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## O'Hare Truck Service v. City of Northlake: It's the Thought That Counts

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# O'HARE TRUCK SERVICE v. CITY OF NORTHLAKE: IT'S THE THOUGHT THAT COUNTS

*[O]ne logical proposition detached from history leads to another, until the Court produces a result that bears no resemblance to the America that we know.<sup>1</sup>*

## I. INTRODUCTION

A good meal takes a long time to prepare, ten minutes to eat, and an undetermined amount of time to motivate a clean-up crew. The history of political patronage in the United States can be traced in the same manner. In other words, political patronage has been a piece of American politics for a span of over 200 years, yet in the last twenty years, the Supreme Court has judicially devoured the "spoils system"<sup>2</sup> as we have known it. The Supreme Court has placed American politics in an awkward period of "wait and see," during which it will be determined whether its recent decision of *O'Hare Truck Service, Inc. v. City of Northlake*<sup>3</sup> proves practically sound and workable, or whether it is time to start engaging the judicial clean-up crew.

Partisan politicking, whether good or bad, has played a large part in developing the history of American politics and in the evolution of the bifurcated political system as it exists today. "[R]ewarding one's allies . . . [and] . . . refusing to reward one's opponents . . . is an American political tradition as old as the Republic."<sup>4</sup> Indeed, even as early as the George Washington administration, political patronage had surfaced.<sup>5</sup> Just as long as it has been tradition,

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1. Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2366 (1996) (Scalia, J., dissenting) (quoting Justice Holmes in what has come to be known in the legal profession as the famed "slippery slope"—the judicial point of no return). The Court decided two political patronage cases concerning the First Amendment on the same day: *Umbehr* and *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996). Justice Scalia's dissent to both cases was consolidated into one document applying to both decisions. While the *Umbehr* decision involved the First Amendment as it pertains to actual speech, the *O'Hare* decision deals with the First Amendment as it pertains to political affiliation. This Note concentrates on *O'Hare*, but, in cases so closely knit, overlap is inevitable.

2. Taken from the phrase "[t]o the victors belong the spoils of the enemy." See GALES & SEATON'S REGISTER OF DEBATES IN CONGRESS (Jan. 1832) (recording that Senator Marcy used the phrase in a speech to the United States Senate); see also Susan Lorde Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11, 16 (1989); Bradford S. Moyer, Note, *The Future of Rutan v. Republican Party of Illinois: A Proposal Insulating Independent Contractors From Political Patronage*, 28 VAL. U. L. REV. 375, 379 (1993); MARTIN TOLCHIN & SUSAN TOLCHIN, TO THE VICTOR 5-6 (1971).

3. 116 S. Ct. 2353 (1996).

4. *Umbehr*, 116 S. Ct. at 2362 (Scalia, J., dissenting).

5. See CARL E. PRINCE, THE FEDERALISTS AND THE ORIGINS OF THE U.S. CIVIL SERVICE at x (1977) (making reference to the "more than two thousand federal officeholders named by Presidents Washington and Adams in the dozen years the Federalists reigned between 1789 and 1801 . . .") (emphasis added).

however, the practice has been extremely controversial.<sup>6</sup> Not giving deference to another Justice Holmes aphorism that "[i]f a thing has been practiced [sic] for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it,"<sup>7</sup> the Supreme Court, in the last twenty years, has put a tight collar on government officials who plan to use political patronage as a tool to weed out low-level and non-policy making employees (and now independent contractors) for the sole reason of political affiliation and support.<sup>8</sup> As we approach the twenty-first century, the role and size of the United States government is an ongoing issue of debate. The future impact of the Supreme Court's decision to extend the rights of government employees concerning political patronage to that of private contractors holding public contracting jobs is very difficult to predict, but may prove to depend upon the make-up and role of our national, state, and local governments.

The decision in *O'Hare* may prove to be well-founded and practical, to create a new benevolent relationship between Democrats and Republicans, and to reincarnate the view in America that politicians are trustworthy; it may, however, prove to initiate ambiguities and confusion, weaken the democratic process, and cause an inordinate amount of litigation and judicial interference in the effectiveness and efficiency of local and state governments. Indeed, time will tell precisely what droves of speculation will not.

This Note explores the history leading up to the *O'Hare* decision, the decision itself, and the resulting future of political patronage in the United States. Part II of this Note outlines the relatively short judicial history of Supreme Court decisions involving political patronage dismissals<sup>9</sup> by reviewing the decisions rendered in *Elrod v. Burns*,<sup>10</sup> *Branti v. Finkel*,<sup>11</sup> and *Rutan v. Republican Party of Illinois*.<sup>12</sup> Part III shows how the different circuit courts have applied the *Elrod/Branti/Rutan*<sup>13</sup> holdings to cases involving government independent contractors.<sup>14</sup> There is evidence that lower court judges do not

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6. See *id.* at 5. Prince tells of a situation in which Washington, on the advice of key local Federalists from Rhode Island, demoted an Antifederalist customs officer. Theodore Foster, then a Senator from Rhode Island, wrote to Washington that his demotion of the Antifederalist officer "indicated the appearance of a political test for appointment." Foster wrote that Washington's actions "continued to 'give occasion for Mistrust'" *Id.* (quoting Letter from Theodore Foster to Washington (February 18, 1790) in *Applications For Office Under President Washington*, Series VII, GEORGE WASHINGTON PAPERS, vol. XI).

7. Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922); see also *Elrod v. Burns*, 427 U.S. 347, 389 (1976) (Powell, J., dissenting).

8. See *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

9. See *infra* notes 21-88 and accompanying text.

10. 427 U.S. 347 (1976).

11. 445 U.S. 507 (1980).

12. 497 U.S. 62 (1990).

13. Hereinafter "Elrod," "Branti," or "Trilogy," and sometimes "Elrod-Branti."

14. See *infra* notes 89-105 and accompanying text. This part of the Note will discuss the specific cases including *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995); *O'Hare Truck Serv., Inc. v. City of Northlake*, 47 F.3d 883 (7th Cir. 1995); *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995); *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991); *Triad Assocs. v. Chicago Housing Auth.*, 892 F.2d 583 (7th Cir. 1989); *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986); *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982).

particularly like the trilogy of holdings and have used the classification of independent contractor as a way of not applying the rationale of these three cases.<sup>15</sup> Part IV reviews the recent decision of *O'Hare Truck Service, Inc. v. City of Northlake*<sup>16</sup> in which the Supreme Court extends the *Trilogy* holdings to encompass government independent contractors.<sup>17</sup> Part V offers two perspectives. First, it explores the reasons why the Supreme Court made this extension in light of various lower court's reluctance to do so, and discusses the fact that modern day politics may have had an underlying role in impacting the Court's decision.<sup>18</sup> Second, it gives perspective as to how the *O'Hare* decision will affect local and state governments, American politics, and the American judicial system.<sup>19</sup> In conclusion, Part VI discusses the questions left unanswered by the *O'Hare* decision and it offers perspective as to how future political patronage cases involving employees and contractors alike should be handled in federal courthouses around the country.<sup>20</sup>

## II. THE TRILOGY

### A. *The Elrod Court*

The Supreme Court's first patronage decision was *Elrod v. Burns*.<sup>21</sup> Elrod, a Democrat, was elected Sheriff of Cook County, replacing the Republican incumbent.<sup>22</sup> It was the normal practice for each newly elected Sheriff, who assumed the office from a Sheriff of a different political party, to replace then existing non-civil-service employees with members of her own political party.<sup>23</sup> After the election, Elrod fired various Republican employees.<sup>24</sup> The employees filed suit, alleging they were fired for the sole reason that they were not affiliated with or sponsored by the Democratic Party.<sup>25</sup>

The *Elrod* plurality concluded that the practice of "[p]atronage . . . to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is 'at war with the deeper traditions of democracy embodied in the First Amendment.'"<sup>26</sup> Noting however, that the prohibition on infringement of First Amendment protections is not absolute, the Court recognized that "[r]estrictions are permitted for appropriate

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15. See Moyer, *supra* note 2, at 378 (finding that "lower federal courts have limited the scope of *Elrod* and *Branti* to government employees, and have refused to expand this protection to independent contractors absent clear Supreme Court decision mandating such an expansion").

16. 116 S. Ct. 2353 (1996).

17. See *infra* notes 106-57 and accompanying text.

18. See *infra* notes 158-91 and accompanying text.

19. See *infra* notes 192-203 and accompanying text.

20. See *infra* notes 204-21 and accompanying text.

21. 427 U.S. 347 (1976).

22. See *id.* at 350.

23. See *id.* at 351.

24. See *id.*

25. See *id.* at 350.

26. *Id.* at 357 (quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972)).

reasons.”<sup>27</sup> Thus, the Court carefully considered the “appropriate reasons” offered by the defendant Sheriff as to why a ban on patronage dismissals should not be implemented.<sup>28</sup> The Court explained its role: “It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny . . . [thus,] the interest advanced [by the defendant] must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.”<sup>29</sup>

The defendants asserted that the practice of political patronage could be justified because the practice served the following government needs: (1) “the need to insure effective government and efficiency of public employees,”<sup>30</sup> (2) “the preservation of the democratic process,”<sup>31</sup> and (3) “the need for political loyalty of employees . . . to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate.”<sup>32</sup>

Applying exacting scrutiny, the Court found that the need to “insure that policies which the electorate has sanctioned are effectively implemented” is sufficiently paramount to override the individual interests of the government employees.<sup>33</sup> However, the Court did not allow this calling for policy implementation to “validate patronage wholesale.”<sup>34</sup> The Court said that by limiting patronage dismissals to employees holding “policy making positions,” the ends to this governmental need will still be achieved.<sup>35</sup> Thus, the *Elrod* Court created a loosely organized test to determine whether an employee occupies a “policy making” position.

