Constitutional Law: *Board of County Commissioners v. Umbehr* and *O'Hare Truck Service v. City of Northlake*—The Extension of First Amendment Protection to Independent Contractors—The Garbage Man Can Now Talk Trash!

Brent C. Eckersley

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NOTES

Constitutional Law: Board of County Commissioners v. Umbehr and O'Hare Truck Service v. City of Northlake —
The Extension of First Amendment Protection to Independent Contractors — The Garbage Man Can Now Talk Trash!

I. Introduction

Peter public employee\(^1\) and Ira independent contractor,\(^2\) both Republicans, went to lunch to discuss the renewal of a city service contract. Ira's service had been outstanding so there was no reason for the city not to renew the contract. As lunch continued, they began speaking negatively about the new mayor, a Democrat. A devoted colleague of the mayor overheard their comments and quickly reported it to the mayor. Realizing that these Republicans opposed his policies, the mayor discharged Peter and did not renew Ira's contract. Prior to June 1996, Ira would have no recourse because his status as an independent contractor did not grant him First Amendment protection for either political affiliation or speech. Peter's status as a public employee, on the other hand, allowed him to seek a remedy. He had two lines of United States Supreme Court precedents protecting his First Amendment rights.

The first line of cases protecting Peter from patronage\(^3\) dismissal began in 1976. In the landmark decision of Elrod v. Burns,\(^4\) the United States Supreme Court held that discharging a nonpolicymaking, nonconfidential public employee for reasons of political patronage or party affiliation violated the employee's rights of association and expression.\(^5\) In 1980, the Court reaffirmed this holding in Branti

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1. In this comment, "public employee" refers to government employees whom the government may discharge for any reason that does not violate the Constitution.

2. An independent contractor is "one who, in exercising an independent employment, contracts to do certain work according to his or her own methods, without being subject to the control of the employer, except as to the product or result of the work." 41 AM. JUR. 2D Independent Contractors § 1 (1995); BLACK'S LAW DICTIONARY 530 (6th ed. 1990).


5. See id. at 372-73.
v. Finkel. The Court completed the trilogy in 1990 with Rutan v. Republican Party of Illinois, in which the Court held that patronage hiring and transfers for reasons of political patronage or party affiliation violated an employee's First Amendment rights. With this trilogy of cases, the Court struck down an important part of the patronage system.

The second line of cases protecting Peter's free speech rights began with Pickering v. Board of Education in 1968. In Pickering, the United States Supreme Court articulated an interest balancing test for determining when an employer may dismiss a public employee for speaking on matters of public concern. Fifteen years later, in Connick v. Myers, the Court refined the test and ruled that it only applied when the employee's speech touched on matters of public concern. In 1987, in Rankin v. McPherson, the United States Supreme Court finished the freedom of expression trilogy protecting public employee First Amendment rights by adding to the balancing test the confidential or policymaking status of an employee. This additional trilogy of First Amendment cases provided public employees even greater protection.

Through all these cases, however, the Court did not extend the First Amendment protection given public employees to independent contractors. These holdings preserved the most valued element of the patronage system, the distribution of government contracts as a reward for political support. Under these decisions, the First Amendment rights of parties depended on whether they worked for the government as public employees or as independent contractors.

Today, however, there is a Court willing to extend First Amendment protection to independent contractors. In June 1996, the United States Supreme Court, in O'Hare Truck Service v. City of Northlake and Board of County Commissioners v. Umbehr, took the first steps toward extending the same First Amendment rights enjoyed by public employees to independent contractors. Although these decisions did not address hiring practices, they did erase the distinction between public employees and independent contractors.

This note first reviews the history of the Court's decisions establishing constitutional limitations in dismissing public employees and the lack of limitations in dismissing independent contractors. Included is a comparison between the public

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8. See id. at 79. The First Amendment to the Constitution of the United States expressly provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.
10. See id. at 573.
12. See id. at 147.
14. See id. at 385.
employee and independent contractor cases. Second, this note reviews and analyzes the opinions of *O’Hare* and *Umbehr* in which the Court finally recognized the need to extend First Amendment protection to independent contractors. Finally, this note addresses the possible ramifications of extending First Amendment protection to independent contractors.

II. History

A. Public Employees

1. Supreme Court Patronage Decisions

The first United States Supreme Court decision on patronage arose out of a challenge to the patronage practices of the Cook County Sheriff’s office. In *Elrod v. Burns*, a newly elected Democratic sheriff fired various Republican employees in the sheriff’s office to make room for Democratic Party supporters. Had the Republican employees pledged political allegiance to the Democratic Party, contributed to the Democratic Party, or promised to work for the election of Democratic candidates, they could have kept their jobs. The employees sued, alleging that the sheriff violated their First Amendment rights of speech and association by discharging them solely because they were not affiliated with or sponsored by the Democratic Party. The defendants argued that patronage dismissals served three important governmental interests: (1) the interest in effective and efficient government; (2) the need for loyal employees to carry out the programs of an elected administration; and (3) the preservation of strong and broad-based political parties.

The United States Supreme Court, in a five-to-three decision, but without a majority opinion, held that the discharges were impermissible. The Court determined that the discharges amounted to the denial of a benefit — government employment — based upon an unconstitutional condition, the coercion of an individual’s freedom of association. Consequently, the discharges indirectly produced a result that the government was forbidden to produce directly.

18. See id. at 349-50.
19. See id. at 355.
20. See id. at 350.
21. See id. at 364-68.
22. Justice Brennan wrote the plurality opinion, which Justices White and Marshall joined. See id. at 349. Justice Blackmun joined Justice Stewart’s separate concurring opinion. See id. at 374 (Stewart, J., concurring). Justice Powell and Chief Justice Burger filed dissenting opinions. See id. at 375-76 (Burger, C.J., dissenting). Justice Rehnquist joined Justice Powell’s dissent, as did the Chief Justice. Justice Stevens did not participate in the decision.
23. See id. at 373.
24. See id. at 359.
25. See id. In reaching this conclusion, the plurality relied upon the Court’s prior opinions invalidating requirements that condition public employment upon political belief. For example, the signature of a loyalty oath or nonmembership in the Communist Party is an invalid requirement for public employment. See id. at 357-58 (citing Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967);
plurality opinion, authored by Justice Brennan,26 found that the discharges implicated two First Amendment interests: (1) the government employee's interest in freely expressing political beliefs and in freely associating with others to advance those beliefs;27 and (2) the societal interest in free and open discussion of public affairs.28 While acknowledging these interests' importance, the Court created an exception allowing patronage dismissals for public positions that inherently involved "policymaking" duties;29 dismissal of policymaking officials serves the vital governmental interest of facilitating the implementation of a new administration's policies.30 Commentators31 and the Court itself32 have read the exception to include confidential employees.

After Elrod, the constitutionality of patronage dismissals turned on whether the employer could classify the employee's position as confidential or policymaking. If so, successful employers could then invoke the exception forbidding dismissals based on political affiliation. The United States Supreme Court later tightened this exception and outlined a test for determining an employee's policymaker status in Branti v. Finkel.33

In Branti, two Republican assistant public defenders brought suit after the newly elected Democratic public defender dismissed them.34 Focusing on the essentiality

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26. See supra note 22.
27. See Elrod, 427 U.S. at 355-56.
28. See id. at 356-57.
29. See id. at 359-60. William Luneburg noted that:
The restrictions that have been imposed on patronage practices under Elrod and its progeny help assure that, when intragovernmental debate does occur, there may be a greater diversity of views expressed than would be the case if various tests of political loyalty could be imposed in structuring the composition of the public workforce. The "policymaking" position exception to Elrod, however, should be very narrowly limited to control its erosion of that diversity within the higher levels of policy debate where such diversity may be essential to a deliberative process capable of taking account of all significant points of view.


