itself to the secondary effects problem.[69] The Court, consistent with the congressional preference for resolving disputes through the collective bargaining process, relegated resolution of the issue to collective bargaining tables.[70]

The *ILA* Court's deference to the collective bargaining process does not appear to present an adequate solution to the difficult and sensitive issues created by massive technological displacement of workers. Until Congress enacts a statutory scheme, however, to confront the problems generated by the technological displacement of workers, there appears to be no adequate alternative to the *ILA* Court's holding.[71]

CONSTITUTIONAL LAW—FIRST AMENDMENT—CONDITIONING PUBLIC EMPLOYMENT ON POLITICAL AFFILIATION UNRELATED TO JOB PERFORMANCE HELD UNCONSTITUTIONAL. *Branti v. Finkel*, 445 U.S. 507 (1980). When the Democrats gained control of the Rockland County legislature in 1977, they appointed petitioner Branti to the position of Public Defender to replace the Republican incumbent.[1] Upon taking office, Branti issued termination notices to six of the nine assistant public defenders,[2] including respondents Finkel and Tabakman.[3]

versus management. Here, one segment of labor seeks to take work away from another segment." 100 S. Ct. at 2324 n.1. (Burger, C.J., dissenting).

The severity of the disruption on other bargaining units is intensified because the longshoremen had, in prior collective bargaining agreements, permitted outside workers to perform the work now claimed. *See* International Longshoremen's Ass'n (Dolphin Forwarding, Inc.), 236 N.L.R.B. 525, 526 (1978); International Longshoremen's Ass'n (Associated Transport, Inc.), 231 N.L.R.B. 351, 355 (1977) (Fanning, Chairman, dissenting). For a discussion of contractual abandonment of claims, see International Longshoremen's & Warehousemen's Local 13 (California Cartage Co.), 208 N.L.R.B. 994, 996 (1974), *enforced mem. sub nom.* Pacific Maritime Ass'n v. NLRB, 515 F.2d 1018 (D.C. Cir. 1975); 90 HARV. L. REV. 815, 827 (1977). *But see* International Longshoremen's Ass'n v. NLRB (Consolidated Express, Inc.), 537 F.2d 706, 712 (2d Cir. 1976).

69. *See* 100 S. Ct. at 2315 n.22.

70. *See id.* at 2314, 2317. *See also* note 61 *supra* and accompanying text.

71. *See generally* International Longshoremen's Ass'n v. NLRB, 613 F.2d 890, 893, n.11 (D.C. Cir. 1979); Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1041 (1965).

1. Branti v. Finkel, 445 U.S. 507, 509 (1980).

2. *Id.* at 509.

3. Respondent Tabakman was a registered Republican. *Id.* Respondent Finkel changed his party affiliation in 1977 from Republican to Democrat to enhance his chances of reappointment. The district court found that despite Finkel's change in political affiliation, the parties regarded him as a Republican during the period in issue. *Id.* at 509 n.4.

With one exception, the nine assistants who Branti intended to appoint or retain were Democrats with Democratic sponsors.[4] Respondents brought suit in federal district court to prevent Branti from terminating their jobs. The trial court found that Branti discharged respondents solely for their political beliefs, and issued a permanent injunction.[5] The court of appeals summarily affirmed.[6] On certiorari, the United States Supreme Court affirmed and *held*: Conditioning continued employment of a public employee upon political party affiliation when the affiliation is not necessary for the effective performance of the public office involved violates the first and fourteenth amendments.

Courts and commentators traditionally regarded public employment as a privilege rather than a right.[7] This distinction alone, however, does not justify dismissal from a job for unconstitutional reasons.[8] The first amendment,[9] applicable to the states through the fourteenth

4. Manuel Sanchez, one of the assistants retained, did not have a registered party affiliation. Finkel v. Branti, 457 F. Supp. 1284, 1285 n.2 (S.D.N.Y. 1978). All nine of the appointees were selected by Democratic town chairpersons or Democratic legislators in accordance with procedures approved by the Democratic caucus. Those procedures excluded candidates with non-Democratic affiliation from consideration. Branti v. Finkel, 445 U.S. at 510 n.5.