The Court admits that “[n]o clear line can be drawn between policymaking and non-policymaking positions.”<sup>36</sup> Nevertheless, it does attempt to provide some direction. Whereas nonpolicymaking employees have limited responsibility, supervisor-types may have responsibilities of a broader, less defined scope.<sup>37</sup> Thus, the “nature of the responsibilities is critical.”<sup>38</sup> Next, an employee who “acts as an adviser” should also be considered as evidence of a policymaker.<sup>39</sup> Finally, weight in favor of “policymaker” should be given to those who “formulate[] plans for the implementation of broad goals.”<sup>40</sup> Justice Stewart filed a concurrence in which he added to the test of the plurality opinion. He framed the issue as “whether a nonpolicymaking, *nonconfidential* gov-

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27. *Id.* at 360.

28. *See id.* at 364-69.

29. *Id.* at 362 (citing *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1975)).

30. *Id.* at 364.

31. *Id.* at 368.

32. *Id.* at 367.

33. *Id.* at 372; *see also* Cynthia Grant Bowman, *The Law of Patronage At A Crossroads*, 12 J.L. & POL. 341, 343 (1996).

34. *Elrod v. Burns*, 427 U.S. 347, 367 (1976).

35. *See id.*

36. *Id.*

37. *See id.* at 368.

38. *Id.* at 367.

39. *Id.* at 368.

40. *Id.*

ernment employee can be discharged. . . ."<sup>41</sup> Thus, he created yet another category to take into consideration when determining whether one is immune from a patronage dismissal by a government official solely because of affiliation.<sup>42</sup>

In sum, the Court held that patronage dismissals "severely restrict political belief and association."<sup>43</sup> Although political patronage dismissals may serve the government's need to insure that voter-supported policies are implemented effectively, this need is not weighty enough to permit patronage dismissals outright.<sup>44</sup> Therefore, the *Elrod* Court held that "the practice of patronage dismissals is unconstitutional [as to nonpolicymakers] under the First and Fourteenth Amendments . . . ."<sup>45</sup>

### B. The Branti Court

Four years later, the Court was again asked to address the constitutionality of patronage dismissals in *Branti v. Finkel*.<sup>46</sup> In *Branti*, a Democrat was appointed Rockland County Public Defender.<sup>47</sup> In Rockland County, the newly appointed public defender subsequently appoints nine assistants who serve for an undetermined term.<sup>48</sup> Shortly after Branti was formally appointed, he began the processes necessary to terminate six of the nine assistants then holding positions.<sup>49</sup> Finkel and Tabakman, Republicans, were two of the six to be terminated, and they filed suit, alleging that the sole basis for their discharge was because of their political affiliation.<sup>50</sup>

The *Branti* Court reaffirmed *Elrod* in the sense that it confirmed the notion that a First Amendment infringement occurs when a government employee is discharged "solely for the reason that they were not affiliated with or sponsored by the [opposing political party]."<sup>51</sup> Additionally, the *Branti* Court recognized

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41. *Id.* at 375 (Stewart, J., concurring) (emphasis added). Justice Stewart also exhibited some reluctance to support a plurality opinion that considers "the broad contours of the so-called patronage system, with all its variations and permutations." *Id.* at 374. For Stewart, the opinion of the majority is too "wide-ranging" for him to fully support. *Id.*

42. See James Kimmell, Jr., Note, *Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 COLUM. L. REV. 558, 561-62 (1985) (observing that after *Elrod*, "public employees in 'nonpolicymaking, nonconfidential' positions cannot be dismissed solely on the grounds of political affiliation"); Moyer, *supra* note 2, at 382 (discussing *Branti* and how the new test is "not whether the 'label policymaker' or 'confidential' fits a particular position"); H. Scott Plouse, Note, *Branti v. Finkel: Spoiling the Spoils System*, 10 CAP. U. L. REV. 871, 878 (1981) (noting that Justice Stewart's concurrence, making nonpolicymaking, nonconfidential distinction supplanted plurality analysis); Mary Ann Thinnies, Note, *Patronage Politics: Democracy's Antidote to Enforced Neutrality in Civil Service—Branti v. Finkel*, 445 U.S. 507 (1980), 6 U. DAYTON L. REV. 231, 241 (1989) (stating "the dual criteria of 'nonpolicymaking-nonconfidentiality emerged as the test"); Brenda H. Verbois, Note, *Constitutional Limitations on Patronage Practice: Branti v. Finkel*, 42 LA. L. REV. 310, 313 n.21 (1981) (stating that [Stewart's] concurring opinion "is viewed as the holding of the Court").

43. *Elrod v. Burns*, 427 U.S. 347, 372 (1976).

44. See *id.* at 373.

45. *Id.*

46. 445 U.S. 507 (1980).

47. See *id.* at 509.

48. See *id.*

49. See *id.*

50. See *id.* at 508.

51. *Id.* at 517 (citing *Elrod v. Burns*, 427 U.S. 347, 350 (1976)).

that both the plurality and the concurrence in *Elrod* stated that "party affiliation may be an acceptable requirement for some types of government employment."<sup>52</sup> But the *Branti* Court went further: "[I]f 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>

The result of the *Branti* decision is that it modified the "policymaker" test promulgated in *Elrod* used to determine whether a discharged employee occupied one of the dismissal-ready positions.<sup>54</sup> The new test, however, no longer depends upon "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."<sup>55</sup> The *Branti* Court noted that some positions that do, in fact, require political affiliation of one party may not be the kind of a position consistent with that of a 'policymaker' or 'confidant.'<sup>56</sup> Thus, the categorical approach taken in *Elrod* is no longer determinative in patronage dismissal cases and is replaced with a more practical approach.<sup>57</sup>

Justice Powell dissented: "The flaw in the Court's opinion lies not only in its application of [the First Amendment] . . . but also in its promulgation of a new, and substantially expanded, standard for determining which governmental employees may be retained or dismissed on the basis of political affiliation."<sup>58</sup> Justice Powell called the majority standard "vague," "sweeping," and destined to "create vast uncertainty."<sup>59</sup> He feared that the standard would no longer provide appointed officials at any level any guidance in knowing when a position could be politically filled.<sup>60</sup> More specifically, Powell was concerned that the decision would (1) "denigrate the role of our national political parties"<sup>61</sup> and (2) "limit[] the ability of the voters . . . to structure their democratic government in the way that they please."<sup>62</sup>

The confusion and uncertainty which Justice Powell fears is not so much a result of the differing "tests" themselves, rather, it is from the seemingly conflicting rationale underlying each separate standard. For example, the *Branti* majority found that "[a government employee's First Amendment rights] may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency."<sup>63</sup> This rationale seems to be in direct conflict with the *Elrod* Court's finding that "the [effective and efficient government

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52. *Id.*

53. *Id.* (citing *Elrod*, 427 U.S. at 366).

54. *See id.* at 518.

55. *Id.*

56. *See id.*

57. *See id.*

58. *Id.* at 522 (Powell, J., dissenting).

59. *Id.* at 524.

60. *See id.*

61. *Id.* at 531.

62. *Id.* at 533.

63. *Id.* at 517 (citing *Elrod v. Burns*, 427 U.S. 347, 366 (1976)) (emphasis added).

justification] does not succeed because it is doubtful that the mere difference of political persuasion motivates poor performance . . . <sup>64</sup>[and] less drastic means [other than patronage dismissals] for insuring government effectiveness and employee efficiency are available to the State."<sup>65</sup> The uncertainties inherent in the *Branti* test left the lower courts to grapple with its application.<sup>66</sup> Some of these ambiguities were addressed and clarified in the Supreme Court's third case of its trilogy on the practice of political patronage dismissals of government employees.<sup>67</sup>

### C. The Rutan Court

In *Rutan*, the Supreme Court was faced with deciding whether its rulings in *Elrod* and *Branti* extend so far as to prevent promotion, transfer, recall, or hiring decisions based on an employee's political affiliation and [lack of] support.<sup>68</sup> The case involved an executive order issued by the then Governor of Illinois instituting a hiring freeze which prevented state officials from "hiring any employee, filling any vacancy, creating any new position, or taking any similar action."<sup>69</sup> The order required that any such move by a state official must carry with it the Governor's "express permission."<sup>70</sup> Several employees who had been denied various promotions or transfers filed suit, alleging that the Governor was using the "hiring freeze" as a means to operate a "political patronage system to limit state employment . . . to those who are supported by the Republican Party."<sup>71</sup>

In a sharply divided five-to-four decision, the Court held that "the First Amendment's proscription of patronage dismissals recognized in *Elrod* . . . and . . . *Branti*" does extend to encompass other adverse employment decisions involving public employment positions.<sup>72</sup> The *Rutan* decision strongly reaffirms the holdings in *Elrod* and *Branti*, finding them "equally applicable to the patronage practices at issue [in the present case]."<sup>73</sup> The *Rutan* Court again traced the government interests offered by the defense in *Branti* as justification for patronage practices and rejected all of them.<sup>74</sup> Notably, the Court again recognized the government interest "in securing effective employees,"<sup>75</sup> an

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64. *Elrod*, 427 U.S. at 365; see also Martin, *supra* note 2, at 21 (noting that "after *Branti*, . . . effectiveness and efficiency may be used in bolstering a government/defendant's position that a particular employee may be fired because the employee comes within the *Elrod/Branti* exception").

65. *Elrod*, 427 U.S. at 366.

66. The lower courts created their own standards and tests. See e.g., Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209 (1st Cir. 1989); Delong v. United States, 621 F.2d 618 (4th Cir. 1980).

67. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); see also, Bowman, *supra* note 33, at 344-345.

68. See *Rutan*, 497 U.S. at 65.

69. *Id.*

70. *Id.*

71. *Id.* at 66.

72. *Id.* at 68.

73. *Id.* at 74.

