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preferable to the present capricious system. Though still inequitable to those most seriously injured, similar statutes have survived equal protection scrutiny elsewhere.[41]

While of little theoretical value, *Foreman* does serve to question the ultimate importance of the constitutional waiver of sovereign immunity. Arbitrary refusal to pay justly adjudicated debts is hardly the result for which legal scholars campaigned in urging the abrogation of the doctrine. A desire for governmental accountability and responsibility bred the revolution which vitiated sovereign immunity, and *Foreman* is a poor vindication of both policies.

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Elrod v. Burns: CONSTITUTIONAL JOB SECURITY FOR PUBLIC EMPLOYEES?

Four unclassified employees of the Sheriff's office in Cook County, Illinois, brought suit in federal court to enjoin their dismissals by the newly-elected Democrat. Plaintiffs, all Republicans, alleged that their discharges[1] were based solely on the fact that they neither supported nor were members of the Democratic Party and had failed to obtain the

upon recovery against the state, *e.g.*, COLO. REV. STAT. § 24-10-113 (1973) ($100,000 per person; $300,000 per occurrence); OR. REV. STAT. § 30.270 (1975) ($100,000 per person; $300,000 per occurrence; $50,000 damage to property); TEX. REV. CIV. STAT. ANN. art. 6252-19(3) (1970) ($100,000 per person; $300,000 per occurrence; $100,000 damage to property); VT. STAT. ANN. tit. 12, § 5601 (1972) ($75,000 per person; $300,000 per negligent act).

41. State of Nevada v. Silva, 86 Nev. 911, 478 P.2d 591 (1971); *cf.* Hall v. Gillens, 13 111.2d. 26, 147 N.E.2d 352 (1958). One court has recently held that limitations placed upon recovery in malpractice actions are unconstitutional. Wright v. Central DuPage Hosp. Ass'n. 63 Ill.2d 313, 347 N.E.2d 736 (1976). *See* Comment, *Recent Medical Malpractice Legislation—A First Checkup,* 50 TUL. L. REV. 655 (1976). The rationales are clearly distinguishable because in the malpractice limitation, a common law right to full recovery was vitiated, whereas in sovereign immunity, the state creates both the right and the remedy. Its power to limit the maximum recovery in the right that it creates thereby differs from its power to abrogate pre-existing common law rights.

1. Three employees had already been discharged while one alleged that he was in imminent danger of dismissal. The suit was brought under 42 U.S.C. §§ 1983, 1985, 1986, 1988 (1970).

sponsorship of one of its leaders. Resolving a conflict among the circuits,[2] the United States Supreme Court *held* that the practice of patronage dismissal violates the first and fourteenth amendments to the United States Constitution[3] and that the employees had stated a proper claim for relief. *Elrod v. Burns*, 96 S. Ct. 2673 (1976).

The "spoils system" is the use of government jobs, contracts, and other discretionary benefits by officeholders to reward political supporters for party services. Though the practice has been drastically curtailed by the imposition of merit employment systems and public bidding laws, it has remained a potent political tool, especially at state and local levels of government.[4] Patronage discharge is perhaps the most dramatic aspect of the system and has come under increasing attack recently in the courts and in legal publications.[5] Its opponents maintain that conditioning public employment on party affiliation unduly inhibits free political belief and association.

The right of association to advance one's political beliefs is derived from the first amendment as a necessary concomitance to the exercise of

2. *Compare* Burns v. Elrod, 509 F.2d 1113 (7th Cir. 1975), *aff'd*, 96 S.Ct. 2673 (1976) *and* Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973) *with* Nunnery v. Barber, 503 F.2d 1349 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975) *and* Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972).

3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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. First amendment protections were made available against state action by the passage of the fourteenth amendment. *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 707 (1931).

