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Robert M. O'Neil
Indiana University School of Law - Bloomington

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POLITICS, PATRONAGE AND PUBLIC EMPLOYMENT

Robert M. O'Neil*

William Perry had been a custodian in the Illinois State Building in Springfield for nearly six years. His performance had been entirely satisfactory. The day after a Republican governor assumed office, Perry was told by his supervisor that “if I joined the Republican [sic] Party I would be able to keep my job.” Perry, a registered Democrat, refused to change his political affiliation. A month later he was terminated by his superior. “They gave me,” he said later, “no reason why I was being let out.”¹ About the same time, a number of other Illinois state employees, all of whom happened to be Democrats, were dismissed or terminated on manifestly political grounds.

As recently as four or five years ago, such practices would simply have been viewed as part of the normal operation of the political process. The few victims of the spoils system who ever found their way to court were sent away empty handed. They were told that unless they were protected by statutory civil service systems they had no legal recourse.² After the Illinois purge, however, a group of former state employees brought suit against the Secretary of State, alleging that patronage dismissal infringed their first amendment freedoms. Although the district court rejected the claim in traditional fashion, the court of appeals reversed and announced a novel precept: that non-policymaking public employees could not be dismissed solely for refusing to change their party allegiance.³ Two years

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* Professor of Law and Executive Vice President for Academic Affairs, University of Cincinnati; Professor of Law and Vice President–Bloomington, Indiana University. A.B., 1956, A.M., 1957, L.L.B., 1961, Harvard University.

¹. Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561, 565 n.4 (7th Cir. 1972).


³. Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561 (7th Cir. 1972). This decision was in substantial conflict with an earlier decision of the Court of Appeals for the Second Circuit, Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), cert. denied, 404 U.S. 1020 (1972), which had refused to find a constitutional claim under similar circumstances. The Second Circuit simply followed the traditional view of patronage dismissals. (The Second Circuit has recently modified its view on this issue in Calo v. Paine, 521 F.2d 411 (2d Cir. 1975)). See also Note, Political Patronage and Unconstitutional Conditions: A Last Hurrah for the Party Faithful?, 14 Wm. & Mary L. Rev. 720 (1973) [hereinafter cited as Political Patronage and Unconstitutional Conditions].
later, the Seventh Circuit applied the same constitutional precept to a case involving the political dismissal of employees of the Cook County Sheriff's office.\textsuperscript{4} This time Supreme Court review was sought, and the case will be argued during the 1975-76 Term.\textsuperscript{5} The constitutional and public policy implications of this and other related cases provide the focus of the present article. Since the legal controversy over patronage dismissal has important practical and policy dimensions, we begin with some contextual considerations.

I. THE LARGER CONTEXT: POLITICS AND PUBLIC POLICY

The patronage dismissal issue does not arise in a vacuum, but is very much a part of the general fabric of American political life. There is, first, a historic dimension of some importance. Patronage and the spoils system are as old as American government. Thomas Jefferson once asked: "If a due participation of office is a matter of right, how are vacancies to be obtained? Those by death are few; by resignation, none. Can any other mode than that of removal be proposed?"\textsuperscript{6} Resort to the spoils system in the nineteenth century was bipartisan, as the extensive political purges by both Jackson and Lincoln attest. In time, the excesses of patronage and political cynicism led to the reforms of the Pendleton Act,\textsuperscript{7} and later the Hatch Act,\textsuperscript{8} the first creating a federal civil service system and the latter curtailing sharply the political activity of most federal employees.\textsuperscript{9} The restrictions later were extended to many state and local government employees.\textsuperscript{10} Meanwhile, state and municipal civil service reforms paralleled those of the federal system and increasingly covered the public sector. (Precise figures are difficult to obtain, but it appears that roughly half of today's government employees are covered by civil service. Coverage is more extensive at the federal and municipal levels, less so at the state and county levels.)\textsuperscript{11}

As civil service protection expanded, it carried the clear negative implication that unclassified public workers enjoyed no comparable protection and

