Few Thoughts about Scalia's Dissenting Opinion in Rutan v. Republican Party of Illinois and His View of the Public Workplace

Rafael Gely
University of Missouri School of Law, gelyr@missouri.edu

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A FEW THOUGHTS ABOUT JUSTICE SCALIA’S DISSENTING OPINION IN RUTAN V. REPUBLICAN PARTY OF ILLINOIS AND HIS VIEW OF THE PUBLIC WORKPLACE

BY

RAFAEL GELY

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I. INTRODUCTION

I first became familiar with the U.S. Supreme Court decision in Rutan v. Republican Party of Illinois, when I began teaching employment law a few years after the decision was issued. Having spent six years in Illinois while attending law school and graduate school, and returning to teach at Chicago-Kent College Law, the case was of particular interest to me, as the names and location of the case all seemed so familiar. I found the dissent by Justice Antonin Scalia particularly interesting in that it raised a number of fascinating issues and made various assertions that seemed to make sense. To be sure, there were other aspects of his opinion that were not entirely convincing and other sections which were, honestly, difficult for me to understand.

This essay summarizes Justice Scalia’s dissent and comments on some of the assertions that I found interesting over twenty years ago.

* James E. Campbell Missouri Endowed Professor of Law, Director Center for the Study of Dispute Resolution, University of Missouri School of Law.
II. THE DECISION

_Rutan_ involved a challenge to various employment practices of the Republican Party and the Illinois Governor. In 1980, then-Governor James Thompson, instituted through executive order a hiring freeze affecting every organization under his control. The executive order provided, however, for possible exceptions to the freeze with “express permission” from the Governor’s office. These requests had become routine, to the point that an agency was created within the Governor’s office to handle them. The complaint alleged that in reviewing requests for exceptions to the freeze, the Governor’s Office would look at whether the applicant previously voted in Republican primaries, had provided financial support to the Republican Party, had promised to join or work on behalf of the Republican Party, and whether the applicant had the support of local Republican party officials. The plaintiffs alleged that the Governor had been using the office to “operate a political patronage system” for the benefit of individuals who supported and were supported by the Republican Party.

In two prior cases, _Elrod v. Burns_ and _Branti v. Finkel_, the Court had dealt with similar issues. In _Elrod_, a group of non-civil service employees brought suit against a newly elected Democratic sheriff, alleging that their termination amounted to a violation of their First and Fourteenth Amendment rights. The employees’ dismissals resulted from their lack of affiliation with the Democratic party. Addressing the constitutionality of patronage dismissals, a divided Court held that patronage violates the First Amendment because it restrains a public employee’s freedom of political belief and association. The government offered three defenses for its use of patronage. First, the government cited the need for effective governance of the workplace and efficient employees. Second, the government argued that patronage was vital to the democratic process because it ensured the vitality of political parties and, hence,
patronage cases to separate those positions of public employment that can be subject to patronage from those that cannot.\textsuperscript{11} Recognizing that when there is a change in political administrations, newly elected officials need to bring in their own people to help implement political policies, the Court held that policymaking positions are the only positions subject to patronage dismissals.\textsuperscript{12} In \textit{Branti}, the Court adhered to the categorical approach, but rejected strict adherence to the policymaking label as the means of applying the \textit{Elrod} test.\textsuperscript{13} Instead, the Court pointed out that the ultimate question is “whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”\textsuperscript{14} The question raised in \textit{Rutan}, thus, was whether the holdings in \textit{Elrod} and \textit{Branti} should be extended to other employment decisions.

Reversing in part the decision by the U.S. Court of Appeals for the Seventh Circuit, the Supreme Court in \textit{Rutan} held that the rationale advanced in \textit{Elrod} and \textit{Branti} against patronage firing, applied with equal force to promotion, transfer, recall, and hiring decisions, when those decisions were made on the basis of the party affiliation of those affected by the decisions.\textsuperscript{15} The Court held that the state had failed to advance a compelling reason which justified interfering with the plaintiffs’ freedom to “believe or associate, or to not believe and not associate.”\textsuperscript{16}

\textsuperscript{11} The Court summarily dismissed this argument, commenting that the elimination of patronage would not bring about the demise of party politics. \textit{Id.} at 368-69. Finally, the government raised a loyalty argument by arguing that patronage was necessary to ensure that employees would not undermine the implementation of new policies sanctioned by the electorate. \textit{Id.} at 367. While somewhat sympathetic to this argument, the Court found that it did not validate the need for patronage in all cases. Instead, the Court argued that limiting patronage to policymaking positions was sufficient to achieve governmental ends. \textit{Id.}

\textsuperscript{12} See \textit{id.} at 367. The Court reasoned that “[n]onpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party.” \textit{Id.} The Court was not completely clear on how to distinguish policymaking from nonpolicymaking positions. See \textit{id.} Justice Brennan acknowledged that while “no clear line can be drawn between policymaking and nonpolicymaking positions,” courts should consider the nature of an employee’s responsibilities and whether the same include acting as an adviser or formulating plans for the implementation of broad goals. See \textit{id.} at 367-68.

\textsuperscript{13} \textit{Branti v. Finkel}, 445 U.S. 507, 518 (1980).

\textsuperscript{14} \textit{Id.}


\textsuperscript{16} \textit{Id.} at 76.
III. SCALIA’S DISSENT

Justice Scalia’s twenty-five-page dissenting opinion is divided into three parts and starts with a short introduction. In the introduction, Scalia laid out his basic disagreement with the majority opinion. After characterizing the majority’s test as “the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an ‘appropriate requirement,’” Scalia noted, “[i]t is hard to say precisely (or even generally) what that exception means.” He then criticized the majority’s willingness to make “its constitutional civil service reform absolute” by extending the prohibition involving firings from *Elrod* and *Branti* to employment decisions involving hirings and promotions. Finally, he warned the Court about the “disastrous consequences” that the holding would have for the political system, not before sardonically taunting the majority for announcing and enforcing “the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs,” when the Justices themselves “overwhelmingly owe their office to its violation.”