30. See Elrod, 427 U.S. at 367 (stating that patronage dismissals of policymakers ensures that representative government will not be undercut by tactics obstructing policies of new administration).
34. See id. at 508. The plaintiffs, Finkel and Tabakman, held positions as assistant public defenders in Rockland County, New York. See id. When the Rockland County Legislature appointed Branti, a Democrat, as Rockland County Public Defender, he issued termination notices to six of the nine assistants in his office. See id. at 509. The plaintiffs were among the six receiving such a notice. See id. Evidence suggested that the only reason for the plaintiffs' dismissals was that they were not recommended by the Democratic caucus because they were not Democrats. See id. at 510 n.5.
of party membership to a position in determining whether the law justified the patronage dismissal, the Court held that a court must ask "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Although this reformulation established a less definitive standard, it did not represent an abandonment of the approach in Elrod. The Court failed, however, to announce any alternatives for determining when political affiliation might be an "appropriate requirement" for public employment under its revised test. As a result, some courts regarded Branti as more semantic than substantive, while other courts, often with inconsistent results, struggled in determining whether the prohibition against patronage firing covered some governmental jobs.

In addition to the policymaking exception, the lower courts now struggled over the question of whether the constitutional prohibition against firing workers because of their political affiliations also applied to hiring and other adverse personnel actions other than firing. Some courts treated demotion as indistinguishable from dismissal.

The United States Supreme Court completed the trilogy of patronage cases when it confronted these issues in Rutan v. Republican Party of Illinois. In Rutan, former and present low-level public employees and an employment applicant

35. Id. at 518. The Court noted that some positions "may be appropriately considered political even though [they are] neither confidential nor policymaking in character," but "party affiliation is not necessarily relevant to every policymaking or confidential position." Id.

36. Justice Powell criticized the revised standard as "framed in vague and sweeping language certain to create vast uncertainty." Id. at 524 (Powell, J., dissenting).

37. Rather than articulating standards for determining when political affiliation might be considered a legitimate employment consideration, the Court merely expressed its conclusion as to the appropriateness of requiring political affiliation for three positions: precinct watcher, speech writer for a state governor, and head football coach of a state university. See id. at 517-18.

38. Many courts, while quoting language from Branti, have applied the nonconfidential, nonpolicymaking test set forth in Elrod. See, e.g., Nekolny v. Painter, 653 F.2d 1164, 1169-70 (7th Cir. 1981).

39. For example, a deputy sheriff may be fired for political reasons in the Seventh Circuit, but not in the Fourth Circuit. Compare Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991) (discharged deputies were not protected from patronage firings), with Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984) (discharge of deputies solely because of political party affiliation is not justified). For a survey of decisions about whether positions are policymaking under Elrod as well as a discussion of the inconsistency and unpredictability of the cases, see Susan Lorde Martin, A Decade of Branti Decisions: A Government Official's Guide to Patronage Dismissals, 39 Am. U. L. REV. 11 (1989).

40. The lower courts developed a variety of tests, including whether a job into which an individual was transferred was "unreasonably inferior" to his previous position, see, e.g., Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209, 1218-19 (1st Cir. 1989), and whether the adverse employment action was "the substantial equivalent of dismissal," see, e.g., Delong v. United States, 621 F.2d 618, 623-24 (4th Cir. 1980).

41. See, e.g., Bennis v. Gable, 823 F.2d 723, 732 (3rd Cir. 1987) (stating that police officers could not be demoted for exercising First Amendment rights); Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 238 (1st Cir. 1986) (en banc) (involving the demotion of two regional directors of Puerto Rico Urban Development and Housing Corporation).

challenged the hiring, promotion, transfer, and recall practices of the Republican Party and the Governor's office of Illinois. In a five-to-four decision, the United States Supreme Court held that patronage hiring, and failures for political reasons to promote, transfer, and recall after layoff, violated the First Amendment. The defendants tried to distinguish hiring from firing on the ground that failure to hire placed a less severe burden upon the disappointed job applicant's rights than did the loss of a job. Finding that these practices placed impermissible burdens on free speech and association, the majority rejected the defendants' argument.

In a strongly worded dissent, Justice Scalia raised several broad policy objections to the constitutional ban on patronage. He argued that patronage had played an important historical role in increasing political participation, democratizing politics, and strengthening the American system of political parties. Indeed, the mere existence of a tradition of political patronage in American history, Scalia argued, was grounds enough to find that the Constitution allowed the practice. Scalia also argued that the Court's decision would effectively open the floodgates of litigation. He believed that transforming every government employment decision adversely affecting a political opponent into a constitutional issue would require federal courts to review virtually every adverse employment decision.

43. See id. at 65-66. On November 12, 1980, Governor Thompson issued an executive order that imposed a hiring freeze on positions within his administration subject to his control; the only way hiring took place thereafter was to obtain a waiver of the freeze as to a particular hiring decision. The governor's political patronage staff made decisions about waivers upon recommendations from local Republican party officials. The political patronage staff looked at whether the applicant voted in Republican primaries in past elections years, whether the applicant had provided financial or other support to the Republican Party and its candidates, whether the applicant had promised to join and work for the Republican Party in the future, and whether the applicant had the support of Republican party officials at state or local levels. See id. For a description of how this patronage system operated, see David K. Hamilton, The Staffing Function in Illinois State Government after Rutan, 53 PUB. ADMIN. REV. 381, 381-82 (1993).


45. See id. at 79.

46. See id. at 77-79.

47. Unlike Justice Powell in Elrod and Branti, Justice Scalia rejected the majority's overall mode of analysis. Scalia argued that the Court must interpret the existence of patronage at the founding of the republic to mean that the First Amendment did not prohibit patronage. See id. at 92-104 (Scalia, J., dissenting). Furthermore, the restriction of the First Amendment rights of public employees does not require strict scrutiny. See id. (Scalia, J., dissenting).

48. See id. at 104-08.


50. See Rutan, 497 U.S. at 115.
2. Supreme Court Free Speech Decisions

In a separate line of decisions beginning in 1968, the Supreme Court articulated the test for determining whether the government has unconstitutionally dismissed a public employee in retaliation for any type of expression. In *Pickering v. Board of Education*, a school teacher sued for reinstatement after the school board fired him for sending a letter critical of school board policy to a local newspaper. In Justice Marshall's majority opinion, the Court held that the school board could not deprive Pickering, the teacher, of his right as a citizen to comment on matters of public concern. The Court did not focus exclusively on the relative authority associated with the employee's position as it had in *Elrod* and *Branti*, but rather sought "to arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The Court refused to enunciate a "general standard" by which it should judge the conflicts in the future because of the infinite variety of factual circumstances in which such conflicts might arise. The Court did, however, note the factors that went into its analysis of the case at bar.