\textsuperscript{4} Burns v. Elrod, 509 F.2d 1133 (7th Cir. 1975).
\textsuperscript{5} Certiorari was granted on October 7, 1975. 96 S. Ct. 33 (1975).
\textsuperscript{6} S. PADOVER, THE COMPLETE JEFFERSON 518 (1943).
\textsuperscript{7} Act of Jan. 16, 1883, ch. 27, 22 Stat. 403.
\textsuperscript{10} See Minge, Federal Restrictions on the Political Activities of State and Local Employees, 57 MINN. L. REV. 493 (1973).
could be dismissed at will when parties changed. Even at the federal level, where the number of vulnerable positions is relatively small, it generally has been assumed that a new President eventually will replace all but a handful of policymaking personnel of the opposite party. At lower levels of government, where the opportunities are far broader, wholesale purges following the inauguration of a new party are expected, even though they are by no means universal. Until very recently, such dismissals simply have been accepted by government employees as one of the vicissitudes of public life.

One reason for the recent changes in attitude and expectation has been the steady growth of public employment as a component of the total national work force. Government service accounted for a small fraction of all jobs even as late as World War II. Today there are roughly 14 million persons in public positions, comprising some 19 percent of all employed persons. This share has grown steadily, both during times of war and of peace. Even more important than this general growth trend has been the increasing dominance of the public sector in many occupations. School teachers, for example, have almost no private sector alternatives. The same is increasingly true for nurses, librarians, safety personnel, and some types of scientists and engineers. As enrollment in public institutions of higher education grows at the expense of once dominant private colleges and universities, prospective professors also face a narrower range of options outside the public sector. Thus it will no longer do to say, as courts could say in an earlier and more mixed economy, that the public employee has made a voluntary choice by which he is reasonably bound. The simple fact is that jobs in many fields now exist only in the public sector.

Another factor bearing on the patronage dismissal issue is the current effort to dilute the purity of the civil service system itself. Although the Hatch Act's restrictions have been sustained twice by the Supreme Court, opponents of forced political neutrality in the public service have sought other forums. Almost unnoticed as a part of the post-Watergate campaign reform law, Congress freed state and local employees of virtually all the federal constraints on political activity which previously had bound them. Today, little is forbidden—at least by federal law—except actual candidacy in partisan elections and pressuring fellow employees for political contribu-

12. Political Patronage and Unconstitutional Conditions, supra note 3, at 720.
tions. Meanwhile, an even more massive attack on the Hatch Act is underway in Congress. Legislation which would remove many of the current fetters on political activity by federal employees has been passed by the House of Representatives with strong support from organized labor.\textsuperscript{17} Should it pass the Senate, which seems quite likely, it probably will be subject to presidential veto, with the eventual outcome depending upon the level of support for an override. On the state level, restrictions on political activity recently have been diluted, also in response to public employee union pressure. At the municipal level, similar changes are underway. The Chicago Civil Service Commission has been abolished and its powers transferred to a city personnel department, a move which some observers fear may strengthen the patronage powers of the Daley machine.\textsuperscript{18} New York State, meanwhile, has greatly relaxed the political restrictions on police officers,\textsuperscript{19} so that (to borrow from Justice Holmes' oft-quoted dilemma) one may now have rights both to talk politics and to be a policeman.\textsuperscript{20} These trends are pertinent to the subject under discussion, because legislative bodies seem inclined to put classified civil service workers back into politics at the same time the courts are beginning to take unclassified public personnel out of politics.

Third and finally, there is a rising tide of discontent with civil service systems. Such criticism reflects in major part the growing fiscal plight of New York and many other governmental units. Whatever may be the cause of the current condition, civil service and tenure protections have provided a convenient scapegoat because they seem to deny the flexibility that is vitally needed in periods of retrenchment. Many harried public officials doubtless share the view of the Governor of Colorado that civil service is the enemy of fiscal responsibility: "You've got to be flexible enough to fire incompetents," he recently stated to a legislative committee, "and you don't have that in state government."\textsuperscript{21} To the extent that the courts develop safeguards for the historically vulnerable side of the public work force, they will thus be running against the tide of executive as well as legislative concern. Obviously, this is not an argument against the extension of constitutional protection to areas not covered by statutory safeguards. Indeed, the pressures from other quarters to weaken or undermine civil service protection and political neutrality may make the new judicial

\textsuperscript{17} H.R. 3000, 94th Cong., 1 Sess., known as the Federal Employees' Political Activities Act of 1975. For the views of the sponsor, see Rep. William L. Clay's letter to the editor, N.Y. Times, June 30, 1975, at 28, cols. 3-4.

