UIC Law Review

Volume 14 | Issue 3 Article 8

Summer 1981

Patronage, Arbitrary Discharge, and Public Policy: Redefining the Balance of Interests in Employment, 14 J. Marshall L. Rev. 785 (1981)

Sarane C. Siewerth

PATRONAGE, ARBITRARY DISCHARGE, AND PUBLIC POLICY: REDEFINING THE BALANCE OF INTERESTS IN EMPLOYMENT

"Social change comes about when people decide that a situation is evil and must be altered, even if they were satisfied or unaware of the problem before."[1] Legal change, in turn, occurs in response to social change, for a society's laws are its perceptions of appropriate and effective solutions to its problems.[2] When new problems arise, or old situations are newly perceived as problems, the law, by definition, has no precedent to deal with society's reevaluation. In such a case, courts may create new rules of law to correct the current problems and, using public policy as a justification, establish new common law precedent.[3] As political and economic growth changes society, the use of such rules to solve problems will persist only as long as they relieve the pressures between competing groups in ways acceptable to and bearable by society as a whole. When the old rule's solution is no longer adequately responsive, a new rule will be devised to take its place.[4]

---

1. Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 54 (1967) [hereinafter cited as Friedman & Ladinsky].

2. *Id.* at 73.

3. "Public policy has been defined as judicial decisions, legislation, and constitutions, as well as customs, morals, and notions of justice which may prevail with the state." Marchlik v. Coronet Ins. Co., 40 Ill. 2d 327, 332, 239 N.E.2d 799, 802 (1968). Strong arguments are often made denying judicial power to legislate, especially on policy determinations defining how society should be changed. Courts may appropriately make laws drawing upon custom, what people have already worked out; but as soon as judges look to policy, they adopt the materials and techniques used by the legislatures, including lobbying, compromises, and "even corruption" in order to reallocate power among groups or change society's structure. Fernandez, *Custom and the Common Law: Judicial Restraint and Lawmaking by Courts*, 11 SW. U.L. REV. 1237, 1237-39 (1979). Nevertheless, if the law changes along with society, the judiciary may become more democratic than the legislature itself: "Obviously courts create law. If it were otherwise the common law would be as out of touch with life as is a corpse. Courts must take an active part in the development of the common law, although this may mean creativeness." Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 361, 367 N.E.2d 1250, 1257 (1977).

4. Freidman & Ladinsky, *supra* note 1, at 59. As long as the rule furthers some social consensus, it will go unchallenged or undefeated. If the rule is weakened by judicially recognized exceptions, however, it will eventually be supplanted when the exceptions engulf the rule.

As society grows more complex, however, substitution of one dogmatic rule for another provides an inadequate solution; the competing groups have too many interrelated economic, social, and political interests to be satisfied by a mechanical rule of law. An approach used increasingly often because it is more accommodating to this complexity is the balancing of competing interests.[5] Established legal dogma, which invariably mandates a single, predictable outcome, becomes only one factor in a multi-sided balancing process. This process first identifies all the parties with a stake in the current controversy and then protects the party with the most compelling interest in a manner least destructive to the interests of the other parties involved.[6]

Judicial methods of handling job security litigation in both public and private sectors are a direct reflection of this fundamental change of approach, specifically, moving away from dependence upon the rule of termination-at-will employment.[7] This rule, whereby both employee and employer are free to sever their relationship at any time without liability, first appeared in the United States as the absolute right of executive discharge over government appointees and soon crystallized into the patronage system.[8] Because the theoretical two-sided freedom was in practice a potent weapon to preserve power, the principle was adopted into the private sector as an effective means to combat the threat to developing industrialism posed by early union activity.[9] During the last decade, however, several converging factors have caused a distinct change in the judicial approach to employer-employee conflicts over job security.

Up until the last ten years, most suits by employees challenging disciplinary action or dismissal were futile, for the predominant rule of law, termination-at-will, mechanically upheld

5. *See* Comment, *Recognizing the Employee's Interests in Continued Employment—The California Cause of Action for Unjust Dismissal*, 12 PAC. L.J. 69 (1980) [hereinafter cited as *Employee's Interests*] for a thorough discussion of California's movement toward the balancing approach when dealing with discharges under termination-at-will contracts.