4. The spoils system's continued viability is attested to by the fact that in 1970 over 2000 Republican employees of the Pennsylvania Department of Transportation were fired by the incoming Democratic administration. American Fed'n of State, County & Mun. Employees v. Shapp, 443 Pa. 527, 528, 280 A.2d 375, 376 (1971). The following year, 1946 Democratic workers in the Illinois Secretary of State's office were also discharged *en masse* for allegedly partisan reasons. Illinois State Employees Union v. Lewis, 473 F.2d 561, 578 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973).

5. *See* O'Neil, *Politics, Patronage, and Public Employment*, 44 U. CIN. L. REV. 725 (1975); Comment, *Freedom of Association—Political Affiliations of Non-Civil Service Employees*, 7 SUFF. L. REV. 1098 (1974); Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297 (1974); Note, 57 IOWA L. REV. 1320 (1972); Note, 4 LOY. CHI. L.J. 459 (1973); Note, 34 U. PITT. L. REV. 699 (1973); Note, 26 VAND. L. REV. 1090 (1973); Note, 14 WM. & MARY L. REV. 720 (1973).

its explicitly guaranteed freedoms.[6] Since victims of patronage dismissals must give up their jobs to remain members of the party of their choice, an obvious burden is placed on the exercise of their right of association. Nevertheless, only the Seventh Circuit, which rendered the decision reviewed in *Elrod*, had previously found the practice to be constitutionally infirm.[7] Other courts had circumvented the constitutional question by either characterizing government employment as a "privilege" which could be terminated at will or by holding that employees who had accepted patronage positions had impliedly "waived" their right to challenge subsequent discharge on the same basis.[8]

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6. *See, e.g.*, Communist Party v. Whitcomb, 414 U.S. 441, 449 (1974); Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973); Coates v. Cincinnati, 402 U.S. 611, 615 (1971).

7. Burns v. Elrod, 509 F.2d 1133 (7th Cir. 1975), *aff'd*, 96 S. Ct. 2673 (1976); Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); Shakman v. Democratic Organization, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

8. No prior Supreme Court decisions were found dealing with the issue. *See, e.g.*, Nunnery v. Barber, 503 F.2d 1349 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975) (waiver); Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972) (right-privilege). The decisions which relied on a "right-privilege" distinction (that is, the government can condition employment as it pleases, even upon the surrender of constitutional rights, since there exists no affirmative right to a government job) ignored a long line of Supreme Court decisions indicating that the doctrine was no longer a valid tool in constitutional adjudication. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 597 (1972); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967); Frost v. Railroad Comm'n, 281 U.S. 583, 593-94 (1926): "It would be a palpable incongruity to strike down an act of state legislation which [expressly divests constitutional rights], but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege . . . ." *See* Elrod v. Burns, 96 S. Ct. 2673, 2683 (1976).

The waiver argument was raised in *Elrod* but disposed of in a footnote in which the Court said that since appropriate justification was required to validate patronage practice, "[a] finding of waiver in this case . . . would be contrary to our view that a partisan job qualification abridges the First Amendment." 96 S. Ct. at 2683 n.13. This seems to imply that such rights cannot be waived but, traditionally, constitutional rights may be waived if done so knowingly, intelligently, and voluntarily. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Boykin v. Alabama, 395 U.S. 238 (1969); Johnson v. Zerbst, 304 U.S. 458 (1938). It is not clear whether the *Elrod* Court would follow those decisions (which deal with criminal and regulatory law) and allow an express written waiver or would simply hold that it could not be truly voluntary where sought and given in return for a government job, a form of economic coercion. *See* Cole v. Richardson, 405 U.S. 676, 691, 692 (1972) (Marshall, J., dissenting).