\textsuperscript{18} N.Y. Times, Oct. 28, 1975, at 12, cols.3-6. In fairness, it should be noted that this revision reflects recent recommendations of the National Civil Service League, and that a former executive director of the League advised on the drafting of the new measure.

\textsuperscript{19} Id., May 16, 1975, at 20, cols. 1-2.

\textsuperscript{20} The reference is to McAuliffe v. New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).

concern even more appropriate and timely. Clearly, the Supreme Court should not, as Mister Dooley charged it was doing at the turn of the century, "follow th' iliction returns." Yet it is important for those who analyze the patronage dismissal issue as a constitutional problem to understand pertinent trends in other forums.

II. PATRONAGE DISMISSALS AND CONSTITUTIONAL RIGHTS: ANALYSIS OF THE LEGAL ISSUES

We now return to the case of William Perry, the Illinois custodian dismissed for refusing to switch his partisan allegiance. A court might dispose of such a case in three possible ways. First, the suit could be dismissed along the traditional lines, the court holding that public employees enjoyed only such safeguards as the civil service laws conferred upon them. At the other extreme, a court could find that all such dismissals were per se unconstitutional on any of several grounds to which we shall shortly turn our attention. The third alternative is the one the court of appeals actually adopted in the Illinois case—to draw lines within the public service, holding that certain groups of unclassified personnel could be ousted on political grounds while others enjoyed constitutional protection from patronage dismissal because of the nature and level of their positions. This third view seeks to balance important competing interests.

Not all patronage dismissals come about in the same way. Probably the most common practice is the one described in the Perry case—a superior administrator tells the employee that he or she would be well advised to switch party affiliation (or must do so), with the strong implication that failure to take the hint will result in termination. (When the coup is eventually administered, there may be no specific reference to politics, but the employee will have little doubt of the basis of the action if his or her previous record was satisfactory.) There are, however, alternative methods. In Burns v. Elrod, the case now before the Supreme Court, employees of the Cook County Sheriff's office were terminated for ostensibly political reasons when a Democratic Sheriff took over—some because they were already members of the wrong party, others because they lacked the requisite political sponsorship from the Democratic organization, and still others because they refused to pledge their political allegiance, to make contributions or to work for the Democratic Party. Presumably, the

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23. This is essentially the view suggested in Patronage Dismissals, supra note 11, at 296-306.
24. Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561 (7th Cir. 1974); cf. Nunnery v. Barber, 503 F.2d 1349 (4th Cir. 1974), in which another federal court of appeals seems willing to adopt such a standard, but finds the particular plaintiff unable to claim relief under it.
manner in which the pressure is applied, or the basis on which the dismissal ultimately rests, should be relevant to the disposition of individual cases. With these considerations in mind, we turn to an analysis of the relevant constitutional issues.

A. First Amendment Freedoms of Expression and Association

The most obvious constitutional basis for a challenge to patronage dismissal is the first amendment. Clearly the loss of a job based on party affiliation significantly impairs a public employee's political freedom.\(^2\) While such a dismissal may not actually prevent the person from voting according to individual choice and conscience, the inhibition of political liberty is pervasive. In analogous contexts the Supreme Court has repeatedly held that deterrence to the exercise of individual rights and liberties need not be complete in order to be unconstitutional.\(^3\) Nor is there any question that political activity is generally within the scope of first amendment freedoms, even though not expressly guaranteed by the Bill of Rights.\(^4\) Several lines of cases suggest how the general principle might be made applicable to the particular issue at hand.

First, and most clearly in point, are cases involving restrictions on political association and affiliation. In a series of decisions striking down loyalty oaths and disclaimers, the Supreme Court has held that a person may not be compelled, as a condition of public employment, to forswear anything less than knowing, active membership in an unlawful organization (e.g., the Communist Party) with the specific intent to further the unlawful aims of that organization.\(^5\) Persons who have a lesser degree of affinity or who do not share the group's illegal aims, the Court has said, simply do not pose that degree of danger which will warrant taking away their first amendment political freedoms.\(^6\) By simplistic analogy, it would appear that mere members of the Republican or the Democratic party, a fortiori, would pose no serious threat to the functioning of government and thus should be allowed to keep both their party ties and their jobs.

