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FIRST AMENDMENT RECENT DEVELOPMENTS*

ELECTED OFFICIALS CAN NO LONGER REWARD SUPPORTERS WITH JOBS . . . OR CAN THEY?

George Washington Plunkitt, famous advocate and practitioner of political patronage systems,¹ once opined:

I ain't up on sillygisms, but I can give you some arguments nobody can answer.

First, this great and glorious country was built upon by political parties; second, parties can't hold together if their workers don't get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay.²

The Supreme Court's decision in *Rutan v. Republican Party of Illinois*³ will allow political scientists to test Plunkitt's hypothesis. The *Rutan* decision struck down Illinois Governor Jim Thompson's patronage system⁴ as violative of state employees' first amendment rights to free speech

* Project Editor: Tammy J. Snyder.

1. A "patronage system" for purposes of this Recent Development refers to a system of rewarding supporters of elected government officials, or their parties, with jobs or favorable treatment regarding promotions, transfers, and rehiring. Patronage in its broadest sense connotes requiring an individual to obtain a sponsor in order to gain employment, as opposed to a strict civil service system in which employment decisions are merit-based. T. BEYLE, STATE GOVERNMENT: CQ'S GUIDE TO ISSUES AND ACTIVITIES 1989-90, at 133 (1990). See *infra* note 4.

Although some people negatively associate the word "patronage," patronage as used in this Recent Development is descriptive rather than judgmental. The patronage system scrutinized in *Rutan v. Republican Party*, 110 S. Ct. 2729, *reh'g denied*, 111 S. Ct. 13 (1990), contained elements of the civil service system. Under Illinois law, all state employees must pass civil service exams tailored to their positions. ILL. REV. STAT. ch. 127, para. 63b101 et. seq. (1985). Thus, the beneficiaries of the patronage system unquestionably were qualified as defined by Illinois law.

2. W. RIORDON, PLUNKITT OF TAMMANY HALL 18-19 (1948), quoted in *Rutan v. Republican Party*, 110 S. Ct. 2729, 2747 (1990) (Scalia, J., dissenting).

3. 110 S. Ct. 2729 (1990).

4. The state officials in *Rutan* asserted that it was critical that the complaint did not allege a "strict partisan" patronage system. Rather, the allegations should encompass the Thompson Administration's consideration of other factors not related to party affiliation, including friendships with Republicans, Governor Thompson's family, or members of the Illinois General Assembly. Brief for Respondents/Cross Petitioners at 2-3, *Rutan*, 110 S. Ct. 2729 (1990) (Nos. 88-1872 and 88-2074). The state officials also argued that because all candidates met the qualifications under the Illinois Personnel Code, the plaintiffs could not claim that the state hired, promoted, or transferred unqualified but politically favored persons at the expense of qualified but unfavored persons. *Id.*

and association. The 5-4 decision⁵ held that the first amendment right to free speech and association prohibits public employers from basing promotion, transfer, recall, and hiring decisions on party membership or support.⁶ Proponents of the decision claim a victory for free speech and better government.⁷ Others denounce the decision as an unwise judicial intrusion into state politics and another note in the death knell of our two-party system of government.⁸ Still others believe that the *Rutan* decision is so easy to evade that its only effect will be to create jobs for employment discrimination lawyers.⁹

Rutan is the last in a trilogy of Supreme Court cases holding that government officials cannot make employment decisions based on an employee's political party affiliation.¹⁰ In 1976, the Court in *Elrod v. Burns*¹¹ held that a sheriff violated former employees' first amendment rights of free speech and association when he replaced them with members of the Democratic Party.¹² The Court's plurality opinion noted that "political belief and association constitute the core of those activities protected by the first amendment."¹³ Thus, the Court concluded that requiring public employees to pledge their allegiance to a political party imposes unconstitutional restraints on the freedoms of speech and association.¹⁴

5. Justice Brennan delivered the opinion of the Court in which Justices White, Marshall, Blackmun, and Stevens joined. Justice Stevens also filed a concurring opinion. Justice Scalia dissented joined by Chief Justice Rehnquist and Justice Kennedy. Justice O'Connor joined in parts II and III of the dissent.