The parallel notion of estoppel is inapplicable, despite the inconsistency of patronage employees challenging the same means by which they may have secured their jobs, since it would be their own party that arguably relied on their conduct

In a long series of decisions, culminating in *Perry v. Sindermann*,[9] the Supreme Court has ruled that mere status as a public servant does not deprive one of the protection against prohibited governmental action that the Constitution affords.[10] In *Perry*, the Court held that a non-tenured state college professor could not be dismissed for publicly criticizing the policies of the school's Board of Regents. Whether the plaintiff had a contractual right to his position or not was immaterial to his claim that he had been fired in retaliation for exercising his first amendment right of free speech.[11] A companion case, *Board of Regents v. Roth*,[12] limited the practical effects of the *Perry* decision, by holding that the procedural due process requirements of notice and an impartial hearing prior to termination do not attach unless the plaintiff can show either a contractual right to his job or that his discharge damaged his reputation or future employability.[13] Absent such a showing, the state need not give any reason for dismissal, and a public employee must turn to the courts and prove that he was fired for a constitutionally impermissible reason. Thus *Roth* may restrict the availability of the constitutional protection promised in *Perry*.

The two concurring Justices in *Elrod* found the Court's decision in *Perry* to be dispositive of the issue presented.[14] The plurality, although

and not an official of the opposition elected several years after they were hired. Further, the Court found, inter alia, that the absence of partisan dismissals would not prove a substantial detriment to either political parties or the state itself. *See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 322-23 (1935); Buck v. Kuykendall, 267 U.S. 307 (1925); Watson v. Gray, 48 So. 2d 84 (Fla. 1950). But *cf.* Ashwander v. TVA, 297 U.S. 288, 346-48 (1935) (Brandeis, J., concurring): "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

9. 408 U.S. 593 (1972).

10. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968); Shelton v. Tucker, 364 U.S. 479 (1960); Weiman v. Updegraff, 344 U.S. 183 (1952).

11. 408 U.S. at 597-98.

12. 408 U.S. 564 (1972).

13. *Id.* at 573, 577. *Roth* held that procedural due process protection only applies if the plaintiff had a property interest in the government benefit or can show that its termination deprives him of his liberty. "To have a property interest in a benefit, a person must have more than an abstract need or desire for it . . . he must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Since a patronage employee normally will have no contract, express or implied, termination alone is not a sufficient reason to invoke due process protections. *See* Nunnery v. Barber, 503 F.2d 1349, 1352 n.10 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975); Illinois State Employees Union v. Lewis, 473 F.2d 561, 563 n.1 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973).

14. 96 S. Ct. at 2690 (Blackmun and Stewart, JJ., concurring). Justice Powell wrote a dissenting opinion in which the Chief Justice and Justice Rehnquist concur-

agreeing that partisan discharge falls within the broad prohibitions of that case,[15] noted that first amendment rights are not absolute and that their exercise can be restrained for appropriate reasons.[16] The proffered justification, however, has to survive the strictest judicial scrutiny when tested against a formidable standard derived from several prior decisions. First, the government has the burden of proving the existence of some vital, as opposed to merely legitimate, state interest which is furthered by the practice of patronage dismissal. Second, the Court required that patronage dismissal be the means of furthering that interest least restrictive of first amendment freedoms. Finally, "the benefit gained must outweigh the loss of constitutionally protected rights."[17]

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red. *Id.* at 2691. Both the plurality and the dissent agreed that the issue was not a "political question" since that doctrine only bars jurisdiction where the question should be resolved by a co-equal branch of the federal government. *Id.* at 2679, 2691 n.1. *See* Baker v. Carr, 369 U.S. 186 (1962). Chief Justice Burger also dissented separately, principally on the ground that the Court was unwarrantedly interfering with state internal policy. *Cf.* National League of Cities v. Usery, 96 S. Ct. 2465 (1976) (decision dealt with an encroachment by Congress on the states' rights to set wage scales for their own employees; there was no allegation that the employees' constitutional rights were being infringed). The other dissenters also seemed to think that the necessity of patronage to the democratic process should be decided by the state legislatures, which had already curtailed the practice through civil service laws. 96 S. Ct. at 2695. But, as the dissent itself pointed out, merit systems were a response to the corruption bred by widespread patronage practice, not a judgment on the constitutionality of the system. *Id.* at 2692. It may be naive to suppose that legislators, who depend on party support at the local level, would risk the wrath of local party bosses and outlaw the practice completely. *See* Note, 57 IOWA L. REV. 1320, 1351-53 (1972). The plurality again disposed of the question by limiting the "separation of powers" principle to coordinate branches of the national government. 96 S. Ct. at 2679. Justice Stevens took no part in the decision. *Id.* at 2690.