There are, however, several distinctions. Dismissal because of membership in a “subversive” organization clearly creates a stigma—so serious that one who is thus branded may be effectively blacklisted from private

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26. See Patronage Dismissals, supra note 11, at 305.
as well as public employment. Dismissal because one is not a member of the major party in power hardly imputes such infamy or carries such consequences. Moreover, the governmental interest behind anti-Communist oaths is the chimerical prospect of violent overthrow or internal subversion of the government; the interests reflected in patronage dismissals are the more practical and immediate desires for loyalty, responsibility, efficiency and party vitality. (This is not to say that such desires or needs do in fact justify dismissal on political grounds, but simply that the asserted interests are more tangible and cognizable in the one case than in the other.) Then, too, patronage dismissals are as ancient as the Republic itself, and are part of the fabric of our national political life, while loyalty oaths are of rather recent (and highly suspect) origin.

Apart from these differences, it is highly relevant that the Supreme Court has twice recently sustained restrictions on the political freedom of public employees. In both cases, the Court held that the strong interest in keeping the federal service free of politics justified even rather drastic curtailment of public workers' first amendment rights. To be sure, the underlying interests recognized in those cases are diametrically opposed to the interests buttressing the patronage system—the former aim to keep politics out of government and the latter to keep it in—but the basic analysis of first amendment rights is analogous. These circumstances at least suggest that the constitutional issue is not as simple or as obvious as resort to the loyalty oath cases initially might suggest.

Meanwhile, lower courts have been more imaginative than the Supreme Court in addressing restrictions on political activity of public employees. The California Supreme Court nearly ten years ago formulated a grid for the constitutional analysis of such restrictions. Conditions attached to public positions must, held the California court, meet three essential conditions: They must "rationally relate to the enhancement of the public service"; the "benefits which the public gains by the restraints [must] outweigh the resulting impairment of constitutional rights"; and government must demonstrate that "no alternatives less subversive of constitutional rights are available." Several California restrictions on political activity of public employees failed to meet these tests and were held unconstitutional—though the court acknowledged the legitimacy of the underlying governmental interests and suggested that narrower, more precise means of implementation would fare better in the future. The

34. E.g., Vogel v. County of Los Angeles, 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967).
application of such a discriminating grid to restrictions on the political freedoms of public employees underscores the inappropriateness of a simplistic approach to the patronage dismissal.

A further source of first amendment precedent is the line of recent cases involving party affiliation and the franchise. In Williams v. Rhodes, the Supreme Court struck down Ohio's differential qualification tests for minor and major political parties, holding that such a scheme denied equal protection to voters and failed to show the “compelling interest” which would warrant a heavy burden on the voter's right to choose minor party candidates. Several years later, in Kusper v. Pontikes, the Court invalidated a more subtle limit on political choice—an Illinois law which barred a voter from crossing party lines for almost two years after voting in a primary election. The Court concluded that the law “substantially restricts an Illinois voter's freedom to change his political party affiliation” and stressed the constitutional stature of the voter's “ability to associate effectively with the party of her choice.”

Superficially, one could argue from these two cases that patronage dismissals fall under a comparable ban because they similarly inhibit party choice and political affiliation. But the analogy is imperfect, and the analysis must be more complex. For one thing, the Williams and Pontikes cases both involved the direct exercise of the franchise, which clearly enjoys the highest status in the array of first amendment political freedoms. The public employee who is told he must join or contribute to the opposite party to retain his job is not required to change his voting pattern as well. Moreover, even in the voting cases the Supreme Court recognized that a “compelling state interest” might justify severe curtailment of party affiliation, but found the particular interests asserted by Ohio and Illinois constitutionally inadequate. Additional and very recent evidence of the non-absolute character of such individual rights comes from the current litigation involving the constitutionality of the 1974 Federal Election Law Amendments. In Buckley v. Valeo, the court of appeals held that strong governmental interests, such as those reflected in the post-Watergate campaign reform legislation, may justify certain inhibitions on political choice:

To the extent that prohibitions and restraints—imposed by the Act in service of the compelling governmental interest in insuring the integrity of federal elections against undue influence—work incidental restrictions on

35. 393 U.S. 23 (1968).
37. Id. at 57-58.
First Amendment freedoms, these constraints, broadly considered, are necessary to assure the integrity of federal elections.\textsuperscript{40}

Granting that the interests asserted in support of the campaign law reforms may stand higher than those reflected in patronage dismissals, the point remains that Williams and Pontikes do not invalidate automatically all restrictions on political affiliation and choice.