74. See *id.* at 74-75.

75. *Id.* at 74.



interest supported in *Branti*, but rejected in *Elrod*.<sup>76</sup> *Rutan* does not change or alter the test promulgated in *Branti* for determining the positions for which a certain political affiliation may be considered the sole requisite for employment. Rather, "it affirms the rules established in *Elrod* and *Branti* while expanding the universe of impermissible patronage practices."<sup>77</sup>

Justice Antonin Scalia wrote a dissenting opinion (joined by Justices Rehnquist, Kennedy, and O'Connor)<sup>78</sup> that powerfully illustrated the deep divergence among the members of the Court on the patronage issue. Justice Scalia echoed the cries of Justice Powell's dissent in *Branti*, arguing that the decision will undermine party discipline, a main source of strength for the two-party political system,<sup>79</sup> and that the decision will prevent candidates from depending on "patronage-based party loyalty for their . . . support, . . . [and thus] . . . greatly accelerate the trend [of growing interest-group politics]."<sup>80</sup> Not only did Justice Scalia contend that *Elrod* and *Branti* should not be extended, he explicitly urged the Court to overrule both of the decisions.<sup>81</sup> Recognizing that the Court should be reluctant when it considers a departure from precedent, he, nonetheless, supported such a departure in this situation. He wrote, "But when that precedent is not only wrong, not only recent, not only contradicted by a long prior tradition, but also has proved unworkable in practice, then all reluctance ought to disappear."<sup>82</sup>

Justice Scalia's dissent was based on two primary points. First, the "desirability of patronage is a policy question to be decided by the people's representatives."<sup>83</sup> He is satisfied that the legislature is capable of determining that the benefits of political patronage could outweigh its constraining effects.<sup>84</sup> Second, Justice Scalia emphasized the ambiguities inherent in the *Branti* decision and demonstrated how this uncertainty has led to a mass of exceptions and confusion by lower courts attempting to apply its standards.<sup>85</sup> To Justice

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76. See Martin, *supra* note 2, at 21.

77. Bryan A. Schneider, *Do Not Go Gentle Into That Good Night: The Unquiet Death of the Political Patronage*, 1992 WIS. L. REV. 511, 538.

78. Tracking which Justice supported which side of the debate will become more relevant in the *O'Hare* analysis. Justices Rehnquist, O'Connor, and Kennedy dissented in *Rutan*, but joined the majority in both the *O'Hare* and *Umbehr* decisions rendered this past summer. This discrepancy will be further explored in Part V. See *infra* notes 158-203 and accompanying text.

79. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 105-06 (1990) (Scalia, J., dissenting). See also *Elrod v. Burns*, 427 U.S. 347, 377-86 (1976) (Powell, J. dissenting) (discussing the arguments in favor of political patronage, including long tradition, significant contributions to the "democratization" of American politics, broadening the base of political participation, and directly serving the interests of a representative type government).

80. *Rutan*, 497 U.S. at 107 (Scalia, J., dissenting).

81. See *id.* at 110-11. Scalia grounds his plea for the overruling of *Elrod* and *Branti* in the uncertainties that exist in the two opinions. He stated that neither decision has been able to draw a workable distinction between desirable and undesirable patronage. He describes both of the holdings and the "tests" created therein and comments, "What that means is anybody's guess." *Id.* at 111.

82. *Id.* at 110-11.

83. *Id.* at 104.

84. *Id.* Justice Scalia states, "The whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives. . . ." *Id.*

85. See *id.* at 111-12 (Scalia, J., dissenting) (citing 18 different lower court cases that illustrate from their lack of uniformity the difficulties involved in deciding a patronage dismissal claim). Compare *Jones v.*

Scalia, further extending the *Elrod-Branti* holdings would only lead to more uncertainties and, thus, more opportunities for differing results.<sup>86</sup> He stressed, "[This] uncertainty undermines the purpose of both the nonpatronage rule and the exception."<sup>87</sup> Justice Scalia predicted that at some point in the future when the courts are "flooded with litigation under that most unmanageable of standards [of *Branti*] . . . [the Court] may be moved to reconsider [its] intrusion into [the] entire field."<sup>88</sup>

### III. PUBLIC CONTRACTS

After *Branti* and *Rutan*, courts used the ambiguities inherent in *Elrod* and *Branti* to carve out exceptions and, thus, limited its application.<sup>89</sup> Even after the *Rutan* extension, some lower courts remained reluctant to extend the *Elrod* rationale beyond its facts.<sup>90</sup> One of the tools used by the lower courts in this manner was to recognize that the Supreme Court decisions of *Elrod* and *Branti* made no mention of the rights of independent contractors, thus, they refused to extend those rulings to situations involving government contracts.<sup>91</sup> For example, the Seventh Circuit, in its first post-*Rutan* political patronage case, refused to extend the "scope of *Rutan*" to reach independent contractors.<sup>92</sup> The Seventh Circuit, relying on two of its pre-*Rutan* decisions, held that "political favoritism in the awarding of public contracts is not actionable [under the First Amendment]."<sup>93</sup> The *Downtown Auto* court also noted that all of the other circuits which had considered whether to extend *Elrod* and *Branti* to independent contractors had refused to do so.<sup>94</sup>

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Dodson, 727 F.2d 1329 (4th Cir. 1984) with *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984); see also *Ness v. Marshall*, 660 F.2d 517 (3rd Cir. 1989); *Bauer v. Bosley*, 802 F.2d 1058 (8th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987); *De Choudens v. Government Dev. Bank of P.R.*, 801 F.2d 5 (1st Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987); *Barnes v. Bosley*, 745 F.2d 501 (8th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); *Tomczak v. Chicago*, 765 F.2d 633 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Abraham v. Pekarski*, 537 F. Supp. 858 (E.D. Pa. 1982).

86. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 111 (1990) (Scalia, J., dissenting).

87. *Id.* at 112-13.

88. *Id.* at 115.

89. See *Bowman*, *supra* note 33, at 349.

90. See e.g., *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986). However, the dissent in the *Horn* case persuasively articulates support for courts to extend the *Elrod-Branti* reasoning to government contractors. See *id.* at 680 (Gibbons, J., dissenting).

91. See e.g., *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir. 1991) (relying on post-*Elrod*, and pre-*Rutan* decisions and holding that *Elrod* and *Branti* do not extend to independent contractors).

92. See *id.* at 709-10 (holding that although "*Rutan* did extend First Amendment protection, [it did so] only within the context of government employment.")

93. *Id.* at 710 (relying on *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983) and *Triad Assocs. v. Chicago Housing Auth.*, 892 F.2d 583 (7th Cir. 1989) (affirming *LaFalce* decision on similar facts)). The *LaFalce* decision, written by Judge Richard Posner, was based on the idea that, unlike a government employee, an independent contractor's income is obtained from many different sources. Essentially, to Posner, the question revolves around economics, and because the independent contractor does not depend economically on the government as much as government employees, their protected interest are more attenuated. See *LaFalce*, 712 F.2d at 294.

94. See *Downtown Auto*, 938 F.2d at 710 (citing *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982)); see also *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986); *Schenberg v. Bond*, 459 U.S. 878 (1982).

Despite the result, the *Downtown Auto* opinion was not overly convincing. In fact, the court admitted that the then recent Supreme Court ruling in *Rutan* "ha[d] altered some of the assumptions upon which the *LaFalce* and *Triad* decisions were based,"<sup>95</sup> and the "rationale behind [*Rutan*] seem[ed] to be at odds with the holding of *LaFalce* and *Triad*."<sup>96</sup> Nevertheless, the court refused to extend *Elrod* and *Branti*.<sup>97</sup>

In spite of the Seventh Circuit's use of pre-*Rutan* precedent, other circuit courts decided the issue of whether to extend *Elrod* and *Branti* differently.<sup>98</sup> For example, the Tenth Circuit heard a case where the owner of a wrecking service was no longer given referrals from the city of Catoosa's rotation list because of his affiliation and support for a certain mayoral candidate.<sup>99</sup> Relying on *Elrod*, the court of appeals held that the owner's First Amendment rights had been violated by the Catoosa city officials.<sup>100</sup> In another similar case, the Fifth Circuit held that the owner of a towing and wrecking service was denied his First Amendment protections when he was removed from the city of Marshall's rotation list because of some of his statements and his 'attitude' toward the Marshall Chief of Police.<sup>101</sup>

The circuit courts which did not extend the protections granted under *Elrod* and *Branti* to that of independent contractors clearly felt that the extension of such a right was not the duty of lower courts. Underlying most of the anti-extension opinions was the notion that the Supreme Court should be the one Court to make the rulings of *Elrod*, *Branti*, and *Rutan* extend so far as to encompass government independent contractors.<sup>102</sup>

Ironically, it was the Seventh Circuit which again invited the Supreme Court of the United States to decide whether to extend *Elrod* and *Branti* when it affirmed the lower court's decision in *O'Hare Truck Service, Inc. v. City of Northlake* which held that the city of Northlake, Illinois, *could* refuse to keep a towing company on a rotation list based on the independent contractor's political affiliation.<sup>103</sup> However, this time the Supreme Court did not pass on the

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95. *Downtown Auto*, 938 F.2d at 710.

96. *Id.* at 709.

97. *See id.* at 710.

98. The Fifth, Eighth, and Tenth Circuits disagree with the Seventh and Third Circuits. *See Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995); *Copsey v. Swearingen*, 36 F.3d 1336 (5th Cir. 1994); *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990); *Smith v. Cleburne County Hosp.*, 870 F.2d 1375 (8th Cir. 1989). *But see Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982).

99. *See Abercrombie*, 896 F.2d 1228.

100. *See id.* at 1233.

101. *See Blackburn*, 42 F.3d at 929.

102. *See LaFalce v. Houston*, 712 F.2d 292, 295 (7th Cir. 1983) (stating that "[s]ome day the Supreme Court may extend the principle of its public-employee cases to contractors. But there are enough differences in the strength of the competing interests in the two classes of cases to persuade us not to attempt to do so.") and *Triad Assocs. v. Chicago Housing Auth.*, 892 F.2d 583, 585 (7th Cir. 1989) (affirming *LaFalce*). The Supreme Court denied certiorari to a number of cases in which this issue could have been decided. *See e.g., Sweeney*, 669 F.2d 542 and *Triad Assoc.*, 892 F.2d 583.

103. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 47 F.3d 883 (7th Cir. 1995) (refusing to extend *Elrod*'s protection beyond government employees). The appellate decision in *O'Hare* asserted that it was not the appellate court's place to extend *Elrod* and *Branti*. Specifically, the court said that "it should be up to the

issue and granted certiorari to two political patronage cases involving independent contractors.<sup>104</sup> The Court's stated goal was to "resolve the conflict [within the circuit courts]," and in so doing, the Supreme Court extended the rulings in its trilogy of employment patronage cases to now include government independent contractors.<sup>105</sup>

#### IV. O'HARE TRUCK SERVICE, INC. V. CITY OF NORTHLAKE

##### A. *Statement of Facts*

John Gratziana owns and operates O'Hare Truck Service; his company provides towing services in two counties in Illinois.<sup>106</sup> The City of Northlake and its Police Department coordinate towing services in the city.<sup>107</sup> Northlake maintains a rotation list of available towing companies, and when the Police have a towing need, they call upon the company next on the list to provide the service.<sup>108</sup> For years, the city would delete a towing company from the rotation list only for cause.<sup>109</sup> O'Hare had been on the list and in the rotation for over thirty years, performing towing services when called upon.<sup>110</sup> In 1989, Reid Paxson was elected the new Mayor of Northlake.<sup>111</sup> Four years later, during his campaign for reelection, Paxson's campaign committee asked Gratziana for a contribution.<sup>112</sup> Not only did Gratziana refuse to contribute, he supported the campaign of Paxson's opponent by displaying the opponent's posters at his place of business.<sup>113</sup> Shortly thereafter, O'Hare Truck Service was removed from the rotation list.<sup>114</sup>

Gratziana and O'Hare (hereinafter "O'Hare") filed suit under 42 U.S.C. § 1983 against the city of Northlake, alleging an infringement of First Amend-

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Supreme Court to extend *Elrod* [to encompass independent contractors]." *Id.* at 885.

104. See *O'Hare*, 47 F.3d 883, cert. granted, 116 S. Ct. 593 (1995). The Supreme Court consolidated another court of appeals decision concerning essentially the same issue. See *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995), cert. granted, 116 S. Ct. 593 (1995).

105. See *O'Hare*, 116 S. Ct. at 2356. The Court granted certiorari on both *Umbehr* and *O'Hare* to essentially kill two birds with one stone. The Supreme Court extended the rule of *Elrod* and *Branti* to apply to independent contractors. Both plaintiffs grounded their cause of action in the First Amendment. However, where *O'Hare* concerns itself with only the prohibition of patronage dismissals based on political affiliation, the *Umbehr* case addresses the issue of whether patronage dismissals based on actual adverse political speech enjoys the same treatment. The Supreme Court developed two separate tests for each situation, but nonetheless extended the rights of *Elrod* to public contracts. Justice Scalia argued that the type of ambiguities involved in distinguishing when to use one test and not the other contributes to the 'uncertainty' of both holdings. See *Board of County Comm'rs v. Umbehr*, 116 S.Ct. 2361, 2371 (1996) (Scalia, J., dissenting).

106. *O'Hare*, 116 S. Ct. at 2355-56.

107. See *id.* at 2356.

108. See *id.*

109. See *id.*

110. See *id.*

111. See *id.*

112. See *id.*

113. See *id.*

114. See *id.*

ment rights and that their removal from the rotation list was solely in retaliation for Gratziana's lack of campaign support to Paxson and his political party.<sup>115</sup>

### B. The Decision

The Supreme Court in a seven-to-two decision, held that the *Elrod* and *Branti* rulings do extend to reach independent contractors.<sup>116</sup> Relying on the rationale and test created for government employees in those two cases, the Court held that O'Hare, an independent contractor, should enjoy the same First Amendment protections as government employees.<sup>117</sup>

The Court began by tracing the history of political patronage cases decided by the Supreme Court.<sup>118</sup> Namely, it examined the tests as promulgated by the *Elrod* and *Branti* Courts.<sup>119</sup> The Court found that *O'Hare*, like *Elrod* and *Branti*, involved "[an] instance[] where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of an inquiry more detailed than asking whether the requirement was appropriate for the employment in question."<sup>120</sup> Thus, in cases which are limited to political affiliation (as was *O'Hare*, apparently), the inquiry is simply "whether the affiliation requirement [enforced by the government official] is a *reasonable* one."<sup>121</sup> The Court stated that the nature of any "reasonableness" test will yield case by case adjudication by the courts.<sup>122</sup> The *O'Hare* Court recognized that the "inevitable" case by case process will "allow the courts to consider the necessity [in the government's view] of [using its] discretion . . . in the administration and awarding of contracts over the whole range of public works and the delivery of governmental services."<sup>123</sup> In other words, to the Court, the reasonableness test will give the lower courts broader discretion to make a ruling that a particular government interest is compelling enough to require employees and independent contractors alike to be of a certain political affiliation.

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115. See *id.*

116. See *id.* The history leading up to the *O'Hare* decision influenced some analysts to believe the dissension among the Justices on this issue would be more sharply defined. In fact, some predicted that the Supreme Court would decline to make the extension. See Moyer, *supra* note 2, at 418 (citing Rosalie Berger Levinson, Survey, *State and Federal Constitutional Law Developments Affecting Indiana Law*, 25 IND. L. REV. 1129, 1143-45 (1992)) (noting that the absence of Justices Brennan and Marshall may put an end to any further extension after *Rutan*); see also *infra* notes 158-91 and accompanying text.

117. See *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353, 2358 (1997) (stating, "We cannot accept . . . that those who perform the government's work outside the formal employment relationship are subject to what we conclude is the direct and specific abridgment of First Amendment rights . . .").

118. See *id.* at 2356-57.

119. See *id.*

120. *Id.* at 2358.

121. *Id.* (emphasis added). The Court distinguished *O'Hare* from the *Umbehr* case. *Umbehr* involved an adverse action taken by a government official on account of an independent contractor's right to free speech. See *id.* The *O'Hare* Court said that situations involving actual speech "call for a different, though related, [test]." *Id.* at 2357. See also *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2347-49 (1996); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). Justice Scalia, in his dissent in *Umbehr*, attacks this distinction as confusing. See *Umbehr*, 116 S. Ct. at 2371 (Scalia, J., dissenting). See also *infra* notes 191-203 and accompanying text.

122. See *O'Hare*, 116 S. Ct. at 2358.

123. *Id.*

The City of Northlake insisted that to apply the *Elrod* and *Branti* rulings to independent contractors would be an error.<sup>124</sup> The City asserted that independent contractors "must yield to the government's asserted countervailing interest in sustaining a patronage system."<sup>125</sup> The Court, however, rejected this argument and held that the principles of *Elrod* and *Branti* are applicable, and that the complaint filed by O'Hare stated an "actionable First Amendment claim."<sup>126</sup> In establishing that the O'Hare complaint was based sufficiently under First Amendment jurisprudence, the Court stated, "Our cases make clear that the government may not coerce support [by terminating those employees or independent contractors who do not demonstrate the 'necessary' political alliance], unless it has some justification beyond dislike of the individual's political affiliation."<sup>127</sup>

After establishing that O'Hare had stated a cause of action and after determining the proper method of analysis, the Court was prepared to delve into the heart of the parties' arguments.<sup>128</sup> First, the City of Northlake again urged the Court not to apply *Elrod* and *Branti* on the basis that independent contractors and employees are inherently different.<sup>129</sup> Second, the City argued that a decision in favor of the independent contractor would lead to a lawsuit overload which would interfere with government administration.<sup>130</sup> Last, the City argued that because its relationship with O'Hare was an "at-will" contract, no justification was needed for their actions.<sup>131</sup> The Court, however, discounted each of these arguments, and held that government independent contractors should enjoy the same constitutional protections of government employees.<sup>132</sup>

### 1. Independent Contractors v. Employees

The City argued that a claim made by an independent contractor should be handled differently than one made by an employee.<sup>133</sup> The Court recognized that the distinction between employees and independent contractors has "deep roots in our legal tradition, . . . and often serves as a line of demarcation for differential treatment of individuals who otherwise may be situated in similar positions . . . ."<sup>134</sup> Nevertheless, the Court clearly felt that to recognize the

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124. *See id.*

125. *Id.*

126. *Id.*

127. *Id.* at 2359 (citing *Branti v. Finkel*, 445 U.S. 507, 516-17 (1980)). Underlying the Court's holding in this sense was the apparent vagrant attempt by the Paxson administration to politically "coerce" O'Hare and, perhaps, many others in the same position. The Court went so far as to compare the actions of Paxson and his administration to that of criminal bribery. *See id.* at 2358-59. The Court also found that the "coercion" present in the *O'Hare* case could not be distinguished "from the coercion exercised in our other unconstitutional conditions cases." *Id.* at 2358 (citing *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) and *Perry v. Sinderman*, 408 U.S. 593 (1972)).

128. *See id.* at 2358.

129. *See id.*

130. *See id.* at 2360.

131. *See id.* at 2361.

132. *See id.*

133. *See id.* at 2359.