In Part I of his dissenting opinion, Justice Scalia discussed the framework he believed appropriate for analyzing the government’s actions in this case. He first noted that the Constitution places different restrictions on government depending on whether it is regulating private conduct, or acting as an employer. He cited as examples cases like *O’Connor v. Ortega*, involving property searches in public workplaces, and *Connick v. Myers*, involving free speech issues for public employees.

With that basic premise laid down, Scalia proceeded to explore whether the employment practice involved in *Rutan*, that is, patronage-based employment decisions, was permissible. In his view, where a practice is not expressly prohibited by the text of the Bill of Rights, the question becomes whether the practice enjoys “a long

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17. *Id.* at 97 (Scalia, J., dissenting).
18. *Id.* at 98.
19. *Id.* at 93.
20. *Id.* at 94.
tradition of open, widespread, and unchallenged use.” If so, noted Justice Scalia, the Court has “no proper basis for striking it down.” Scalia believed that in this case, that inquiry did not present “a difficult question,” because unlike some other employment practices, patronage clearly had that “landmark status.” As supporting evidence, he referred to Justice Powell’s dissenting opinions in Branti and Elrod and to three academic writings. In addition, and somewhat defensively, in a footnote, Justice Scalia responded to the possible argument of invoking Brown v. Board of Education, “as demonstrating the dangerous consequences” of the constitutional interpretation principle he was proposing. Scalia argued the reference to Brown was unsupportable because unlike the practice of patronage, “a tradition of unchallenged validity did not exist with respect to the practice in Brown.”

In Part II of his dissenting opinion, Justice Scalia criticized the majority’s decision to evaluate the government’s actions in this case under a strict scrutiny standard. Scalia made two key points. First, he argued that it would be more appropriate to evaluate the government conduct using a rational basis test. Second, he argued that the government would clearly meet the rational basis level of scrutiny with regard to the practice of patronage.

As to the first issue, Scalia reiterated the point he made earlier, that different standards apply to the government when it acts as an employer as opposed to when it attempts to regulate private conduct. The argument in this section centered around the issue of whether in evaluating speech restrictions on employees in cases like Civil Service Commission v. Letter Carriers, Public Works v. Mitchell, Pickering v. Board of Education, and Connick, the Court had applied the strict scrutiny or the rational basis test. Justice Scalia

23. Rutan, 497 U.S. at 95 (Scalia, J., dissenting).
24. Id.
25. Id.
26. Id. at 96.
27. Id.
28. Id. at 95 n.1 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).
29. Id.
30. Id. at 98-102.
31. Id. at 102-10.
32. Id. at 98.
34. 330 U.S. 75 (1947).
argued that in those cases the Court did not apply the “normal” strict scrutiny test that the Court would traditionally apply in cases involving government regulation of speech.\textsuperscript{36} For example, with regard to \textit{Mitchell}, Justice Scalia noted that in upholding the provisions of the Hatch Act prohibiting political activities by federal employees, the Court only required a showing that the law was intended to regulate “‘an act reasonably deemed by Congress to interfere with the efficiency of the public service.’”\textsuperscript{37} Justice Scalia also cited to cases like \textit{Pickering} and \textit{Connick} as fodder for his argument that the Court had held previously that “government employment decisions taken on the basis of an employee’s speech [are unconstitutional] merely because they fail the narrow-tailoring and compelling-interest tests applicable to direct regulation of speech.”\textsuperscript{38} Scalia noted that the Court had given government “a wide degree of deference” in deciding whether speech by employees interfered with government’s ability to function as an employer.\textsuperscript{39}

In a long footnote, Justice Scalia responded to a criticism levied by the majority.\textsuperscript{40} In the majority opinion, Justice Brennan had criticized Scalia’s opinion on two grounds. First, the majority referred to Justice Scalia’s analysis as “questionable” given that the cases that Scalia described did in fact apply strict scrutiny.\textsuperscript{41} Second, Justice Brennan also noted that the governmental interests that Justice Scalia argued were furthered by the practice of patronage, were not interests that the government exercised in its capacity as employer, but interests that the government “might have in the structure and functioning of society as a whole.”\textsuperscript{42} As to the former criticism, Justice Scalia characterized the majority’s assertion as incorrect and unhelpful. He also dramatically argued that if the majority was correct and that those cases indeed applied strict scrutiny, then “the so-called ‘strict scrutiny’ test means nothing.”\textsuperscript{43} As to the latter, Justice Scalia basically argued that there was no distinction between interest of government “as an employer” and “in the structure and functioning of society as a whole,” and even if those were different,

\begin{itemize}
\item \textsuperscript{36} \textit{Rutan}, 497 U.S. at 100 (Scalia, J., dissenting).
\item \textsuperscript{37} \textit{Id.} at 98 (quoting \textit{Mitchell}, 220 U.S. at 101).
\item \textsuperscript{38} \textit{Id.} at 99-100.
\item \textsuperscript{39} \textit{Id.} at 100.
\item \textsuperscript{40} \textit{Id.} at 100 n.3.
\item \textsuperscript{41} \textit{Id.} at 70 n.4 (majority opinion).
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{Id.} at 100 n.3 (Scalia, J., dissenting).
\end{itemize}
the Court had in the past recognized those interests.44

Having concluded that strict scrutiny was not required, Justice Scalia then discussed what the appropriate test ought to be. He acknowledged that the Court had not been clear about the formulation of the appropriate test. He noted that one possible formulation of the test might be “whether the practice could be ‘reasonably deemed’ by the enacting legislature to further a legitimate goal.”45 He proposed, however, the “less permissive standard” of whether the advantages to government of the employment practice can “reasonably be deemed to outweigh its ‘coercive’ effects.”46