6. *Rutan*, 110 S. Ct. at 2732.

7. See *infra* notes 36-38 and accompanying text.

8. See *infra* notes 39-45 and accompanying text.

9. See *infra* notes 45-53 and accompanying text.

10. See *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). See *infra* notes 11-19 and accompanying text.

11. 427 U.S. 347 (1976).

12. *Id.* at 347. Sheriff Richard Elrod fired both the Chief Deputy of the Process Division and a bailiff. In addition, he threatened to fire a process server if he did not obtain the support of the Democratic Party. *Id.* at 350-51.

13. *Id.* at 356. See *Board of Education v. Barnette*, 319 U.S. 624, 742 (1943) ("[i]f 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"), quoted in *Elrod*, 427 U.S. at 356; *Buckley v. Valeo* 424 U.S. 1, 19 (1976) ("First Amendment protects political association as well as political expression"), quoted in *Elrod*, 427 U.S. at 357. For other cases discussing freedom to associate with a political party, see *NAACP v. Button*, 371 U.S. 415, 430 (1963); *Bates v. Little Rock*, 361 U.S. 516, 522-23 (1966); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

14. *Elrod*, 427 U.S. at 357-59. For cases addressing various other state employment practices,

The Court employed a strict scrutiny standard to determine whether the justifications for patronage dismissals outweighed the infringement on the employee's constitutional rights.¹⁵ The Court disregarded the in-

see *United Public Workers v. Mitchell*, 300 U.S. 75, 100 (1947) (Congress cannot enact regulations prohibiting members of a certain party or race from appointment to federal office) (dicta); *Weiman v. Updegraff*, 344 U.S. 183 (1952) (states cannot require employees to take a loyalty oath denying past affiliation with Communists). See also *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898 (1961) (security officer cannot be dismissed from her job requiring security clearance on the basis of party affiliation) (dicta); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (striking down a New York statute prohibiting state employees from associating with subversive organizations); *Perry v. Sindermann*, 408 U.S. 593 (1972) (state college professor has first amendment claim if the state's refusal to review his employment contract was the result of his public criticism of school-board policies). In *Perry*, the Court held that the first amendment prohibits the government from denying a public benefit to a person in a manner inhibiting the exercise of free speech. Thus, the government impermissibly penalizes a person for exercising political beliefs if it denies employment because of political association. *Id.*

Chief Justice Burger, dissenting in *Elrod*, thought that the minimal free speech consideration did not warrant federal intrusion into state politics. *Elrod*, 427 U.S. at 376 (Burger, J., dissenting). Without passing on the effectiveness of the patronage system, the Chief Justice wrote that the tenth amendment gives states the choice to use patronage in the management of its functions. He accused the plurality of "trivializing constitutional adjudication." *Id.*

Justice Powell's dissent in *Elrod* argued that not only does the first amendment not require the Court to prevent patronage dismissals, but that the plurality opinion actually undermines the core values of the first amendment. *Elrod*, 427 U.S. at 377 (Powell, J., dissenting). Justice Powell further argued that in employing its balancing test, the plurality not only failed to appreciate the role of the patronage system, but also exaggerated the characterization of the first amendment rights implicated. *Id.* at 382. According to Justice Powell, patronage strengthens political parties and creates opportunities for minority groups. *Id.* at 382 (citing *Storer v. Brown*, 415 U.S. 724, 735 (1974) (the government has strong interests in stable parties because they provide a medium for presenting citizens with understandable choices and with support once the winner takes office)). The *Storer* Court also held that "splintered parties and unrestrained factionalism [might] do significant damage to the fabric of government." *Storer*, 415 U.S. at 735, quoted in *Elrod* 427 U.S. at 383 (Powell, J., dissenting). See also *Elrod*, 427 U.S. at 382 n.6 (quoting S. LUBELL, *THE FUTURE OF AMERICAN POLITICS* 76-77 (1952) (patronage helps open opportunities to minorities, because once a member of a minority group is appointed, she will have the opportunity to employ other minorities)). Without question, patronage politics helped ethnic minorities gain political power during the industrial revolution of the 1880s, when racial and ethnic hatred was widespread. D. JUDD, *THE POLITICS OF AMERICAN CITIES: PRIVATE POWER AND PUBLIC POLICY* 50-52 (1984).