6. *Id.*

7. The breakdown of dogmatic responses to suits by discharged employees is clearly seen in two cases, both decided in 1977. Pstragowski v. Metropolitan Life Ins. Co., 553 F.2d 1 (1st Cir. 1977) followed the holding in Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), which established that any discharge of a private sector employee for bad faith reasons violated his interest in his employment. In contrast, Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977) held that although the facts of that case did not warrant a judicially granted exception to the general terminable-at-will rule of private employment, the issue "is one that must be left for another day and different facts." *Id.* at 898, 568 P.2d at 770.

8. *See* notes 26-30 and accompanying text *infra*.

9. H. BERMAN & W. GRIENER, THE NATURE AND FUNCTIONS OF LAW 809-17 (4th ed. 1980) [hereinafter cited as BERMAN & GREINER].

the employer's absolute right of dismissal.[10] The law in both public and private sectors made the worker's continued employment totally dependent on the "pleasure of the employer."[11] The last decade, however, has experienced inflation,[12] recession, mechanization and computerization,[13] all of which have resulted in a decrease in society's demand for goods and services. The attendant Reduction in Force[14] effects have added pressure on the courts to reexamine orthodox dogma of employer-employee relations. In addition, the successful equal protection challenges during the 1960s to state fostered discrimination reaffirmed the principle that a balancing approach was a viable means of accommodating two or more meritorious claims.[15]

The development of the balancing approach alternative reflects the courts' general recognition of fundamental value changes which have occurred in our society. Public and private sector employers no longer have full freedom to manage their affairs as they please, for the increasing recognition of individual rights and privileges has caused the balance of employer-em-

---

10. *See* notes 32-41 and accompanying text *infra*.

11. Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 299 (1974).

12. U.S. NEWS AND WORLD REP., March 10, 1981 at 39-45.

13. [I]n this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government. . . ."

Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 225 (1964) (Stewart, J., concurring). For an excellent analysis of the causes and effects of severe regional unemployment, *see* FORBES, March 16, 1981, at 120-26.

14. A "Reduction in Force" refers to the practice of discharging ("RIF-fing") tenured employees on a seniority basis because of declining demand for the goods or services of the employing organization. While tenured employees are protected from arbitrary discharge by statutorily or contractually granted rights, no protection is guaranteed against discharges made to balance supply and demand. The prime requirements for a justifiable "RIF" are (1) that no replacement is hired for the phased-out position, and (2) the increased work load apportioned to the remaining employees does not equal a full assignment.

15. The courts have always acknowledged that even fundamental rights may need to be tempered by the necessity of preserving other rights:

The methodology of balancing interests has been adopted by the courts as the most acceptable way of responding to the conflicting interests of the individual and the community. The balancing formula, which has been judicially adopted, requires the courts, in each particular instance, to balance the individual . . . interests against any legitimate . . . ends sought by practices which restrict [individual interests].

Note, *Non-Statutory Causes of Action for an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y. L. SCH. L. REV. 743, 753-54 (1979).

ployee interests to shift.[16] In the public sector, recent case law shows that the balance of interests has become weighted heavily in favor of the employee.[17] In the private sector, however, change is occurring much more slowly, and the balance still heavily favors the employer.[18]

This uneven development in employee job rights is a direct result of the dual source of American law. On the one hand, common law concepts of freedom of contract and mutuality of obligation to a great extent still control private sector employment relationships.[19] On the other hand, the judiciary has extended constitutional protections to vast areas of government activity, including public employment, which were previously insulated from fundamental constitutional guarantees of personal rights and liberties.[20] Thus, to the extent the balancing approach is utilized in either sector, a type of procedural due

16. Although the establishment of the competitive civil service in the 19th century and the passage of the National Labor Relations Act in 1937 removed whole blocks of employees from domination by their respective public and private sector employers, those groups were "released" not because the legislature changed its perception of the proper balance of power, but because of the needs of society at the time. The rapidly growing federal government, with its equally expanding responsibilities, needed a core of workers to provide continuity between administrations and to ensure the uninterrupted functioning of the various agencies despite any number of executive changes. *See* notes 44-56 and accompanying text *infra* for a factual history of this period. The National Labor Relations Act, on the other hand, was passed during the depression of the 1930s in an effort to stop the severe displacement and literal starvation of thousands of members of the laboring class. *See* note 57 *infra*.

17. *See, e.g.*, Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

18. *See, e.g.*, Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975).

