comment, *Do Not Go Gentle Into That Good Night: The Unquiet Death Of Political Patronage*, 1992 WIS. L. REV. 511, 536 (“[T]he *Branti* Court rejected *Elrod*’s policymaker-nonpolicymaker categorical approach as the sole touchstone in determining which positions are susceptible to patronage dismissal. After *Branti*, the label ‘policymaker’ is [still] relevant to the inquiry, but does not compel a conclusion.”).

The Court has since expanded the protections announced in *Elrod* and *Branti*. *Branti* itself rejected the proposition that *Elrod* prohibited only dismissals resulting from an employee’s failure to capitulate to coercion. *Branti*, 445 U.S. at 517 (“To prevail in this type of an action, it was sufficient, as *Elrod* holds, for respondents to prove that they were discharged ‘solely for the reason that they were not affiliated with or sponsored by the Democratic Party.’”).

<sup>62</sup> *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 709 (1978) (Powell, J., concurring).

<sup>63</sup> *Finkel v. Branti*, 457 F. Supp. 1284, 1290-91 (S.D.N.Y. 1978).

<sup>64</sup> *Branti*, 445 U.S. at 519.

<sup>65</sup> “It does not appear that the *Branti* opinion gave direct consideration to the issue [of why a policymaker exception might be important] as it affects true governmental policymakers, no doubt because the issue was not raised by the facts of the case.” *Garretto v. Cooperman*, 510 F. Supp. 816, 820 (1981).

<sup>66</sup> *See infra* notes 134-142 and accompanying text. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Court extended the rule of *Elrod* and *Branti* to promotion, transfer, recall, and hiring decisions based on party affiliation and support without further discussion of the “policymaking exception.” *Id.* *See generally* Martin H. Brinkley, Note, *Despoiling the Spoils: Rutan v. Republican Party of Illinois*, 69 N.C. L. REV. 719 (1991); *The Supreme Court, 1989 Term—Leading Cases: Constitutional Law; Freedom of Speech, Press, and Association*, 104 HARV. L. REV. 227 (1990); Megan Glasheen, *Patronage Employment Practices and the First Amendment*, 34 HOW. L.J. 663 (1991); Cynthia Grant Bowman, *The Law of Patronage at a Crossroads*, 12 J.L. & POL. 341, (1996). *Cf.* *Neely v. Mangum*, 396 S.E.2d 160, 163 (W. Va. 1990) (interpreting *Branti* as a narrowing of the policymaking exception—thus an expansion of the protection against dismissals—and *Rutan* as a possible further narrowing of the policymaking exception by using language which suggested that only high-level employees can come within the purview of the *Elrod-Branti* exception).

In *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), the Court extended the protections of *Elrod* and *Branti* to an independent contractor who was terminated and removed from a list of authorized contractors in retaliation for refusing to comply with demands for political support. *Id.* *See generally* Laurence A. Shapero, Note, *A Logical Extension: The Supreme Court Extends Rights of Free Speech and Association to Government Contractors*, 47 DEPAUL L. REV. 155 (1997); Eckersley, *supra* note 61; Jamie Johnson, Note & Comment, *O’Hare Truck Service, Inc. v. City of Northlake: Further Limiting the Spoils of the Victor*, 14 GA. ST. U. L. REV. 489 (1998); Bowman, *supra* note 66; Michael H. Koby & Paul

left to their own devices.

### C. *The Circuits*

The existence of various standards promulgated among the circuits—a balkanized federal employment protection where a government employee may have been a policymaker in Kentucky, but not in Rhode Island—highlights the problem of inconsistent vindication of constitutionally-protected conduct. Promisingly, however, this variation presents the Supreme Court with a wide range of approaches to striking the appropriate balance between patronage and political freedom.<sup>67</sup> The following review of the circuits demonstrates the inconsistency, unpredictability, and ultimately the inefficiency, of a weakly defined federal right; it also reveals a workable solution.

This section strives to make use of the common themes and contrasting approaches among the circuits. These approaches to the *Elrod-Branti* protection can be grouped into four categories, including the unique Sixth Circuit methodology: (i) *Elrod*-Based Factors (circuits that have further developed the policymaking analysis suggested in *Elrod* by identifying factors, categories of employment, or a test);<sup>68</sup> (ii)

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Fischer, *The Supreme Court Cries "Foul" to Patronage Contracting: Where Have You Gone Joe McDonough?*, 32 NEW ENG. L. REV. 1 (1997); Kurston P. McMurray, Note, *O'Hare Truck Service v. City of Northlake: It's The Thought That Counts*, 32 TULSA L.J. 653 (1997); Comment, *First Amendment Rights and Independent Contractors: The Law of Political Patronage and Protected Speech in the Wake of Umbehrr and O'Hare Truck Service*, 45 U. KAN. L. REV. 1299 (1997).

<sup>67</sup> This area of the law is by no means the only one in which determination of whether a position is a "policymaking" position defines the scope of federal employment protection. For example, the protection of the Age Discrimination in Employment Act of 1967 excludes employees who are "appointe[d] on the policymaking level." 29 U.S.C. § 630(f) (2006); see, e.g., Equal Employment Opportunity Comm'n v. Massachusetts, 858 F.2d 52 (1st Cir. 1988) (ADEA was not intended to apply to appointed state judges, who are excepted from its protections as employees at the policymaking level); Gregory v. Ashcroft, 510 U.S. 452, 466-67 (1991) ("It may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance" in deciding whether an employee is a policymaker.).

Another example arose in *Sugarman v. Dougall*, 413 U.S. 634 (1973), where four federally registered aliens challenged a New York State law which prohibited noncitizens from public employment. The statute required citizenship as a prerequisite for eligibility in the civil service. The court found that such an exclusion was not appropriate, except for a narrow class of employees—"policymakers." As in the patronage context, the concern on the part of the state is the employee's unfettered loyalty to her public employer. The state may determine the qualifications of its employees, but only for "persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Id.* at 647; see also *infra* notes 105 (Lobbying Disclosure Act) and 143 (public employees protected from dismissal for speech).

<sup>68</sup> The Courts of Appeals for the Second, Third, Fifth, Seventh, and Ninth Circuits, while acknowledging the difficulty of creating an exhaustive list of positions which are appropriately excepted from partisan selection and rejection, have nonetheless developed outlines for district

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courts to use in determining whether an employee is a “policymaker” under *Elrod* and *Branti*. Their analyses focus on the plurality holding in *Elrod*.