Fifteen years later, in *Connick v. Myers*, the Supreme Court added two refinements to the balancing test. First, before applying the *Pickering* balancing test, the Court must determine whether the employee's speech touches on "a matter of public concern." In making this determination, a court must look to "the content, form, and context of a given statement, as revealed by the whole record." When the expression does not satisfy this initial inquiry, the First Amendment does not offer protection against the challenged personnel decision. If the speech at issue satisfies the threshold inquiry, the district court should then apply the second prong of the analysis, carefully balancing the government's interests against the

52. See id. at 564.
53. See id. at 568.
54. Id. at 568.
55. See id. at 569.
56. Among the factors that appeared to weigh heavily in the result were the nature of the working relationship between the teacher and the school board, and the public significance of the letter's content. See id. at 569-72.
57. 461 U.S. 138 (1983). Connick, an assistant district attorney in New Orleans, circulated a questionnaire to her co-workers concerning pressure to campaign on behalf of candidates supported by the district attorney, office morale and the trustworthiness of supervisors. See id. at 140-41.
58. The Court had considered the *Pickering* balancing test on two previous occasions. See Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 413 (1979) (expanding scope of protection to include private expression regarding issues of public concern); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284-87 (1977) (finding that no cause of action exists where an employee would have been dismissed regardless of protected expression).
60. Id. at 147-48.
61. See id. at 146.
employee's First Amendment right to speak. Relevant factors to consider include the particular need for close working relationships, the disruptiveness of the speech, and the extent to which the speech involves matters of public concern. In Connick, finding that the statement in question "touched upon matters of public concern in only a most limited sense," the Court permitted the public employer to justify the dismissal by showing that he had "reasonably believed" that the expression would cause disruption. The Court cautioned, however, that "a stronger showing [of disruption] may be necessary if the employee's speech more substantially involved matters of public concern."

The Court further refined the Pickering balancing test in Rankin v. McPherson. In Rankin, a deputy constable spoke on a matter of public concern when she remarked, in response to learning of an assassination attempt on President Reagan, "[I]f they go for him again, I hope they get him." The Court held that the speech was of public concern, applied the Pickering balancing test, and still resolved the balance in favor of the deputy. In balancing the employee's speech interest against the state's efficiency interest, the Court added the confidential or policymaking status of an employee as another factor weighing in the balance of the Pickering test. The Court observed that where the "employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." Thus, the more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer.

B. Independent Contractors: A Comparison With Public Employee Decisions

Not long after the Branti decision, disappointed independent contractors began seeking the same First Amendment protection from patronage that public employees enjoyed. The first significant case to address the constitutional rights of patronage practices affecting independent contractors was Sweeney v. Bond. In Sweeney, former fee agents for the Missouri Department of Revenue brought suit against the new Republican Governor and the Director of the Department, alleging that the governor and director dismissed them from their positions solely because of their

62. See id. at 150.
63. See id. at 151-54.
64. Id. at 154. The trial court had required a showing of actual disruption. See id. at 142.
65. Id. at 152; see also The Supreme Court, 1982 Term, 97 Harv. L. Rev. 70, 164-71 (1983) (stating that Connick "created a doctrinal conflict," and the "result will be conflict among the circuits and confusion among public employees.").
67. Id. at 381, 386-87.
68. See id. at 388-89, 392.
69. See id. at 390-91.
70. Id.
71. See id. The Court found a reduced state interest because the employee, although bearing the title of "deputy constable," performed the duties of a data entry clerk. See id. at 380-81.
72. 669 F.2d 542 (8th Cir. 1982).
political affiliation.\textsuperscript{23} The United States Court of Appeals for the Eighth Circuit determined that the fee agents were not state employees and instead found them to be independent contractors.\textsuperscript{24}

The \textit{Sweeney} court concluded that the holdings in \textit{Elrod} and \textit{Branti} were limited specifically to the dismissal of public employees for partisan reasons.\textsuperscript{25} Relying solely on the statements in \textit{Elrod}\textsuperscript{26} limiting those decisions to the issue of discharged public employees, the court declined to extend First Amendment protection to independent contractors.\textsuperscript{27} The court then determined that political affiliation was an appropriate requirement for effective performance, thus bringing the fee agents within the \textit{Branti} exception.\textsuperscript{28} Thus, in dismissing any potential application of \textit{Elrod} and \textit{Branti}, the circuit court never reached the merits of the case, nor did it address any competing interest between individual rights of speech and association and overriding governmental concerns. Classifying the employees as independent contractors was apparently enough to distinguish \textit{Elrod} and \textit{Branti} and dismiss the validity of any constitutional claim.

Shortly after the \textit{Sweeney} decision, the United States Court of Appeals for the Eighth Circuit reaffirmed its position. In \textit{Fox & Co. v. Schoemehl},\textsuperscript{29} the plaintiff public accounting firm brought suit against the new mayor of St. Louis alleging that the mayor had replaced them as auditors for the St. Louis Board of Education solely because they opposed the mayor in the recent election.\textsuperscript{30} The court held that the accounting firm hired as auditors were not public employees but rather independent contractors whom the mayor could deny auditing contracts in succeeding years.

\textsuperscript{73} See id. at 544.
\textsuperscript{74} See id. at 545. Fee agents issue motor vehicle licenses and collect motor vehicle sales and use taxes for the state. See id. at 544 n.3. In determining that fee agents were independent contractors, the court noted that the state did not supervise the fee agents, did not pay the fee agents, did not hire and fire the fee agents with respect to individual offices, did not pay the fee agents expenses, required the fee agents to pay self-employment taxes, and that the fee agents were not part of the state retirement system. See id. at 545-46.
\textsuperscript{75} See id. at 545.
\textsuperscript{76} "Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons." Elrod v. Burns, 427 U.S. 347, 353 (1976).
\textsuperscript{77} See \textit{Sweeney}, 669 F.2d at 545 (citing \textit{Branti} v. Finkel, 445 U.S. 507, 508 (1980); \textit{Elrod}, 427 U.S. at 353).
\textsuperscript{78} See id. at 546. The court argued that fee agents are "selected emissaries of the incumbent administration and . . . symbols of the governor's office who do not bring the usual disadvantages of patronage employees to their posts." \textit{Id.} (quoting \textit{Sweeney} v. Bond, 519 F. Supp. 124, 129 (E.D. Mo. 1981) (trial court opinion)). It is difficult to see how political affiliation is any more necessary to the effective collection of motor vehicle sales and use taxes than it is to the effective performance of the functions of the process server in \textit{Elrod} or the assistant public defenders in \textit{Branti}. The court seems to have misread the \textit{Branti} exception as allowing patronage hiring unless partisan politics would hinder job performance rather than as allowing patronage hiring only when partisan political affiliation is necessary to job performance. \textit{Cf.} United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (upholding provision in Hatch Act, 5 U.S.C. § 7324(a)(2) (1982), prohibiting political activity by federal employees because such activity is detrimental to the efficient administration of government).
\textsuperscript{79} 671 F.2d 303 (8th Cir. 1982).
\textsuperscript{80} See id. at 304.
based solely on political affiliations. The court faithfully followed its previous decision in *Sweeney*. The court relied completely upon the language used within *Sweeney*, and reiterated its refusal to extend the patronage decisions to cases that did not involve public employees.

The following year the United States Court of Appeals for the Seventh Circuit followed suit in refusing to extend the *Elrod* and *Branti* protection to independent contractors. However, the decision in *LaFalce v. Houston* articulated a reason why the patronage protection decisions should not extend to cases that did not involve public employees. In *LaFalce*, an individual proprietor had submitted the low bid for the installation and maintenance of benches along the streets of Springfield, Illinois. The City of Springfield nevertheless awarded the contract to a political supporter of the mayor. Although the court recognized that the practice of awarding public contracts on political grounds inhibited free expression and association by contractors, the court declined to extend the scope of *Elrod* and *Branti* to independent contractors.