Justice Scalia went on to apply that standard in the next part of his dissenting opinion.47 While making clear that he was not endorsing the practice of patronage, he went on to describe the potential benefits of patronage. Quoting Justice Powell’s dissent in Elrod, Justice Scalia characterized patronage as stabilizing political parties and preventing excessive political fragmentation. Patronage provides the motivation to encourage party faithful to engage in the “drudgery” of organizing precincts, registering new voters, and providing constituent services.48

Scalia then chastised the majority for ignoring the effect that patronage has in enforcing party discipline and the corresponding effect on making political parties effective, in particular the majority’s claim that the need for party workers is obsolete, given the use of media and advertisement in running campaigns. Justice Scalia described it as “self-evident” that “eliminating patronage will significantly undermine party discipline” and ultimately the strength of the two-party system.49 He found the majority’s claim that “[p]olitical parties have already survived the substantial decline in patronage employment practices” unpersuasive. Parties might have survived, noted Scalia, but as very different and weakened entities.50

Justice Scalia elaborated on this concern by noting patronage not only strengthens political parties in general, but that “it fosters the
two-party system in particular.” According to Scalia, the two-party system is supported via the effect that patronage has on diminishing the attractiveness of marginal/extreme groups, diminishing the effect of interest groups, and helping assimilate new entrants (such as racial and ethnic minorities) into the political process. Patronage might have the salutary effect of encouraging the parties to adopt more centric policies in order to appeal to a majority of the electorate. Patronage also decreases the role that interest groups could play in politics. Scalia lamented that the Court’s decisions in Branti and Elrod have contributed to the growth of interest-group politics. He continued:

Our decision today will greatly accelerate the trend. It is not only campaigns that are affected, of course, but the subsequent behavior of politicians once they are in power. The replacement of a system firmly based in party discipline with one in which each office-holder comes to his own accommodation with competing interest groups produces “a dispersion of political influence that may inhibit a political party from enacting its programs into law.”

Scalia then briefly commented on the disadvantages of patronage. He noted that patronage might facilitate corrupting practices such as salary kickbacks. He also acknowledged that patronage might create inefficiencies as less qualified but politically active individuals might be hired. Finally, he noted “[a]nd, of course, it applies some greater or lesser inducement for individuals to join and work for the party in power.”

Justice Scalia went on to discuss why these concerns, particularly the last one, are not as worrisome as the majority seemed to claim. His basic argument was that patronage does not demand party workers to adopt a specific set of political beliefs, but only “demands loyalty to, and activity on behalf of, the organization.” Scalia continued:

[The party worker] is generally free to urge within the organization the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless. The diversity of political expression (other than expression of party loyalty) is channeled, in other words, to a different stage – to the contests for

51. Id.
52. Id. at 106-08.
53. Id. at 107.
54. Id. (quoting Branti v. Finkel, 445 U.S. 507, 531 (1980) (Powell J., dissenting)).
55. Id. at 109.
56. Id.
party endorsement rather than the partisan elections.\textsuperscript{57}

Justice Scalia concluded Part II of his dissent by arguing that the framework established by \textit{Branti} and \textit{Elrod} had proven to be unworkable given the Court’s reluctance to either declare that all patronage decisions are unconstitutional, or by designing a clear line “that judges, lawyers, and public employees can understand.”\textsuperscript{58} He then listed a few examples of the “shambles \textit{Branti} has produced.”\textsuperscript{59}

A city cannot fire a deputy sheriff because of his political affiliations, but then again perhaps it can, especially if he is called the “police captain.” A county cannot fire on that basis its attorney for the department of social services, nor its assistant attorney for family court, but a city can fire its solicitor and his assistant, or its assistant city attorney, or its assistant state’s attorney, or its corporation counsel.\textsuperscript{60}

After noting the futility of trying to identify the dividing line between permissible and impermissible patronage, Scalia concluded:

Once we reject as the criterion a long political tradition showing that party-based employment is entirely permissible, yet are unwilling (as any reasonable person must be) to replace it with the principle that party-based employment is entirely impermissible, we have left the realm of law and entered the domain of political science, seeking to ascertain when and where the undoubted benefits of political hiring and firing are worth its undoubted costs.\textsuperscript{61}

In Part III of his dissenting opinion, Scalia argued that even if he was to be convinced that \textit{Branti} and \textit{Elrod} were not wrongly decided, he would not extend their holdings to cases involving hiring decisions. Characterizing cases involving decision to dismiss an employee as involving “an appreciably greater constraint” than the disappointment associated with the failure to obtain a promotion or to obtain employment, Scalia saw the Court’s extension of the holding in those prior cases as unwarranted.\textsuperscript{62} He ended by cautioning the majority as to the flood of litigation that was likely to ensue from cases brought by “that most persistent and tenacious of suitors” – “the disappointed office seeker.”\textsuperscript{63}

\begin{footnotes}
\item[\textsuperscript{57}] \textit{Id.}
\item[\textsuperscript{58}] \textit{Id.} at 111.
\item[\textsuperscript{59}] \textit{Id.}
\item[\textsuperscript{60}] \textit{Id.} at 111-12.
\item[\textsuperscript{61}] \textit{Id.} at 113.
\item[\textsuperscript{62}] \textit{Id.} at 115.
\item[\textsuperscript{63}] \textit{Id.} at 116.
\end{footnotes}
IV. ANALYSIS

As this summary illustrates, Justice Scalia had a lot to say in his dissenting opinion. He covered a wide array of issues including the history of patronage, his originalist approach to constitutional interpretation, the use of patronage at the time the case was decided, the state of the two-party system, and the implications of the Court’s decisions. Any of these issues could be the basis of an entire article, and indeed many have been written. In this section, I focus on three issues which I find of particular interest: Justice Scalia’s discussion regarding the history of patronage; his assessment regarding the standard chosen by the majority; and the picture that emerges from this opinion about Justice Scalia’s view of the public workplace.