5. 457 F. Supp. at 1285-86 n.4. The district court explained that the ruling required petitioner to permit respondents to work as assistants and to pay them a normal assistant's salary. Mere payment of salary would not constitute full compliance with the judgment. *Id.*

6. No. 78-7494 (2d Cir. 1979). The court specifically held that the record supported the district court's finding of fact. It also expressed "no doubt" that the district court "was correct in concluding that an Assistant Public Defender was neither a policymaker nor a confidential employee." *Id.*, slip op. at 4, *quoted in* Petitioner's Brief for Certiorari at 4 app., Branti v. Finkel, 445 U.S. 507 (1980).

7. Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961); Adler v. Board of Educ., 342 U.S. 485 (1952); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court per curiam*, 341 U.S. 918 (1951).

Justice Holmes expressed the concept in one of his celebrated aphorisms when he said, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-42 (1968) and cases cited therein. For a modern application of the right-privilege distinction, see Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971) (per curiam), *cert. denied*, 404 U.S. 1020 (1972) (discharged city employee had no right to public employment).

8. Perry v. Sindermann, 408 U.S. 593, 597 (1972); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967). These cases rejected the earlier doctrine expressed in Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court per curiam*, 341 U.S. 918 (1951), and Adler v. Board of Educ., 342 U.S. 485 (1952), that because there was no right to a government benefit, such as public employment, the benefit could be denied for any reason. *See generally* Van Alstyne, *supra* note 7.

9. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of

amendment,[10] protects the right to engage in political expression and association.[11] A compelling governmental interest may limit this right, but only if advanced in the least restrictive manner.[12]

Patronage has existed as a governmental practice in the United States at least since the presidency of Thomas Jefferson.[13] Although patronage awards take many forms,[14] the most visible form is the distribution of government jobs based on political affiliation and loyalties. Recipients of patronage positions serve at the whim of the political party in control; thus wholesale purges following the inauguration of a new party are commonplace.[15]

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the press; or the rights of the people peaceably to assemble, and to petition the Government for a redress of grievances."

10. U.S. CONST. amend. XIV, § 1, cl. 2 provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The incorporation of the first amendment into the fourteenth is generally dated from Gitlow v. New York, 268 U.S. 652 (1925).

11. Buckley v. Valeo, 424 U.S. 1, 114 (1976); Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973); NAACP v. Button, 371 U.S. 415, 430 (1963); Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958). *See generally* Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964).

12. Elrod v. Burns, 427 U.S. 347, 362 (1976); Buckley v. Valeo, 424 U.S. 1, 94 (1976); Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973); Williams v. Rhodes, 393 U.S. 23, 31-33 (1968); NAACP v. Button, 371 U.S. 415, 438, 444 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 464-66 (1958).

The Court has not made clear the precise test to be used in assessing the nature of the governmental interest. A mere showing of a legitimate state interest will not justify encroachment. Kusper v. Pontikes, 414 U.S. 51, 58 (1973). The interest must be paramount and of vital importance. Elrod v. Burns, 427 U.S. 347, 362 (1976) (implying a test of strict scrutiny). There is some authority for the proposition that political affiliation is a suspect classification, requiring a test of the most exacting scrutiny, Shapiro v. Thompson, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting) ("The criterion of political allegiance may have been added [to the list of suspect criteria] in Williams v. Rhodes . . . ."). It should be noted, however, that *Williams v. Rhodes*, which held that Ohio's differential ballot qualification tests for major and minor political parties were unconstitutional, involved the direct exercise of the franchise. This right enjoys the highest status of first amendment rights, and arguably differs from mere political affiliation. *See generally* O'Neil, *Politics, Patronage and Public Employment*, 44 U. CIN. L. REV. 725, 730-33 (1975); Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 317-19 (1974).