\textbf{B. Substantive Due Process}

A second constitutional basis for challenging all patronage dismissals is the recently revived concept of substantive due process. The current source of such protection is the 1974 Supreme Court decision in Cleveland Board of Education v. LaFleur.\textsuperscript{41} With only two dissents, the Court held that the mandatory maternity leave requirements of many public school districts were arbitrary and thus invalid on general due process grounds—not (as most observers expected) on equal protection principles. Specifically, the Court found that the uniform cut-off dates bore “no rational relationship to the valid State interest” in maintaining continuity of instruction or in keeping physically unfit teachers out of the classroom.\textsuperscript{42}

The possible relevance of LaFleur to patronage dismissals has not yet been tested. It would seem, however, that rules terminating employment because of party affiliation should be viewed with at least as strict scrutiny as those triggered by pregnancy.\textsuperscript{43} However valid and substantial may be the asserted governmental interests, LaFleur seems to require proof of a rational relationship between those goals and the dismissal of a particular employee. The resulting burden would be quite similar to the California Supreme Court's mandate that restrictions which curtail first amendment freedoms be shown to “rationally relate to the enhancement of the public service” and that less restrictive alternatives be unavailable.\textsuperscript{44}

\textbf{C. Equal Protection}

Closely related is the suggestion that patronage dismissals may deny equal protection to their victims.\textsuperscript{45} At least two specific distinctions appear vulnerable. One is the different treatment of similar groups of public employees on the basis of party membership, affiliation, or support—a classification

\begin{itemize}
  \item \textsuperscript{40} Id. at 842.
  \item \textsuperscript{41} 414 U.S. 632 (1974).
  \item \textsuperscript{42} Id. at 643.
  \item \textsuperscript{43} The Court in LaFleur did classify the bearing of children and decisions concerning procreation as “protected freedoms,” \textit{citing}, e.g., Roe v. Wade, 410 U.S. 113 (1973). This interest surely does not, however, enjoy a greater degree of constitutional protection than the first amendment right to participate in civic life and expression.
  \item \textsuperscript{44} Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 501-02, 421 P.2d 409, 411, 55 Cal. Rptr. 401, 403 (1966).
  \item \textsuperscript{45} See, e.g., Patronage Dismissals, supra note 11, at 305-06.
\end{itemize}
that would appear constitutionally suspect (like geography and wealth). Strong support for this view comes from *Williams v. Rhodes*, which ultimately turned on equal protection rather than the first amendment, though citing both constitutional grounds for the voter's right to prefer minor parties.

The other possibly vulnerable classification is the one drawn between protected (i.e., civil service) and unprotected groups of public employees. As a result of what may have been the accident of legislative draftsmanship, persons in one category are immune to the political sword, while others are fully exposed, even though their tasks may be quite similar.

The likelihood of success on either equal protection ground would depend largely on the categorization of the underlying individual interest. If that interest were deemed "fundamental," then the courts would subject the classification to strict scrutiny and would sustain it only upon finding a compelling governmental interest. The *Williams* and *Pontikes* cases suggest a basis for the "fundamental interest" and "strict scrutiny" test, although (as we have already observed) those cases both dealt with actual voting and not with other forms of political activity and affiliation. Moreover, the Supreme Court's insensitivity to a similar argument in the Hatch Act cases—that the distinction between classified and unclassified personnel related irrationally and arbitrarily to the need for political naturalization—leaves one less optimistic about the equal protection clause as a basis of constitutional attack on patronage dismissals.