A. The Tradition of Patronage

According to Justice Scalia, evaluating the constitutionality of a government employment practice ought to start by exploring whether the practice being challenged (i.e., patronage) enjoyed “a long tradition or open, widespread, and unchallenged use.” Scalia found that to be not a difficult question, as patronage in his view clearly enjoyed a “landmark status as one of our accepted political traditions.” Interestingly, and despite the importance that he placed on this part of the inquiry, Justice Scalia spent just one paragraph on this matter. For the proposition that “patronage was, without any thought that it could be unconstitutional, a basis for government employment from the earliest days of the Republic until Elrod,” Justice Scalia cited to Justice Powell’s dissenting opinions in Elrod and Branti. Thus, in exploring the soundness of Justice Scalia’s argument, we need to briefly explore the basis for Justice Powell’s commentary in both Elrod and Branti.

The main source of Justice Powell’s material in Elrod, which preceded Branti by four years, is a 1905 book by Carl R. Fish titled, The Civil Service and the Patronage. The book is a detailed

64. Id. at 95.
65. Id. at 96.
67. Carl R. Fish, The Civil Service and the Patronage (1905).
discussion of the patronage system. Justice Powell argued that the use of patronage preceded Jackson’s presidency and that in fact it goes back to the practices of the very first president. Powell noted that Washington tended to confine appointments to Federalists, that Adams removed some Republicans from minor posts, and that Jefferson, who was the first President to succeed a President from an opposing party, made significant use of patronage. As did Fish, Justice Powell then attributed the relatively sparse use of patronage during the preceding several years to the fact that the next three presidents were from the same political party. Also relying on Fish’s work, Justice Powell noted that patronage was practiced widely among the states, especially in New York and Pennsylvania. Finally, Powell argued that the practice of patronage was credited with broadening the base of political participation by providing incentives to newcomers to the country to take part in the political process.

Justice Powell’s summary of Fish’s book, which is incorporated by reference in Justice Scalia’s dissent, is an accurate but incomplete representation of that work. In particular, two aspects of the book are not given, I think, their proper due.

First, Fish’s book not only describes the practice of patronage but also, as reflected in the title, the civil service system. This focus is more than a choice of titles, but reflects a crucial component of his work. For example, in the introduction to the book, Fish noted,

The leading words of the title limit each other; it is a history of the civil service from the standpoint of the patronage, and of the patronage with regard solely to the public offices. The aim has been to give fully the development of policy and practice as to the relation of these two elements of our public life, from the foundation of the government to the present day.

Fish then developed this theme throughout the entire book. Fish discussed extensively, both the practice of patronage and the development of the civil service system. The first chapter, for instance, focuses on the establishment of the national civil service. In this chapter, Fish explained in great detail the context in which the very first appointments to government positions were made. His

69. Id.
70. Id.
71. Id.
72. Id. at 379.
73. Fish, supra note 67, at v.
74. Id. at 9-28.
account illustrates that while the practice of patronage was known and had been practiced in the colonies, there was an equally and perhaps dominating influence of non-patronage appointments. His description of President Washington’s appointments is particularly telling. Fish contextualized these very first appointments by noting that the first task of the new administration was making appointments “in order that the constitution, and the laws as they were passed, might be executed.”75 Fish then explained that in making appointments, Washington was guided by the principles of appointing not “only fit men to office,” but also appointing “those who [were] most fit.”76 He noted that Washington’s definition of fitness included of course the ability to perform the functions of the post, but also other factors.77 Geographical considerations were important given the stage of development of the country, as was the reputations of those to be appointed.78 Fish noted, “[t]he constitution was as yet an experiment; and Washington, who was responsible for its success, wished it to be put in force, but by men known and respected in the localities in which they were to serve.”79 That same overarching concern that the Constitution was in formative stages, led Washington also to consider when making appointments that government officers were “sound supporters of the new system.”80 “That is,” noted Fish, “political orthodoxy was considered as one of the elements of fitness for office.”81

While ultimately selecting appointees he found amenable in qualifications as he defined them, Washington’s appointment philosophy seems much more consistent with the development of a civil service system than with a system of patronage. According to Fish, President Adams followed a very similar approach. Fish concluded that during the administrations of Washington and Adams, fitness for office was always an essential requirement, and although “other qualifications were often looked for . . . these were ever subsidiary to the ability to perform the duties of the office.”82 Thus, Justice Powell’s statement indicating that “Washington tended to

75.  Id. at 6.
76.  Id. at 7.
77.  Id. at 8.
78.  Id.
79.  Id. at 8-9.
80.  Id. at 9.
81.  Id.
82.  Id. at 27.
confine appointments even of customs officials and postmasters to Federalists, as opposed to anti-Federalists, seems to be incomplete and to suggest that the use of patronage was more central to the appointments process than what a more complete reading of Fish would suggest.

Second, not only is the focus of Fish’s book broader than what Justice Powell’s summary suggests, but also his analysis of the practice of patronage in the early years of the Republic makes it clear that the practice was not accepted without some level of discomfort and skepticism. Consider for example, Fish’s description of the use of patronage under President Jefferson, who as the first President to succeed a President from a different political party would have been the first President to make extensive use of patronage. Fish noted, for instance, that like Washington, Jefferson understood the importance of having supporters in important positions. However, Jefferson was aware of the need to move carefully in making appointments. According to Fish, Jefferson commented, “deprivations of office ... must be as few as possible, done gradually, and bottomed on some malversation or inherent disqualification.”84 After extensively reviewing Jefferson’s use of appointments, Fish noted that while Jefferson placed more emphasis on politics than prior administrations, “[f]itness continued to be considered essential” and that appointments were not confined to those individuals who offered their services.86 Fish summarized his discussion of Jefferson’s administration as follows:

Technically one must assign to Jefferson the introduction of the spoils system into the national service, for party service was recognized as a reason for appointment to office, and party dissent as a cause for removal. It was not however, the sole reason required; and, as has been shown, the character of the civil service was really not much changed.87

Further evidence of the conflicting way in which earlier administrations embraced the practice of patronage is also found in Fish’s discussion of the various administrations that followed Jefferson. During the administration of James Madison, constitutional amendments were introduced prohibiting the

84. Fish, supra note 67, at 31.
85. Id. at 50.
86. Id. at 49.
87. Id. at 51.
appointment of any senator or representative to “employment, under the authority of the United States, until the expiration of the presidential terms in which such person shall have served as a senator or representative.” Fish noted that although the amendment ultimately failed, and although as a reform measure it was ineffective, the efforts illustrated a concern with the dangers of patronage. Similarly, while patronage was practiced at the state level, and while it became much more firmly established by the start of Andrew Jackson’s administration in 1829, it was certainly not universally revered. For example, Fish noted that while patronage was well established in New York and Pennsylvania, its practice in Massachusetts, North Carolina, and Georgia was rare.