Unlike the courts in *Sweeney* and *Fox & Co.*, the *LaFalce* court examined the competing interests of the City and contractor so it could draw a principled line between public employees and independent contractors. Recognizing what it thought was a significant difference in the extent of interference from patronage practices between public employees and independent contractors, the court concluded that the degree of coercion exerted on contractors by patronage practices was less than on public employees. The court reasoned that "[i]f the contractor does not get the particular government contract on which he bids . . . it is not the end of the world for him; there are other government entities to bid to, and private ones as well. It is not like losing your job." The court tried to discount those contractors who dealt exclusively with, or devoted a substantial portion of their business to, government entities by characterizing them as "political hermaphrodites" who support both parties and thus would not be affected by partisan policies.

81. *See id.* at 305.
82. *See id.*
83. 712 F.2d 292 (7th Cir. 1983).
84. *See id.* at 293.
85. *See id.* at 293-94.
86. *See id.* at 294.
87. *Id.* Judge Posner, writing for the court, stated that many government workers could not find employment at the same wage in the private sector; and the prospect that a protracted period of search following discharge might well result in a substantially less well paid job would cause many government workers to flinch from taking political stands adverse to their superiors.
88. *LaFalce*, 712 F.2d at 294. The court reasoned that contractors with extensive independent contractors support both major parties, not because contracts are issued on a partisan basis, but because the role of government in American life has made it important to be on good terms with political groupings in society. *See id.* This rationale is flawed. If the court is allowing patronage in awarding contracts in order to advance a party's interest, then contractors supporting both parties cannot be awarded contracts based on their political affiliation because their loyalties are split. If by choice
The LaFalce court also attempted to weigh the costs of further subjecting this country's long-established patronage system to First Amendment scrutiny against the benefits to an independent contractor's exercise of First Amendment rights. The court concluded that the costs of protecting public contracts outweighed the benefits of protecting independent contractors: "To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable." Furthermore, the court was reluctant to extend Elrod and Branti to independent contractors because the United States Supreme Court seemed to indicate a desire to limit Elrod and Branti to public employee dismissals.

In 1986, in Horn v. Kean, the United States Court of Appeals for the Third Circuit reaffirmed the LaFalce court's position that independent contractors do not have protection against patronage practices. In Horn, former New Jersey vehicle agents chosen for their positions by a Democratic governor brought claims for violations of their constitutional rights when a Republican governor replaced them. Again the court held that the agents were independent contractors rather than public employees and thus were not within the First Amendment's protection.

Despite a more detailed analysis of the historical patronage doctrines and the reasoning of Elrod and Branti, the Horn court held that Elrod and Branti explicitly encompassed only the dismissal of public employees for partisan reasons and did not include independent contractors. The court did, however, marginally address the interests of independent contractors and noted that "the respective interests identified to be weighed by the court in Elrod and Branti are similar to interests implicated when patronage practices affect independent contractors." However,
the court supplied its own reasoning as to the vitality of the government interest in patronage and concluded that the actual balance struck produces a different result.97

Four judges dissented,98 presenting for the first time a powerful argument why independent contracts should be protected from patronage dismissal. According to the dissent, the critical question was not whether there was a factual or economic difference between public employees and independent contractors but "whether the state's interests in firing independent contractors because of their political associations are sufficiently compelling to overcome the contractors' First Amendment interests."99 The only compelling interest recognized in *Elrod* was the state's interest in placing persons sympathetic to the politics of elected officials into policymaking positions.100 It was far from clear that the state's interest in patronage would outweigh the independent contractors' interest in freedom of belief and association.101 The power exerted over an individual's political beliefs, if the government controlled a substantial portion of that individual's income, could be as effective as when the government had control over one-hundred percent of that individual's income.102 Finally, the dissent noted that a rule holding that the Supreme Court's patronage decisions do not protect independent contractors essentially allows the states to free themselves of the limitations of the First Amendment by simply contracting out functions previously performed by state employees.103

III. *O'Hare Truck Service v. City of Northlake and Board of County Commissioners v. Umbehr*

The *O'Hare* and *Umbehr* decisions, addressing patronage and free speech respectively, were argued separately, but the United States Supreme Court decided them on the same day. The minority, realizing the distinction between government

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97. See id. The court again addressed the assumed understanding that partisan politics lies at the core of our democratic process and that it is necessary for the effective implementation of the administration's programs. See id. However, the court conceded that "the politically-based interests sought to be advanced by patronage practices are similar whether public employees or contractors are involved," but decided that "the countervailing First Amendment interests differ." Id. This court deemed this distinction important because the central concern of the Court in *Elrod and Branti* — that patronage coerces public employees into adopting a new belief or dissociating themselves from a particular belief — has diminished importance when the recipient is a contractor with the state rather than a state employee. See id. The court relied on *LaFalce* to support this alleged distinction. See id. at 674-75.

98. Circuit Judge Gibbons presented the dissenting opinion with whom Judges Sloviter, Mansmann, and Stapleton joined. See id. at 680-85 (Gibbons, J., dissenting).

99. Id. at 683 (Gibbons, J., dissenting).

100. See id. at 682 (Gibbons, J., dissenting).

101. See id. at 682-83 (Gibbons, J., dissenting).

102. See id. at 683 (Gibbons, J., dissenting).

103. See id. at 680 (Gibbons, J., dissenting). Writing for the dissenters, Judge Gibbons also expressed his disbeliefs that the Founding Fathers would have allowed one party to use the economic power of the state to prevent other groups from competing effectively to replace them. See id. at 684-85 (Gibbons, J., dissenting).
employees and public contractors was eroding, attached the same dissenting opinion to O'Hare and Umbehrt.104

A. O'Hare

1. Facts

The City of Northlake (City) coordinated a towing service through the police department and maintained a rotation list of available towing companies. When the police department received a towing request, it would call the next towing company on the list. The City's policy had been to remove a tow truck operator from the rotation list only for cause. O'Hare Truck Service, Inc. (O'Hare) had been on the list since 1965. O'Hare and the City's former mayor had a mutual understanding that the City would maintain O'Hare's place on the rotation list so long as O'Hare provided good service.

In 1989, soon after being elected the City's new mayor, Reid Paxon told Mr. Gratzianna, the owner of O'Hare, that he was pleased with O'Hare's work and would continue using its services. Four years later, when Mr. Paxon was running for reelection, his campaign committee asked Gratzianna for a contribution. Gratzianna refused to contribute and instead supported Paxon's opponent. Shortly thereafter, O'Hare was removed from the rotation list.