### D. Procedural Due Process.

A fourth and final basis of attack on patronage dismissals is the absence of any sort of hearing. Now that the Supreme Court has declined to extend to public employment the requirement of a pretermination hearing, the status of this argument is uncertain. Where a particular administrative action imposes a stigma, or where an employee's expectation creates a property interest in the position, or where the termination is based on the exercise of a constitutional right, then a hearing is required. These general precepts, however, do not afford much solace to the typical victim of patronage dismissal. As we noted earlier, a political dismissal imposes no badge of infamy, and seldom hurts the person's prospects for future employment. Moreover, the very fact that exempt employees are subject to patronage

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46. 393 U.S. 23 (1968).
dismissals at all tends to defeat any possible proprietary claim of the kind that arises from tenure and other forms of job security or expectation. Only the third option remains—the claim that the dismissal reflects the exercise of an independent constitutional right such as freedom of expression.\textsuperscript{51} This is, of course, the very issue we explored under the first constitutional heading. If a sound first amendment claim can be established in patronage cases, then we really do not need a procedural right; if it cannot be established, the basis for a hearing in the typical patronage case seems doubtful under the current Supreme Court view of due process for public employees.

Thus it appears that the likeliest grounds on which to challenge patronage dismissals are the first amendment and the substantive due process concepts. Under either constitutional heading, the government agency responsible for the dismissal would be required to prove at least (a) a substantial governmental interest, (b) a rational relationship between that interest and such dismissal, and (c) the unavailability of alternatives which would restrict less severely individual freedoms. In light of this framework, it becomes important to examine both the asserted governmental interests and the relationship between those interests and the patronage dismissal.

III. GOVERNMENTAL INTERESTS AND PATRONAGE DISMISSALS

At least three types of governmental interests have been cited by commentators and critics. First, it has been suggested that the patronage system ensures the efficient operation of government.\textsuperscript{52} Specifically, it has been argued that loyalty in government service is maximized through patronage and that responsibility and responsiveness to policymaking superiors are enhanced by this approach to appointments and retention. Second, it has been argued that patronage strengthens and maintains a healthy and effective two-party system, since the expectation of the “spoils” at the end of a successful campaign provides a vital incentive or stimulus to political activity.\textsuperscript{53} Third, it has been suggested more broadly that the efficient operation of government demands that the philosophy of a new administration be reflected throughout the public service.\textsuperscript{54} Should the patronage system now be held unconstitutional, government arguably would cease to serve these interests and the political process as we know it would atrophy.

This is not the place to appraise the validity of each of these asserted interests. That has been done elsewhere, and requires more the expertise of political science than of law.\textsuperscript{55} In order to advance the constitutional analysis, we may assume that each of these objectives is in the abstract a valid governmental interest. The critical question is that of the relationship

\textsuperscript{51} 408 U.S. at 596.
\textsuperscript{52} A Constitutional Analysis of the Spoils System, supra note 2, at 1324-25.
\textsuperscript{53} Id. at 1325-26.
\textsuperscript{54} Patronage Dismissals, supra note 11, at 319-21.
\textsuperscript{55} Id. at 317-28.
between the end and the means: whether the patronage dismissal or affiliation requirement is rationally and directly related to the asserted interest and whether that interest could be served by less restrictive means.

IV. SERVING THE INTERESTS: A FRAMEWORK FOR THE ANALYSIS OF PATRONAGE DISMISSALS

Clearly, any valid constitutional test must accommodate the easy cases at both extremes. However persuasive may be the constitutional attack, it seems quite clear that some dismissals on partisan grounds are valid and necessary. At the other extreme, some dismissals bear little or no relationship to the asserted governmental interests and thus would seem invalid on substantive due process grounds without even reaching the first amendment issues. What is needed is a framework that will both accommodate the various relevant principles and issues and help courts to decide the difficult intermediate cases.

A. Nature of the Position

Every court that has considered the patronage issue seriously has recognized obvious differences between the governor's executive secretary and the state capitol custodian. There appears to be general agreement that the former position should be under political control, but that no such justification exists for the ouster of a custodian of the opposite party. The line between these two cases has been drawn in terms of whether or not the employee holds a "policymaking" position. On the basis of this distinction, the Seventh Circuit held unconstitutional the dismissal of custodians and other sub-policy level employees,\(^5\) but sustained the dismissal of employees of the Indiana State Department of Public Instruction who "were clearly engaged in the implementation of the policies of the [Department] and at least indirectly in the formulation of those policies."\(^5\) The case currently before the Supreme Court is closer to the middle of this continuum; the court of appeals had sent back to the district court the factual issue of whether the Cook County Deputy Sheriffs were policymaking employees.\(^5\) In an earlier case in which the Pennsylvania Supreme Court divided 4-3 over the constitutionality of patronage dismissals,\(^9\) the dissenters argued that a governor should be able to dismiss solely on partisan grounds "any employee who is engaged in a policymaking position, or in a position charged with implementing or