15. 96 S. Ct. at 2683. "Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished. . . . Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant." *Id.* at 2681.

16. *See, e.g.*, United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973); United States v. Robel, 389 U.S. 258, 265 (1967); Shelton v. Tucker, 364 U.S. 479, 488-89 (1960). The criteria used to test the constitutionality of any restraint have become progressively more stringent. *Compare* NAACP v. Alabama, 357 U.S. 449, 461 (1958) *and* United Pub. Workers v. Mitchell, 330 U.S. 75, 96 (1947) *with* United States v. Robel, 389 U.S. 258, 265 (1967) *and* Shelton v. Tucker, 364 U.S. 479, 488-89 (1960).

17. 96 S. Ct. at 2685. The first two requirements were derived from the following decisions dealing with government action infringing first amendment

The appellants in *Elrod* contended that three important interests are furthered by patronage and justify the infringement of individual rights it entails.[18] First, they claimed it leads to more effective government since members of the incumbent party will work hard to ensure their party's continuation in office and thus their jobs; members of the opposition, if retained, presumably would be inefficient in order to discredit the party in office.[19] The Court found that the connection between patronage and efficiency is somewhat tenuous and that discharge for cause is a less restrictive means to accomplish that end. Next, it was argued that partisan discharge is necessary to prevent obstruction of the new administration's policies. Quite logically, the Court found that this interest can be adequately served by limiting the partisan discharge to employees holding policymaking positions.[20] Finally, the state argued that patronage is an indispensable political tool of the major parties and that the latter are necessary institutions for the maintenance of American democracy. The plurality cited the drastic curtailment of the spoils system since the incep-

rights: Buckley v. Valeo, 424 U.S. 1 (1976); Kusper v. Pontikes, 414 U.S. 51, 59 (1973); Williams v. Rhodes, 393 U.S. 23, 31-33 (1968); United States v. Robel, 389 U.S. 258, 265 (1967); Sherbert v. Verner, 374 U.S. 398, 406 (1963); NAACP v. Button, 371 U.S. 415, 464-66 (1963); Shelton v. Tucker, 364 U.S. 479, 488-89 (1960). The final part of the test was taken from United Pub. Workers v. Mitchell, 330 U.S. 75, 96 (1947).

18. 96 S. Ct. at 2684-88.

19. *Id.* at 2685. The plurality referred to a line of decisions that dealt with statutory provisions forbidding members of the Communist Party from holding certain public jobs. Such statutory presumptions of subversiveness have been invalidated in several cases as constituting an unreasonable classification violative of due process. There seems to be even less justification to presume obstructiveness or inefficiency on the part of members of the major political parties. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 608-09 (1967); Elfbrandt v. Russell, 384 U.S. 11, 18 (1966). *Cf.* Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

20. The Court indicated that the government should bear the burden of proving that any particular employee had been in a policymaking position. Acknowledging that no absolute distinction between policymaking and non-policymaking positions could be fashioned, the plurality said that primary consideration should be given to the breadth and scope of responsibilities attached to a position and whether an employee was found to be an "advisor or formulates plans for the implementation of broad goals." 96 S. Ct. at 2687. The problem of distinguishing policymaking positions has worried both the judiciary and the commentators. *See* Nunnery v. Barber, 503 F.2d 1349, 1353-58 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975); Illinois State Employees Union v. Lewis, 473 F.2d 561, 578 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). *See* authorities cited in note 5, *supra*. Some case-by-case adjudication following the Court's guidelines should lead to a more precise delineation and help avoid the twin fears of a "multiplicity of frivolous lawsuits" and establishment of a "super civil service commission" in the federal courts.

tion of civil service regulations as evidence that elimination of partisan dismissals will not lead to the collapse of the two-party system.[21] Further, any gain to the electoral process due to the increased political involvement required of patronage workers was seen as more than offset by the resultant entrenchment of two parties, to the exclusion of others.[22]

The result reached in *Elrod* follows the pattern of recent decisions invalidating, as penalties for exercising first amendment rights, denials of government benefits, including employment.[23] Nevertheless, some doubts remain as to whether the outcome was correct, how the validity of other aspects of the patronage system is affected, and the decision's efficacy as a prohibition to partisan discharge.