O'Hare and Gratzianna filed suit in the United States District Court of the Northern District of Illinois under 42 U.S.C. § 1983, alleging their removal from the rotation list was in retaliation for Gratzianna's stance in the campaign. The District Court dismissed the complaint.105 The United States Court of Appeals for the Seventh Circuit affirmed, adhering to the view that "it should be up to the United States Supreme Court to extend Elrod."106 The United States Supreme Court, to resolve the conflict between Courts of Appeal regarding the applicability of Elrod and Branti to independent contractors, granted certiorari on March 20, 1996.107

2. Holding

The issue presented to the United States Supreme Court was whether the protections of Elrod and Branti extend to an independent contractor who, in retaliation for refusing to comply with demands for political support, has a government contract terminated or is removed from an official list of contractors authorized to perform public services.108 The Court, in a seven-to-two vote, held that the protections of Elrod and Branti extend to an instance where the government

104. See Board of County Comm'rs v. Umbehrt, 116 S. Ct. 2342, 2361 (1996) (containing Justice Scalia's dissent, joined by Justice Thomas, to both Umbehrt and O'Hare).
105. See O'Hare Truck Serv. v. City of Northlake, 843 F. Supp. 1231, 1234 (N.D. Ill. 1994).
106. See O'Hare Truck Serv. v. City of Northlake, 47 F.3d 883, 885 (7th Cir. 1995).
108. See id. at 2355.
retaliates against a contractor, or a regular service provider, for exercising rights of political association or expression of political allegiance.109

B. Umbehr

1. Facts

In 1981, and after a renegotiation in 1985, Wabaunsee County, Kansas (the County) contracted Keen A. Umbehr to be the exclusive hauler of trash for cities in the county. The County was to automatically renew the contract between Umbehr and the County unless either party terminated it by giving at least sixty-days notice before the end of the year, or unless either party instituted a renegotiation on ninety-days notice. Umbehr hauled trash from 1985 to 1991 on an exclusive and uninterrupted basis.

During the term of his contract, Umbehr was an outspoken critic of the Board of County Commissioners of Wabaunsee County (the Board). Umbehr spoke at the Board meetings and wrote critical letters and editorials in local newspapers about the County's landfill user rates and alleged mismanagement of taxpayer money. Umbehr also ran for election to the Board. The Board members allegedly took offense to Umbehr's words, threatening to censor the county newspaper for publishing his writings. In 1991, after a similar attempt in 1990,110 the Board terminated Umbehr's contract by a vote of two-to-one.

In 1992, Umbehr brought suit against the two majority Board members in their individual111 and official capacities under 42 U.S.C. § 1983, alleging that they had terminated his government contract in retaliation for his criticism of the County and the Board. The United States District Court for the District of Kansas held that "the First Amendment does not prohibit [the Board] from considering [Umbehr's] expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term"112 because as an independent contractor, the First Amendment did not entitle Umbehr to the same protections afforded to public employees.113 The United States Court of Appeals for the Tenth Circuit reversed, holding that

an independent contractor is protected under the First Amendment from retaliatory governmental action, just as an employee would be, and that the extent of protection is to be determined by weighing the

109. See id. at 2359.
110. In 1990, the Board voted 2-1 to terminate, or at least prevent the automatic renewal of, Mr. Umbehr's contract with the County. The attempt failed because of a technical defect. See Board of County Comm'nrs v. Umbehr, 116 S. Ct. 2343, 2345 (1996).
111. The district court held that the claims against the Board members in their individual capacities were barred by qualified immunity, see Umbehr v. McClure, 840 F. Supp. 837, 841 (D.Kan. 1993), and this ruling was affirmed on appeal, see Umbehr v. McClure, 44 F.3d 876, 883 (10th Cir. 1995). The Board members who were the original defendants eventually resigned their positions, so in the Supreme Court, the Board was substituted for them as petitioner.
government's interests as contractor against the free speech interests at stake in accordance with the balancing test that we used to determine a government employee's First Amendment rights in [Pickering v. Board of Education].

Therefore, the court remanded the official capacity claims to the district court for further proceedings, including consideration of whether the termination was retaliatory. The United States Supreme Court, to resolve a conflict between the United States Courts of Appeals about whether, and to what extent, the First Amendment protects independent contractors, granted certiorari on November 28, 1995.

2. Holding

The issue presented to the Supreme Court was whether, and to what extent, the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of freedom of speech. The Court, by a vote of seven-to-two, held that the First Amendment protects independent contractors from the termination or prevention of automatic renewal of at-will government contracts in retaliation for their exercise of the freedom of speech. The Court also held that the Pickering balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of protection.

C. Decisions

1. O'Hare — The Kennedy Majority

Justice Kennedy, delivering the opinion for the majority, began his analysis with a history of the Court's rejection of the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights. Absent some reasonably appropriate requirement, Kennedy argued, the government may not make public employment contingent upon political beliefs or prescribed expression.

In introducing the Court's opinion, Justice Kennedy presented a comparison between Gratzianna and a public employee. If Gratzianna was a public employee whose job was to perform tow truck operations, he argued, there is no doubt that the City could not discharge him for refusing to contribute to the mayor's campaign

114. Umbehr, 116 S. Ct. 2346 (quoting Umbehr, 44 F.3d at 883).
115. The Fifth and Eighth Circuits agreed with the Tenth Circuit while the Third and Seventh Circuits did not. See id.
116. See id. at 2346.
117. See id. at 2345.
118. See id. at 2346.
119. See id.
120. Voting for the majority were Justices Stevens, O'Connor, Souter, Ginsburg, Breyer and Chief Justice Rehnquist. Justice Scalia filed a dissenting opinion which Justice Thomas joined.
121. See O'Hare Truck Serv. v. City of Northlake, 116 S. Ct. 2353, 2357 (1996).
or for supporting his opponent.122 Thus, according to Kennedy, the Court could not distinguish between the actions of the City in this case and the coercion exercised in other unconstitutional condition cases.123 In fact, had the mayor or his backers asked for the contribution as a quid pro quo for continuing O'Hare's arrangement with the City, they might well have violated bribery statutes.124

Justice Kennedy then addressed the City's arguments. The City tried to distinguish this case on the basis that it involved a claim by an independent contractor. While acknowledging this fact, Kennedy could still see no reason for the constitutional claim of an independent contractor to turn on that distinction. Kennedy argued that to recognize such a distinction would invite manipulation by government, which could avoid constitutional liability simply by attaching different labels to particular jobs.125

In reaching his conclusion, Justice Kennedy referred to the Court's decision in Lefkowitz v. Turley,126 where the court did not "see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor."127 It was this "difference of constitutional magnitude," in the degree to which employees and contractors depend on government sources for their income, which Kennedy concluded the City did not show.128 However, it was not on this distinction that Justice Kennedy wanted to rest. He recognized that courts are not well suited to the task of measuring levels of employee dependence.129 The fundamental concern was that independent contractors, as well as public employees, should have the right to protest wrongful government interference with their rights of speech and association.130

Finally, Justice Kennedy emphasized the rights of governmental entities in making contracting decisions.131 If the government terminates a provider for

122. See id. at 2358.
123. See id.
124. See id. at 2350-59.
125. See id. (citing Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2349 (1996)).
127. See O'Hare, 116 S. Ct. at 2359 (citing Lefkowitz, 414 U.S. at 83).
128. See O'Hare, 116 S. Ct. at 2359.
129. See id. at 2360.
130. See id.
131. Justice Kennedy noted that the Constitution accords government officials a large measure of freedom:

Interests of economy may lead a governmental entity to retain existing contractors or terminate them in favor of new ones without the costs and complexities of competitive bidding. A government official might offer a satisfactory justification, unrelated to the suppression of speech or associational rights, for either course of action. The first may allow the government to maintain stability, reward good performance, deal with known and reliable persons, or ensure the uninterrupted supply of goods or services; the second may help to stimulate competition, encourage experimentation with new contractors, or avoid the appearance of favoritism. These are choices and policy considerations that ought to remain open to government officials when deciding to contract with some firms and not others, provided of course the asserted justifications are not the pretext for some improper practice.
reasons unrelated to political association, for example, the provider is unreliable or if political affiliation is an appropriate requirement for the effective performance of the task, no First Amendment violation exists.