13. For a history and analysis of patronage practices, see M. TOLCHIN & S. TOLCHIN, TO THE VICTOR (1971).

14. Patronage practices include such favors as construction and defense contracts, "banking and insurance funds, and specialized treatment by . . . discretionary governmental agencies." *Id.* at 5-6.

15. O'Neil, *supra* note 12, at 726-29; Note, *Political Patronage and Unconstitutional Conditions: A Last Hurrah for the Party Faithful?*, 14 WM. & MARY L. REV. 720 (1973).

In *Illinois State Employees Union v. Lewis*[16] the Seventh Circuit became the first court to give constitutional protection to dismissed patronage employees.[17] Plaintiffs sued for reinstatement after the Secretary of State dismissed them for failing to support the Republican party. The court held that government officials could not discharge nonpolicymaking employees solely for refusing to transfer political allegiance from one party to another.[18] The court recognized, however, that a compelling state interest in conditioning employment on political affiliation could justify the dismissal of policymaking employees.[19]

The *Lewis* court's reasoning did not gain full acceptance,[20] however, until the Supreme Court addressed the issue of patronage dismissals in *Elrod v. Burns*.[21] Petitioner, Sheriff of Cook County, Illinois, replaced non-civil service employees with members of his own political party when the existing employees failed to obtain support from, or affiliate with, that party. The plurality,[22] relying on *Keyishian v. Board of Regents*[23] and *Perry v. Sindermann*,[24] held that public officials must re-

16. 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1975).

17. Two courts earlier failed to find any constitutional violation of a dismissed public employee's rights. In Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1021 (1972), the court held that public employment was a privilege rather than a right, and therefore terminable at will. The court in American Fed'n of State, County, & Mun. Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971), similarly held that the employees had no right to their jobs, and further, had waived any constitutional rights by obtaining their jobs through the patronage system. "[T]hose who . . . live by the political sword must be prepared to die by the political sword." *Id.* at 536, 280 A.2d at 378. For a discussion of the constitutionality of patronage dismissals prior to these cases, see generally Schoen, *Politics, Patronage, and the Constitution*, 3 IND. LEGAL F. 35 (1969).

18. 473 F.2d at 574, 576.

19. The court suggested that considerations of personal loyalty could justify the employment of political associates in certain positions. Although the court did not define "policymaking," it said that janitors, elevator operators, and school teachers were not policymaking employees. *Id.* at 574.

20. *See* Nunnery v. Barber, 503 F.2d 1349 (4th Cir. 1974) (discharged liquor store employee who chose patronage position waived right to complain), *cert. denied*, 420 U.S. 1005 (1975); Indiana State Employees Ass'n v. Negley, 357 F. Supp. 38 (S.D. Ind. 1973) (*Lewis* decision was a narrow holding, limited to nonpolicymaking employees), *aff'd*, 501 F.2d 1239 (7th Cir. 1974).

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

22. *Elrod* was a plurality decision. Justice Brennan, joined by Justices White and Marshall, wrote the plurality opinion. Justice Stewart filed a concurring opinion, joined by Justice Blackmun. Chief Justice Burger filed a dissenting opinion. Justice Powell also filed a dissenting opinion in which the Chief Justice and Justice Rehnquist joined. Justice Stevens did not participate.

23. 385 U.S. 589 (1967) (statute making Communist party membership prima facie evidence of unfitness for public school teacher position held unconstitutional).