15. *Elrod*, 427 U.S. at 362. The plurality noted that when the government significantly impairs a person's first amendment rights, it must show some vital government interest and demonstrate that no less restrictive means of accomplishing that interest are available. *Id.* Furthermore, the benefit gained from the government action must outweigh the loss of constitutionally protected rights. *Id.* The plurality applied this standard without explaining why the infringement on first amendment rights was "substantial." See *infra* note 31 and accompanying text. The Court expressly declined to apply a "rational relation" test, whereby the government merely needs to show that the government's conduct was rationally related to a legitimate governmental purpose. *Elrod*, 427 U.S. at 362.

The Supreme Court previously has applied the less demanding rational relation test to situations in which the government acts in its capacity as employer. However, the strict standard applies when the government regulates the conduct of private citizens. See *infra* note 31 and accompanying text.

terests of the political parties and instead focused on whether the government had a vital interest in patronage.¹⁶ For example, for positions that involve policymaking or access to confidential information, the Court held that the government properly may require party affiliation.¹⁷

In 1980, the Court in *Branti v. Finkel*¹⁸ held that the first amendment prohibited a Democratic public defender from requiring that his assistant public defenders obtain Democratic Party support in order to keep their jobs.¹⁹ Reaffirming *Elrod*,²⁰ the Court ruled that failure to obtain a political sponsor cannot be the sole basis for depriving incumbent public employees of continued employment.²¹

The *Elrod* and *Branti* decisions protect public employees fired because of their political affiliations, or lack thereof.²² The Court's decision in *Rutan* further extends that protection to public employees who have been denied promotions or transfers on the basis of their failure to support the political party in power. Furthermore, the holding reaches would-be public employees who are not recalled after a layoff or who are not hired because of their party affiliation.²³

16. *Elrod*, 427 U.S. at 362. Justice Powell's dissent argued that the Court's distinction between what is beneficial for parties and what is beneficial for government is flawed. The Court had stated in other opinions that strong political parties are important to the effective functioning of government. *Id.* at 383 (Powell, J., dissenting). See *Storer*, 415 U.S. at 735; *Buckley v. Valeo*, 424 U.S. 1, 98 (1976) (political parties are important to the effective management of our government).

17. *Elrod*, 427 U.S. at 367. The plurality admitted, however, that the distinction between policymakers and nonpolicymakers is a fine line. *Id.*

18. 445 U.S. 507 (1980).

19. *Id.* The Court in *Branti* elaborated further on the policy-maker exception and concluded that the appropriate test is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518.

20. *Branti* extended the *Elrod* rationale to situations in which the government requires employees to gain support from a political party. The *Elrod* holding involved employee dismissals for failure to be an *actual* member of a political party.

21. *Id.* at 516-17.

22. See *supra* notes 10-19 and accompanying text.

23. *Rutan v. Republican Party*, 110 S. Ct. 2729, 2732 (1990).

Justice Scalia's dissent proposes several reasons why the Court's decision was wrong. 110 S. Ct. at 2746-59 (Scalia, J., dissenting). See *infra* notes 34, 40-42, and accompanying text. First, Scalia argues that the Court has no basis for striking the government's previously unchallenged practice of patronage when the Bill of Rights does not expressly prohibit it. *Rutan*, 110 S. Ct. at 2747-49. Justice Scalia's view is not original; Justice Holmes once wrote that "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackson v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922), quoted in *Elrod*, 427 U.S. at 389 (Powell, J., dissenting). Second, Justice Scalia argues that the desirability of patronage is a political question more appropriately addressed by the state's legislature. *Rutan*, 110 S. Ct. at 2750.