As this more detailed account of Fish’s work suggests, the practice of patronage has a far more checkered past than what one might be led to believe based on Justice Powell’s summary in Elrod. Unlike as asserted by Justice Powell, the practice in earlier administrations (particularly Washington and Adams) seemed to have been very limited and constantly tempered by an interest in appointing the most qualified individuals. In ensuing administrations, the use was guarded. Also, while as Justice Powell argued, patronage was practiced widely in states like New York and Pennsylvania, Fish’s work makes clear that in other jurisdictions, the practice was almost non-existent. Most importantly, Justice Powell’s account fails to address the fact that even as the practice of patronage was developing, there were counter efforts to uphold the values that at the end of the 1800s came to be associated with the civil service reform movement.

This more detailed look at Fish’s book undermines one of Justice Scalia’s central arguments in opposition to the majority’s decision to limit the use of patronage. Scalia argued that when a court-created “‘rule,’ or ‘three-part’ test,’ or ‘balancing test” is in tension with a “venerable,” “accepted tradition,” or “landmark practice,” it is “the former that must be recalculated.” His point here was that to the extent that patronage was well-accepted and established at the beginning of the Republic, the Court has no role in limiting its use. Scalia based his finding that patronage enjoyed such status on Justice

88. Id. at 56-57.
89. Id. at 57.
90. Id. at 95-99.
Powell’s dissenting opinions and consequently on his understanding of Fish’s arguments. But as described above, Fish’s argument was much more nuanced than what Justice Powell’s summary suggest. In particular, Fish’s book provides evidence that patronage was at best a reluctantly accepted practice during the forming years of the Republic, and that it was not fully practiced at the federal level potentially until the 1830s, during the Jackson administration. Fish also makes clear that even then, and concurrent with the development of patronage, there were contrary forces, sometimes taking the form of proposals to amend the Constitution, which viewed patronage with suspicion and argued in favor of a civil service system. Finally, Fish also provides evidence that even at the state level, the practice of patronage was less than fully accepted.

If Fish is right, then Justice Scalia’s claim that patronage was the kind of established practice which forms the very “points of reference by which the legitimacy or illegitimacy of other practices [such as limitations on the use of patronage] are to be figured out,” seems less convincing. If patronage never enjoyed the “landmark status” which Scalia claimed it did, then there is less reason to defer to the practice as “the stuff out of which the Court’s principles is to be formed.” The raison d’être of Justice Scalia’s analysis seems to be weakened and with it, his major criticism of the majority’s analysis.

B. The Unworkability of the Court’s Attempt to Regulate Patronage

Justice Scalia also argued that the Court’s effort to limit the practice of patronage had proven unworkable, and that extending the holding in *Elrod* and *Branti* to cases involving hiring decisions, would make it worse. As evidence of this claim, Justice Scalia listed a variety of cases which seem to reach contradictory and nonsensical results, such as different results being reached in a case involving a deputy sheriff and a case involving a police captain. Justice Scalia chastised the majority for failing either to allow patronage in every case, or prohibit it in every case. He complained that the middle position takes the court into the “domain of political science” and likely would be unworkable.

My reaction to Justice Scalia’s concern is twofold. First, it seems
to me that the criticism seems a bit shallow to the extent that it relies on job titles and does not explore deeply the functions performed by the plaintiffs in the specific cases. There is of course no universal job classification system for all public employees. Thus, it should not be at all surprising that employees holding the same, or similar titles, but working in completely different jurisdictions will be doing very different jobs.

In fact, a closer look at two of the cases that Scalia cites reveals that the two positions involved differed not only in terms of titles, but also differed in terms of the work that the employees were doing. One of the dyads that Justice Scalia cited involved the case of deputy court clerks, and the case of a staff legal assistant to the clerk. The two cases are particularly interesting because they involved several employees who lost their jobs following a change in administrations in a local governmental unit. Three of the employees held the position of Deputy Circuit Clerks and the fourth held the position of Staff Legal Assistant. All the employees were terminated after having supported the losing candidate in the race for Circuit Court Clerk. The main issue in both cases involved whether the plaintiffs occupied the kind of policy-making position which justified dismissal based on party affiliation. In both cases, the court focused on the functions involved in the two positions. With regard to the deputy circuit clerks, the court held that although the employees occupied management positions, “their duties were, for the most part, ministerial” and that “[d]iscretionary decisions were, for the most part, referred to the circuit clerk.” On the other hand, in evaluating the staff legal assistant duties, the court characterized the relationship between the plaintiff and the Circuit Court Clerk as an attorney-client relationship, involving the rendering of legal advice. Not surprisingly, the court upheld the termination of the staff legal assistant, but reversed the termination of the deputy court clerks. Thus, while reaching different results, the court in these two cases reached results easily reconcilable with the Elrod, Branti, and Rutan mode of analysis.

98. Barnes, 745 F. 2d at 508.
99. Bauer, 802 F. 2d at 1060.
100. Id. at 1063.
101. Id. at 1063, 1065.
102. Barnes, 745 F. 2d at 508.
Second, Justice Scalia argued that the ambiguous nature of the Court’s approach and the fact that the Court’s decision extended *Elrod* and *Branti* to all hiring decisions, were bound to make the standard unworkable. According to Scalia, “[w]hen the courts are flooded with litigation under that most unmanageable of standards (*Branti*) brought by that most persistent and tenacious of suitors (the disappointed office seeker) we may be moved to reconsider our intrusion into this entire field.”

