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Diane Rotering

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I. INTRODUCTION

On Tuesday, November 2, 1976, American voters across the nation elected new government officials. As a consequence, thousands of public employees faced the prospect of dismissal due to the fact that their new boss, be it President of the United States or local sheriff, maintained a different political persuasion. However, due to a recent decision of the United States Supreme Court, this prospect of dismissal presented a threat to fewer employees than ever before.

In *Elrod v. Burns*,[1] the Supreme Court ruled that dismissing political patronage employees violates public employees' rights under the first and fourteenth amendments. Such dismissals, the Court reasoned, unconstitutionally restrict employees' political beliefs and associations.[2] Thus, a nonpolicymaking, non-confidential government employee may not be discharged from a job that she is satisfactorily performing, upon the sole ground of her political beliefs.[3] In other words, wholesale political dismissal of public employees following a change of administration is unconstitutional.

The implications of *Elrod* are substantial. Many public employees, both federal and state, are already regulated by various civil service systems.[4] With the advent of first amendment considerations, political patronage will be restricted to an even greater extent. Perhaps such restriction is necessary, as adherence to the prescriptions of civil service systems often has been more superficial than real. Much bureaucratic and administrative inefficiency in non-civil service systems is directly attributable to the wholesale turnovers which historically accompany changes of administration. Yet it is possible that the political party system cannot survive without the incentive of patronage employment.[5] *Elrod's* import-

1. 96 S. Ct. 2673 (1976) [hereinafter referred to as *Elrod*].
2. *Id.* at 2689.
3. *Id.*
4. *Id.* at 2692 (Powell, J., dissenting).
5. Justice Powell raised this issue in the following terms:

> It is naive to think that [party organization] political activities are motiviated at [local] levels by some academic interests in "democracy" or other public service impulse. For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties. It is difficult to overestimate the contributions to our system by the major political parties. . . .

Id. at 2695.

ance stems from the Court's specific recognition that the first amendment reigns supreme, regardless of the patronage system's historical contributions to democratic government.

This note will review previous decisions concering the freedoms of belief and association of public employees,[6] and analyze the relationship of these freedoms to patronage dismissals. Additionally, *Elrod's* complementary effect on Montana's Human Rights Act[7] will be discussed.

II. Forerunners of Elrod

A. *Public Employment and the First Amendment*

In *Keyishian v. Board of Regents*,[8] the Supreme Court determined that a state could not terminate a person's public employment merely because the employee was a member of the Communist Party.[9] The Court ruled that termination of public employment solely because of the employee's membership in the Communist Party, absent a showing of "specific intent to further the unlawful aims of the Party," was an unconstitutional infringement of the associational freedoms afforded by the first amendment.[10] Although the Court did not recognize any constitutional *right* to public employment, it summarily rejected the argument that constitutional rights, such as association and belief, could properly be "infringed by the denial of or placing of conditions upon a benefit or privilege" such as public employment.[11] The Supreme Court quoted with approval from the Second Circuit's decision in *Keyishian:*

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6. This comment will not review every decision concerning the first amendment and public employment, but only those decisions which directly presage the patronage controversy. For a more complete discussion of the first amendment and public employment, see Schoen, *Politics, Patronage, and the Constitution,* 3 Ind.Leg.Forum 35 (1969).

7. Revised Codes of Montana (1947) [hereinafter cited as R.C.M. 1947], §§ 64-301 to 330 (Supp. 1975).

8. 385 U.S. 589 (1967).

9. Appellants in *Keyishian* were faculty members of a state university. Their employment was conditioned upon their compliance with a "New York plan" which was intended to prohibit members of subversive organizations from public employment. Under the plan, appellants were required to sign certificates stating that they were not Communists, or if they had ever been Communists, they had communicated that fact to the university president. Failure to so certify would result in dismissal. *Id.* at 591-92.

10. *Id.* at 609. *See also* United States v. Robel, 389 U.S. 258 (1967), in which the Supreme Court invalidated a federal statute which imposed criminal penalties on any Communist Party member employed in a private plant that had been designated a "defense facility" by the Secretary of Defense. To escape prosecution, the employee had to either terminate employment or terminate party membership. Since "the operative fact on which the job disability depends is the exercise of an individual's right of association," the statute was deemed unconstitutional. *Id.* at 263.

11. Keyishian v. Board of Regents, 385 U.S. 589, 606 (1967). The reasoning that the government may not achieve indirectly what it is forbidden from doing directly is a recurring theme in this discussion.