24. 408 U.S. 593 (1972) (unconstitutional to refuse to renew untenured teacher's one year contract because of teacher's public criticism of college administration). *Perry* and *Keyishian* to-

strict patronage dismissals to policymaking employees.[25] Only a vital governmental interest can justify an infringement of nonpolicymaking employees' first and fourteenth amendment rights.[26] The *Elrod* plurality found that the implementation of the new administration's policies as sanctioned by the electorate was a vital governmental interest.[27] Because nonpolicymaking employees lack the power to thwart these policies, however, the plurality concluded that dismissal based solely on an employee's political affiliation is an unjustifiable infringement of the employee's constitutional rights.[28] The concurring Justices declined to join the plurality's discussion of the patronage system.[29] Rather, the concurrence held that government officials cannot discharge nonpolicymaking, nonconfidential employees for their political beliefs.[30]

The *Elrod* standard proved unmanageable. The distinction between policymaking and nonpolicymaking positions is unclear in the middle ranges of employment hierarchies.[31] Furthermore, lower courts dis-

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gether stand for the proposition that the government cannot condition the retention of jobs on unconstitutional demands that it could not make directly.

25. The Court did not explicitly define "policymaking," but suggested three criteria for evaluating jobs: The nature of the responsibilities, whether the individual acts in an advisory capacity, and whether he formulates plans to implement broad goals. 427 U.S. at 367-68.

26. *Id.* at 362.

27. *Id.* at 367. The plurality rejected the petitioners' argument that wholesale dismissals of the out-party's employees could be justified because such employees have no incentive to work efficiently and may thwart the new administration's efforts. A less intrusive means, discharge for cause, is available. *Id.* at 366. The plurality also was not persuaded that the elimination of patronage practice would bring about the demise of political parties. The democratic process could function well without the practice, and perhaps even better, by eliminating the entrenchment of one party to the exclusion of others and the impairment of constitutional rights. *Id.* at 368-70.

The plurality stressed that governmental interests should not be confused with interests of partisan organizations. Only the former may impinge on constitutional rights. *Id.* at 362.

28. *Id.* at 367.

29. *Id.* at 374 (Stewart, J., concurring).

30. *Id.* at 375 (Stewart, J., concurring) (citing Perry v. Sindermann, 408 U.S. 593 (1972)). The concurring opinion constitutes the holding of the Court. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). This has been referred to as the "least common denominator" test. Finkel v. Branti, 457 F. Supp. 1284, 1289 (S.D.N.Y. 1978), *aff'd*, 598 F.2d 609 (2d Cir. 1979), *aff'd*, 445 U.S. 507 (1980).

31. *Compare* DiPiro v. Taft, 584 F.2d 1 (1st Cir. 1978) (fire chief characterized as policymaking employee), *cert. denied*, 440 U.S. 914 (1979) *and* Newcomb v. Brennan, 558 F.2d 825 (7th Cir.) (deputy city attorney characterized as policymaking employee), *cert. denied*, 434 U.S. 968 (1977) *and* Alfaro De Quevedo v. De Jesus Schuck, 556 F.2d 591 (1st Cir. 1977) (director of office of criminal justice characterized as policymaking employee) *and* Rivera Morales v. Benitez de Rex-

agreed whether the nonconfidentiality aspect of employment was ancillary to the concept of policymaking or was a separate test in itself.[32]

In *Branti v. Finkel*[33] the Court refined the contours of the *Elrod* standard. The majority, in an opinion written by Justice Stevens, reiterated the arguments of the *Elrod* plurality, but recognized that labeling a job policymaking or confidential often fails to resolve the issue of whether political affiliation furthers a compelling state interest.[34] Instead, the test is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office.[35]

The Court agreed with the district court's finding that respondents were neither policymaking nor confidential employees.[36] Applying the new test, the Court found that an indispensible element of an assistant public defender's job is the ability to act independently of the govern-

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ach, 541 F.2d 882 (1st Cir. 1976) (assistant secretary of education characterized as policymaking employee) *and* Mitchell v. King, 537 F.2d 385 (10th Cir. 1976) (state museum regent characterized as policymaking employee) *and* Dyke v. Otlowski, 154 N.J. Super. 377, 381 A.2d 413 (1977) (supervisor of senior citizens activities characterized as policymaking employee) *and* Ause v. Regan, 59 A.D.2d 317, 399 N.Y.S.2d 526 (1977) (county hospital supervisor characterized as policymaking employee) *with* Rivera Morales v. Benitez de Rexach, 541 F.2d 882 (1st Cir. 1976) (field coordinator for staff development project characterized as nonpolicymaking employee) *and* Vincent v. Maeras, 447 F. Supp. 775 (S.D. Ill. 1978) (communications technician characterized as nonpolicymaking employee).