The Second Circuit, in its opinion in *Vezzetti v. Pellegrini*, 22 F.2d 483, 486 (2d Cir. 1994), listed eight factors to be used as a guide in determining whether an employee is a policymaker and thus exempt from protection. Courts are to determine whether the employee is exempt from civil service protection, has some technical competence or expertise, controls others, is authorized to speak in the name of policymakers, is perceived as a policymaker by the public, influences government programs, has contact with elected officials, and is responsive to partisan politics and political leaders. *Butler v. N.Y. State Dep’t of Law*, 211 F.3d 739, 744 (2d Cir. 2000) (citing *Vezzetti*, 22 F.2d at 486).

The Third Circuit, in *Brown v. Trench*, held that the terms “confidential” and “policymaker” illuminated the contours of the employee class that may permissibly be subjected to a political litmus test, but any specific application of the exception must turn on the importance of political loyalty to the execution of the employee’s duties. *Brown v. Trench*, 787 F.2d 167, 169 (3d Cir. 1986) (citing *Barrett v. Thomas*, 649 F.2d 1193, 1201 (5th Cir. 1981)). It also set out several factors to be considered when determining whether political affiliation is an appropriate precondition for a government position: whether the employee has duties that are non-discretionary or non-technical, participates in discussions or other meetings, prepares budgets, possesses the authority to hire and fire other employees, has a high salary, retains power over others, and can speak in the name of policymakers. *Galli v. N.J. Meadowlands Comm’n*, 490 F.3d 265, 271 (3d Cir. 2007) (citing *Brown*, 787 F.2d at 169). “The key factor seems to be not whether the employee was a supervisor or had a great deal of responsibility, but whether the employee has ‘meaningful input into decision making concerning the nature and scope of a major . . . program.’” *Brown*, 787 F.2d at 169-70 (citation omitted).

The Fifth Circuit has also acknowledged that *Branti* rejected the strict application of “policymaker” or “confidential” tests, but found that these terms from *Elrod* still serve a purpose in identifying which employees may permissibly be dismissed for their political affiliation. *Barrett*, 649 F.2d at 1201 (“the terms ‘policymaking’ and ‘confidential’ illuminate the contours of the employee class that may permissibly be subjected to a political litmus test”). That is, the court will more readily find that the government’s interests outweigh the employee’s interests where the employee is a policymaker or is confidential. *Wiggins v. Lowndes*, 353 F.3d 387, 390 (2004). Prior to *Branti*, the court in *Stegmaier v. Trammell*, 597 F.2d 1027, 1035 (5th Cir. 1979), had defined a policymaker as an employee who holds a position that requires more than mere “ministerial competence,” who “creates or implements policy,” and who possesses great discretion in choosing her duties. *Id.*; see also *Wiggins*, 353 F.3d 387, 390 (5th Cir. 2004) (“A policymaker is an employee ‘whose responsibilities require more than simple ministerial competence, whose decisions create or implement policy, and whose discretion in performing duties or in selecting duties to perform is not severely limited by statute, regulation, or policy determinations made by supervisors.’” (citing *Stegmaier*, 597 F.2d at 1035)). The Fifth Circuit, in a nod to Justice Brennan’s opinion in *Elrod*, gives further consideration to whether the employee acts as an adviser or formulates plans for the implementation of broad goals. *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 368 (1976)). In *McCormick v. Edwards*, 646 F.2d 173, 178 (5th Cir. 1981), the court held that the *Elrod-Branti* protections did not extend to a non-civil service employee who actively campaigned for a challenger in a mayoral campaign. Since state and federal governments may constitutionally discharge civil service employees for such activity, so too could a non-civil service employee serving at the will of his superior. *Id.*

The Seventh Circuit has developed the least specific standard in this group. “The test is whether the position held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation.” *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981).

The Ninth Circuit has elaborated on the Supreme Court’s standard, similarly to the Second Circuit, and held that some factors to be considered when determining whether a job is a policymaking position are: vague and broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of the policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders. *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1334 (9th Cir. 1997).

*Branti*-Based Political Affiliation Inquiries (circuits that have strictly adhered to the *Branti* modification of *Elrod* and conduct an *ad hoc* evaluation of whether the position is one for which party affiliation is an appropriate requirement for the effective performance of the position at issue);<sup>69</sup> (iii) the First Circuit Two-Step (circuits that have adopted a hybrid two-step inquiry, where a *Branti*-derived threshold examines whether the position relates to partisan political interests or concerns<sup>70</sup> before examining whether the position resembles that of a policymaker, by reference to factors similar to those used in the *Elrod*-based factors group);<sup>71</sup> and, (iv) the Sixth Circuit Analysis.

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<sup>69</sup> *Branti*, 445 U.S. at 518. The Courts of Appeals for the Eighth, Tenth and Eleventh Circuits have interpreted *Branti* to take the focus almost entirely away from whether an employee was a policymaker or confidential employee. These Circuits base their analysis on the *Branti* language which instructed that policymaking no longer possessed talismanic significance, and that courts should ask whether party affiliation is an appropriate requirement for the position at issue.

For instance, the Tenth Circuit has instructed that the inquiry is to make the determination whether “party affiliation is an appropriate requirement,” and to do so, courts must analyze “the nature of the employee’s duties and responsibilities.” *Dickeson v. Quarberg*, 844 F.2d 1435, 1441-42 (10th Cir. 1988).

The Eight Circuit has essentially combined the standards, reading *Branti* as allowing a government employer to take adverse employment actions against employees for protected activities if they hold confidential or policymaking positions for which political loyalty is necessary to an effective job performance. *Shockency v. Ramsey*, 493 F.3d 941, 950-51 (8th Cir. 2007).

Similarly, the Eleventh Circuit, rather than creating a list of factors or range of considerations to make this determination, refers to the standard elucidated in *Branti* and conducts its inquiry on an *ad hoc* basis. The court examined which positions may be permissibly subject to patronage dismissal in *Terry v. Cook*. 866 F.2d 373 (11th Cir. 1989). It held that the closeness and cooperation required between sheriffs and their deputies necessitated “absolute authority” by the sheriff over hiring and firing his deputies. *Id.* at 377. Thus, loyalty to an individual sheriff and the goals and policies he seeks to implement was an appropriate requirement for the effective performance of a deputy sheriff. However, it had not been established that loyalty to an individual sheriff was an appropriate requirement for effective job performance for the positions of clerk, investigator, dispatcher, jailer, and process server. *Id.* at 377-78.