> [T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.[12]

In 1972, the Supreme Court reinforced the reasoning of *Keyishian* in *Perry v. Sindermann.*[13] In *Perry*, a college professor sued for reinstatement, claiming that his dismissal was based upon his public criticism of the board of regents, and thus constituted infringement of the first amendment right to free speech. In remanding the case for a determination of the factual basis for the professor's dismissal, the Court held:

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech.[14]

The Court correctly reasoned that if the government were allowed to deny a benefit to a person because of his constitutionally protected speech, exercise of that freedom would be penalized and inhibited. This would permit the government to "produce a result which [it] could not command directly."[15] Such an interference with constitutional rights is impermissible.[16] The Court has applied this direct-indirect principle to many areas, "but most often . . . to denials of public employment . . . regardless of the public employee's contractual or other claim to a job."[17]

B. Extension To Patronage Dismissals

When the Supreme Court accorded first amendment protection against employment dismissal to members of the Communist Party, Republicans and Democrats facing such dismissal were certain to voice a similar constitutional challenge. Initial attempts to be heard on the issue met with rapid refusals by the courts. *American Federation of State, County and Municipal Employees v. Shapp*[18] typified the courts' response to cases in which the patronage issue first ap-

12. *Id.* at 605-06, *quoting* Keyishian v. Board of Regents, 345 F.2d 236, 239 (2d Cir. 1965).

13. 408 U.S. 593 (1972).

14. *Id.* at 597.

15. *Id., quoting* Speiser v. Randall, 357 U.S. 513, 526 (1958).

16. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

17. *Id., citing* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967); Shelton v. Tucker, 364 U.S. 479, 485-86 (1960); Wieman v. Updegraff, 344 U.S. 183, 192 (1952); United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947).

18. 443 Pa. 527, 280 A.2d 375 (1971).

peared. *Shapp*, a 1971 case, held that a state employee who himself had obtained employment through political patronage had no federal or state constitutional or statutory right to complain of dismissal because of patronage.[19] "Those who, figuratively speaking, live by the political sword must be prepared to die by the political sword."[20] A public employee, the Pennsylvania court reasoned, is "'essentially an employee at will.'"[21]

In 1972, two circuit courts split on the patronage dismissal question. In *Alomar v. Dwyer*,[22] the Second Circuit held there was no constitutional prohibition against the dismissal of governmental employees because of their political affiliations or beliefs. The Seventh Circuit, however, reached an opposite conclusion in *Illinois State Employees Union v. Lewis*.[23] Because the opinion in *Lewis*, written by then Circuit Judge John Paul Stevens, was relied on by the Supreme Court in *Elrod*, and in many respects is better reasoned than *Elrod*, it is reviewed here in some detail.

The plaintiffs in *Lewis* were non-civil service employees of the Illinois Secretary of State's office. A Republican was appointed to fill the unexpired term of the deceased Secretary, a Democrat. Shortly thereafter, plaintiffs, who were also Democrats, were terminated. Plaintiffs sued, claiming their discharge was based upon political affiliations. Defendants argued that a tradition of almost two hundred years of uninterrupted acceptance of the patronage system could not be overcome by judicial fiat. To resolve this issue, the court first reviewed applicable precedent. Early cases held public employees had no constitutional right to their jobs, and thus there could be no valid constitutional objection to summary removal.[24] Later cases held that public employers were more limited.[25] Referring to *Keyishian* and *Weiman*, the court commented:

> We think it unlikely that the Supreme Court would consider these plaintiffs' interest in freely associating with members of the Democratic Party less worthy of protection than the [Communist] employees' interest in associating with Communists or former Communists.[26]

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19. *Id.* at 535, 280 A.2d at 378.
20. *Id.* at 536, 280 A.2d at 378.
21. *Id.* at 534, 280 A.2d at 377-78, *quoting from* Scott v. Pennsylvania Parking Auth., 402 Pa. 151, 166 A.2d 278, 280 (1960).
22. 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972).
23. 473 F.2d 561 (7th Cir. 1972).
24. *Id.* at 568, *citing* Adler v. Board of Educ., 342 U.S. 485 (1952); Bailey v. Richardson, 182 F.2d 46, 59 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951).
25. Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).
26. Illinois State Employees Union v. Lewis, 473 F.2d 561, 570 (7th Cir. 1972).