Justice Scalia's opinion cites the following inconsistent cases to demonstrate that *Elrod* and *Branti*

In *Rutan*, Governor Thompson issued an executive order in late 1980²⁴ that imposed a hiring freeze on positions within his administration. To implement the order, Governor Thompson created the Office of Personnel to review applications in order to determine whether: 1) the applicant voted in Republican primaries in past election years; 2) the applicant provided financial or other support to the Republican Party; 3) the applicant promised to join and work for the party; and 4) the applicant had the support of Republican Party officials.²⁵

Five employees of the State of Illinois brought suit against Illinois Republican Party officials, alleging that they suffered employment discrimination for failing to support the Republican Party.²⁶ The named

are unworkable and should be overturned: *Jones v. Dodson*, 727 F.2d 1329, 1338 (4th Cir. 1984) (city cannot fire a deputy sheriff because of his political affiliation); *Layden v. Costello*, 517 F. Supp. 860, 962 (N.D.N.Y. 1981) (county cannot fire its attorney for the department of social services because of party affiliation); *Tavano v. County of Niagra*, 621 F. Supp. 345, 349-50 (W.D.N.Y. 1985) (cannot fire assistant attorney for family court), *aff'd mem.*, 800 F.2d 1128 (2d Cir. 1986); *Ness v. Marshall*, 660 F.2d 517, 521-22 (2d Cir. 1981) (city can fire its solicitor and his assistants); *Finkelman v. Barthelemy*, 678 F. Supp. 1255, 1265 (E.D.L.A. 1988) (can fire assistant city attorney); *Livas v. Petka*, 711 F.2d 798, 800-01 (7th Cir. 1983) (can fire assistant state's attorney); *Barnes v. Bosley*, 745 F.2d 501, 508 (8th Cir. 1984) (city cannot discharge its deputy court clerk for his political affiliation), *cert. denied*, 471 U.S. 1017 (1985); *Bauer v. Bosley*, 802 F.2d 1058, 1063 (8th Cir. 1986) (city can fire its legal assistant to the clerk on basis of party affiliation), *cert. denied*, 481 U.S. 1038 (1987); *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988) (firing juvenile court bailiff permissible if assigned permanently to a single judge); *Abraham v. Pekarski*, 537 F. Supp. 858, 865 (E.D. Pa. 1982) (city cannot fire its director of roads on partisan grounds), *aff'd in part and dismissed in part*, 728 F.2d 167 (3d Cir.), *cert. denied*, 467 U.S. 1242 (1984); *Tomczak v. Chicago*, 765 F.2d 633 (7th Cir.) (city can fire the second in command of the water department), *cert. denied*, 474 U.S. 946 (1985); *De Choudens v. Government Dev. Bank*, 801 F.2d 5, 10 (1st Cir. 1986) (government cannot discharge the senior vice president of its development bank for political reasons), *cert. denied*, 481 U.S. 1013 (1987); *Rosario Nevarez v. Torres Gaztambide*, 820 F.2d 525 (1st Cir. 1987) (government can discharge the regional director of its rural housing administration).

24.

Executive Order No. 5 (Nov. 12, 1980).

STATE OF [SEAL] ILLINOIS
EXECUTIVE DEPARTMENT
SPRINGFIELD, ILLINOIS

EXECUTIVE ORDER

Number 5 — (1980)

HIRING FREEZE

Effective at the close of business today, November 12, 1980, no agency, department, bureau, board or commission subject to the control or direction of the Governor shall hire any employee, fill any vacancy, create any new position or take any other action which will result in increases, or the maintenance of present levels, in State employment, including personal service contracts. All hiring is frozen. There will be no exceptions to this order without my express permission after submission of appropriate requests to my office.