The closest the Eleventh Circuit has come to identifying a test that district courts may use was whether the position had limited objectives and defined duties. Thus, if the position did not require the employee to function as the alter ego of the sheriff or ensure that his policies and goals are implemented, then the employee is not subject to dismissal. *Id.* at 378.

<sup>70</sup> *Branti*, 445 U.S. at 519.

<sup>71</sup> The First Circuit has developed a hybrid two-step inquiry which has also been adopted by the D.C. and Fourth Circuits. The inquiry was first announced by the First Circuit in *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986) and subsequently adopted in the Fourth Circuit in *Stott v. Haworth*, 916 F.2d 134, 141-42 (4th Cir. 1990) and by the D.C. Circuit in *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988). As an initial matter, the threshold inquiry involves examining whether the position relates to partisan interests or concerns. *Jimenez Fuentes*, 807 F.2d at 241-42 (“That is, does the position involve government decisionmaking on issues where there is room for political disagreement on goals or their implementation? Otherwise stated, do party goals or programs affect the direction, pace, or quality of governance?”). This inquiry is based on the holding in *Branti*, which suggests that the First Circuit assumed that the *Branti* exception to protection from patronage dismissals is necessarily broader than the exception in *Elrod*. LARSON, *supra* note 1, at § 171.01[a][1] (interpreting the *Branti* decision as an attempt to narrow the policymaking exception, thus broadening the

Across the circuits, there exists a core set of factors, first identified by Judge Weinstein of the Eastern District of New York in *Ecker v. Cohalan*<sup>72</sup> in 1982, which are used in determining whether a public employee may appropriately be dismissed for her political affiliation. Particularly among the First, Second, Third, Fourth, Ninth, and D.C. Circuits a common list of factors is apparent, although with some slight variations. These factors are: relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials and responsiveness to partisan politics and political leaders.<sup>73</sup>

The First Circuit has adopted this test wholesale, although its two-part inquiry first requires that the position qualify under a *Branti*-derived threshold that asks whether the position relates to partisan political interests or concerns. To Judge Weinstein's list, the First Circuit has also added whether the position entails vague and broad responsibilities as a factor to be considered in the second part of its inquiry.<sup>74</sup> The Second Circuit has also adopted the test, but excludes consideration of relative pay or salary, while adding consideration of whether the position is exempt from civil service protection.<sup>75</sup> The

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protection). "The Court [in *Branti*] concluded that although the work of assistant public defenders was confidential and policymaking in one sense, party affiliation was irrelevant to the effective performance of their jobs." *Hall*, 856 F.2d at 262.

After this threshold inquiry has been satisfied, the court must then examine whether the responsibilities of the position resemble that of a policymaker. This second inquiry is based on the *Elrod* holding and Justice Brennan's plurality language. *Jimenez Fuentes*, 807 F.2d at 242 ("examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement"). The court is then instructed to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served. In making the judgment, courts are instructed to use the catalogue of relevant factors identified by Judge Weinstein of the Eastern District of New York: "Among the indicia that locate a job along the spectrum between policymaker and clerk are: relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials and responsiveness to partisan politics and political leaders." *Id.* (citing *Ecker v. Cohalan*, 542 F. Supp. 896, 901 (E.D.N.Y. 1982)). To this list, the court added consideration of whether the responsibilities are broad or vague. *Id.* This is largely the same list of factors used by the Second and Ninth Circuits.

Finally, the First Circuit accords some deference to a legislature's determination that a position is treated as policymaking. *Jimenez Fuentes*, 807 F.2d at 246. In the First Circuit's seminal case on the issue, an act established a civil service personnel system in which all Puerto Rico government employees are classified into two categories. Puerto Rico Public Service Personnel Act of 1975, 3 L.P.R.A. § 1349, *repealed by* Act Aug. 3, 2004, No. 184, § 16. Career employees are selected on merit, and are subject only to for cause dismissal, while confidential employees are free from selection and removal because they collaborate substantially in the formulation of the public policy, or provide services to the head of an agency. *Id.* §§ 1331-1338.

<sup>72</sup> *Ecker v. Cohalan*, 542 F. Supp. 896, 901 (E.D.N.Y. 1982).

<sup>73</sup> *Ecker*, 542 F. Supp. at 901.

<sup>74</sup> *See supra* note 71.

<sup>75</sup> *See supra* note 68.

Third Circuit test does not contemplate public perception or contact with elected officials, but adds to Judge Weinstein's inquiry whether a person in the position at issue participates in meetings and whether the position has vague and broad responsibilities.<sup>76</sup> As discussed above, the Fourth Circuit has adopted the test promulgated by the First Circuit.<sup>77</sup>

The Fifth Circuit has a simplified definition of a policymaking employee, which echoes some of the factors used by the group employing Judge Weinstein's factors.<sup>78</sup> Although worded somewhat differently, it also looks to the employee's technical competence.<sup>79</sup> The other two factors identified by the Fifth Circuit are essentially based upon language contained in Justice Brennan's opinion in *Elrod*: whether the position has vague or broad responsibilities<sup>80</sup> and whether the employee plans or implements policy.<sup>81</sup>

The Sixth Circuit, as discussed below,<sup>82</sup> employs a unique approach that is more akin to the inquiry used by courts to determine municipal liability.<sup>83</sup> The Seventh Circuit focuses exclusively on whether the employee has authority and input into government decision-making on partisan issues. This factor is similar to the program control factor in Judge Weinstein's list, and the language of Justice Brennan's opinion in *Elrod*.<sup>84</sup>

The Eight Circuit along with the Tenth and Eleventh, have failed to elaborate on the *Elrod-Branti* opinions in order to provide the district courts in their respective jurisdictions guidance in applying the prohibition against political affiliation discharges and the policymaking

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<sup>76</sup> See *supra* note 68.

<sup>77</sup> See *supra* note 71.

<sup>78</sup> See *supra* note 68.

<sup>79</sup> *Wiggins v. Lowndes*, 363 F.3d 387, 390 (5th Cir. 2004) ("responsibilities require more than simple ministerial competence").

<sup>80</sup> *Id.* ("discretion in . . . selecting duties . . . is not limited by statute, regulation, or policy determinations made by supervisors").

<sup>81</sup> *Id.* A policymaker is an employee "whose decisions create or implement policy . . ." Also, a court should consider whether the employee "formulates plans for the implementation of broad goals." *Id.*

<sup>82</sup> See *infra* notes 87-101 and accompanying text.