In *Lewis,* the court recognized that public employees' first amendment freedoms with respect to political activities are not absolute.[27] State interests may justify some curtailment of public employees' political activities. At the same time, the court declared:

> [I]t seems perfectly clear that the abject and complete surrender of a citizen's first amendment rights could never be justified.* * * The basic rights of citizenship survive acceptance of public employment.[28]

If the conditions of public employment merely involve some curtailment of first amendment rights, as opposed to abject surrender, state interests may, if strong enough, justify the curtailment.[29] The burden of proving such justification is on the State, and "[i]n view of the importance which the [Supreme] Court has consistently attached to the first amendment rights of the citizenry, that burden is a heavy one."[30]

The *Lewis* court then addressed the justifications advanced by the State in defense of the patronage dismissals *sub judice.* The State argued first that because plaintiffs were beneficiaries of the patronage system, they should not be heard to complain of the foreseeable consequences of that system.[31] Although according this theory some validity, the court responded that it may only limit the scope of relief, not foreclose relief altogether.[32] More importantly, courts will not lightly assume waiver of a fundamental first amendment right such as freedom of association.[33] " '[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights.' "[34]

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27. *Id.* at 572, *citing* United Public Workers v. Mitchell, 330 U.S. 75 (1947).

28. Illinois State Employees Union v. Lewis, 473 F.2d 561, 572 (7th Cir. 1972).

29. *Id., citing* Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972).

30. Illinois State Employees Union v. Lewis, 473 F.2d 561, 572-73 (7th Cir. 1972).

31. Recall that this rationale was the basis of the Pennsylvania court's decision in *Shapp.*

32. Illinois State Employees Union v. Lewis, 473 F.2d 561, 573 (7th Cir. 1972).

33. *Id.* at 574.

34. *Id., quoting* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) *which quoted* Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937). Also cited by *Lewis* were Illinois v. Allen, 397 U.S. 337, 343 (1970); Brookhart v. Janis, 384 U.S. 1, 4 (1966); Carnley v. Cochran, 369 U.S. 506, 514 (1962); Smith v. United States, 337 U.S. 137, 150 and n. 11 (1949); Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 307 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882). *See also* Stevens v. Marks, 383 U.S. 234, 243-44 (1966):

> Even were we to assume . . . that a state may constitutionally exact, on pain of loss of employment . . ., the waiver of a constitutional right, we would be unable to find any justification for denying the right to withdraw [the waiver].

But see Mr. Justice Harlan's separate opinion. *Id.* at 248.

As a second justification the State contended that political affiliation was a relevant and proper qualification for certain employment. Although the court conceded this point as to policy-making and confidential government positions, it held that such a justification was not applicable to all employees, and thus did "not afford a basis for dismissing all of plaintiffs' claims without a trial."[35]

Finally, the State argued that effective government administration requires that public executives be given broad latitude in appointing, replacing and discharging personnel. Again noting the legitimacy of such a justification in some instances, the court responded that state and federal employers simply do not have the freedom of action enjoyed by private employers, even as to internal operations.[36] "The price which a government must pay to protect the constitutional liberties of its employees is some loss of the efficiency enjoyed by private employers; [but] the Supreme Court has repeatedly decided that the value of those individual liberties is well worth the cost."[37]

Of greater significance to the *Lewis* court was that the impact on the body politic had to be considered whenever the free political choice of public servants was inhibited or manipulated by the selective award of public benefits.[38] Even though the patronage system might be defended in the name of democratic tradition, the Seventh Circuit determined that patronage's "paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment."[39]

In 1974 the Fourth Circuit considered the patronage dismissal question, and was apparently unimpressed with the Seventh Circuit's analysis. In *Nunnery v. Barber,*[40] the court allowed the patronage dismissal of a liquor store manager. Crucial to the court's decision, however, was a West Virginia statute specifically providing that liquor store managers exercised such public duties that political dismissal therefrom would not be improper.[41] In 1975 *Burns v. Elrod* reached the Seventh Circuit.[42] Following the "scholarly and

35. Illinois State Employees Union v. Lewis, 473 F.2d 561, 574 (7th Cir. 1972).

36. *Id.* at 575, *citing* Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 897-98 (1961).

37. Illinois State Employees Union v. Lewis, 473 F.2d 561, 574 (7th Cir. 1972).

38. *Id.* at 576: "Of greater significance is the fact that as the number of employees affected is increased, the importance of preserving their First Amendment freedoms likewise grows."

39. *Id.*

40. 503 F.2d 1349 (4th Cir. 1974).