Concluding that the city failed to show that the absolute right to enforce a patronage scheme was a necessary part of a legitimate political system in all instances, Kennedy chose to continue following the decisions in *Elrod* and *Branti*. Therefore, Justice Kennedy refused to draw, and some may argue erased, a line excluding independent contractors from First Amendment protection.

2. *Umehr* — The O'Connor Majority

Justice O'Connor, writing for the majority, first determined that the similarities between government employees and government contractors were obvious. She then looked to government employment precedents for guidance. Relying on proper application of the *Pickering* balancing test, O'Connor concluded that the Court could apply government employee cases to independent contractors.

Both Umehr and the Board argued that independent contractors worked at a greater remove from government officials than do most government employees. The Board further argued that the lack of day-to-day control accentuated the government's need to have work done by someone it trusted and that the cost of fending off litigation outweighs the interest of independent contractors, who are typically less financially dependent on their government contracts than are employees. By contrast, Umehr argued that the government's interest in maintaining harmonious working environments and relationships recognized in government employee cases are attenuated where the contractor does not work at the government's workplace and does not interact daily with government officers and employees. Umehr also pointed out that where the public perceives him as an independent contractor, any government concern that his political statements will be confused with the government's political positions is mitigated.

Although Justice O'Connor recognized the merits of both arguments, she still believed the *Pickering* balancing test could accommodate the differences between

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133. See *O'Hare*, 116 S. Ct. at 2361.
134. See id. at 2361.
135. Concurring with the majority opinion, Parts I, II-A, II-B-2 and III, were Justices Stevens, Ginsburg, Kennedy, Souter, Breyer, and Chief Justice Rehnquist, and with respect to Part II-B-1, were Justices Stevens, Kennedy, Souter, Ginsburg and Breyer. Justice Scalia filed a dissenting opinion in which Justice Thomas joined.
137. See id. at 2347.
138. See id. at 2348.
139. See id.
140. See id.
141. See id.
142. See id.
143. See id.
public employees and independent contractors. The bright line rule proposed by the Board would give the government carte blanche to terminate independent contractors for exercising First Amendment rights and leave First Amendment rights unduly dependent on whether state law labels a government service provider's contract as a contract of employment or a contract for services. Thus, Justice O'Connor concluded that independent contractors do enjoy limited First Amendment protection. The Court's decision, however, is limited to a preexisting commercial relationship with the government and therefore does not address the possibility of suits by bidders or applicants for new government contracts.

3. Umbehr and O'Hare — The Dissenting Partnership of Scalia and Thomas

Justice Scalia's dissenting opinion began by rebuking the Court for being "fickle" in its convictions. Justice Scalia argued that refusing to reward one's opponents is an American political tradition as old as the Republic and questioned each Justice's ability and right to change tradition. Justice Scalia then concluded by quoting from Justice Holmes in a case challenging the constitutionality of a federal estate tax:

"[The] matter . . . is disposed of . . ., not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use — on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax . . . Upon this point a page of history is worth a volume of logic."
After arguing in favor of tradition, Justice Scalia focused on government contracting itself. Citing examples of federal, state, and local regulations, he noted that these regulations were the way the government regulates their contracts and the way the government addressed public policy problems. However, these regulations have brought with them a degree of discrimination, discernment, and predictability that a constitutional prohibition cannot achieve. Justice Scalia also argued that the government favors, or disfavors, those who agree with its political view everyday when it decides where to build public works, on whom to impose taxes, and on whom to grant benefits.

Justice Scalia then highlighted the differences between public employees and independent contractors. Relying on Judge Posner's distinction in *LaFalce*, he argued that a public employee is virtually always one who is not rich, and the loss of his job would deny him his livelihood. On the other hand, an independent contractor is usually a corporation, and a loss of a contract rarely kills an entire business.

After focusing on the differences between independent contractors and public employees, Justice Scalia concentrated on the potential for additional litigation. Deciding that today's decision created just another "case-by-case, balance-all-the-factors-and-who-knows-who-will-win" situation, he concluded that such uncertainty would breed litigation. Justice Scalia focused on the merits of the existing government contracting laws. Scalia found the contracting laws were clear and detailed, and it was easy to ascertain when a party had violated them. Conversely, the extension of First Amendment protection to independent contractors now requires a sensitive "balancing" which will place all government entities at risk of § 1983 lawsuits unless they implement procedures which make it easy to defend against a claim of political favoritism.

Justice Scalia then attacked the decision itself. "What the Court sets down in *Umehr*," Justice Scalia argued, "it rips up in *O'Hare*." Scalia cited the general principles which divide the freedom of speech into two categories: (1) the right of free speech to which the *Pickering* balancing test applies; and (2) political affiliation to which the rules in *Elrod* and *Branti* apply. Realizing that both types of

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349 (1921)).
154. *See id.* at 2365 (Scalia, J., dissenting).
155. *See id.* (Scalia, J., dissenting).
156. *See id.* at 2366 (Scalia, J., dissenting).
157. *See id.* at 2366-67 (Scalia, J., dissenting) (quoting *LaFalce* v. Houston, 712 F.2d 292, 294 (7th Cir. 1983)).
158. *See id.* at 2366 (Scalia, J., dissenting).
159. *See id.* (Scalia, J., dissenting).
160. *See id.* at 2367 (Scalia, J., dissenting).
161. *Id.* at 2374 (Scalia, J., dissenting).
162. *See id.* at 2367 (Scalia, J., dissenting).
163. *See id.* at 2368 (Scalia, J., dissenting).
164. *See id.* at 2367 (Scalia, J., dissenting).
165. *Id.* at 2370 (Scalia, J., dissenting).
166. *See id.* (Scalia, J., dissenting).

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speech could occur in the same situation, Justice Scalia argued that the United States Courts of Appeals will face uncertainty in deciding which test to apply.\textsuperscript{167}

Concluding his opinion, Justice Scalia referred to hard cases making bad law.\textsuperscript{168} In fact, Scalia argued, "[t]he cases before the Court today set the blood boiling, with the arrogance that they seem to display on the part of elected officials."\textsuperscript{169} Finally, warned Scalia, "[w]hile the present Court sits, a major, undemocratic restructuring of our national institutions and mores is constantly in progress."\textsuperscript{170}

\textit{IV. Analysis of Umbehr and O'Hare Opinions}

\textbf{A. Majority}

After refusing to recognize the similarities between public employees and independent contractors for over twenty years, Justices O'Connor and Kennedy were correct in returning to the public employee cases for guidance when the Court did decide to extend protection to independent contractors. One question that remains, however, is why did it take so long?

The majority recognized and argued that patronage-based contracting coerces beliefs and unconstitutionally infringes upon individual rights protected by the First Amendment. Limiting the availability of public contracts by conditioning contracts on partisan affiliation hinders free belief and association. Consequently, the loss or rejection of a public contract for failing to compromise one's convictions creates a constitutional claim. Conversely, if independent contractors want public contracts, some will suppress their free speech and associational rights to obtain and establish such contracts. Both situations, while requiring one to make a choice, result in oppression of constitutional liberties and are therefore not choices at all.

\textbf{B. Minority}

Justice Scalia obviously supported 'the practice of patronage, whether in the context of public employees or independent contractors. Based primarily on the age of the institution of patronage, Justice Scalia argued that the Court should allow patronage hiring because it has been an accepted practice for such a long time. Scalia based this argument on the belief that the Court should not read into the Constitution any rights which it did not clearly contain at the time of its drafting.