<sup>83</sup> See, e.g., *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1987). *Praprotnik* outlines three theories of liability for municipalities alleged to have committed constitutional torts. Under the first theory the plaintiff must prove that a particular decision by subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker. Under this theory, the supervising policymaker has to approve of both the underlying decision as well as the unconstitutional basis of the action. However, the plaintiff will not be able to make an action out against a municipality until she gets an adjudication by an ultimate policymaker. The second theory of liability is where a series of decisions were made by subordinates became "custom or usage" to which the supervisor would have been aware. However, because the court has continually rejected respondeat superior liability for municipalities, a mere failure to investigate a subordinate's decision would not trigger liability. The third theory for liability might be an explicit delegation of policymaking authority with no right to review. *Id.*

<sup>84</sup> Whether the employee "formulates plans for the implementation of broad goals." *Elrod v. Burns*, 427 U.S. 347, 368 (1976).

exception.<sup>85</sup>

The Ninth Circuit has incorporated the factors identified by the First Circuit. However, courts in the Ninth Circuit do not first conduct the *Branti*-derived inquiry into whether the position relates to partisan interests, as do those in the First and Fourth Circuits.<sup>86</sup>

#### D. *The Sixth Circuit*

The standard adopted by the Sixth Circuit accurately captures the necessary deference to legislative determinations about policymaking positions, while incorporating the essential elements of the patronage cases. This standard allows courts to strike the appropriate balance between insulating government from partisan pressures and maximizing responsiveness to electoral mandates.

In *McCloud v. Testa*,<sup>87</sup> the Sixth Circuit interpreted *Branti* by outlining four categories that qualified for the exception, each of which reflects language contained in *Elrod*, *Branti*, and *Rutan v. Republican Party of Illinois*,<sup>88</sup> where the Court extended the rule of *Elrod* and *Branti* to promotion, transfer, recall, and hiring decisions based on party affiliation and support. A position need not fit perfectly within one of the “generic” *McCloud* categories in order to be found by a court to be a confidential or policymaking job.<sup>89</sup> But, should the position fit into one of the categories with reasonable certainty, then political affiliation is an appropriate requirement of employment and a public employee may be fired without violation of her constitutional rights.<sup>90</sup> The court will give “some deference” to the legislature’s determination as to whether a job is “political.”<sup>91</sup>

*McCloud* category one positions are “specifically named in relevant federal, state, county or municipal law to which discretionary authority with respect to the enforcement law or the carrying out of some other policy of political concern is granted.”<sup>92</sup> As an example of a category one position, “a secretary of state given statutory authority over various state corporation law policies” is a policymaker.<sup>93</sup>

*McCloud* category two positions are those “to which a significant

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<sup>85</sup> See *supra* note 69.

<sup>86</sup> See *supra* note 68.

<sup>87</sup> *McCloud v. Testa*, 97 F.3d 1536, 1557-58 (6th Cir. 1996).

<sup>88</sup> *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).

<sup>89</sup> *Feeney v. Shipley*, 164 F.3d 311, 318 (6th Cir. 1999).

<sup>90</sup> *Sowards v. Loudon*, 203 F.3d 426, 435 (6th Cir. 2000).

<sup>91</sup> *Caudill v. Hollan*, 431 F.3d 900, 909 (6th Cir. 2005) (discussing the so-called “*Rice* cannon”).

<sup>92</sup> *McCloud*, 97 F.3d at 1557-58.

<sup>93</sup> *Id.*

portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions."<sup>94</sup> Category two "exists to capture those who would otherwise be category one policymakers, except that the federal government, state, county, or municipality has chosen for whatever reason not to set out the requirements of such a position in statute, ordinance, or regulation."<sup>95</sup> The court's example for category two was "a deputy secretary of labor in a state, to whom the secretary of labor has delegated the responsibility for crafting the department's annual proposed legislative agenda."<sup>96</sup>

*McCloud* category three is comprised of "confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to category one positions, category two positions, or confidential advisors" (i.e., "a judge's law clerk or secretary").<sup>97</sup>

*McCloud* category four incorporates "positions that are a part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies."<sup>98</sup> These could include independent agencies and quasi-governmental institutions or municipal authorities. This includes, for example, "a gubernatorially-appointed Democratic economist placed on a revenue forecasting committee consisting by law of two economists (one Republican and one Democrat) chosen by the state legislature, two economists of similar party affiliation chosen by the governor, and one economist of any party chosen by the president of the state's most prominent university."<sup>99</sup>

The court held that an assistant attorney general qualified as a policymaking position under categories two and three.<sup>100</sup> In another case, the court found that the statutorily authorized Gifted and Talented Teacher/Coordinator position in Kentucky schools was not a

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1557 n.31.

<sup>96</sup> *Id.* at 1557.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1558.

<sup>100</sup> *Latham v. Office of the Attorney Gen. of Ohio*, 395 F.3d 261, 268 (6th Cir. 2005). The authorizing statute read: "The attorney general may appoint . . . assistant attorneys general, each of whom shall be an attorney at law, to serve for the term for which the attorney general is elected, unless sooner discharged by him, and each shall perform such duties, not otherwise provided by law, as are assigned him by the attorney general." OHIO REV. CODE ANN. § 109.03 (2009).

policymaker under any of the categories.<sup>101</sup>

Thus, the *McCloud* standard incorporates each of the relevant holdings of *Elrod*, *Branti* and *Rutan*, while giving appropriate deference to the determination of a legislature. This framework succeeds in placing employees on notice that they are likely to be found to be policymakers by the courts and gives legislatures the incentive to define positions as policymaking (or not) in the first instance. This lesson, to encourage legislatures and government employers to define positions, is learned from the experience of the federal executive model.

### III. THE FEDERAL EXECUTIVE MODEL

#### A. *How It Works*

Every position in the federal bureaucratic pantheon is predetermined as either subject to turnover with an administration change or protected by the Office of Personnel Management (OPM), the successor to the original Civil Service Commission. Thus, individuals who accept federal jobs know whether or not their position is protected by the civil service.

There is always considerable debate, but scarce litigation, over patronage in the executive branch.<sup>102</sup> The struggle to deal with “career

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<sup>101</sup> *Hager v. Pike Bd. of Educ.*, 286 F.3d 366, 371-72 (6th Cir. 2002). Before finding that the inherent duties of the position clearly designated that seventy-five percent of the position time must be spent teaching gifted and talented students and the remaining twenty-five percent is to be spent on administration of the program the court reviewed the county board of education description of the position.