41. W. VA. CODE, ch. 29, art. 6, § 2 (1976).

42. 509 F.2d 1133 (7th Cir. 1975).

persuasive" opinion of Judge Stevens in *Lewis,* the court found wholesale patronage dismissals to be unconstitutional.[43]

III. The Supreme Court's Decision in Elrod

To fully understand *Elrod,* the Court's decision must be viewed in perspective. The opinion, written by Justice Brennan, does not reflect a majority, but rather a plurality.[44] The disagreement registered by the two concurring justices focuses upon Justice Brennan's failure to consistently differentiate between the entire patronage system and the narrow issue of patronage dismissal.[45] It is clear, however, that a majority of the Court found patronage dismissal of governmental employees to be unconstitutional. *Elrod* is further limited in that the holding applies solely to nonpolicymaking employees. Finally, *Elrod* is not applicable to employment regulated by statutory civil service systems.

In *Elrod,* the Republican sheriff of Cook County was replaced by Richard Elrod, a Democrat. Respondents had all been employees under the Republican administration. They were non-civil service employees and, therefore, were not covered by any statute prohibiting arbitrary discharge. Subsequent to Sheriff Elrod's assumption of office, respondents were discharged from their employment because they neither supported nor belonged to the Democratic Party, and had failed to obtain the sponsorship of one of the Party leaders.

Prior to discussing the merits, the Court responded to two jurisdictional questions interposed by the appellants. In the first, appellants maintained that the political question doctrine made this case inappropriate for judicial resolution. A question is "political" when its resolution is committed by the Constitution to a branch of the federal government other than the Court.[46] It is thus "the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"[47] The Court therefore determined that merely because "matters related to a State's . . . elective process are implicated by this Court's resolution of a question [that] is not sufficient to justify our withholding decision of a question."[48] Moreover, *Elrod* was concerned solely with

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43. *Id.* at 1135.

44. Justices White and Marshall joined in Justice Brennan's opinion, with Justices Stewart and Blackmun concurring in the result. Justice Stevens took no part in the decision of the case.

45. *Elrod,* 96 S. Ct. 2673, 2690 (1976) (Stewart, J., concurring).

46. Baker v. Carr, 369 U.S. 186, 217 (1962).

47. *Id.* at 210.

48. *Elrod,* 96 S.Ct. 2673, 2679 (1976). The *Lewis* court phrased it differently:

[O]ur duty to accord appropriate respect to a state's sovereignty does not require

a question of constitutionality, "a function which is ultimately the responsibility of the Supreme Court."[49] Regarding the second jurisdictional issue, appellants argued that the separation of powers doctrine also militated against judicial resolution. The Court summarily dismissed this contention by noting that the separation of powers, as with the political question doctrine, had no applicability to the federal judiciary's relationship to the states.[50]

Moving to the merits, the Court identified the costs of the political patronage system as: (1) a restriction of an individual's belief and free association, and (2) a disproportionate tipping of the electoral process scales in favor of the incumbent party.[51] The Court found the former to be the more important consideration as "political belief and association constitute the core of those activities protected by the First Amendment."[52] The decisions in *Keyishian* and *Perry* were "[p]articularly pertinent to the constitutionality of the practice of patronage dismissals."[53] The reasoning of these cases, which the Court found fundamental to the *Elrod* decision, is the familiar theme that the government may not do indirectly what it cannot do directly:

> The threat of dismissal for failure to provide [support for the employer's political party] unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise. The belief and association which Government may not ordain directly are achieved by indirection.[54]

The inquiry into constitutionality does not stop upon determination that patronage dismissal infringes upon first amendment rights. First amendment protections are not absolute: "Restraints [on the exercise of first amendment rights] are permitted for appropriate reasons."[55] *Keyishian* and *Perry* have continued importance in the inquiry. Not only do they establish a presumptive prohibition on infringement, but they also stand for the proposition that

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> us to accord finality to a decision to dismiss an employee for an impermissible reason, or to a policy of discrimination against members of a particular race, religion or political faith in the award or withdrawing of public benefits.

Illinois State Employees Union v. Lewis, 473 F.2d 561, 567 (7th Cir. 1972).

49. *Elrod,* 96 S.Ct. 2673, 2679 (1976).