The United States Supreme Court, prior to these decisions, has occasionally sustained practices, otherwise suspect under the First Amendment, where there has been a long history of allowing the practice.\textsuperscript{171} A court is therefore likely to exercise caution before declaring an institution unlawful when the court, for nearly 200 years, believed the institution was constitutional.\textsuperscript{172} Until recently, it was

\begin{itemize}
  \item \textsuperscript{167} See id. at 2371 (Scalia, J., dissenting).
  \item \textsuperscript{168} See id. at 2373 (Scalia, J., dissenting).
  \item \textsuperscript{169} Id. (Scalia, J., dissenting).
  \item \textsuperscript{170} Id. (Scalia, J., dissenting).
  \item \textsuperscript{171} See, e.g., Marsh v. Chambers, 463 U.S. 783, 786 (1983) (upholding recitation by chaplain of daily prayer in opening proceedings in state legislature); cf. Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is not protected expression under the First Amendment).
  \item \textsuperscript{172} The plurality in \textit{Elrod} did not really give this justification serious consideration, and indeed
\end{itemize}
believed that because government could withhold benefits, it could also attach strings to those benefits it decided to distribute. This doctrine was based on the idea that government benefits are privileges and not rights. Today, however, the doctrine is based on the idea that the government cannot do indirectly what it cannot directly do. Patronage contracting, by requiring political support as a condition for obtaining a contract, imposes an unconstitutional condition on the exercise of First Amendment rights, thereby making patronage unconstitutional.

Indeed, patronage contracting has a storied past that had its time and its place in the halls of tradition where Justice Scalia roams, but circumstances have changed. Government has grown at all levels. The demand made by government on labor and services from the private sector was once relatively minor, but the government is now a major consumer of both. This shift in significance of government as employer and consumer makes reliance on the history of patronage contracting unsound.173

Justice Scalia's best argument may have been regarding litigation. Raising every adverse government employment decision to the level of a constitutional issue will result in a potential rise in litigation. The results of twenty years of patronage employment decisions have varied and made it difficult for government employers to be certain their employment actions are constitutional. Now those same difficulties extend to government contracts as well.

The effect of this unpredictability means that the fear of litigation and uncertainty over the results of judicial review may cause government officials to award contracts based on price alone, resulting in contracts with inadequate and incompetent contractors. Such acts would not serve the public interest and may even harm it. If employers do not always award the contract to the lowest bidder, the lowest bidder may sue and subject the employers who properly exercised their powers of discretion to unfavorable publicity. The government would spend more tax dollars to defend itself in cases that may not really be about First Amendment rights at all but about struggles over and between political adversaries. Therefore, Justice Scalia's desire to maintain the status quo still has some merit.

V. Ramifications of Umbehr and O'Hare

The effect that Umbehr and O'Hare will have on public contracts is uncertain. Undoubtedly, courts will continue to struggle in applying the public employee decisions to independent contractors. The obvious effect of Umbehr and O'Hare will be to quell commentator opinions that the Court should extend First Amendment protection for public employees to independent contractors. Many

173. As Justice Stevens pointed out in the first court of appeals decision to hold patronage dismissals unconstitutional, "If the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure." Illinois State Employees Union v. Lewis, 473 F.2d 561, 568 n.14 (7th Cir. 1972), quoted in Elrod v. Burns, 427 U.S. 347, 369 n.22 (1976).
courts will question whether First Amendment protection extends to all independent contractors or only those whom the government terminated from an existing contract.

A. Governmental Benefits

Obviously, the Scalia dissent supports patronage practices and, if possible, would overrule the public employee and independent contractor patronage protection cases. The majority, however, recognizes that patronage conditions or penalizes the receipt of a government benefit at the cost of individual rights. Allowing independent contractors to keep their jobs if they provide support for a favored political party effectively produces a result that the government could not directly command. This implicates independent contractor's individual rights by forcing them to suppress or give up their speech and associational beliefs to receive a public contract.

The decisions of O'Hare and Umbehr have removed the ability of government officials to purchase power at the cost of First Amendment rights. The government can no longer condition valuable benefits on the relinquishing of constitutional rights or deny benefits to a person on a basis that infringes upon an individual's constitutionally protected interests.

B. Governmental Interests

Although the government can no longer purchase power at the cost of First Amendment rights, proof of a compelling state interest may still override the rights of independent contractors. The only governmental interest ever mentioned is in political patronage itself and it is "an interest that has never been recognized in a First Amendment context by a majority of the Supreme Court." The majority in O'Hare and Umbehr makes it clear that the government's interest in patronage no longer takes on greater weight in the independent contractor context. Consequently, the Court now affords public employees and independent contractors equal First Amendment rights.

Placing public employees and independent contractors on equal footing may hurt independent contractors. Like the public employee patronage decisions that inadvertently hurt public employees by encouraging the government to contract out governmental functions to those with less First Amendment protection, the O'Hare and Umbehr decisions may also inadvertently hurt independent contractors by limiting the number of contracts into which the government is willing to enter. Any decision to keep a project in-house adversely affects independent contractors because it is one less project available to them. If the government sees an efficiency or economic benefit to keeping a project in-house, the decision to keep the project

174. Horn v. Kean, 796 F.2d 668, 683 (3d Cir. 1986) (Gibbons, J., dissenting). In discounting the majority's opinion in Horn, the dissenters note that even in identifying this interest (efficiency and economy), the majority does not engage in the necessary comparison between the state's interests in patronage and the independent contractors' interests in freedom of belief and association. See id. (Gibbons, J., dissenting). The dissent noted that the Horn majority, without analysis, assumed that independent contractors lack any serious interests that need to be insulated from patronage. See id. (Gibbons, J., dissenting).
in-house is easier to make because public employees and independent contractors now have similar First Amendment protections. Both efficiency and economic benefit are vital governmental interests.

The only governmental interest sufficient to justify a limitation on First Amendment rights in public employee cases is the government's interest in having policymaking positions occupied by persons aligned with the administration's policies. The Court has never deemed such party affiliation crucial to public contracts. Although hiring politically affiliated contractors may be an effective way to carry out the administration's program, the work of the government should not be a conduit through which political factions gain and wield economic power. Both O'Hare and Umbehr make it clear that unless an independent contractor's political affiliation clearly indicates it will compromise the government's ability to discharge its responsibilities, the court should prohibit the government from disabling aspects of a contractor's political commitment that lie at the core of citizenship.

C. Patronage Hiring

The decisions in O'Hare and Umbehr may have removed the government's ability to terminate independent contractors for exercising First Amendment freedoms, but they did not restrict patronage hiring of independent contractors. Responding to the American people's decision that political influence in government contracting is not desirable, all fifty states have created some kind of lowest responsible bidder statute. These statutes are the way the government limits its contracting decisions, but these statutes do allow for some favoritism and discrimination. How long will the Court allow this favoritism in hiring to continue? The result in the example of Peter public employee and Ira independent contractor has changed in the context of termination, but if the example were a hiring situation, Ira would still have no recourse. It is probably just a matter of time before the Supreme Court grants certiorari to address the issue of patronage hiring. Until that time, however, there will exist a distinction between public employees and independent contractors.

D. Floodgates of Litigation

As a result of the Umbehr and O'Hare decisions, and as the Scalia dissent posited, there may be a rise in litigation. Indeed, this could occur because Umbehr and O'Hare have effectively expanded the pool of potential plaintiffs. However, potential plaintiffs and their attorneys still face two substantial legal hurdles in any suit alleging any First Amendment right restrictions: (1) establishing standing to sue and (2) meeting the burden of proof.