The Gifted and Talented Teacher/Coordinator shall oversee the operation of the District’s Gifted and Talented Program and assist schools in implementing the provisions and policies set forth by the Kentucky Department of Education. The Gifted and Talented Teacher/Coordinator shall oversee the expenditure of funds for gifted education to ensure those funds are used to provide direct services to identified students. The Gifted and Talented Teacher/Coordinator shall meet the requirements for certificate endorsement as established in Kentucky Administrative Regulation.

He/she shall coordinate the annual, on-going process of evaluating all aspects of the gifted program and make recommendations for upgrading those areas found to be deficient.

He/she shall provide direct services to students who are gifted and talented. Seventy-five percent of the Teacher Coordinator’s time shall be spent directly teaching gifted students. Twenty-five percent of their time shall be spent coordinating the program.

He/she will serve as liaison between the district and the state, ensure internal compliance with state statutes and administrative regulations.

*Id.* at 373.

<sup>102</sup> See, e.g., Musgrave, *supra* note 31 (arguing for a more politicized federal government and deriding notions of an impartial, professional civil service).

men” in government is not new.<sup>103</sup> Both the history<sup>104</sup> and current debate over Presidential appointments provides a lens through which to view the policymaking exception and the role of party affiliation in public employment.<sup>105</sup> Understanding the current system reveals its value and limitations in resolving the policymaking exception problem.

OPM has outlined four broad categories of individuals or positions that may be changed during a presidential transition.<sup>106</sup> Those categories are: (i) Presidential appointments made with the advice and consent of the Senate; (ii) other Presidential appointments in which the incumbent serves at the pleasure of the President; (iii) non-career Senior Executive Service (SES)<sup>107</sup> appointments; and, (iv) appointments to other positions in which the incumbent serves at the pleasure of the

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<sup>103</sup> President Harry Truman expressed his frustration with career civil service employees and their obstruction of his policies in his memoirs, reflecting that “every President in history has been faced with this problem: how to prevent career men from circumventing presidential policy,” and that “[t]he difficulty with career officials . . . is that they regard themselves as the men who really make policy and run the government.” MCCULLOUGH, *supra* note 30, at 619.

<sup>104</sup> “[T]he spoils system developed to assure that a new president’s programs were implemented by those sympathetic to his policies. This was done with the Jacksonian assumption that government jobs were so simple that virtually anybody could handle them. The legacy of the reform movement removed most federal government jobs from the spoilsmen by expanding appointment by merit . . . but still left the top tier of positions to presidential discretion. After the high-water mark of the merit system was reached in the 1940s, the pendulum reversed directions, and the proportion of political appointees began to increase again, particularly in the 1970s and 1980s.” Pfiffner, *Political Appointees*, *supra* note 30, at 57 (citation omitted).

<sup>105</sup> Another legal question which requires determination of a policymaking position is the Lobbying Disclosure Act of 1995. See 2 U.S.C. §§ 1601-1614 (2006 & Supp. 2007). The Act imposes disclosure and registration requirements on lobbyists who contact covered legislative and executive branch officials. It also requires that a “covered executive branch official” who is contacted by a lobbyist disclose this fact upon the request of the person making the lobbying contact. Covered executive branch officials are defined as: the President, the Vice President, any officer or employee in the Executive Office of the President, any officer or employee serving in level I, II, III, IV, or V of the Executive Schedule, any member of the uniformed services above pay grade O-7, and “any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character . . . .” *Id.* § 1602 (emphasis added).

<sup>106</sup> U.S. OFFICE OF PERSONNEL MGMT., PRESIDENTIAL TRANSITION GUIDE TO FEDERAL HUMAN RESOURCES MANAGEMENT (2008), available at <http://www.chcoc.gov/Transmittals/Attachments/trans1300.pdf>.

<sup>107</sup> The SES is a unique executive personnel system completely separate from the competitive and excepted services. It includes “most of the top managerial, supervisory, and policy positions in the executive branch that are not required to be filled by Presidential appointment with Senate confirmation.” Every two years, OPM allocates to each agency a number of SES slots based on the agency’s needs. Within that allocation, the agency may establish SES positions and designate them as either “General” or “Career Reserved.” Career Reserved positions must be filled by career SES appointees to ensure public confidence in the impartiality of the federal Government. Agencies may, however, make SES non-career appointments to any SES General position without regard to competitive requirements and may set the pay level of those appointees. These appointments must be approved by OPM before the appointment is made. The law limits the total number of SES positions that can be filled by non-career appointment to ten percent of the Government-wide SES space allocation and 25 percent of an individual agency’s allocation. Other limitations may be imposed administratively or by statute on an agency-by-agency basis. *Id.* at 9.

agency head (commonly known as “Schedule C” positions).<sup>108</sup> Schedule C positions are excepted from the competitive service and are therefore subject to change during a transition based on their “responsibility for determining or advocating agency policy or their confidential character.”<sup>109</sup>

“Officers and employees who serve ‘at the pleasure of’ the President or other appointing official may be asked to resign or may be dismissed at any time. They are not covered by standard civil service removal procedures and, generally, have no right to appeal terminations, unless” alleging that such action was taken as the result of “prohibited discriminatory reasons.”<sup>110</sup>

With each incoming Presidential administration, the debate begins anew over the expanding role of Presidential appointments in the executive branch.<sup>111</sup> This debate illuminates the public policy values at play when weighing the appropriate role of political affiliation in public employment.

In 2000, President Bush entered office with some 3,000 political appointments to be made,<sup>112</sup> and has sought to reform federal government in a number of ways since then.<sup>113</sup> Including the appointments under the direct control of the President, there are some 8,000 open positions to be filled with the change to the Obama Administration.<sup>114</sup> The debate reflects the trade-off between

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<sup>108</sup> *Id.* at 4. “When President Eisenhower came to office after 20 years of Democratic rule, Schedule C positions were created to allow the Republicans to place their own appointees at lower levels in the bureaucracy, GS-15 and below.” Pfiffner, *Political Appointees*, *supra* note 30, at 58.

<sup>109</sup> U.S. OFFICE OF PERSONNEL MGMT., *supra* note 106, at 4. The “excepted service” includes all positions in the executive branch that have been excepted from the competitive service or the SES by statute, the President, or OPM. *Id.* at 12. “Schedule C positions are excepted from the competitive service because they have policy-determining responsibilities or require the incumbent to serve in a confidential relationship to a key official.” *Id.* at 13.