32. Loughney v. Hickey, 480 F. Supp. 1352, 1362 (M.D. Pa. 1979). "The courts split over whether the test is conjunctive or disjunctive, *i.e.*, whether an employee who is 'confidential' *or* 'policymaking' is beyond First Amendment protection, or whether the employee must be 'confidential' *and* 'policymaking.'" *Id.* (emphasis in original).

Following the district court opinion in Finkel v. Branti, 457 F. Supp. 1284 (S.D.N.Y. 1978), *aff'd*, 598 F.2d 609 (2d Cir. 1979), *aff'd*, 445 U.S. 507 (1980), and Rosenthal v. Rizzo, 555 F.2d 390 (3d Cir.), *cert. denied*, 434 U.S. 892 (1977), the *Loughney* court found the test to be conjunctive. A confidential employee is one who stands in a confidential relationship to the policymaking process. *But see* Stegmaier v. Trammell, 597 F.2d 1027 (5th Cir. 1979) (deputy circuit clerk is confidential employee, although not policymaking, and subject to dismissal); Catterson v. Caso, 472 F. Supp. 833 (E.D.N.Y. 1979) (even if county attorney is not a policymaking employee, he is confidential employee with respect to his clients, the county officers, and so subject to dismissal).

33. 445 U.S. 507 (1980). Justice Stevens wrote the majority opinion. He was joined by Justices Brennan, White, and Marshall (the *Elrod* plurality), Justice Blackmun (who concurred in *Elrod*), and Chief Justice Burger (who dissented in *Elrod*). Justice Stewart concurred in *Elrod* but dissented in *Branti*.

34. The Court gave several examples. A Republican election judge could legitimately be discharged for changing party registration, even though his job was neither policymaking nor confidential. On the other hand, a state university football coach formulates policy and has access to confidential information, yet his party affiliation is irrelevant. *Id.* at 518.

35. *Id.*

36. *Id.* at 511. The district court found that respondents had little, if any, policymaking

ment and to oppose it in litigation.[37] Under these circumstances, conditioning the jobs on allegiance to the dominant political party undermines, rather than promotes, effective performance of the public office.[38]

Justice Stewart, in dissent, argued that *Elrod* was inapplicable because respondents were confidential employees, much like lawyers in a private law firm.[39] Justice Powell, in a separate dissenting opinion, found the new standard "vague and sweeping."[40] He argued that patronage advances substantial governmental interests.[41] These interests outweigh respondents' first amendment rights.[42] Justice Powell also argued that the decision might impair the right of local voters to structure their form of government.[43]

The majority correctly analyzed the issue of patronage dismissals from a constitutional standpoint, thus avoiding the polemics of pa-

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responsibilities. In addition, they did not occupy a confidential relationship to the policymaking process of the office. 457 F. Supp. at 1291.

The Court rejected petitioner's argument that *Elrod* is limited to dismissals resulting from an employee's failure to capitulate to political coercion.

> Such an interpretation would surely emasculate the principles set forth in *Elrod*. While it would perhaps eliminate the more blatant forms of coercion described in *Elrod*, it would not eliminate the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain his job.

445 U.S. at 516.

37. *Id.* at 519 (quoting Ferri v. Ackerman, 444 U.S. 193, 204 (1979)).

38. *Id.* at 519.

39. *Id.* at 521 (Stewart, J., dissenting).