25. *Rutan*, 110 S. Ct. at 2732. The Republican county chairpersons developed the form and submitted it to the Governor's Office of Personnel. *Id.*

26. *Id.* at 2732-33. Cynthia B. Rutan had worked as a rehabilitation counselor for the State

petitioner, Cynthia Rutan, alleged that the State denied her promotion to positions for which she was qualified because she had neither worked for nor obtained the support of the Republican Party.²⁷

The Supreme Court held that the State's refusals to promote, hire, transfer, and recall employees were significant penalties imposed on the exercise of the employees' first amendment rights.²⁸ Rejecting the respondents' argument that there is no constitutional right to be promoted, transferred, hired, or recalled, the Court relied on *Perry v. Sindermann*²⁹ to illustrate that, although a person does not have a right to a government job, the State may not deny that person a job "on a basis that infringes his constitutionally protected interests—especially, his interest in free speech."³⁰

The Court employed a strict scrutiny standard in weighing the state's interest against the interests of the individuals, requiring the government to show that its practice is "narrowly tailored to further vital government interests."³¹ The respondents, however, failed to establish any overriding

since 1974. Four other employees also were involved in the suit: Franklin Taylor, an equipment operator for the Illinois Department of Transportation since 1969, allegedly was denied a promotion to lead worker in 1983 in favor of someone who had the support of a Republican county chairman, and was denied requested transfers because of his failure to obtain the support of the Republican Party; Ricky Standefer, a part-time garage worker for the State, allegedly was laid off and not recalled because he had voted in the Democratic Party primary; Dan O'Brien, an employee at the Department of Mental Health and Developmental Disabilities facility from 1971 to 1984, was laid off and never recalled, allegedly due to his political affiliation. Finally, James Moore received a letter from his Illinois state representative stating that he had no chance of being hired unless he obtained the support of his Republican county chairman. Brief for Petitioners at 6-10, *Rutan v. Republican Party*, 110 S. Ct. 2729 (1990) (Nos. 88-1872 and 88-2074).

27. Brief for Petitioners at 6-10, *Rutan*, 110 S. Ct. 2729.

28. *Rutan*, 110 S. Ct. at 2737. Previously, the Seventh Circuit held that the petitioners had a constitutional claim only if they had been subjected to the equivalent of a dismissal. *Rutan v. Republican Party*, 868 F.2d 943 (7th Cir. 1989). The court of appeals distinguished its more permissive standard from the strict standard set forth in *Elrod* and *Branti*, reasoning that denial of a promotion, hire, transfer, or recall is significantly less coercive and disruptive than a discharge. *Id.* The Seventh Circuit reasoned that federal intrusion into state political affairs, which is justified in cases involving dismissals, is not warranted in situations in which the employee is subjected to decisions less significant than dismissals. *Id.* at 955.

29. 408 U.S. 593 (1972). See *supra* note 14.

30. *Rutan*, 110 S. Ct. at 2736 (quoting *Sindermann*, 408 U.S. at 597).

31. *Id.* While the *Rutan* standard is consistent with *Elrod* and *Branti*, the dissenting justices noted that previous decisions employed a less demanding "rational connection" test when examining the practices of a government engaged for the management of its affairs. See, e.g., *Connick v. Myers*, 461 U.S. 138, 152 (1982); *Perry v. Sindermann*, 408 U.S. 593 (1972) (applying a less strict balancing test announced in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). The dissent cited precedent that recognizes that it is permissible for the government to regulate conduct in its capacity as an employer. Justice Scalia, applying the logic of one such case, wrote: "Since the government

government interest in patronage practices.³² The Court asserted that other less intrusive means of securing effective employees are available, such as firing only those employees whose performance is unacceptable.³³ Justice Brennan's majority opinion also rejected the respondents' argument that the patronage system furthers the democratic process and nurtures the two party system.³⁴ Finally, the Court stated bluntly that it was not concerned that the decision would expose state employment decisions to excessive federal court interference.³⁵