134. *Id.*

distinction in this particular instance would be condoning an overreaching use of the two classifications.<sup>135</sup> The Court said the distinction would lead to government manipulation:

A rigid rule "giv[ing] the government *carte blanche* to terminate independent contractors for exercising First Amendment rights . . . would leave [those] rights unduly dependent on whether state law labels a government service provider's contract as a contract of employment or a contract for services, a distinction which is at best a very poor proxy for the interests at stake."<sup>136</sup>

The City continued to attempt to support the need for distinction by arguing that a "difference of constitutional magnitude" exists in the level of dependence on government sources for their income between contractors and employees.<sup>137</sup> Essentially, the argument was that because independent contractors are less economically dependent on their contracts with the government than are employees with their jobs, it is not necessary to extend the protections given to employees by *Elrod* and *Branti* to encompass independent contractors.<sup>138</sup>

The Court refused this line of reasoning on three bases: (1) analogous precedent, (2) courts lack of resources (efficiency), and (3) fundamental rights of individuals.<sup>139</sup> It found support for its decision not to distinguish between contractors and employees (when dealing with a constitutional claim) in Supreme Court precedent: "Our conclusion is in accord with *Lefkowitz v. Turley*, where independent contractor status did not suffice to allow government to insist upon a waiver of the Fifth Amendment's privilege against self-incrimination."<sup>140</sup> Next, the Court found that to measure the various levels of employee and contractor dependence would be beyond the scope of a court's resources.<sup>141</sup> To do so would force courts to "inquire into the extent to which the government dominates various job markets as employer or as contractor."<sup>142</sup> Finally, in addition to precedent and court efficiency, there exists "a more fundamental concern."<sup>143</sup> One of the underlying reasons justifying the Court's non-distinction policy is simply that regardless of legal classification, people should be "entitled to protest wrongful government interference with their rights of speech and association."<sup>144</sup>

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135. See *id.* The Court was not comfortable with having a purely constitutional issue (First Amendment freedom of speech) "turn on" a distinction created solely by the common law of tort and agency. See *id.*

136. *Id.* (citing *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2349 (1996)). The Court further illustrated this problem by stating that to recognize this distinction would allow the government to "avoid constitutional liability simply by attaching different labels to particular jobs . . ." *Id.* at 2359.

137. *Id.* (citing *LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983)).

138. See *LaFalce*, 712 F.2d at 294.

139. See *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2343, 2359-60 (1996).

140. *Id.* at 2359 (citation omitted). The *O'Hare* Court "fail[ed] to see a difference of constitutional magnitude between the threat of job loss to an employee . . . and a threat of loss of contracts to a contractor." *Id.* (citing *Lefkowitz v. Turley*, 415 U.S. 70 (1973)).

141. See *id.* at 2360.

142. *Id.*

143. *Id.*

144. *Id.*

The Court acknowledged that the independent contractor and employee distinction is an integral part of our legal tradition that sometimes calls for different treatment of otherwise similarly situated individuals.<sup>145</sup> However, this distinction is not so integrated within our system that it can—on its own—be used to prevent an individual from seeking a fundamental constitutional protection, such as freedom of speech and association.<sup>146</sup>

## 2. Numerous Lawsuits

The City's next, main argument was that a decision which extends the *Elrod* rights to independent contractors would "lead to numerous lawsuits, which will interfere with the sound administration of government contracting."<sup>147</sup> The Court quickly disposed of this argument by measuring the effects of six years under the *Rutan* decision, which extended the anti-patronage rights from firing to hiring.<sup>148</sup> The Court said that since *Rutan*, "only 18 suits alleging First Amendment violations in employment decisions have been filed against . . . state officials [in Illinois]."<sup>149</sup> Indeed, the Court could see no difference in the current burden on the courts in terms of employee-based patronage lawsuits and the future burden of independent contractor-based lawsuits after the *O'Hare* extension.<sup>150</sup> The Court noted that many choices and policy considerations should be open to government officials when they decide whether to contract with one firm or another, but political affiliation is not, and cannot be, one of these considerations.<sup>151</sup>

## 3. The "At-Will" Contract

Underlying the City's position was the notion that because the contract with O'Hare was "at-will," no justification was needed for the removal of O'Hare from the rotation list. The City posited that government officials "are entitled, in the exercise of their political authority, to sever relations with an outside contractor for any reason including punishment for political opposition."<sup>152</sup> However, relying on the rationale of *Elrod* and *Branti* that an "absolute right to enforce a patronage scheme . . . has not been shown to be a necessary part of a legitimate political system," the Court again rejected this line of reasoning.<sup>153</sup>

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145. See *id.* at 2359.

146. See *id.*

147. *Id.* at 2360.

148. See *id.*

149. *Id.*

150. See *id.* The Court stated, "[W]e doubt that our decision today will lead to the imposition of a more extensive burden." *Id.*

151. See *id.* (stating some of the considerations include stability, rewarding good performance, reliability, and ensuring an uninterrupted supply of goods or services).

152. *Id.* at 2361.

153. *Id.*



After establishing the analytical framework necessary in examining a patronage dismissal case revolving around political affiliation, the Court addressed the facts and arguments as presented by both sides.<sup>154</sup> The Court declined to distinguish between government employees and independent contractors when it comes to the fundamental protections of the Constitution.<sup>155</sup> It discounted as irrelevant and flawed the argument that a decision not making such a distinction would lead to an uncontrollable amount of litigation concerning government contracts.<sup>156</sup> As an overarching rationale, the Court held that, because enforcing political patronage schemes is not a "necessary part" of our political system, it should not be condoned by the courts.<sup>157</sup> Thus, the Court extended the rights created for government employees under *Elrod* and *Branti* to reach that of independent contractors who contract to give goods or services to the government.

## V. ANALYSIS

The decision of the Court to extend the *Elrod* and *Branti* rulings to government contracts makes practical sense. As mentioned, the size and role of our government is an ongoing issue of debate. Indeed, both national parties in the recent past, have relied on the position that their party is the one which can make the government more cost effective and efficient. Even Mr. Clinton has promised to phase out or "cut" thousands of federal employee positions during his tenure in an effort to accomplish a more efficient use of government resources.<sup>158</sup> These "phased-out" positions may now be contracted out to the private sector, namely to independent contractors.<sup>159</sup> The logic in the holding lies

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154. See *id.* at 2358-61.

155. See *id.* at 2359.

156. See *id.* at 2360.

157. *Id.* at 2361.

158. See Richard Wolf, *Making Government Someone Else's Business*, USA TODAY, June 22, 1995, at A6 (noting that "[f]rom the post office to weather services to even the space shuttle, a new push is on to give private industry a crack at running services and projects long handled by the federal government").

159. See *id.* Proposals from both political parties to privatize the government have been made in an effort to make government operations "cheaper, smarter and quicker to react to changing needs . . ." *Id.* The following is a list of some of these proposals from both parties and their estimated savings:

- (1) Air Traffic Control—plans to privatize FAA's traffic police, *savings*—\$14.7 billion over seven years.
- (2) Amtrak—plans to phase out subsidies to rail passenger service, *savings*—\$2 billion over seven years.
- (3) General Services Administration—plan to sell three small functions of government's landlord to private firms, *savings*—\$652 million over seven years.
- (4) Power Marketing Administration—plan would sell electric-generating facilities at federal dams, *savings*—\$1.6 billion to \$4.2 billion gross.
- (5) Tennessee Valley Authority—plan would cut aid to nation's largest electric utility, *savings*—\$864 million over seven years.
- (6) NASA—plans to privatize space shuttle and some communications systems, *savings*—\$179 million to \$4.2 billion over five to seven years.

See *id.* These are just a few proposals made by either the House, Senate, or the Clinton administration for the budget. Privatization is a curiously odd political issue these days: consider that Ronald Reagan pushed to raise \$9 billion in three years using privatization and the selling of government assets, and Bill Clinton in 1995 wanted to sell \$8 billion in surplus assets. The parties seem to agree on one thing—anything the government

in the practical effects it will have on government contracts. Analyzed in terms of the privatization trend, the holding may not prove to be much of an extension after all; some of the "employee" positions protected by *Elrod*, *Branti*, and *Rutan* will be the same or similar "contractor" positions now protected by *O'Hare*.<sup>160</sup> Therefore, to the extent there is overlap in the positions which are protected by the First Amendment, the effects of *O'Hare* will be minimal and entirely necessary.

The problems inherent in the *O'Hare* decision, however, lie not in its final destination, but in the long, confusing route it takes to get there. Though the history of political patronage in the Supreme Court has been relatively short (20 years), the law created in that time has been plentiful: the standard test was created in *Elrod*, modified in *Branti*, misapplied in lower federal courts around the country, extended in *Rutan*, again misapplied in lower federal courts, and again extended and unsuccessfully explained in *O'Hare* and *Umbehr*. *O'Hare* and *Umbehr* are especially peculiar decisions. Surprisingly, three of the four dissenters in *Rutan* joined the majority in *O'Hare*, a decision which is positive in result, yet unsettling in application. The uncertainties of these three Justices seemingly leaked their way into the majority's less than sound explanation and application of the *Elrod-Branti* test.

#### A. Three Blind Mice?

Exactly what goes on inside a single justice's mind is virtually impossible to determine. What makes a Supreme Court justice switch positions on an issue during their tenure will always spur analysis and commentary from many scholars and experts. Consequently, the *O'Hare* decision will be placed at the top of Supreme Court scholar's "to do" list. Three Justices seem to have changed their position on patronage cases between *Rutan* (1990) and *O'Hare* (1996). Justices Rehnquist, O'Connor, and Kennedy—all who sided with Justice Scalia's strong dissent in *Rutan*—now joined together with the majority in *O'Hare* to the extent the very law they apparently opposed in *Rutan*.<sup>161</sup> There are potentially hundreds of reasons why these three Justices "flip-flopped" on this particular issue;<sup>162</sup> yet, the most compelling seem to be (1) the persuasiveness of the

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can do, the private sector can do just as easily. *See id.*

160. *See Moyer, supra* note 2, at 418.

161. In fact, many commentators thought it reasonable to believe that, when the Supreme Court granted certiorari to both *O'Hare* and *Umbehr*, the *Elrod/Branti/Rutan* rulings would be overturned. *See e.g., Moyer, supra* note 2, at 418; *see also* James G. Sotos, *A Party Divided Faces Its Own Patronage Limits*, CHI. DAILY L. BULL., Nov. 7, 1996, at 5. Indeed, Justice Scalia himself was surprised at the result in *O'Hare*. *See Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2362 (Scalia, J., dissenting) (stating that with the addition of Justice Thomas to the Court, "one would think it inconceivable that *Elrod* and *Branti* would be extended far beyond *Rutan* to the massive field of all government contracting").