Was Justice Scalia correct in his prediction regarding the consequences of the Court’s decision in *Rutan*? A review of the existing literature did not produce any detailed study of the number of suits brought by employees involving patronage decisions. A 1996 law review article reports that a Lexis search revealed an increase of 30 percent in the number of reported federal district court cases when compared to the five years before and after *Rutan*. A 2012 law review article reported more than 300 court opinions in patronage employment cases in the five-year period preceding the publication of the article. To further explore this issue, I conducted a Westlaw search using the terms “Patronage and Rutan or Elrod” for the period starting in 1991 (the year after *Rutan* was decided) and ending in 2017. Dividing that time period in approximately equal nine-year periods produced the following results: 1991 to 1999 (356 court decisions); 2000 to 2008 (358 court decisions); and, 2009 to 2017 (306 court decisions). While these are just citations to court reports and thus do not capture the number of claims filed that did not result in court decisions, the figures do not appear to support the litigation flood trend that Justice Scalia predicted.

In part, this might be due to the fact that over time court decisions applying the Supreme Court’s standard have produced some clarity for many types of job positions. At the same time, the civil service system which existed at the time that *Elrod*, *Branti*, and

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106. See Susan L. Martin, *A Decade of Branti Decisions: A Government Official’s Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11, 43-46 (1989) (providing an extensive list of jobs which courts have held to be protected from or subject to patronage dismissals after *Elrod* and *Branti*); see also Martin, supra note 105, at 680-88 (providing a similar list for cases decided since *Rutan*).
Rutan were decided has continued to develop. Over the course of the last three decades, governmental units at all different levels have made changes to their civil service systems, at times expanding and at times contracting the rights of public employees.107 By changing the descriptions of different positions and their classifications, government entities can avoid the kind of uncertainties alluded to by Justice Scalia.

In short, Justice Scalia’s concern regarding the unworkability of the standard developed by the Court in Elrod, Branti, and Rutan seems to have been somewhat unwarranted. There does not seem to have been a dramatic increase in the litigation of patronage cases. Lower courts and governmental units have adapted to the requirements laid out in those cases, and over time a common law has developed applying the standard.

C. Justice Scalia’s View of the Public Workplace

In a paper published in 2000, Professor Timothy Chandler and I described two approaches which we argued seemed to capture the way courts dealt with disputes involving patronage and challenges to laws regulating political activities by public employees (e.g., the Hatch Act and the “Little” Hatch Acts).108 We noted that both approaches have been challenged in the courts as infringing upon the constitutional rights of public employees and that in turn, when evaluating their constitutionality, courts had adopted contrasting positions.

As illustrated by the Court’s decision in Rutan, courts have been unsympathetic to government’s defense of patronage. We argued that with regard to patronage, the Court had taken a markedly pro-employee view.109 Defenders of patronage have argued that it is necessary to insure effective government and the efficiency of public employees. Presumably, employees of political persuasions different from those of the party controlling public office will lack the incentive to work efficiently and “may even be motivated to subvert the incumbent administration’s efforts to govern effectively.”110 An

109. Id. at 778, 805-06.
implication of this argument is that the public employer, who is in charge of implementing patronage, can be trusted to use it in a way that fosters efficiency and, thus, is not abusive.\textsuperscript{111} The Supreme Court has rejected this view, as well as the notion that patronage serves some valuable objective and that it is necessary for the effective and efficient operation of American government. Instead, the Court has adopted what we dubbed a “partisan politics” model, which views patronage as a mechanism for political control that has both costs and benefits.\textsuperscript{112} Using this model, courts have concluded that, except for a limited set of circumstances, the negative social consequences of patronage outweigh its benefits and, thus, justify limitations on its use.\textsuperscript{113}

We then compared the approach courts have taken regarding challenges to patronage with the manner in which courts have responded to challenges to law regulating the political activities of public employees.\textsuperscript{114} At the federal level, the major piece of that type of legislation is the Hatch Act, enacted in 1939.\textsuperscript{115} The Hatch Act imposed a number of limitations on the ability of federal employees to run for office or participate in political activities.\textsuperscript{116} Congress has amended the statute several times, loosening some of the prohibitions by maintaining the proscription against allowing covered employees to use their authority to affect the results of an election, run for office in a partisan election, to solicit or receive political contributions, or to engage in political activities while on duty or on federal property.\textsuperscript{117} As in the case of patronage, the Hatch Act has also faced constitutional challenges. Defenders of such laws have argued that limiting political activities by government employees is necessary to ensure efficient and impartial administration of public services.\textsuperscript{118} Prohibitions on political activity, the argument goes, provide an equitable administration of the law and distribution of resources, thus

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\textsuperscript{111} Gely & Chandler, supra note 108, at 805.
\textsuperscript{112} Id. at 805-06.
\textsuperscript{113} Id. at 806.
\textsuperscript{114} Id. at 807-17.
\textsuperscript{116} As originally enacted, the act prohibited covered employees to “take any active part in political management of in political campaigns.” Subsequent amendments clarified these terms. See Gely & Chandler, supra note 108, at 779-82.
\textsuperscript{117} See 5 U.S.C. §§ 7324(a)(1)-(4) (2012). Similar prohibitions have been enacted at the state level. The so-called “Little” Hatch Acts are in place in a substantial majority of states, restricting in some manner the ability of state and local employees to actively engage in political activities. See Gely & Chandler, supra note 108, at 791-96.
\textsuperscript{118} Gely & Chandler, supra note 108, at 803.
leading to a more efficient and fair bureaucracy. Unlike the patronage cases, however, courts have taken a much more pro-employer approach with regard to the regulation of public employees’ political activities, often upholding these restrictions.119 Courts have justified these restrictions on the basis of efficiency, impartiality, and the protection of public employees’ interests.