50. *Id.* Again, the *Lewis* court was more specific: "If, however, a discharge is motivated by considerations of race, religion or punishment of constitutionally protected conduct, it is well settled that the State's action is subject to federal review." Illinois State Employees Union v. Lewis, 473 F.2d 561, 568 (7th Cir. 1972); *see also* Perry v. Sindermann, 408 U.S. 593 (1972).

51. *Elrod,* 96 S.Ct. 2673, 2681 (1976).

52. *Id.*

53. *Id.* at 2682, *citing Keyishian* and *Perry.*

54. *Id.* at 2683 (footnote omitted).

55. *Id. See also* pp. 368-69 & note 26 *supra.*

public employment, which may be denied altogether, may not be subjected to unreasonable conditions.[56] Significant impairment of first amendment rights must survive exacting scrutiny.[57] "Thus encroachment 'cannot be justified upon a mere showing of some legitimate state interest.' The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." [citation omitted].[58] In addition, the means employed by the government to further its interest must be more than merely rationally related to that end. The government must "'[employ] means closely drawn to avoid unnecessary abridgement . . .'" of first amendment rights.[59] If a less drastic means of fulfilling the state's legitimate interests exists, the State may not choose a scheme that stifles fundamental interests.[60]

> In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.[61]

The Court then considered the various interests advanced by the appellants as justifications for the infringement of first amendment rights caused by patronage dismissal,[62] first considering the need to insure effective government and the efficiency of public employees. Appellants argued that employees of political persuasions other than that of the party in power will not have the incentive to work effectively, and may even subvert the incumbent administration's efforts to govern effectively. The Court found this interest insufficient to justify the infringement for several reasons: the inefficiency resulting from the wholesale replacement of public employees belies the argument that patronage dismissal aids governmental effectiveness; the prospect of dismissal after an election

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56. *Id.*

57. *Id.* at 2684, *citing* Buckley v. Valeo, 424 U.S. 1, 59 (1976) and NAACP v. Alabama, 357 U.S. 449, 460-61 (1958).

58. *Elrod,* 96 S.Ct. 2673, 2684 (1976), *citing* Buckley v. Valeo, 424 U.S. 1, 88 (1975); Williams v. Rhodes, 393 U.S. 23, 31-33 (1968); NAACP v. Button, 371 U.S. 415, 438 (1963); Bates v. Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama, 357 U.S. 449, 464-66 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945).

59. *Elrod,* 96 S.Ct. 2673, 2684 (1976), *quoting* Buckley v. Valeo, 424 U.S. 1, 20 (1975).

60. *Elrod,* 96 S.Ct. 2673, 2684-85 (1976), *quoting* Kusper v. Pontikes, 414 U.S. 51, 59 (1973).

61. *Elrod,* 96 S.Ct. 2673, 2685 (1976) (footnote omitted).

62. The Court cautioned against confusing the interests of partisan organizations with governmental interests. Only the latter suffices as a possible justification for the infringement of first amendment rights. *Id.* at 2684.

is only a disincentive to efficient performance; a patronage employee will not necessarily be a more qualified person; and it is doubtful that the mere difference of political persuasion encourages poor performance.[63] In reviewing the record, the Court discerned that considerations of governmental effectiveness and employee efficiency did not appear to be the motivating factors behind the dismissals.[64] The employer had less drastic means available for insuring effectiveness and efficiency, specifically, discharge for good cause based on insubordination or poor performance.[65] Appellants argued further that patronage serves the interests of effective government and employee efficiency by giving the employees of an incumbent party the incentive to perform well in order to preserve their party's incumbency and thereby retain their jobs. Patronage, according to this argument, makes employees highly accountable to the public. Again the Court felt that less intrusive means, such as dismissal for cause and merit systems, were available.[66] Thus, the Court found no justification for patronage dismissal as a means of furthering governmental effectiveness and employee efficiency.[67]

The need to preserve political loyalty of employees so that representative government will not be undercut by tactics obstructing implementation of policies sanctioned by the electorate was also offered as an interest justifying encroachment upon the first amendment. Although the Court acknowledged the validity of such a justification, it believed, as did the *Lewis* court, that it was insufficient to sanction wholesale patronage dismissal. Instead, the Court held: "Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end."[68] The Court acknowledged that distinguishing between policymaking and nonpolicymaking positions would be difficult in some instances, but concluded, "[t]he nature of the [employee's] responsibilities is critical."[69]

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63. *Id.* at 2685.

64. *Id.*, n. 18.

65. *Id.* at 2686.