162. For example, any justice may have made a "behind closed doors deal" with another justice; or Justice Kennedy may have simply wanted to keep his "where I go, so goes the Court" statistic, documented in a recent article about the Supreme Court. *See* David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES MAG., Oct. 6, 1996, at 65 (finding that Kennedy's vote is "most oftentimes" the deciding vote of the Court). The point is simple: regardless of efforts to decipher the intricacies of a Supreme Court justice's mind, scholars and experts may never fully understand why they seemingly switch positions on an issue from time to time. Perhaps

facts of *O'Hare* and (2) the Court's implicit change from applying "strict scrutiny" review in the context of patronage dismissals (*Elrod*) to a more flexible "reasonableness" test (*O'Hare* and *Umbehr*).

### 1. Determinative Facts

The facts of each case make the law. In this sense, *O'Hare* was the perfect vehicle for the extension of *Elrod* and *Branti* into government contracts. The *O'Hare* Court found intolerable the actions of Mayor Paxson and his administration. In fact, Justice Kennedy compared Paxson's actions to "violat[ing] criminal bribery statutes."<sup>163</sup> The disputed action in *Rutan*, however, involved a Governor's executive order for a hiring freeze—an action never compared to or discussed as that of a criminal action. *O'Hare* was different. For instance, O'Hare was on the City of Northlake's rotation list for over 30 years, had no record of poor performance, and was a "small independent contractor[] . . . unable [financially] to maintain close ties to all the organized political forces in [his] communit[y]."<sup>164</sup> The extent of Mayor Paxson's actions, coupled with the underlying notion in all the Supreme Court's political patronage cases that "the loss of one's job is a powerful price to pay for one's politics,"<sup>165</sup> may have pressed the outer moral limits of the justices. Further, the actions of the Paxson administration are the very type of actions that have plagued politics with the stigma of uncleanness, and have deemed politicians as untrustworthy.<sup>166</sup> The facts, as presented in *O'Hare*, undoubtedly, would appeal to any judge's sense of equity and fairness.

### 2. "Strict-Scrutiny" or "Reasonableness"

A closer look at all of the patronage decisions decided by the Supreme Court uncovers that, perhaps, no substantive "switch" was made by the three dissenters in *Rutan*. Indeed, the main issue of dissent in every patronage decision, dating back to *Elrod* in 1976, has been what level of scrutiny the Court should apply in political patronage cases. For instance, the plurality in *Elrod* held that "a significant impairment of First Amendment rights must survive exacting scrutiny."<sup>167</sup> However, the dissent urged that "[t]he question . . .

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the best offer of explanation is this—they're human. But, *O'Hare* and *Umbehr* offer more concrete potential explanations, rather than pure guess work. See *infra* notes 158-91 and accompanying text.

163. *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353, 2358-59 (1996). Justice Kennedy went further: "That Paxson may have steered clear of criminal liability, . . . does little to diminish the attempted coercion of [O'Hare's] political association, enforced by a tangible punishment." *Id.*

164. *Id.* at 2360. The fact that *O'Hare* was a "smaller" contractor "unable" to curry favor with different political parties clearly helped persuade the Court in its favor: "That some citizens find a way to mitigate governmental overreaching, . . . does not excuse wrongs done to those who [do not]." *Id.*

165. *Board of County Comm'r's v. Umbehr*, 116 S. Ct. 2361, 2366 (1996) (Scalia, J., dissenting).

166. The justices of the Supreme Court are surely aware of the American public's general disgust with "politics as usual." Certainly, patronage dismissals like the Paxson dismissals epitomize the very "good ol' boy" mentality despised by the people. How influential this was in their decision in *O'Hare* is impossible to measure, but nonetheless deserves some attention.

167. *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (citing *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976)). The

is to be determined . . . by whether patronage hiring practices sufficiently advance *important* state interests to justify the consequent burdening of First Amendment interests."<sup>168</sup>

This dissension among the justices was more explicitly documented in the *Rutan* decision. The *Rutan* majority plainly stated that "[u]nless these patronage practices are narrowly tailored to further *vital government interests*, we must conclude that they impermissibly encroach on First Amendment freedoms."<sup>169</sup> Justice Scalia, writing for Justices Rehnquist, O'Connor, and Kennedy, cited this passage and responded, "[t]hat strict-scrutiny standard finds no support in our cases."<sup>170</sup> The dissenters urged the application of a lower level of scrutiny, stating that when the government is dealing with its own employees, "its regulations are valid if they bear a 'rational connection' to the governmental end sought to be served."<sup>171</sup> The *Rutan* dissenters argued that the criterion for violation of the First Amendment in patronage cases should be the test created in *Pickering*.<sup>172</sup> Relying on precedent, the dissenters argued that, because "government offices could not function if every employment decision became a constitutional matter,"<sup>173</sup> the Court has not in the past, "subjected such decisions to strict scrutiny, but have accorded 'a wide degree of deference to the employer's judgment.'"<sup>174</sup> Thus, the dissenters concluded that even when the adverse government action was conducted on the basis of political affiliation, the same *Pickering* analysis should apply, "not the strict scrutiny test applied to restrictions imposed on the public at large."<sup>175</sup> The debate over the appropriate level of scrutiny that should be applied in patronage cases was clearly the reason for such a strong dissent in *Rutan*.

To Justice Scalia, *O'Hare* was no different. However, to Justices Rehnquist, O'Connor, and Kennedy, the scrutiny problem in *Rutan* has been solved because of the decisions of *O'Hare* and *Umbehr*.<sup>176</sup> Because the Court is set on distinguishing between two types of political patronage cases, it is

*Elrod* Plurality followed up: "The interest advanced must be paramount, one of *vital* importance, and the burden is on the government . . ." *Id.* (emphasis added).

168. *Id.* at 381 (Powell, J., Burger, C.J., and Rehnquist, J., dissenting). The dissent in *Elrod* contends that the plurality "underestimates the strength of the government interest" and "exaggerates the perceived burden on [the First Amendment.]" *Id.* at 382. This, however, was just the tip of the iceberg in arguing the appropriate level of scrutiny. Compare *Branti v. Finkel*, 445 U.S. 507, 516 (1980) (majority modifying the *Elrod* test, but upholding the "vital government interest" standard) and *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990) (same as *Elrod* and *Branti*) with *Branti*, 445 U.S. at 527 (dissent stating that no violation should exist if the patronage practice furthers "sufficiently important [government] interests . . .") (Powell, J., and Rehnquist, J., dissenting) and *Rutan*, 497 U.S. at 98 (dissent urging the use of a "lower level of scrutiny") (Scalia, J., Rehnquist, C.J., O'Connor, J., and Kennedy, J., dissenting).

169. *Rutan*, 497 U.S. at 74-75 (citing *Elrod*, 427 U.S. at 362-63 and *Branti*, 445 U.S. at 515-16) (emphasis added).

170. *Id.* at 98.

171. *Id.* (citing *Kelley v. Johnson*, 425 U.S. 238, 247 (1976)).

172. *Id.* at 99. As mentioned, the *Pickering* "balancing" test depends on the balance "between the interests of the [employee], as a citizen, . . . and the interest of the State, as an employer. . . ." *Id.* at 99.

173. *Id.* at 99 (citing *Connick v. Myers*, 461 U.S. 138, 143. (1983)).

174. *Id.* at 100.

175. *Id.*

176. It is interesting to note that two of the four dissenters in *Rutan* actually wrote the opinions of *Umbehr* (Justice O'Connor) and *O'Hare* (Justice Kennedy).

necessary, for this part of the analysis, to examine both the *Umbehr* and *O'Hare* decisions together. Read together, the cases may take the responsibility of applying strict scrutiny out of the hands of lower federal courts.<sup>177</sup> From the discussion in *O'Hare*, it appears that the Supreme Court has applied strict scrutiny to patronage practices in *Elrod* and *Branti* and "determined that patronage is constitutionally permissible only where political affiliation is an appropriate qualification [for the position]."<sup>178</sup> Thus, the only job left for the lower courts is to categorize the case as one grounded in speech or in political affiliation, and apply the necessary test.<sup>179</sup> For cases involving freedom of speech of public workers, the courts should apply the *Pickering* "balancing" test;<sup>180</sup> but, for cases involving only freedom of belief, they will apply the test promulgated in *Elrod-Branti* and *O'Hare*.

Justice O'Connor wrote the *Umbehr* opinion which extended First Amendment protections to public workers who comment about matters of public concern. In determining the proper method of analysis for such a case, Justice O'Connor relied on an argument substantially similar to the one set out by Justice Scalia in the *Rutan* dissent:

[I]f the [government] had exercised sovereign power against [the plaintiff contractor] as a citizen in response to his political speech, it would be required to demonstrate that its action was narrowly tailored to serve a compelling governmental interest. But . . . in government employment cases, . . . its interest in being free from intensive judicial supervision of its daily management functions, [is] potentially implicated. Deference is therefore due to the government's reasonable assessments of its interests as contractor.

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We therefore see no reason to believe that proper application of the *Pickering* balancing test cannot accommodate the differences between employees and independent contractors.<sup>181</sup>

The *Umbehr* majority envisioned "a fact-sensitive and deferential weighing of the government's legitimate interests."<sup>182</sup> A bright line rule, the Court said, would "give the government *carte blanche* to terminate independent contractors for exercising First Amendment rights."<sup>183</sup> So, the government could "prevail if it [could] persuade [the court] that the [government's] legitimate interests as a contractor, deferentially viewed, outweigh the free speech interests at

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177. See *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996). The Court in *McCloud* states that strict scrutiny is no longer the responsibility of lower courts: "[After *O'Hare*,] the lower federal courts need only apply [the] *Branti* test; they do not have to apply strict scrutiny in each individual case." *Id.* at 1543.

178. *McCloud*, 97 F.3d at 1543. This is further evidenced in a passage from *O'Hare*: "We need not inquire, however, whether patronage promotes the party system or instead serves to entrench parties in power, . . . for *Elrod* and *Branti* establish that patronage does not justify the coercion of a person's political beliefs and associations." *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353, 2357 (1996).