Since the Elrod decision, the Supreme Court's interpretation of the standing requirement has become increasingly restrictive. A plaintiff must show both that the injury suffered is fairly traceable to, or caused by, the defendant's action and that

176. See Horn, 796 F.2d at 685 (Gibbons, J., dissenting).
177. See Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2364 n.1 (1996).
the action of the court is likely to redress the injury. These requirements should tend to cut down the number of suits brought to challenge individual employment decisions because the potential plaintiff would need to show not only that they had applied for the job and did not get it but also that they were among the smaller number of candidates who were under consideration for the position. Only by showing these things could a plaintiff reasonably argue that the court's decision would in fact result in relief.

The second hurdle facing plaintiffs bringing political discrimination suits is an extremely difficult burden of proof. A plaintiff must show that constitutionally protected conduct — freedom of expression and association in patronage cases — was a substantial motivating factor in the employer's decision. The government may then establish as a defense that it would have made the same decision even absent the protected conduct. Assuming competent counsel represents both parties, these heavy burdens on any potential plaintiff will reduce the number of cases brought before the Court.

E. Application of Elrod and Pickering

Another issue raised by the O'Hare and Umbehr decisions is which test, Pickering or Elrod, applies when the government terminates an independent contractor for exercising her freedom of political association and speech rights. The Court has advised which test applies when only one right is offended: Pickering applies to free speech cases and Elrod applies to political affiliation cases. This is consistent with decisions affecting public employees. However, the existence of two separate doctrines for similar situations will likely continue to confound lower courts.

In the past, courts have differed on how to approach cases where both free speech and political affiliation may have played a role in the decision to terminate. Which test applied depended on the court's view of the relationship between the two lines of Supreme Court precedent. The two lines of cases share similar constitutional concerns and similar interests of the parties. Accordingly, several courts have concluded that the patronage cases are a narrow subset of the Pickering cases. In contrast, other courts viewed Pickering and Elrod as governing entirely separate situations which has caused a great deal of confusion. Lower courts now hearing independent contractor cases may merge the patronage cases with employee speech cases and apply the Pickering or Elrod analysis in situations where

180. Id. at 287.
181. See O'Hare, 116 S. Ct. at 2349.
183. See, e.g., McBee v. Jim Hogg County, 730 F.2d 1009, 1014 (5th Cir. 1984) (en banc).
it is inappropriate. *O'Hare* and *Umbehr* have still left unanswered the questions about treatment of independent contractors, or public employees, who offend the government by both speech and political affiliation. Until such a plaintiff stands before the Supreme Court, lower courts will have a lot of discretion in deciding which line of cases to apply.

**F. Governmental Decision Making**

The final problem emerging from the *O'Hare* and *Umbehr* decisions is what consequences attempts to enforce the extension of First Amendment rights will have on governmental decision making. Governmental hiring decisions involving nonpolicy-making public employees are not as complex as governmental contracting decisions for two reasons. First, the going wage for a government employee is usually fixed, and therefore the employee's "price" is not a criterion for deciding whom to employ. Second, the qualifications for employment are usually clear from the nature of the job and its history.

The result is that nonpolitical reasons for an adverse employment decision, such as lack of education, misconduct, or poor performance, can easily be documented to justify the decision. Similarly, the employer can easily prove the absence of such factors, so that where insufficient nonpolitical justification exists, a cause of action under *Elrod* is easily made out. Therefore, government officials are put on notice as to the limits of their discretion with respect to employment decisions. Moreover, given the expense and difficulty of proving a claim under *Elrod* when nonpolitical factors do form the basis of an employment decision, individuals are unlikely to bring suit unless they can make a clear case.

The situation is both more complex and less certain from the government's viewpoint in the contracting context. When two or more prospective contractors are bidding for government contracts, price is almost always a factor. Other factors, such as past performance, experience, and unique capabilities, are also sure to be important, while the uniqueness of the task may make the optimal qualifications for the job uncertain and unquantifiable. The preponderance of these complex, unquantifiable factors in contracting decisions, makes it more difficult for a court to isolate and detect improper grounds for awarding contracts than for making employment decisions.

The effect of this higher level of uncertainty in the contracting context is twofold. First, the fear of frivolous litigation and uncertainty over the results of judicial review of contracting decisions may lead government officials to feel themselves constrained to award all contracts based on price alone. Such awards may often be at the cost of inadequate contract performance by inexperienced or otherwise incompetent contractors. Having less capable, though cheaper, contractors perform government contracts would inevitably harm the public interest. The alternative, equally detrimental to the public interest, might be to have every award to a contractor, other than the lowest bidder, litigated in a federal court. Increased litigation could adversely affect the contractor's interest if it makes the contract awarding process more expensive. Government entities may decide that the competitive bidding process is simply too time-consuming and complicated. They
may therefore choose instead to negotiate only with a single contractor they believe to be most likely suited for the job. Alternatively, government purchasers may feel constrained to bid out even those contracts now awarded through individual negotiations. This system at least has the advantage of reducing the number of potential litigants contesting the award to one — the lowest bidder — rather than all contractors who might claim they would have been chosen but for political considerations.

The second, somewhat ironic, consequence of the uncertainty inherent in enforcing the rule of Elrod may be to dissuade contractors from making political contributions. Either because of the warning effect on government officials or because the existence of prior political contributions could form the basis of suits by competitors to have their contract awards rescinded, contractors might legitimately fear that prior political contributions could cause them to lose contracts.185 To avoid such losses, many contractors might feel compelled to withhold support that they would otherwise choose to provide from a political party. Hence, extending Elrod may actually result in an inadvertent suppression of speech.

While these possibilities do exist, they do not justify completely denying independent contractors any protection against the infringement of their First Amendment rights. Though refusing to recognize a cause of action altogether would alleviate the problem, such a solution is grossly overinclusive. To completely deny the existence of First Amendment rights would be a simplistic way of avoiding problems associated with its enforcement. As with other causes of action posing similar drawbacks, a careful delineation of the elements of the cause of action and a judicious allocation of burdens of proof and persuasion, considering the government official’s need for certainty and discretion and the plaintiff’s need for a remedy can accommodate any competing First Amendment concerns.

VI. Conclusion

No compelling governmental interest outweighs the First Amendment rights of independent contractors. Extension of the prohibition of patronage to independent contractors follows the same rules and exceptions of Elrod, Branti, or Pickering. The only grounds on which the government may not terminate the contract are those which the First Amendment protects.

For the Court to have ruled any differently would have been to contradict recent First Amendment jurisprudence, which particularly condemns all forms of viewpoint-based suppression of speech186 and contribution.187 By contrast,

185. Cf. Shakman v. Democratic Org., 435 F.2d 267, 269 (7th Cir. 1970) (voters and candidates who allege that the city’s patronage employment system denied them an equal opportunity in elections state a cause of action under the equal protection clause). In Shakman, the court warned the district court that, in fashioning a remedy on remand, “care will be required in order to distinguish between compelled and voluntary political support by public employees,” since, in the absence of a statute prohibiting such conduct, “such individuals enjoy the same right of political association and expression, on their own time, as anyone else.” Id. at 271.

186. See, e.g., Rosenberger v. Rector & Visitors, 115 S. Ct. 2510, 2516 (1995); R.A.V. v. City of
punishing contractors who derive income from work performed for the government because they have supported a political opponent of the persons in power unconstitutionally chills the exercise of associational and speech rights that are at the heart of the First Amendment.

_Brent C. Eckersley_

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