<sup>110</sup> *Id.* at 7. Prohibited discriminatory reasons include a failure to declare a belief in God. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

<sup>111</sup> See, e.g., Musgrave, *supra* note 31 (arguing the “mixed system” of political appointees and civil service career employees is hard to justify); Pfiffner, *Political Appointees*, *supra* note 30, at 57 (concluding that the “in and outer” system has served the country well, but that the “balance should be shifted back toward fewer presidential appointees” and that the number of political appointees can be limited without sacrificing responsiveness of federal agencies to the president’s prerogatives); Robert Maranto, *Why the President Should Ignore Calls to Reduce the Number of Political Appointees*, HERITAGE FOUND., Feb. 27, 2001, available at <http://www.heritage.org/Research/GovernmentReform/BG1413.cfm>. (arguing that political appointees are vital to implementation of the President’s policies and that the arguments for the merit system are based upon misconceptions about its effectiveness).

<sup>112</sup> Maranto, *supra* note 111.

<sup>113</sup> Paul C. Light, *Obama Has a Chance to Reverse Long Erosion of the Federal Service*, WASH. POST, Nov. 19, 2008, at A19 (“From 2001 to 2005, civilian employment remained at 1.8 million, more or less, while the estimated number of contractor jobs surged from 4.4 million to 7.6 million.”).

<sup>114</sup> See *supra* note 31 and accompanying text.

responsiveness and effectiveness. Although executive branch leadership was designed to maximize responsiveness by political appointment of top officials, this can minimize efficiency with rapid turnover and policy reversals.<sup>115</sup> A recent study found that while political appointees were better educated, “[p]rograms administered by civil servants were significantly more likely to display better strategic planning, program design, financial oversight—and results.”<sup>116</sup>

Supporters of the politicization of the federal bureaucracy contend that the American federal executive branch, which combines a unique mix of “in-and-out” and career executives, is more effective than the alternatives.<sup>117</sup> The pro-politicization camp<sup>118</sup> cites for support of the increase in political control of agencies the growth of the administrative state in the latter half of the twentieth century and its role in effectuating

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<sup>115</sup> See Pfiffner, *Political Appointees*, *supra* note 30, at 62 (arguing that some inefficiency is a small price to pay for the connection this provides between government and the electorate, but that too much penetration of political appointees into the bureaucracy is inappropriate, reaching a “point of diminishing returns”).

<sup>116</sup> Vedantam, *supra* note 30 (“These findings . . . were based on the Bush administration’s own evaluation system—the Program Assessment Rating Tool, administered by the Office of Management and Budget.”).

<sup>117</sup> Pfiffner, *Political Appointees*, *supra* note 30, at 57. The American system of government administration, contrasted with those found in western European governments, is vastly more political than its counterparts. Those democracies—France, Britain, and Germany—allow only approximately 100 new political appointees to each new administration. *Id.* Professor Pfiffner, a political scientist at George Mason University, has “suggested the number of political appointees be slashed by a third—but acknowledged this was unlikely to happen. ‘Presidents want patronage and think it will help them control the government,’ he said. ‘But the increasing number of layers of political appointees attenuates rather than increases control from the top.’” Vedantam, *supra* note 30.

<sup>118</sup> Vedantam, *supra* note 30.

Not everyone agrees that the United States has too many political appointees: Robert Maranto at the University of Arkansas argued that political appointees have poorer track records than bureaucrats because presidents may preferentially give them the toughest assignments. Moreover, Maranto said, amid rising political partisanship, presidents need to stock departments with people who understand politics and the increased importance of interaction with Congress, lobbyists and the media. If a president placed more civil servants in slots now occupied by political, he argued, this could expose bureaucrats to the kind of controversies that can jeopardize careers.

*Id.* Others have argued that greater politicization of the federal bureaucracy is a good thing because the alternative is for all policy decisions to come out of the White House. Musgrave, *supra* note 31.

In a democracy . . . sometimes rapid and fundamental change is both necessary and sustained by the popular will. . . . If the president can’t make such changes directly in the agencies, then he will attempt to go outside the system by making the White House staff responsible for policy management. Having members of the White House staff, who are remote from the departments and entirely dependent on the president’s favor for their influence, in charge of operations is the worst of all possible worlds. But given the inflexibility of civil service rules and the difficulty of navigating the Senate confirmation process, it’s no surprise that presidents often resort to the creation of yet another “czar” . . . to fill government ranks.

*Id.*

Presidential policy;<sup>119</sup> the growth of the Washington political industry including Congressional staff and political action committees;<sup>120</sup> the nature of high-level executive branch work as inherently political and “risky;”<sup>121</sup> the tendency of career-dominated agencies to resort to “groupthink” or “tunnel vision;”<sup>122</sup> and the perception among Americans that an employment system based on tenure lacks legitimacy and makes it difficult to deal with problem employees.<sup>123</sup>

Those that argue for separation of politics from the administration of government cite the reasoning of Woodrow Wilson and Max Weber, who argued that the very nature of the politician and the civil servant were incompatible.<sup>124</sup> In support of career executives, this camp argues that protected professionals will have the long-term perspective to pay attention to the health of institutions and to the integrity of the processes that assure nonpartisan implementation of the law.<sup>125</sup> While bureaucrats are concerned about the institutions they manage as well as the current policies of those institutions, politicians tend to see organizations as mere tools to achieve their policy ends.<sup>126</sup>

The debate persists—over how political the federal government should be and the values motivating that question—but ultimately the federal model is one where OPM, an executive agency, decides which jobs are political.

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<sup>119</sup> See, e.g., John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901 (2001) (arguing that the president’s exercise of regulatory review authority necessary to producing government regulation that efficiently promotes the public interest rather than special interests); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 421-22, 459 (1987) (arguing that the “post-New Deal increase in presidential power, and the creation of a massive bureaucracy concentrated in the executive branch, have augmented factional power and self-interested representation, often leading to regulation that fails to serve the interests of the public at large” and that “a system of executive control” should seek to strike “the proper balance between two goals of administration—insulation from partisan pressure and responsiveness to electoral preferences”); Gary Lawson, Symposium, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”).

<sup>120</sup> In 1960, there were 2,441 U.S. House of Representatives staffers, 1,115 U.S. Senate staffers, and no political action committees (PACs). By 1992, there were 7597 House staffers, 4249 Senate staffers, and 4125 people working for PACs. Maranto, *supra* note 111.

<sup>121</sup> “[Political work] is risky activity that career executives who want to work across changes in Administrations may not want to handle.” *Id.*

<sup>122</sup> See IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOS* 139-42 (2d ed. 1982).

<sup>123</sup> Maranto, *supra* note 111.

<sup>124</sup> See Pfiffner, *Political Appointees*, *supra* note 30, at 59.

<sup>125</sup> *Id.* at 60.