Proponents of the *Rutan* decision argue that it will improve the administration of state and local government.³⁶ Government employees will perform more effectively if they know that their career paths will be determined by their performance rather than by their political activities. Government careers will become more attractive to talented people who previously refused to work in the public sector due to patronage.³⁷

Despite *Rutan*'s positive effects, the decision has created more

may dismiss an employee for political *speech* 'reasonably deemed by Congress to interfere with the efficiency of the public service,' . . . it follows *a fortiori* that the government may dismiss an employee for political *affiliation* if 'reasonably necessary to promote effective government.'" *Rutan*, 110 S. Ct. at 2750-51 (Scalia, J., dissenting) (quoting *Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947); *Brown v. Glines*, 444 U.S. 348, 356 (1980)).

32. *Rutan*, 110 S. Ct. at 2737.

33. *Id.* The Court also noted that the policy-maker exception, which allows a government to dismiss high level employees based on their political affiliation, adequately serves to ensure that government policies will be advanced effectively. *Id.*

34. *Id.* The Court rejected the argument without analysis. Its reference to *Elrod* is to a similarly conclusory statement. See *Elrod*, 427 U.S. at 372-73. The *Elrod* Court did not provide a single example of a less intrusive means of nurturing political parties. The Court only alluded to the national decline of the patronage system and to the growth of form letters, advertising, and other money-intensive campaign methods. Arguably, these means of campaigning have dismantled rather than nurtured political parties. See generally J. HREBENAR & R. SCOTT, *INTEREST GROUP POLITICS IN AMERICA* 256-59 (1982); CONGRESSIONAL QUARTERLY INC., *CQ'S GUIDE TO CURRENT ISSUES AND ACTIVITIES* 134 (1989-90); Sorauf, *Patronage and Party*, 3 *MIDWEST J. POL. SCI.* 118-20 (1959).

35. *Rutan*, 110 S. Ct. at 2737 n.8.

36. Professor Charles Haar of Harvard Law School stated, "[I]n a society that emphasizes education and objective qualifications, it seems to me all to the good to place more emphasis on merit." *Boston Globe*, June 22, 1990, at 11. John Manske, executive director of Common Cause of Illinois, filed a brief as amicus curiae on behalf of the petitioners. Manske cheered the decision as "a great day for professionalism in government and the success of individuals based on merit." *Chicago Tribune*, June 22, 1990, at 8. In another *Chicago Tribune* article, Frank Parker of the Lawyer's Committee for Civil Rights claimed that the *Rutan* decision "restores the civil service system to its original concept of eliminating political favoritism." *Chicago Tribune*, June 22, 1990, at 1.

37. Nowlan, *Death Knell For Political Patronage? Hardly*, *Chicago Tribune*, June 29, 1990, at 19. James D. Nowlan is a former Illinois state legislator and agency director, and a professor of public policy at Knox College.

problems than it has solved.³⁸ Political scientists deplore the decision as destroying what remained of the working-class citizen's participation in the two-party system.³⁹ Justice Scalia stated in his dissent that the decision eliminates a mechanism for minority groups to secure political power.⁴⁰ Moreover, elected officials will be unable to engage in political give and take with their constituents and will have no jobs to offer. As a result, politicians, looking to alternative campaign methods such as expensive television or radio commercials to gain re-election,⁴¹ likely will offer political favors to special interest groups in exchange for campaign financing.⁴² Indeed, this quid pro quo occurs in many states as well as in the federal government, where a straight merit-based system has replaced the patronage system.⁴³

The *Rutan* decision also will create a flood of lawsuits by disgruntled applicants who are denied promotions, denied transfers, or who are not hired or not recalled after layoffs.⁴⁴ Courts might extend the decision to limitless contexts, providing a forum to question every decision involving distribution of a government benefit.⁴⁵ Furthermore, the *Rutan* decision

38. See *infra* notes 39-53 and accompanying text. "The court, with a decision written in broad strokes, has created innumerable problems for local government while trying to address abuses that should be corrected at the ballot box." Editorial, *Chicago Tribune*, June 29, 1990, at 18. "The *Rutan* decision poses more questions than it answers and invites lawsuits. . . . There will still be job patronage." Nowlan, *supra* note 37.