66. *Id.*

67. The lack of such justification distinguished *Elrod* from CSC v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) and United Public Workers v. Mitchell, 330 U.S. 75 (1947). In these latter cases, legislative restraints on political activity by public employees were upheld despite the obvious encroachment on first amendment rights because they did serve in a necessary manner to protect efficient and effective government. *Elrod,* 96 S.Ct. 2673, 2686 (1976).

68. *Id.* at 2687.

69. *Id.* The Court set forth several criteria as a future guide for making a determination:

> An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. . . . [C]onsideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals . . . . [T]he burden of establishing this justifica-

The final interest offered as justification for limiting first amendment freedoms was that the patronage system preserves the democratic process. That is, patronage helps a democratic government operate successfully, and consequently exacts a price for its service.[70] Although preservation of the democratic process is certainly an interest which may justify limitation on first amendment freedoms,[71] the Court did not believe that elimination of patronage dismissals would destroy party politics.[72] To the contrary, the Court thought "if patronage contributes at all to the elective process, that contribution is diminished by the practice's impairment of the same."[73] Thus, the Court held patronage dismissal of nonpolicy-making employees to be unconstitutional under the first and fourteenth amendments.[74]

Interestingly, the Court only indirectly discussed the issue of waiver — that respondents, themselves the beneficiaries of previous patronage dismissals, should not be heard to complain of the practice.[75] Political offices change hands numerous times and in this sense the patronage dismissal system operates evenhandedly in the long run, but the Court concluded that "protected interests are still infringed and thus the violation remains."[76]

IV. Montana's Human Rights Act

Elrod's implications will not be as profound in Montana as in other States due to the Montana legislature's foresighted enactment of the Human Rights Act.[77] The Act provides:

> It is an unlawful discriminatory practice for the state or any of its political subdivisions:
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> . . . .
>
> (c) to refuse employment to a person, or to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his political beliefs.[78]

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tion as to any particular [employee] will rest on the [government], cases of doubt being resolved in favor of the particular [employee].

Id.

70. *Id.*

71. *Id.*, *citing* Buckley v. Valeo, 424 U.S. 1 (1975); CSC v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); Williams v. Rhodes, 393 U.S. 23 (1968); United Public Workers v. Mitchell, 330 U.S. 75 (1947).

72. *Elrod*, 96 S.Ct. 2673, 2687 (1976).

73. *Id.* at 2688.

74. *Id.* at 2689.

75. Mr. Justice Powell did raise this issue in his dissent. *Id.* at 2693.

76. *Id.* at 2683.

77. R.C.M. 1947, §§ 64-301 to 330 (Supp. 1975).

78. *Id.* § 64-306(5)(c).

This prohibition does not apply to policymaking positions on the immediate staff of an elected official of the executive branch,[79] to the appointment by the governor of a director of a "principal" department, or to the immediate staff of the majority and minority leadership of the Montana legislature.[80] Thus, the Act provides statutory protection against patronage dismissal to the same employees who are covered by *Elrod*. In fact, Montana's statute may go beyond the confines of *Elrod*. The statutory language could be interpreted to protect policymaking employees holding important departmental positions but who are not directors of "principal" departments. Although the federal constitution may not require such extensive protection, it is certainly within the legislative prerogative to accord greater protection under the state constitution.[81]

V. CONCLUSION

By utilizing the rationale which protects Communist Party members against arbitrary dismissal from public employment, the Supreme Court declared unconstitutional the dismissal of a nonpolicymaking public employee on the sole ground of political belief and association. This decision likely will improve substantially governmental effectiveness and employee efficiency. In Montana, the decision will augment a legislative enactment which attempts to achieve the same results. Although Chief Justice Burger criticized *Elrod* for "trivializing" constitutional adjudication,[82] the decision reaffirms the Supreme Court's long-standing dedication to the primacy of the first amendment.

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79. MONT. CONST. art. VI, § 1 defines "executive branch" as "a governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor."

80. R.C.M. 1947, § 64-306(5)(c) (Supp. 1975).

81. For illustration, the Supreme Court held in Apodaca v. Oregon, 406 U.S. 404 (1972), that the sixth amendment, made applicable to the states through the fourteenth amendment, does not require jury unanimity in criminal convictions. However, the Montana legislature gave criminal defendants greater protection than that required by the sixth amendment when it enacted R.C.M. 1947, § 95-1915(a) (Supp. 1975), which requires jury unanimity.

82. *Elrod*, 96 S.Ct. 2673, 2690 (1976) (Burger, C. J., dissenting).