The plurality minimized the patronage system's contribution to the continued viability of the major parties and the latter's role in the electoral process.[24] As the dissent pointed out, however, the major parties are highly visible, permanent institutions that voters "can and do hold . . . to long term accountability"; help simplify the complexity of today's lengthy ballots; and assure "the winners of a general election sufficient support to govern effectively."[25] Undeniably, patronage is an effective tool used by local politicians to obtain contributions of time and money with which to support party efforts in less than prestigious election campaigns and to run party offices on a daily basis. Though special interest groups, such as labor unions, are becoming increasingly involved in party politics, whether they can or will provide substantial support at the local level, where the benefits to be reaped for their causes are relatively insignificant, is far from certain.[26] Further, the wisdom of increasing the dependence of

21. *See also* Williams v. Rhodes, 393 U.S. 23, 31-32 (1968); Note, 57 IOWA L. REV. 1320, 1346 (1972); Note, 26 VAND. L. REV. 1090, 1098 (1973).

22. The justifications offered by the appellants and several other possible state interests furthered by patronage practice are discussed at length and found insufficient to validate the practice of patronage discharge in Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 327-28 (1974) and Note, 57 IOWA L. REV. 1320, 1324-27, 1342-50 (1972).

23. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Pickering v. Board of Educ., 391 U.S. 563 (1968); United States v. Robel, 389 U.S. 258 (1967); Sherbert v. Verner, 374 U.S. 398 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961); Speiser v. Randall, 357 U.S. 513 (1958). *Contra*, United States Civ. Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

24. 96 S. Ct. at 2687-88.

25. *Id.* at 2694, *quoting from* Storer v. Brown, 415 U.S. 724, 735 (1974).

26. *Id. But see* Note, 26 VAND. L. REV. 1090, 1098 (1973), where the author surmises that a curtailment of patronage will only deplete a traditional source of voluntary political workers and will not lead to the demise of parties because of the

parties, and thus elected officials, upon the generosity of large pressure groups, instead of the individualized support of the patronage recipient, may be doubted.

It might have been uncertainty as to the validity of the state's interest in maintaining the two-party system, and the ability of that system to function without patronage, that prompted the plurality to interweave the "vital state interest-least restrictive means" analysis, characteristic of recent first amendment cases,[27] with the explicit "balancing" favored in older decisions.[28] The plurality did not hesitate in finding that other methods of promoting governmental efficiency and policy implementation, less drastic than widespread partisan dismissals, were available.[29] However, the opinion seemed to struggle with the last profferred justification and merely suggested that, in light of existing alternatives available to fill party coffers and man election campaigns, the political process should function as well without patronage.[30] Though this conclusion might have been sufficient to dispose of the issue on a "least restrictive means" basis, the plurality went on to weigh what they thought to be the competing interests involved and reached what may actually be an alternative basis for the decision.

The plurality, in effect, articulated a hierarchy of first amendment rights. Patronage, they concluded, is an aspect of political campaigning and management, activities protected by the first amendment as necessary to and perhaps the reason for the existence of parties, themselves manifestations of the right to associate.[31] Nevertheless, if partisan activity abridges the individual's freedom to believe and affiliate as he chooses, it must yield since it is a right derived from and subsidiary to the very

rise of special interest groups (*e.g.*, labor unions) that will contribute money to party coffers and manpower during elections in return for political favors.