<sup>126</sup> *Id.*

B. *Application of the Federal Model at the State and Local Level*

The federal executive approach, where OPM identifies all positions subject to change during a Presidential transition, may provide a useful model for application at the state, county and municipal levels. Under this theory, a burden would be placed on an executive actor to establish whether a position is appropriately considered a “policymaking” position. Potential employees would be made aware, before accepting jobs, whether they would be subject to dismissal for cause only, or whether employment decisions could be made solely on their political affiliation.

It is doubtful, however, that state, county and municipal governments have the resources or foresight to undertake such a task. Even with appropriate resources, this solution would ignore the appropriate role of the courts. As a federal § 1983 action, it is of course for the courts to say “what the law is.”<sup>127</sup> If an unchecked hiring authority were able to define for itself which employees may be dismissed for their political affiliation, the fox will have been charged with guarding the henhouse. A putative governmental employer could label many of its subsidiary positions “policymaking” so that elected or appointed officials could install employees loyal to them.

Legislatures, as opposed to executive actors, are not a hiring authority, and thus might be afforded more credibility (and deference) in their labeling of “policymaking” positions. In any event, while a position may be a policymaking job in terms of state law, it may be non-policymaking for the purposes of federal constitutional civil rights law.<sup>128</sup> The Fourth Circuit, for example, has held that a legislature may not evade the Supreme Court’s holdings by defining certain state employees as policymakers when the job duties of such employees do not involve policymaking.<sup>129</sup>

Whether political affiliation is an appropriate requirement for a public position, within the meaning of *Elrod* and *Branti*, is to be decided by reference to a constitutional standard, and cannot be circumvented by statute.<sup>130</sup> So, even while the legislature’s

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<sup>127</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>128</sup> *See, e.g., Hartley v. Fine*, 780 F.2d 1383, 1388 (8th Cir. 1985) (“[A] position which is non-policymaking for purposes of the civil rights law may well be a policymaking position for state law purposes.”). The Sixth and First Circuits accord only “some deference” to legislative labels. *Caudill v. Hollan*, 431 F.3d 900, 909 (6th Cir. 2005) (discussing the so-called “*Rice* cannon”); *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 246 (1st Cir. 1986).

<sup>129</sup> *Akers v. Caperton*, 998 F.2d 220 (4th Cir. 1993). The West Virginia legislature had statutorily defined road maintenance superintendents as being policymakers in an effort to preserve the political patronage system.

<sup>130</sup> *Id.*

determination is entitled to some deference, ultimately the matter is for the courts to decide.<sup>131</sup>

Thus, while there is a vital government interest in political loyalty,<sup>132</sup> the cause of action which derives from the First Amendment is ultimately concerned with the individual rights of American citizens. On balance, affording a legislature's determination some measure of deference seems to be a worthy approach.<sup>133</sup> It provides incentives to legislatures to make such determinations in the first place, and thus incorporates the benefits of notice and predictability seen on the federal level.

The benefit of notice comes without the negative aspect of permitting the executive to define for itself which positions are policymaking. The policymaking determination, whether legislative or executive, is not ultimately binding on the courts, and employees litigating wrongful termination suits under the *Elrod-Branti* protection would be entitled to argue that the legislature's determination is inappropriate for the purposes of protecting their First Amendment rights.

#### IV. PROPOSAL

If *Branti* is to be read literally, the policymaking responsibilities of any public employee are no longer relevant. The only relevant inquiry would be whether party membership would be an appropriate requirement for the effective performance of the duties of the office.<sup>134</sup> The difficulty of this inquiry is apparent—there is not an office in the pantheon of federal, state and local governments for which party affiliation is a *necessary* prerequisite for effective performance of its duties.<sup>135</sup> Several courts have recognized this difficulty and have essentially ignored the *Branti* language and retained their focus on the

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<sup>131</sup> *Id.* at 225 n.7.

<sup>132</sup> In both *Elrod* and *Branti*, the Court recognized that to the extent political loyalty promoted the government interest in efficiency and effectiveness, public employees could be dismissed based upon their political affiliation. Limiting such dismissals to policymaking employees adequately balanced the government's vital interest and the individual's freedom of association.

<sup>133</sup> *See supra* note 128.

<sup>134</sup> *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

<sup>135</sup> *Garretto v. Cooperman*, 510 F. Supp. 816 (S.D.N.Y. 1981).

If *Branti* is taken to mean what it says, it raises a question whether President Carter's Cabinet members have a cause of action to retain their Departments in President Reagan's administration. Membership in the same party as the President is not required for effective performance of a Cabinet office. There have been several examples in recent administrations of Cabinet appointments which crossed party lines. Even if Cabinet members are special and outside the *Branti* rule, the same question arises for subcabinet level policymaking positions.

*Id.* at 819.

policymaking inquiry, as instructed in *Elrod*.<sup>136</sup>

The language which was to have altered the *Elrod* holding in *Branti* is a classic example of a legal tautology. The court stated, in rather conclusory fashion, that a public employee may not be fired for their political affiliation unless the job requires it. In claiming to take the focus away from the term “policymaker,” the Court removed the one guidepost provided by Justices Brennan and Stewart to assist courts in making the determination that the government has demonstrated a sufficient interest in loyalty to justify the dismissal.

The *Branti* opinion itself, immediately after suggesting that the inquiry is changed, goes right to the use of the terms “policymaker” and “confidential” to analyze whether the employees of the Cook County Sherriff’s Office could have been appropriately dismissed. Thus, it is unlikely that the opinion meant to substantially alter the policymaking inquiry.<sup>137</sup>

The text from *Branti* which addresses the policymaking inquiry is dicta. It was not essential to the holding and is therefore not binding. Language in a decision which is not necessary to the holding may be accorded less weight in subsequent cases.<sup>138</sup> The facts of *Branti* did not raise the issue of a policymaking employee—the District Court had found that assistant public defenders were not engaged in a policymaking function,<sup>139</sup> and the Supreme Court agreed.<sup>140</sup>

The issue on review in *Branti* was whether claimants could prevail in an action if they were discharged solely for the reason they were not affiliated with the employer’s party—the opinion did not consider the reasons why a policymaker exception might be important.<sup>141</sup> The controlling opinion, then, remains that which Justice Stewart’s concurrence and Justice Brennan’s plurality opinions agree most narrowly upon in *Elrod*.