40. *Id.* at 524 (Powell, J., dissenting). Justice Rehnquist joined the Powell dissent and Justice Stewart joined as to this first part.

41. *Id.* at 528 (Powell, J., dissenting). Justice Powell stated that patronage appointments help build stable political parties. Political parties, in turn, serve governmental interests by donating time and money to candidates for election and by carrying out the policies of elected officials. Strong political parties thus ensure democracy. This is essentially the same argument he advanced in his *Elrod* dissent. Elrod v. Burns, 427 U.S. 347, 376-89 (1976) (Powell, J., dissenting).

The argument that patronage strengthens political parties and thus ensures democracy is fallacious. Democracy is determined by the constitutional right to vote, not by the existence of a two party system or partisan politics. *See* Schoen, *supra* note 17, at 83-101.

42. 445 U.S. at 526 (Powell, J., dissenting). Powell also argued that the majority was creating a national civil service system by judicial fiat. *Id.* at 534 (Powell, J., dissenting).

43. *Id.* at 533 (Powell, J., dissenting). Justice Powell explained that the voters of Rockland County could have elected the officials, but instead gave their legislators a representative proxy to appoint the officials on the basis of party affiliation. The Court's decision will require the voters to elect the officials to fill the positions on a partisan basis. Chief Justice Burger also recognized this concern in Elrod v. Burns, 427 U.S. at 375-76 (Burger, C.J., dissenting) (citing National League of Cities v. Usery, 426 U.S. 833 (1976)).

tronage.[44] The question presented to the Court was not whether patronage was good or bad, but rather whether its use justified an infringement of first amendment rights.

The Court's test regarding patronage dismissals is appropriate. The newly refined test will allow courts to confront directly the constitutional issue of employment conditioned on party affiliation without having to categorize the positions by applying artificial labels. The test promotes direct analysis of the conflict between the governmental interest in uninhibited hiring and the public employees' constitutionally protected interest of freedom of association and demands governmental justification for infringement of constitutional rights.

The *Branti* test, however, imposes a heavier burden on the hiring authority.[45] It is arguably more vague than the *Elrod* policymaking-confidentiality test. A demonstration that party affiliation is an appropriate requirement for employment is less precise than a demonstration that policymaking and confidentiality are aspects of a particular job.[46] In addition, the Court gave few guidelines for application of the new test.[47]

The *Branti* decision will result in greater job protection for a greater number of public employees. The test covers most, if not all, employees protected under the *Elrod* test.[48] Moreover, *Branti* protects those

44. There is no unanimity of opinion on the benefit of patronage to government. *See* M. TOLCHIN & S. TOLCHIN, *supra* note 13, at 9-10, 307-11.

45. Once the plaintiff establishes that party affiliation was the reason for the dismissal, the employer must demonstrate that party membership was appropriate to the discharge of the plaintiff's responsibilities. Such a burden may not be difficult to carry for those positions immediately subordinate to the elected official, for those employees may well be in a position to implement party goals. The farther down the hierarchical employment ladder one progresses, however, the more tenuous the connection becomes between party affiliation and the effective performance of the job.

This burden may force states to alter their employer-employee relationships and to adopt civil service-type standards that outline permissible grounds for dismissal. Such standards would provide greater opportunity to justify dismissals absent appropriate relevancy of party affiliation to the job. The burden imposed on employers does not necessitate implementation of a national civil service system: Local standards are sufficient. 445 U.S. at 534 (Powell, J., dissenting).

46. The content given to the words "policymaking" and "confidential" is debatable, however, as evidenced by the post-*Elrod* decisions. *See* note 31 *supra* and accompanying text.

47. The Court's examples of the football coach and the election official, see note 34 *supra*, are of little aid because they are obvious. Clarification is necessary for application of the test in closer situations.