27. The standard assiduously avoids any express balancing of interests. The state is only required to articulate a governmental interest which the Court considers "compelling"; the Court then inquires whether the regulation in question is the narrowest means of furthering that end. *See, e.g.*, Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973); Williams v. Rhodes, 393 U.S. 23, 31 (1968); Shelton v. Tucker, 364 U.S. 479, 488-89 (1960); Bruff, *Unconstitutional Conditions upon Public Employment: New Departures in the Protection of First Amendment Rights*, 21 HAST. L. J. 129 (1969). However, it is arguable that in accepting a state interest as compelling, the Court is, in fact, balancing the competing interests *sub silentio*. *See generally* Note, 117 U. PA. L. REV. 144 (1968).

28. *See, e.g.*, American Comm. Ass'n v. Douds, 339 U.S. 381 (1950); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

29. 96 S. Ct. at 2685-87.

30. *Id.* at 2687-88.

31. *Id.* at 2688-89.

freedom it threatens.[32] Thus, the plurality reasoned that *Elrod* was not contrary to the decisions upholding the Hatch Act,[33] as the appellants had contended; rather, those cases mandated the result since they only validated restraints on the political activities of federal employees in order to safeguard those employees' right of free association. In essence, the plurality seemed to conclude that it is the individual, not parties, who is the bulwark of the democratic process and whose interests are therefore paramount in the constitutional scheme.[34]

It remains to be seen just how effective the decision will prove as a deterrent to other patronage practices.[35] Although the plurality often lapsed into sweeping language implying that the patronage system is unconstitutional in its entirety,[36] both the holding and the concurrence are explicitly limited to partisan discharge of non-policymaking public employees.[37] Thus patronage hiring may still be permissible, perhaps by reasoning that the burden on first amendment rights is not as significant when the state action is a passive failure to hire a member of the other party as opposed to discharging him from employment solely on partisan grounds.[38] Practically, termination of one's present job would often work a greater hardship, and be more coercive, than inability to secure a desired

32. *Id. Cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

33. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). Both cases upheld provisions of the Hatch Act which prohibited federal employees from taking part in certain partisan political activities to prevent the use of their services to ensure the incumbency of the party in power. Employees remain free to vote and affiliate with the party of their choice, unlike workers under the patronage system.

34. It is interesting to note that Justice Brennan, who wrote the plurality decision in *Elrod*, and Justice Marshall, who concurred in that opinion, both joined in dissenting from the result in the 1973 Hatch Act case which they rely on in *Elrod*; they argued that the provisions in question were overbroad. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 595, 598 (1973).

35. The dissent believed that the entire patronage system had been dealt a death blow by the decision in *Elrod*. 96 S.Ct. at 2696 n.10.

36. *Id.* at 2686-88.

37. *Id.* at 2689, 2690.

38. The pointedly limited holding of the two concurring Justices may indicate that they will switch sides should a case arise challenging other aspects of patronage; more likely, it signifies a judicious reluctance to deal with a constitutional issue not properly before the Court.

position. Should the courts recognize such an "active-passive" distinction, not only unclassified employment, but also awards of those government contracts not subject to public bidding laws, and a generally more receptive official ear may still be available to reward the party faithful.[39]

Even for the victims of patronage discharge, all problems have not been solved by *Elrod*. Unless politicians are foolish enough to indulge in mass firings immediately upon assumption of office,[40] a dismissed worker will have a difficult burden proving that the sole motivation for his discharge was his political affiliation since he is entitled to neither written reasons nor an administrative hearing prior to termination.[41] Prospectively, *Elrod v. Burns* may be a decision that advocates of political patronage can live with, albeit somewhat uncomfortably, as a barrier only to the system's more obvious and flagrant constitutional violations.

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39. *But cf.* Graham v. Richardson, 403 U.S. 365 (1971); Sherbert v. Verner, 374 U.S. 398 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961); Shelton v. Tucker, 364 U.S. 479 (1960).

40. See note 4, *supra*.

41. See the text and notes 12-13, *supra*. *See* Illinois State Employees Union v. Lewis, 473 F.2d 561, 579 (7th Cir. 1972) (Campbell, J., concurring), *cert. denied*, 410 U.S. 928 (1973); Note, 26 VAND. L. REV. 1090, 1098 (1973).