\(^5\) Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561 (7th Cir. 1972).
\(^5\) Indiana State Employees Ass'n, Inc. v. Negley, 501 F.2d 1239, 1244 (7th Cir. 1974).
devising the means of implementing the governor’s policies.” (The application of that test would have been easy in the particular case since the plaintiffs were “unskilled and semi-skilled employees whose daily occupations are merely to maintain the public highways.”)⁶⁰

Clearly the policymaking test is not self-defining. There is, however, one analogous context from which one might borrow a working definition. In Barr v. Matteo,⁶¹ the Supreme Court held that certain federal officials enjoyed absolute immunity from defamation suits for statements made in an official capacity. The protected group included those “policymaking executive officials” at the cabinet and sub-cabinet level who, in the Court’s view, should be free from the fear of damage suits to ensure the smooth and responsible operation of government.⁶² The rationale for immunizing certain highly responsible and sensitive positions from defamation liability is at least partially akin to the rationale for leaving such positions under the patronage system. Below that level, the acknowledged interests in the smooth and efficient operation of government seem to warrant neither the extension of the spoils system nor the extension of an absolute privilege to defame.

An alternative but much lower level at which the line might be drawn is suggested by the cases defining the privilege to make defamatory statements about public officials. Since that privilege first was recognized in 1964,⁶³ the Supreme Court scrupulously has avoided drawing a clear, sharp line marking its lower boundary. Well within the privilege are such positions as state university football coach,⁶⁴ candidate for sheriff,⁶⁵ and deputy chief of detectives of a city police department.⁶⁶ Given the policies behind this constitutional privilege and its rather broad scope, this line would seem a dangerously low one in the patronage dismissal context; many people who might be deemed “public officials” for defamation purposes should not be subject to political dismissal.

If the line is drawn roughly in accord with Barr v. Matteo, then the essential governmental interests would appear to be adequately met. Persons above that line are clearly involved in the formulation and implementation of policy. The chief executive or administrator should be able to insist both on loyalty and partisan affiliation from such people. The continued presence of politically dissonant or disloyal persons in such positions—however competent they may be—could seriously cripple the effectuation of a new administration’s policies and programs. The opportunity to appoint key people at that level constitutes a major incentive or inducement for seekers of high

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⁶⁰ Id. at 543, 280 A.2d at 382.
⁶² Id. at 571; see Handler & Klein, The Defense of Privilege in Defamation Suits Against Government Executive Officials, 74 Harv. L. Rev. 44 (1960).
elective office; the prospect of having such positions "locked in" after election would discourage many aspirants and would rigidify the quality of political life. Even the Seventh Circuit, the court least sympathetic to patronage dismissals, has recognized that "considerations of personal loyalty or other factors besides determination of policy, may justify the employment of political associates in certain positions." For all these reasons, it would seem reasonable to draw the line just below the policymaking level and to locate that line with the help of the Supreme Court's decision in Barr v. Matteo.

B. Form of the Political Condition

The validity of a patronage dismissal may also depend in part on the way in which the restriction or condition is imposed. It would be one thing to warn an employee not to criticize openly the new party and then to dismiss him because he failed to heed the caution. It would be quite another matter to force a public employee, even at a policymaking level, to profess support publicly for an abhorrent political view or organization. Between these two extremes lies the general run of cases, in which a person is dismissed either for having belonged to the "wrong" party in the past or for refusing to switch allegiance after the new party takes over. In such cases the form of the condition probably adds relatively little, though it may be helpful where the position is very close to the line separating policymaking and non-policymaking roles.