The courts’ approach to these cases, which we referred to as the “good government” model, stands in contrast to the approach courts have taken in the patronage cases. The “good government” model seems to assume that public employees, if given the opportunity, will abuse their positions by placing partisan politics ahead of the public’s interests.120 The Mitchell decision, for example, contains multiple references to the “evils” created by public employees’ involvement in politics,121 and the menacing aspects of their behavior.122 In order to control the problem created by this predisposition attributed to public employees, the “good government” model turns to the public employer as the solution. The public employer, represented by the legislature, is expected to control public employees by enacting laws that limit the ability of public employees to corrupt the delivery of public services.123

Fundamentally, these two models differ on the level of trust they placed in the public employer to regulate the public workplace without exceeding constitutional limits. By limiting the use of patronage except in some specific cases, the “partisan politics” model places little trust on the ability of government to use the power it has to manage the workforce appropriately. The “good government” model, on the other hand, allows the government to limit the ability of employees to engage in certain types of political activities while in office. In this sense, the model seems to place significant trust in the

119. See, e.g., U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 556 (1973) (holding that restricting the political activities of public employees is constitutionally permitted if it is justified by the need to provide efficient government); United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 99 (1947) (holding that Congress can constitutionally restrict active partisan political activity of federal employees).
121. “The influence of political activity by government employees, if evil in its effects on the service, the employees or people dealing with them, is hardly less so because that activity takes place after hours.” 330 U.S. at 95. “To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system.” Id. at 99.
122. “When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required.” Id. at 103.
ability of government to appropriately regulate the actions of their employees.

The Court’s decisions in *Elrod*, *Branti*, and *Rutan* are consistent with the “partisan politics” model in that they reject the need to allow government to use political preferences as criteria for exercising managerial authority. The Court in *Elrod* rejected as unpersuasive the argument that preventing patronage would lead to internal subversion, or that it would interfere with the ability of elected officials to implement policy. The Court was willing to allow the employer to manage the workplace, but placed significant limits in the use of the patronage tool.

In the 2000 article, we argued that the courts’ differential treatment of patronage and restrictions on public employees’ political activities was unwarranted because both are mechanisms of political control and, thus, should be treated similarly. When governments implement restrictive Hatch Act-type legislation, they are controlling the ability of public employees to be politically involved to a similar degree as would occur if they were conditioning public employment on prospective employees’ political affiliations. We further argued that laws regulating the political activities of public employees are motivated by the desire of legislators to achieve re-election and, thus, manipulate the political process as much as occurs under a patronage system. We argued that courts needed to be more willing to question government efforts to limit public employee’ political participation through Hatch-Act type laws.

Justice Scalia’s dissenting opinion in *Rutan* and his various opinions in some related cases involving public employees seem to be at the exact opposite end of the spectrum, as he seemed to propose a model that incorporates the worst of the “good government” and “partisan politics” models. On the one hand, he favored prohibitions against the political participation of public employees (whether individually or through their collective bargaining representative), while on the other hand, he would have allowed public employers to allocate the benefits of government employment on the basis of political considerations.

The latter assertion is based, as stated above, on Justice Scalia’s

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127. *Id.* at 779, 821-22.
position in *Rutan*. He elevated the practice of patronage to “landmark” status. He brushed aside the concerns raised related to the use of patronage, and highlighted the importance of patronage as a centerpiece of the political system. He mocked the majority’s concern that allowing the use of patronage induces “individuals to join and work for the party in power.” As Scalia put it, “[t]o hear the Court tell it, this last is the greatest evil,” noting also “that the patronage system does not have as harsh an effect upon conscience, expression, and association” as the majority feared. This approach suggests that Justice Scalia saw the public employer as limited by political forces, and thus that any incremental incursions into the rights of public employees do not raise any constitutional concerns.

Not only would Justice Scalia have allowed government to use patronage, but he also proposed a public sector workplace in which the employer is able to exercise control over the political actions of employees. To some extent, this is apparent from *Rutan*. Allowing the public employer to use patronage, and thus limit employment opportunities to those with the same political preferences, already imposes limits in the ability of employees to express their political preferences. Justice Scalia, however, went further as illustrated by his support of the cases which upheld the constitutionality of the Hatch Act, his support of cases involving speech restrictions by public employees, and his approach in cases involving the constitutionality of “fair-share” (union security) arrangements in the public sector.

In *Rutan*, Justice Scalia cited approvingly the Court’s rationale in *Public Workers v. Mitchell*, and *Civil Service Commission v. Letter Carriers*. In those two cases, the Court upheld the constitutionality of the Hatch Act, finding that the Hatch Act was intended to eliminate the corrupting influence that political patronage was having on the political process and public service. Once that legitimate end was established, Congress needed only to achieve those ends through reasonable means, which the Court found Congress had done. According to Justice Scalia, *Mitchell* and *Letter Carriers* applied the appropriate standard of review given that “a governmental employer may subject its employees to such special restrictions on free

129. *Id.*
130. *Id.*
expression as are reasonably necessary to promote effective
government.”

Justice Scalia was similarly supportive of the Court’s decision in
Pickering v. Board of Education,135 dealing with the regulation of
speech in the public workplace. As in Letter Carriers, the Court had
to decide what kind of restrictions the government can impose on the
free speech rights of public employees.136 Pickering involved a high
school teacher who had been fired for his comments in a local
newspaper criticizing the Board of Education and the district
superintendent’s handling of certain financial matters. The School
Board defended the teacher’s termination on efficiency grounds.
According to the defendants, the teacher’s statements were not only
false, but allowing them would “tend to foment ‘controversy, conflict
and dissension’ among teachers, administrators, the Board of
Education, and the residents of the district.”137 Recognizing the
tension between the individual’s right to free speech and the
government’s interest in maintaining orderly and effective public
service, the Court adopted a balancing test to determine when
government may restrict a public employee’s freedom of speech.138