It is well settled in Supreme Court jurisprudence that when no single rationale commands a majority, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.<sup>142</sup> Clearly, those grounds in *Elrod*

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<sup>136</sup> They are correct to do so. See *Hall v. Ford*, 856 F.2d 255, 262 (D.C. Cir. 1988) (“Even though, after *Branti*, ‘policymaker’ carries no talismanic significance, it remains a convenient shorthand for the type of employee for whom political affiliation is an appropriate requirement.”).

<sup>137</sup> See *supra* note 61.

<sup>138</sup> *Monell v. Dep’t of Soc. Servs. of New York*, 436 U.S. 658, 709 (1978) (Powell, J., concurring).

<sup>139</sup> *Finkel v. Branti*, 457 F. Supp. 1284, 1290-91 (S.D.N.Y. 1978).

<sup>140</sup> *Branti v. Finkel*, 445 U.S. 507, 519 (1980).

<sup>141</sup> *Garretto v. Cooperman*, 510 F. Supp. 816, 820 (S.D.N.Y. 1981) (“It does not appear that the *Branti* opinion gave direct consideration to the issue [of why a policymaker exception might be important] as it affects true governmental policymakers, no doubt because the issue was not raised by the facts of that case.”).

<sup>142</sup> *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 764 n.9 (1988).

were the extension of *Perry v. Sinderman* into the public employment/political affiliation context. Thus, the *Elrod* standard prohibits the dismissal of a non-policymaking, non-confidential employee for the sole reason of her political affiliation.

Regrettably, bringing the scope of those public employees who may properly be dismissed for their political fealty back to that enunciated in *Elrod* does not solve the problem. Failure to expound on how courts should identify a policymaking or confidential employee has led to disparate treatment of similarly situated employees depending on the circuit in which they reside and work.

After consideration of each circuit's standard as a candidate for adoption as a unified federal standard, nearly all fail to achieve the necessary goals of putting employees on notice, incentivizing government to define positions as policymaking or not, and minimizing the risk of litigation over wrongful dismissals. There are other standards in this area of law which might offer guidance,<sup>143</sup> but their

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<sup>143</sup> A cause of action arises under the rule of *Pickering v. Board of Education*, 391 U.S. 563 (1968), when a public employee alleges that an adverse employment decision was taken, in contravention of the freedom of speech guarantees of the First Amendment, as a result of something the employee said, rather than the employee's conduct or affiliation, as in the patronage cases. There are four elements to the *Pickering* cause of action.

First, the public employee must have been speaking on a matter of public concern; if not, it would not be necessary to scrutinize the reasons for the discharge. *Connick v. Myers*, 461 U.S. 138 (1983). Second, the court must "balance" the interest of the employee as a citizen commenting on public matters, and the interest of the State in promoting efficiency in administration of public service. *Pickering*, 391 U.S. at 568. Third, as in the *Elrod-Branti* cases, the employee must prove that his speech was a substantial or motivating factor in his discharge. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Last, the government employer has the opportunity to show that it would have taken the same action absent the protected speech. *Id.*

The second element, balancing the interests of the government in efficiency against the employee's interest in speech, is much the same as the trade-off embodied in *Elrod*. The Supreme Court has summarized the elements of government interest: whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. *Rankin v. McPherson*, 483 U.S. 378, 387 (1987). The state interest element focuses on the effective functioning of the public employer's enterprise. *Id.* Thus, the same concern for the success of government programs which led to the policymaking exception to protection against patronage dismissals is reflected in the *Pickering* test.

Applying the *Pickering* balancing test to the context of political affiliation would require balancing the government's interest in loyalty—to the end it promotes efficiency—against the individual's interest in political association. Although the first factor, whether the speech related to a matter of public concern, would not be relevant in the patronage context, the rule could nonetheless be applied.

In *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988), the D.C. Circuit adopted a unique approach to the problem presented by the speech of a public employee who was employed at a high level (i.e., a policymaking employee). The court found that the case presented an issue which the Supreme Court had not directly addressed. Recognizing that the same government interests that were applicable in the patronage context were also useful in the speech context, the court developed a *Pickering-Elrod* hybrid to be used in such cases.

value is limited and further diminished in light of the Sixth Circuit standard.

Ultimately, the most reasonable, practicable, and comprehensive standard is that promulgated by the Sixth Circuit.<sup>144</sup> That inquiry focuses, at the outset, on the relevant state, county, or municipal law which creates a policymaking position. Then, the Sixth Circuit's standard helps a court to identify whether such policymaking authority has been delegated to subordinates. The Sixth Circuit standard gives weight to the legislative determination of whether a position is a "policymaking" position or not. This provides an incentive for state, county, and municipal legislative bodies to speak to the issue, which in turn, gives a reliable indication to a potential employee whether a court will ultimately consider the position subject to patronage dismissal or not.

The standard is also desirable for the simple reason that it provides a coherent, comprehensive framework, which embodies much of the relevant case law.<sup>145</sup> It captures the wide variety of public positions which exist throughout the country, gives deference to local custom and systems of government, while identifying positions that are appropriately called "policymaking," even if not defined as such by the legislative body.

#### CONCLUSION

The weak plurality holding of *Elrod*, which created constitutionally based political discrimination protection and the accompanying policymaking exception, left an unsettled field which the dicta of *Branti* failed to sufficiently define for application by the inferior courts. This has led to disparate application of that standard and balkanization of the doctrine. The standard implemented by the Sixth Circuit captures the

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The court in *Hall* decided to adopt the criteria set forth by the First Circuit in *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986), as a means of identifying high-level employees who must be compatible with their superiors, but modified its terminology by substituting "policy" for "partisan" and political. *Hall*, 856 F.2d at 264; *see also supra* note 71. Like the Seventh Circuit, the inquiry will look first to whether an employee's position relates to an area where there is room for principled disagreement on goals or their implementation. *Hall*, 856 F.2d at 264; *see also* *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981). That is, is it a policy area? If this threshold is met, the court will then ask whether the position gives the employee broad responsibilities with respect to policy formation and implementation. *Hall*, 856 F.2d at 264. That is, was the individual a policymaker?

If both these criteria are met, the court will then ask whether the government interest in effective implementation of its administrative objectives through loyal deputies is implicated by the employee's speech. *Id.* Naturally, in the patronage context, the final inquiry would focus on whether effective government administration is implicated by the employee's political affiliation.

<sup>144</sup> *See supra* notes 87-101 and accompanying text.

<sup>145</sup> *See supra* note 88.

necessary deference to legislative determinations about policymaking positions, while incorporating the essential elements of the patronage cases, such that lower courts are able to strike the appropriate balance between insulating government from partisan pressures and maximizing responsiveness to electoral mandates.