179. See *McCloud*, 97 F.3d at 1543.

180. See *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2349 (1996).

181. *Id.*

182. *Id.* at 2348.

183. *Id.* at 2349.

stake.”<sup>184</sup> Thus, the Court announces that when it is dealing with the termination of a government contract, which was motivated by the government worker's speech on a matter of public concern, the *Pickering* balancing test will be implemented. This “legitimate” interest standard is the difference between the *Pickering* test and *Elrod's* and *Branti's* holdings that the “interest advanced must be *paramount*, one of *vital* [governmental] importance.”<sup>185</sup> Justice O'Connor's opinion falls directly in line with the *Rutan* dissent she supported; it is legally sound and makes a great deal of sense.<sup>186</sup> However, the one major distinction in the cases is that *Rutan* dealt with the Court's other category of patronage cases—affiliation. We turn to *O'Hare* for guidance.

Justice Kennedy wrote the *O'Hare* opinion which addressed the proper level of review that should be applied to cases involving only political affiliation terminations (or other adverse employment/contractor decisions). Justice Kennedy makes the distinction between the two types of instances involving patronage:

[W]here a government employer [or contractor] takes adverse action on account of an employee or service provider's right of free speech . . . we apply the balancing test from *Pickering* . . . [However,] *Elrod* and *Branti* involved instances where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of an inquiry more detailed than asking whether the requirement was appropriate for the employment in question.<sup>187</sup>

Justice Kennedy's opinion then explains why strictly political affiliation cases have required the more rigid standards of *Elrod* and *Branti*:

There is an advantage in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by the government. It is true, on the other hand . . . that the inquiry is whether the affiliation requirement is a reasonable one, so it is inevitable that some case-by-case adjudication will be required *even where political affiliation is the test the government has imposed*.<sup>188</sup>

This language suggests that, though bound to apply the *Elrod* and *Branti* standards to political affiliation cases, the “reasonableness” of the affiliation requirement enforced by the government should be the mode of analysis. Read this way, the *O'Hare* opinion seems to be a discrete modification of the test used in “affiliation type” cases.<sup>189</sup> Justice Kennedy states that the “reasonable-

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184. *Id.* at 2352.

185. *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (emphasis added).

186. The decisions of the *Umbehr* and *O'Hare* Courts *not* to distinguish between the rights of independent contractors and employees, as mentioned, are entirely practical. Also positive is the decision of the *Umbehr* Court to *make* a distinction between the “citizen plaintiff” and the “government worker plaintiff.” Thus, deference must be given to the government's reasonable employment/contracting decisions, yet a restriction, such as the balancing test, is needed to prevent giving the government “carte blanche” to terminate its relationships with its workers.

187. *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353, 2357-58 (1996).

188. *Id.* (emphasis added).

189. If this is true, then *Umbehr* and *O'Hare* provide the *Rutan* dissenters with a moral victory: the Court

ness analysis" will also allow the Court more flexibility when dealing with cases "where specific instances of the [worker's] speech or expression, . . . are intermixed with a political affiliation requirement."<sup>190</sup> In those "intermixed" cases, the Court says, "the balancing *Pickering* mandates will be inevitable."<sup>191</sup>

### B. "Affiliation" or "Free Speech"

The problem with these two opinions—especially, the *O'Hare* decision—is that read together, they are extremely confusing. The Court's seemingly immovable contention that patronage cases must be separated into two categories is the source from which most of the confusion arises. Justice Scalia agrees:

[Distinguishing between the two types of patronage practices] leaves it entirely to the district court to clean up, without any guidance or assistance from us, the mess that we have made—to figure out whether [a particular instance of patronage falls under] the Political Affiliation Clause of the Constitution [or whether it falls] within the Right of Free Speech Clause.<sup>192</sup>

Justice Scalia's sarcastic attack on the Court's differing standards is persuasive. The separation requires the lower courts (who, by the way, have been generally confused about patronage cases since 1976), to determine whether a particular government worker's claim against a state action is grounded on "free speech" or "political affiliation." The facts of *O'Hare* illustrate the difficulty involved in making this kind of determination.

Recall that Mayor Paxson approached O'Hare for campaign support. O'Hare refused and supported Paxson's opponent by displaying the opponent's campaign posters at O'Hare's place of business.<sup>193</sup> The district court's responsibility is to determine whether O'Hare's termination claim was based on free speech (subjecting it to the balancing test), or grounded on political affiliation (subjecting it to the more rigid *Elrod/O'Hare* test). The district court in *O'Hare* originally found it to be "simply an affiliation case," a finding with which the Supreme Court agreed.<sup>194</sup> But on what basis? How or where does the lower court's determination begin? Is not the displaying of the campaign posters at his place of business *speech*? Is this different than if Gratziana responded, "No, I will not support Paxson, but I will support his opponent because my ideological beliefs are more in line with his opponent's!"<sup>195</sup> How can a court find that a

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will now use a more "fact-sensitive" test in both instances of patronage. However, the Court ultimately remanded the *O'Hare* case back down to the lower courts stating that the lower courts were to "decide whether the case is governed by the *Elrod-Branti* rule or by the *Pickering* rule," a decision which will inevitably lead to more confusion. See *id.* at 2361.

190. *Id.* at 2358.

191. *Id.*

192. Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2372 (1996) (Scalia, J., dissenting).

193. See *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353, 2356 (1996).

194. See *id.* at 2358.

195. See *Umbehr*, 116 S. Ct. at 2372 (Scalia, J., dissenting) (discussing how to tell the difference between affiliation cases and speech cases).

termination on the basis of such a statement is a violation of freedom of *speech*, but not freedom of *belief*, and vice versa? By the Court's own explanation, it should be apparent that these type of situations fall under the "intermixed" cases, in which the Court says the *Pickering* balancing test will be "inevitable."<sup>196</sup> But, the Court did not apply the "inevitable" balancing test; it affirmed that *O'Hare* was "simply an affiliation" case.<sup>197</sup>

This mass of uncertainty and confusion is a mistake. The *O'Hare* case presented itself as an opportunity for the Court to clean up the already confusing field of political patronage. *O'Hare* offered to the Court a chance to start over with a clean slate—an opportunity for the Court to uphold the rationale behind protecting government workers' free speech and beliefs by combining the *Pickering* line of cases with the *Elrod* line of cases. The *Elrod-Branti* test, applied where affiliation alone is concerned, is a more stringent test because "[p]atronage . . . to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is 'at war with the deeper traditions of democracy embodied in the First Amendment.'"<sup>198</sup> Essentially, the *formation* of one's beliefs should be more strictly protected than one's freedom to *express* those same beliefs. But the Court's insistence to separate the "affiliation" cases from the "speech" cases cannot be soundly justified. This author fails to see how the *Pickering* balancing test alone would not succeed in protecting both of these important constitutional concerns.<sup>199</sup>

As mentioned, the facts of each case make the law. Take again, for example, the *O'Hare* case. Will the result in the *O'Hare* case be different if, on remand, the district court determines that the *Pickering* test, not the *Elrod-Branti* test, will apply? The answer is surely "no," for, the interests protected by both tests are virtually the same. The advantage, however, of the more flexible *Pickering* test is that, while its purpose is to protect fundamental First Amendment rights, it also allows the courts to consider the necessity of giving deference to the interest of the government "in promoting the efficiency of the public services it performs through its [workers]."<sup>200</sup> The more rigid *Elrod-Branti* test offers no such flexibility.<sup>201</sup>

The decision of the Court to "extend" the same First Amendment protections offered to government employees to reach government independent contractors is positive. However, to continue to distinguish between "affiliation"

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196. See *O'Hare*, 116 S. Ct. at 2358.

197. See *id.*

198. *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972)).

199. Frankly, it is hard to understand exactly how they can be different at all. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 100 (1990).

200. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

201. One caveat to this statement—if lower courts interpret *O'Hare* as a modification of the *Elrod-Branti* test (namely, considering the "reasonableness" discussion by Justice Kennedy), then more flexibility will surface. But cf. *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996) (holding that "freedom of belief" cases should be subjected to strict scrutiny, even after *O'Hare*).



cases and "free speech" cases is at odds with the positive effects of the extension. This distinction only causes more unnecessary and inefficient "guess-work" to be performed by lower federal courts. Indeed, a question of such great importance as First Amendment protection should not turn on a distinction saturated with so many uncertainties. The *Pickering* balancing test is a mode of analysis fully equipped to fulfill the needs concerning both freedom of belief and freedom of speech. Thus, the *Elrod-Branti* line of cases should be re-examined in terms of the *Pickering* balancing standard. Undoubtedly, the results would be mostly the same, yet the path much easier to follow. The *Pickering* test may not be the perfect solution to the problem of unwarranted patronage practices conducted by our elected officials,<sup>202</sup> but neither does it give government workers *carte blanche* to sue our government officials for exercising their daily management functions.<sup>203</sup>

## VI. IMPLICATIONS

The Supreme Court's decision in *O'Hare* only extended the First Amendment rights enjoyed by government employees to reach government contractors. It did not change the fact that many uncertainties and sources of confusion still surround the entire field of patronage. Thus, while the effects of the *O'Hare* decision will be positive in the sense that a wider base of constitutional protection is awarded to private citizens conducting business with the government, it will also be negative in the sense that most participants will be "uncertain" as to their individual, legal position. It is these "uncertain[ies]" which "breed litigation."<sup>204</sup> In just four short months since the *O'Hare* and *Umbehr* decisions, evidence of both of these potential positive and negative effects has surfaced in courthouses around the country.

### A. Positives

The *O'Hare* decision by the Supreme Court "made it unlikely" for the state of Alabama's Governor Fob James to win an appeal of a recent patronage case involving himself and two other state officials.<sup>205</sup> Shortly before the three elected officials took office in January 1995, they combined to fire 153 voter registrars and replace them with appointees more friendly to their own political party's administration.<sup>206</sup> A federal district judge awarded the 153 ousted registrars a combined \$1.2 million in back wages.<sup>207</sup> The *O'Hare* decision to extend the *Elrod-Branti* rulings to cover independent contractors or regular service

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202. Unfortunately, sometimes government employment decisions are made by "unelected" officials. See Fran Golden, *Aftermath of Travelgate: Picking Up the Pieces*, TRAVEL WEEKLY, Aug. 2, 1993, at 29.