Although the Court in Pickering used the balancing test that
Justice Scalia criticized in Rutan, Scalia cited with approval the
passage in Picketing where the Court recognized that the “State has
interests as an employer in regulating the speech of its employees that
differ significantly from those it possesses in connection with
regulation of the speech of the citizenry in general.”139 Justice Scalia
also cited with approval a case in which the Court made clear that in
evaluating the government conduct as an employer, strict scrutiny was
not appropriate.140

The fair-share cases provide yet another aspect of Justice Scalia’s
view of the public workplace. Fair share agreements refer to
provisions requiring employees covered under a collective bargaining

Brown v. Glines, 444 U.S. 348, 356 n.13 (1980)).
136. Id. at 565.
137. Id. at 566-67. It should be noted that Justice Scalia joined the majority decision in
Garcetti v. Ceballos, 547 U.S. 410, 421 (2006), in which the Court, in a five to four decision,
limited the Pickering test to those instances in which the public employee speaks as a citizen and
not as a public employee.
139. Rutan, 497 U.S. at 99 (Scalia, J., dissenting) (citing Pickering, 391 U.S. at 568).
140. Id. at 100 (citing Connick v. Myers, 461 U.S. 138, 152 (1983)).
agreement to pay the proportion of union dues corresponding to the
cost of contract negotiation and administration. The issue of fair-
share agreements in the public sector, and more broadly the issue of
union-security provisions, have been a contentious issue in labor law,
with proponents contending that such agreements are necessary to a
well-functioning system of collective bargaining, and opponents
arguing that such agreements imposed unreasonable demands on
individual employees.

In the public sector where the government is the employer, the
debate of course raises constitutional issues. Until recently, the
framework for deciding challenges to fair-share agreements was
provided in the Court’s decision in *Abood v. Detroit Board of
Education*. In *Abood*, the Court considered a challenge to a state
public sector law that allowed school districts to agree to fair-share
provisions and also permitted fees collected through those
agreements to be used to fund the union’s political activities. The
Court held that a public employer could not constitutionally permit
the expenditure of fees collected as part of agency provisions on
political activities when objected by nonmember employees. According
to the Court, fees collected through fair-share agreements
could only be expended for purposes that were germane to collective
bargaining.

Justice Scalia got an opportunity to opine on the union dues issue
in 1991 in *Lehnert v. Ferris Faculty Association*, a case involving a
challenge by a group of dissenting employees who objected to certain
uses by their collective bargaining representative of their service
fees. The Court upheld the challenge and found that “the State
constitutionally may not compel its employees to subsidize legislative
lobbying or other political union activities outside the limited context
of contract ratification or implementation.”

The case’s historical significance rests not as much in the

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143. Id. at 139.
145. Id. at 211
146. Id. at 236.
147. Id. at 235.
149. Id. at 522.
majority’s opinion, but in the concurring/dissenting opinion. While agreeing with the Court’s disposition of most of the challenged expenditures, Justice Scalia wrote to explicitly criticize the test used by the Court. Justice Scalia argued that the only expenses that a union should be able to charge are those expenses “incurred in discharge of the union’s ‘greatest responsibilities’ in ‘negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances.’” More importantly for the purposes of our discussion, Justice Scalia introduced a heightened standard of review, by noting that the “compelling state interest” that justified allowing the union to collect fees from nonmembers was the obligation imposed on the union to represent all employees in the bargaining unit fairly regardless of their union membership.

Justice Scalia’s reliance on the strict scrutiny test is particularly interesting because just the year before in Rutan, he had criticized the Court for using that standard in the context of the patronage case. Yet, he concluded that regulation of employees’ engagement in political activities as a group needed to be evaluated under a stricter standard of review.

The understanding of the workplace that emerges from these three lines of cases is one in which the public employer is in control and the employees are subject to severe limitations on their speech rights. To get there, Justice Scalia seems to have taken a circuitous path. He cited with approval cases like Mitchell and Letter Carriers, which upheld the constitutionality of the Hatch Act, which was intended to eliminate the use of patronage—the very practice he supported in Rutan. He criticized the Rutan majority for using a balancing test, yet he cited with approval the predicate of Pickering’s balancing test, to the extent that the case acknowledged the differences between the ability of the state to regulate speech when acting as an employer as compared to regulation of speech more generally. He chastised the majority in Rutan for both applying and misapplying the strict scrutiny test, yet used that test in evaluating

150. See Fisk & Poueymirou, supra note 141, at 453.
151. Lehnert, 500 U.S. at 556-57 (Scalia, J., concurring in part and dissenting in part) (quoting Abood, 431 U.S. at 221).
152. Id. at 556. The application of strict scrutiny in fair-share agreement cases came to full fruition in Harris v. Quinn, 134 S. Ct. 2618 (2014), where the Court held that the First Amendment prohibited the collection of agency fees from rehabilitation program personal assistants who were paid by the state but hired and supervised by the patients. Id. at 2639. See Gould, supra note 142, at 142.
constitutional challenges in the union dues cases.

This is a view of the public workplace that places public employees in a relatively vulnerable position. In Justice Scalia’s view of the public workplace, patronage is acceptable, as is the ability of the public employer to impose limits on the political activities and speech of public employees. The public employer seems to deserve room to manage the workplace freed from having courts second-guessing its actions. As such, a more deferential standard of review is more appropriate. Public employees, on the other hand, need to be constrained, as otherwise they will likely abuse their office.

V. CONCLUSION

Justice Scalia’s dissenting opinion in *Rutan* is indeed an interesting opinion. To a large extent, the decision is quintessentially Scalia-like in tone and in substance. Those who admired him are likely to find much in it that they would like, such as the memorable jab accusing the majority of announcing a rule that “will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation.” Those who tended to disagree with him will also find support for their opinion of the late Justice, such as his less than accurate assessment of the historical record, or his inflated assessment of the likely impact of the Court’s decision.

Two things are clear, though: Justice Scalia’s dissenting opinion portrays a view of the public workplace that is not particularly hospitable to public employees, and except for the issue of patronage, Justice Scalia’s view has come to dominate the way today’s Supreme Court approaches the regulation of the public workplace.

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