48. In Aufiero v. Clarke, 489 F. Supp. 650 (D. Mass. 1980), a post-*Branti* decision, an employee who was arguably neither policymaking nor confidential was dismissed. The court reached the correct decision under *Branti*, but applied the wrong reasoning. Plaintiff, a former Republican

policymaking and confidential employees for whom party affiliation is an inappropriate job requirement from the effects of patronage.[49] The *Branti* decision thus reinforces the first amendment rights of patronage employees and provides lower courts and hiring authorities with a more direct means of constitutionally analyzing the competing interests.

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patronage appointments secretary (although his official title was Chief of Bureau for District Offices in the Massachusetts Department of Corporations and Taxation), was dismissed upon the inauguration of a Democratic governor. The plaintiff established a prima facie case that his discharge was because of his political activity and party affiliation. *Id.* at 652. The defendant did not satisfy the burden of showing a nonpolitical justification for the discharge. *Id.* at 653. It was clear that political affiliation had no relevance to the performance of the duties of Bureau Chief. *Id.* By all rights the plaintiff should have won. The court, however, became confused and stated that plaintiff's position "was related to his political association, *i.e.*, patronage appointments, and might well be deemed protected if it did not involve the very conduct that was itself condemned in *Elrod v. Burns* and *Branti v. Finkel*. It is doubtful if even under those cases the same conduct can be both constitutionally condemned and constitutionally protected." *Id.* at 653-54.

The conduct, of course, would not be protected if it related to his political association. The defendants clearly erred in not showing that party affiliation was appropriate to the effective performance of plaintiff's job, whatever his official title was.

49. It is possible that employees denied constitutional protection in the post-*Elrod* decisions would be protected under the *Branti* test. *See* DiPiro v. Taft, 584 F.2d 1 (1st Cir. 1978) (fire chief), *cert. denied*, 440 U.S. 914 (1979); Newcomb v. Brennan, 558 F.2d 825 (7th Cir.) (deputy city attorney), *cert. denied*, 434 U.S. 968 (1977); Alfaro De Quevedo v. De Jesus Schuck, 556 F.2d 591 (1st Cir. 1977) (director of office of criminal justice); Rivera Morales v. Benitez de Rexach, 541 F.2d 882 (1st Cir. 1976) (assistant secretary of education); Mitchell v. King, 537 F.2d 385 (10th Cir. 1976) (state museum regent); Dyke v. Otlowski, 154 N.J. Super. 377, 381 A.2d 413 (1977) (supervisor of senior citizen activities); Ause v. Regan, 59 A.D.2d 317, 399 N.Y.S.2d 526 (1977) (county hospital supervisor).

The *Branti* decision could wreak havoc with other aspects of the patronage system. Challenges to patronage hirings could come under the *Branti* test because requiring party affiliation for employment infringes constitutional rights as much as requiring party affiliation for continuation of employment. 445 U.S. at 522 n.2 (Powell, J., dissenting). Two post-*Branti* decisions support this proposition. In Delong v. United States, 621 F.2d 618 (4th Cir. 1980), the court held that *Branti* sweeps wider than threatened or actual dismissals, and includes practices that are the substantial equivalent of dismissal. In *Delong* a former state director of the Farmers Home Administration was demoted to "program assistant." The court remanded the case to the district court and ordered it to consider plaintiff's subjective and objective expectations and reliance upon continuation of particular assignments in determining constitutional protection. In Aufiero v. Clarke, 489 F. Supp. 650 (D. Mass. 1980), the court said:

> A distinction might be made between the hiring done by the plaintiff here, and the firing done by the defendants in *Elrod* and *Branti*. But these are obviously two sides of the patronage coin. Clearly, the inducement to suppress one's political philosophy and choice of party affiliation operates equally forcefully on the person who seeks a job or promotion as it does on one who desires to retain one.

Id. at 654 (citing Branti v. Finkel, 445 U.S. at 522 n.2 (Powell, J., dissenting)).