A similar and possibly relevant factor should be the scope of the dismissals. At least as a practical matter, the extent of the displacement accompanying a change in party would affect the likelihood of proving that a particular dismissal was politically motivated. If only a small number of jobs change and nothing is said specifically about party affiliation or support, it may be extremely difficult to convince a court of what the press and others suspect about the underlying motivation. If the displacement reaches purge proportions, however, and if concurrent public statements generate a clear inference of partisan motivation, then the case obviously becomes much easier to establish. Apart from these practical problems of proof, there is some appeal to a "de minimis" rule which would allow a moderate degree of patronage displacement when a new party assumes office, even if that displacement reaches below the policymaking level. Whether or not such a

67. See Note, 57 Iowa L. Rev. 1320, 1345 (1972).
68. Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561, 574 (7th Cir. 1972). As this qualification suggests, the policymaking line is not capable of precise location on the spectrum of public officialdom. For critical comments on the definitional problem, see Nunnery v. Barber, 503 F.2d 1349, 1356 (4th Cir. 1974); Note, 26 Vand. L. Rev. 1090, 1097-98 (1973).
70. See Patronage Dismissals, supra note 11, at 327-28.
suggestion rises to the dignity of constitutional law, it surely does have some practical appeal in an eminently practical setting.

C. Clarity of Notice and Source of the Position

The way in which the person subject to dismissal obtained the position is sometimes thought relevant. If, for example, the position has traditionally been a "patronage job," and the incumbent obtained it on openly political grounds, some courts will stop there. The majority in the Pennsylvania case concluded that "State employees who obtained their positions [jobs]—as all the parties agree they did—by politics or party patronage, and complain of being fired solely on the grounds of political sponsorship or affiliation, have . . . no constitutionally protected right to their jobs. . . ." \(^7\) That is, "those who . . . live by the political sword must be prepared to die by the political sword." \(^8\)

Other courts have approached the issue more cautiously. The Seventh Circuit, while acknowledging that a factual basis for such waiver might be established in individual cases, has warned of the hazards of presuming a general waiver from the acceptance of a traditional patronage position. \(^9\) The Supreme Court, moreover, has cautioned repeatedly that a waiver of constitutional rights will not be inferred lightly. \(^10\) Thus there should be proof in the individual case that the political vulnerability of the position was well known and understood at the time the plaintiff assumed it. Where substantial doubt exists about the clarity of this understanding, the "notice" or "waiver" factor might weigh against the validity of the dismissal, regardless of the level of the position.

D. Extent and Nature of the Legislative Judgment

The clarity with which the legislature has excluded a particular position from civil service protection may also be germane. Sometimes the statute has been written to exempt a particular position with unmistakable clarity and readily inferable intent; in other cases the legislative classification is so general as to afford little or no insight. The percentage of the public work force covered by civil service may also be relevant; where the legislature has given protection to a major share of the public sector, courts might be more willing to sustain political dismissals within the unprotected area than would

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72. Id. at 536, 280 A.2d at 378. On the significance of this factor, compare Nunney v. Barber, 503 F.2d 1349 (4th Cir. 1974) ("she voluntarily accepted the patronage position with a full realization of its conditions and its hazards"), with Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa. 1973) (plaintiff alleged he began work unaware that his position was a "patronage job").
73. Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561, 573-74 (7th Cir. 1972).
be the case if only a small fraction of all positions were protected. Moreover, the nature and quality of civil service protection might also be relevant—the type of hearing provided for dismissal of a civil servant, the specifica-
tion of grounds for dismissal, and other similar factors.

This line of argument could, of course, prove too much. The fact that the legislature has chosen to protect some public employees from political dismissal surely does not preclude judicial protection for others. Since we are dealing here with a possible constitutional right, the withholding of statutory coverage is surely not dispositive. Legislative intent may, however, be useful and relevant in resolving close cases, since the line between policy-making and other positions is far from precise. If the legislature has carefully and conscientiously addressed the legal and policy issues implicated in the patronage litigation, a court might then approach the issue with somewhat greater deference.

V. Conclusion

There are no clear, easy answers in the patronage dismissal field. About all that is certain is that the volume of litigation will continue to increase—unless, of course, the Supreme Court holds that no constitutional remedy exists, even for the statehouse janitor. There is a need for guidance in differentiating between public employees who should be amenable to changes in political fortune and those who should not. That guidance probably can come only through case-by-case determination, since the demarcation of a precise line by the Supreme Court seems as unlikely here as in the public official-defamation area. The determination of such guidelines will at least be aided by consideration of various factors of the kind summarized briefly in this article. Whatever may happen to the civil service system at the hands of frustrated executives and impatient legislators, a wholly new source of protection for the neutrality of public employees seems to be emerging.