203. See Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2349 (1996).

204. *Id.* at 2367-68 (Scalia, J., dissenting).

205. See *State To Pay \$1 Million-Plus In Back Pay To Ousted Registrars*, ASSOCIATED PRESS, Sept. 17, 1996, available in 1996 WL 5406992.

206. See *id.*

207. See *id.*

providers to the government influenced Governor James not to file an appeal. Indeed, these kinds of actions by our government officials will now be deterred because of decisions like *Umbehr* and *O'Hare*. It is true that the decision will cost the state of Alabama \$1.2 million, but that is a small price to pay for the positive assurance that one's fundamental constitutional rights are protected. Money, it seems, was also on the mind of Governor James's lawyer: "There's no point wasting taxpayers' money arguing this matter [on appeal]." <sup>208</sup>

What about the taxpayers' money the first time through the lawsuit? Not *all* of the blame should be placed on Governor James with respect to this question, for, the laws in this area are and have been inherently "uncertain." It would be easier to point fingers at government officials as "wrongdoers" if they better understood the laws which potentially subject their administrations to judicial scrutiny and the states they represent to civil liability. These uncertainties are discussed below.

### B. Negatives

*O'Hare* clearly refuses to make a distinction between the First Amendment rights of government employees and independent contractors. It still, however, leaves some unanswered questions that impact modern political patronage law. A brief look at three post-*O'Hare* issues will demonstrate the struggles that lower federal courts continue to have in deciding patronage cases.

#### 1. Question of Law or Fact?

The lower courts have not uniformly held that determining whether party affiliation is an appropriate requirement for the position is a question of law (decided by the court), or a question of fact (decided by the jury). Not surprisingly, the *O'Hare* decision gives no guidance. The First and Fourth Circuits have held that whether the *Elrod-Branti* justification applies is an issue of law for the court.<sup>209</sup> However, the Third, Fifth and Seventh Circuits have held it to be a question of fact for the jury.<sup>210</sup> The effect of this issue being left untouched by the Supreme Court is probably substantively minimal, but it adds more to the procedural and application-type "uncertainties" already facing the judges when a patronage case finds its way on their docket.

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208. *Id.*

209. See *McGurrin Ehrhard v. Connolly*, 867 F.2d 92, 93 (1st Cir. 1989); *Jones v. Dodson*, 727 F.2d 1329, 1336 (4th Cir. 1984); see also *Soelster v. King County*, 931 F. Supp. 741, 744 (W.D. Wash. 1996) (deciding as an issue of law because there was insufficient evidence to raise a factual issue on the matter of affiliation).

210. See *Soderbeck v. Burnett County*, 752 F.2d 285, 288 (7th Cir. 1985); *Ness v. Marshall*, 660 F.2d 517, 522 (3rd Cir. 1981); *Stegmaier v. Trammell*, 597 F.2d 1027, 1034 n.8 (5th Cir. 1979).

## 2. What About Other Government Workers?

A second question seemingly left unanswered is whether the *Elrod-Branti* rulings are applicable *only* to government employees and independent contractors. In other words, can the lower courts after *O'Hare* use the ambiguities inherent in the decision to carve out exceptions and limit its application just as they did with respect to independent contractors before *O'Hare*? The Seventh Circuit struggled in *Tarpley v. Jeffers*<sup>211</sup> with the question of whether a temporary employment position was protected under *O'Hare*:

Based on the categorical analysis employed by [the *O'Hare* Court], it is not readily apparent how exceptions to the patronage ban are to be justified unless some sort of de minimis principle applies. However, there are many kinds of temporary employment, and a ruling on one may not implicate all the others.<sup>212</sup>

The *O'Hare* decision does not explicitly state, "this opinion applies to all who work in any form for the local, state, or national government." Whether this absence will allow courts to carve out more exceptions, and thus, limit the application of *O'Hare* remains to be seen. When that happens, however, the lower courts should find that *O'Hare* does cover instances similar to the one facing the court in *Tarpley*. A passage from *O'Hare* is helpful: "We cannot accept the proposition, however, that those who perform the government's work outside the formal employment relationship are subject to what we conclude is the direct and specific abridgement of First Amendment rights . . . ."<sup>213</sup> Arguably, most reasonable interpretations would consider this reasoning by the *O'Hare* Court to protect positions like the one questioned in *Tarpley*. However, the mere fact the "constitutional status of patronage hiring for temporary positions . . . [is] not clearly established"<sup>214</sup> is quite concerning.

## 3. Nonideological Factions of the Same Party

Another question left unanswered—perhaps because it was unforeseeable—is whether an adverse employment action taken against members of a non-ideological faction by members of similar factions violates the First Amendment. The Sixth Circuit, in *McCloud v. Testa*,<sup>215</sup> extended the *Elrod-Branti/O'Hare* protections to non-ideological political factions of the same party.<sup>216</sup>

The government argued that the issue had never been decided by the Supreme Court, stating that the *Elrod-Branti* rulings "consistently refer to the need

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211. 96 F.3d 921 (7th Cir. 1996).

212. *Id.* at 924. See also *id.* at 931 (Flaum, J., concurring) (stating that the court may have to, at some point later in the lawsuit, "address the challenging question of the legality of patronage hiring for temporary positions in light of the teachings of both *Rutan* and *O'Hare*") (citations omitted).

213. *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353, 2358 (1996). See also *Tarpley*, 96 F.3d at 924.

214. *Tarpley*, 96 F.3d at 927.

215. 97 F.3d 1536 (6th Cir. 1996).

216. See *id.* at 1550.

for protecting freedom of belief *and* association in" patronage cases.<sup>217</sup> However, the *McCloud* court reasoned that the results in the "big four" Supreme Court cases "would have been the same even if only freedom of political belief was the animating force behind those opinions."<sup>218</sup> In this line of reasoning, the *McCloud* court found it "significant" that the Court in *O'Hare* never mentioned the political parties of the contractor, Mayor Paxson, or the Mayor's opponent.<sup>219</sup>

Further, the court found several other reasons supporting the extension:

First, patronage favors incumbent factions . . . [t]herefore, the practice of patronage by either faction could favor a potentially ideological faction, and could impinge upon the freedom of belief in the future. . . .

....

Second, the doctrine of unconstitutional conditions, . . . is implicated thoroughly even when patronage is practiced by non-ideological factions. . . .

....

[And t]hird, applying the patronage ban across the board even on non-ideological factions allows courts to avoid the sticky entanglements associated with making . . . decisions about what kinds of disputes . . . are . . . ideological, and which are non-ideological.<sup>220</sup>

The future effects of decisions like *McCloud* are extremely hard to predict, not to mention hard to understand. However, the immediate negative impact to the area of patronage law is simple—it adds more to the "uncertainties" discussed in this note and in Justice Scalia's dissent.

These last two cases are perfect examples of how the ambiguities and uncertainties inherent in the *O'Hare* decision can be manipulated by the courts. For the *Tarpley* court, *O'Hare* offers a chance to limit itself to *only* apply to government employees and independent contractors, leaving out the likes of other government "workers," such as temporary positions. But, for the *McCloud* court, *O'Hare* offers a chance for the court to hold that political "affiliation" cases are not always limited to cases involving two different ideologically positioned political parties. As long as the courts are confused about the application of the *O'Hare* decision, the already broad spectrum of interpretations will expand, until the courts reach a conclusion completely at odds with the stated purpose of protecting the fundamental rights of those involved with conducting business with the government. When this happens, Justice Scalia's prediction in *Rutan* that, one day when the courts are "flooded with litigation under that most unmanageable of standards [of *Branti*] . . . [the Court] may be moved to reconsider [its] intrusion into [the] entire field," will be entirely applicable to the *O'Hare* decision.<sup>221</sup>

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217. *Id.* at 1547.

218. *Id.*

219. *See id.* at 1547-48.

220. *Id.* at 1550-51.

221. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 115 (1990) (Scalia, J., dissenting).

## VII. CONCLUSION

Without question, the Court's decision to extend the same First Amendment rights given to government employees to reach government independent contractors is a positive one. Political patronage practices, to the extent that they restrain belief, limit association, and "chill" speech on matters of public concern, are extremely harmful to our system of government and the entire democratic process which we have so proudly created.<sup>222</sup> The *O'Hare* opinion should act as a deterrent to government officials with unwarranted patronage dismissals on their agenda.

However, the *O'Hare* decision is plagued with many uncertainties. This confusion may be used by the lower courts to create loopholes and exceptions that could limit the application of such an important case. Additionally, the *O'Hare* decision leaves to the lower courts, with not much guidance at all, the responsibility of categorizing each patronage case before them as an "affiliation" case or a "freedom of speech" case. The application of two similar, yet different judicial inquiries depend on this difficult determination. Thus, this Note has argued that the protection of one's First Amendment rights should not turn on such a hairsplitting distinction. The *Pickering* balancing test offers both the ability to protect the formation of beliefs and their expression through speech, and, simultaneously, offers deference to the government's interest in being free from judicial supervision of its daily management functions.<sup>223</sup>

It is entirely too early in its development to predict the actual effect the *O'Hare* decision will have on America. The decision may prove to be well-founded and practical, to create a new friendlier relationship between Republicans and Democrats, and to reincarnate America's perception that politicians are trustworthy. However, it may prove to create more uncertainties and confusion, weaken the democratic process, and cause a huge amount of litigation and unwanted judicial interference in local and state governments. This author suspects that a mixture of all these possibilities will surface. But, only time itself truly knows what the real effects of the *O'Hare* decision will mean for the practice of political patronage in American politics and the efficiency of internal government operations.

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222. See *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972)).

223. See *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2348 (1996).