39. Larry Sabato, author of *GOODBYE TO GOODTIME CHARLIE* 67 (2d ed. 1983), a book discussing the transformation of the American governorship, stated: "This is a terrible, tragic decision for the two-party system. Patronage is the oil that greases the machine of government. It's been an essential part of a functioning two-party democracy." *L.A. Times*, June 22, 1990, at 1, col. 4.

40. *Rutan*, 110 S. Ct. at 2753-54 (Scalia, J., dissenting) (citing *CORNWELL, BOSSES, MACHINES AND ETHNIC POLITICS* in *ETHNIC GROUP POLITICS* 190, 195-97 (1969)). See also 54 *PUBLIC CHOICE* 171, 181 (1987) (noting that the election of a black mayor and the accompanying patronage hiring led to increase of political influence among blacks in Atlanta).

41. T. BEYLE, *supra* note 1, at 134. L. SABATO, *GOODBYE TO GOODTIME CHARLIE* 66-69 (2d ed. 1983).

42. L. SABATO, *supra* note 41, at 66-69.

43. *Id.*

44. Editorial, *Chicago Tribune*, *supra* note 38; Ciolli & Eisenberg, *Patronage Jobs Illegal: Political Spoils System Declared Unconstitutional*, *Newsday*, June 22, 1990, at 3.

45. Nowlan, *supra* note 37. For example, disgruntled contractors who do not contribute to the political party in power might claim they have been penalized in violation of the first amendment. *Id.* Denying a government contract because the contractor was not a political supporter arguably would, under *Rutan*, penalize that contractor for his political beliefs, and thus violate the contractor's first amendment rights. Applicants or employees who are neither able nor willing to obtain letters of recommendation from legislators, interest groups, or influential private citizens might also have a claim under *Rutan*. *Id.* These persons could argue that they did not believe in the legislator or interest group, or had no access to the influential person, and therefore were penalized for their political beliefs and associations in violation of the first amendment. Without speculating on

fails to delineate clearly which government positions are sufficiently politically sensitive to be excluded from the Court's ban on patronage. Undoubtedly, the decision will create litigation that will test the parameters of the exception.⁴⁶

Finally, the Court's decision will have little effect on patronage. *Rutan* prohibits only the most blatant forms of patronage, which voters can address more effectively simply by voting the official out of office.⁴⁷ Patronage still will occur in the government workplace; only the sources and methods of disseminating information on applicants will change.⁴⁸ Phone calls and conversations in informal settings will replace standardized forms. Party chairpersons no longer will keep long lists of approved applicants; instead these lists will be held by others, such as interest group leaders, individual campaign contributors, leaders in the business community, and legislators who have political leverage with elected officials in control of hiring decisions.⁴⁹

Governor Thompson's reaction to *Rutan* illustrates that future em-

whether these specific effects are "good" or "bad," the *Rutan* decision throws the "baby out with the bathwater," protecting political freedom of association by sapping those associations of any consequence. The New Republic, July 23, 1990, at 4, col. 4. After *Rutan*, government officials will be constantly involved in litigation, and in laying proper paper trails to justify their decisions.

46. The *Rutan* prohibition on patronage is limited to "employment positions for which party affiliation is not an appropriate requirement." *Rutan*, 110 S. Ct. at 2734. After *Rutan*, former Governor Thompson's legal counsel reportedly considered hiring outside consultants to help them determine which positions *Rutan* embraces. Shomon, *Governor's Office Issues Hiring Guidelines*, United Press International, July 19, 1990. Many predict that this will be a heavily litigated issue. *Id.* Nowlan, *supra* note 37. Voters, however, have the ability to stop blatant patronage practices by voting the elected official out of office.

47. Editorial, Chicago Tribune, *supra* note 38. Most state legislatures have implemented strict civil service systems to abolish political patronage hiring. One report indicates that patronage hiring accounts for only five percent of all state jobs in most states. T. BEYLE, *supra* note 1, at 135. However, Beyle notes that the existence of patronage is difficult to measure because patronage is difficult to define and recognize. *Id.* at 133-35. Another report indicates that in 1958, 49.3% of state employees owed their jobs to patronage. In 1963, the figure had decreased to 46% and by 1980 the figure further declined to 25%. L. SABATO, *supra* note 41, at 67.

48. Nowlan, *supra* note 37. Some have commented that most existing patronage systems will be unaffected because they operate much more discreetly than did that of Illinois. Martin Ashare, an attorney and chairman of the Republican Party in Suffolk County, New York, reportedly characterized the Illinois system as a smoking gun. "My sense is the government people here . . . may be far more subtle and discreet about how they do this sort of thing." *Newsday*, *supra* note 44. In the same article, Karen Burstein, formerly the head of New York's civil service system, called the decision "very easy to evade." *Id.*

49. When campaign contributions replace party support as the primary means of re-election, government jobs and contracts are awarded to financial contributors rather than to party loyalists. T. BEYLE, *supra* note 1, at 134.

ployment decisions will not be made solely on the basis of performance.⁵⁰ One month after the decision, the Governor issued an order creating new personnel guidelines tailored to meet the *Rutan* decision.⁵¹ Though the guidelines prohibited basing employment decisions on party affiliation, they stated that “[a]gencies may consider recommendations and referrals from any source of any political party when making personnel decisions.”⁵²

Although the advantages of a merit-based system may outweigh the attributes of a patronage system, voters and state legislatures are capable of making that determination without judicial interference, and without the inevitable wave of litigation that the *Rutan* decision will create.⁵³ The end result of the *Rutan* decision will be little or no change in patronage politics.⁵⁴

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50. *Rutan's* protection applies to patronage based strictly on political affiliation. Without a link to political affiliation, the first amendment claim vanishes. However, if one defines patronage to include sponsorship rather than party affiliation, people like Cynthia Rutan will continue to be passed over in favor of persons sponsored by political influences. See M. TOINET & J. GLENN, CLIENTELISM AND CORRUPTION IN THE "OPEN" SOCIETY: THE CASE OF THE UNITED STATES 203 (1982), reprinted in CLAPHAM, PRIVATE PATRONAGE AND PUBLIC POWER 193-210 (1982). For example, *Rutan* does not protect an employee denied a promotion, not because of party affiliation, but because the head of the administration received contributions from a business person who recommended someone else for the job.

51. See Shoman, UPI Release, Governor's Office Issues Hiring Guidelines, July 18, 1990.

52. *Id.*

53. See *supra* note 44 and accompanying text. Many governors dismantled the patronage systems they inherited; other states dismantled patronage systems through legislation. L. SABATO, *supra* note 41, at 69. Some governors feel that, on balance, using patronage as a means to secure political support is not worth the animosity it creates. *Id.*

54. A recent study conducted by The Associated Press suggests that patronage hiring has continued after the *Rutan* decision. Conrad, *Illinois Patronage Hiring Continues, Study Suggests*, St. Louis Post-Dispatch, March 25, 1991, at 1. According to the study, almost 80% of those hired at a new state prison and who declared a party preference were Republicans. The prison is located in a county where Democrats outnumber Republicans by a 5-1 margin. *Id.* However, the number of new hires who declared no party preference rose dramatically since the decision. 47% of employees hired after *Rutan* declared no party preference, while only 14% of those hired before the *Rutan* decision declared no party preference. *Id.* at 124. Governor Edgar's legal counsel reportedly stated that the increase in employees showing no party preference indicates that the new administration has effectively implemented *Rutan*. *Id.*