19. The employee's freedom to leave his employment at any time is balanced by the employer's freedom to dismiss the employee at any time. "In a legal sense, both parties were considered to be on an equal bargaining footing." Note, *Non-Statutory Causes of Action for an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y. L. SCH. L. REV. 743, 745-46 (1979). The clearest statement of the mutuality of obligation rule appears in Pitcher v. United Oil & Gas Synd., Inc., 174 La. 66, 139 So. 760 (1932):

> An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself; and the law will presume . . . that he did not so intend. And if the contract of employment be not binding on the employee for the whole term of such employment, then it cannot be binding upon the employer; there would be lack of "mutuality."

Id. at 69, 130 So. at 761.

20. *See* notes 87-113 and accompanying text *infra*.

process review has been provided.[21] In order to establish whose interests are applicable, the relative urgency of those interests, and the predictable effects of favoring one interest over another, the affected parties must be given an opportunity to be heard.

Judicial recognition of the various competing interests is a positive step toward finding the proper point of balance in employer-employee conflict. Until the courts more accurately identify the nature and scope of those interests, however, resulting decisions will be accurate only by chance.

THE PHILOSOPHIC BACKGROUND OF PUBLIC AND PRIVATE EMPLOYMENT: A COMPARATIVE HISTORY

The two conflicting philosophies illustrated in public and private employment did not spring fully developed from the collective legal mind, but rather resulted from two hundred years of shifting trends and pressures. A brief review of this background is essential to an understanding of why the current balance of employer-employee rights in both public and private sectors is threatening economic and political health.

Employer-employee relationships in both public and private sectors had their foundations in the American law of master and servant.[22] This law in turn was based on the status principles of feudal tenure in land. The lord and the tenant formally and ceremoniously agreed that each owed lifetime duties to the other, the lord promising protection and support, the tenant promising

---

21. Only state infringements of the individual's life, liberty, or property are constitutionally guaranteed some due process review. Although the exact nature of the "process" that is "due" varies depending upon established rules applicable to a given type of situation, generally accepted basic requirements are (1) notice to the individual threatened with deprivation, (2) some type of hearing, and (3) a neutral decisionmaker. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 477 (1978). Due process itself is a balancing process:

> Due process is not a mechanical instrument . . . it is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, . . . the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring). Even though no such process is mandated in the private sector except by statute or contract, to the extent that notice and a hearing are granted, the claimant is benefitting from a form of due process review.

22. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 122-24 (1976) [hereinafter cited as Feinman].

service and labor.[23] Both regarded their relationship as intensely paternal and domestic.[24] By the eighteenth and nineteenth centuries, however, American employment relationships reflected the development in England of the law of contract rather than status. The presumption in an indefinite-term employment agreement changed from that of lifetime duration to a yearly term of hire.[25]

The first one hundred years of American history in the public employment sector was exactly opposite to that in the private sector. At the same time that master-servant relationships were the dominant employment arrangements in the private sector, total executive discretion to hire and fire at will was the dominant philosophy in the public sector.[26] This discretion, subject to few legislative or judicial checks, was the philosophy of employment adopted in the 1789 debates in the House of Representatives, which established the principles to govern appointive government positions.[27] In theory, the public interest in an ideal representative government would be served best by a system dependent on the power of summary discharge to ensure faithful response to the executive and ultimately to the

23. Comment, *Employment at Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 212-13 (1974). This status relationship was reinforced by the Statutes of Laborers, 5 Eliz., c.4 (1562). The common law principles of termination of employment by notice and dismissal for cause stem from these statutes.

24. Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1438 (1975) [hereinafter cited as *Common Law Action*].

25. *Id.* at 1439. The principle of yearly hire was authoritatively stated by Blackstone:

> If the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done as when there is not. . . .

2 BLACKSTONE'S COMMENTARIES 425 (1st ed. Tucker 1803).

26. The principle of absolute power of removal was adopted after a heated debate in the 1789 House of Representatives. Representative William Smith's position was that unless some predictable job security was to be granted government employees, unlimited executive power to discharge them would prevent the best people from accepting such tenuous employment. People of the desired caliber would refuse appointments rather than become subject to possible abuse of executive authority. In contrast, Representative James Madison contended that the dangers attendant upon the executive's being unable to quickly remove unsatisfactory officers were far greater than those of possibly unbridled executive authority. The House of Representatives adopted Madison's approach favoring executive authority. Senate agreement, however, was obtained only by virtue of the tie breaking vote of the Vice-President. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 947-49 (1976) [hereinafter cited as Frug].

27. *Id.*

public will.[28]

Practically applied, this wide executive discretion resulted in the practice of promising government jobs as a means of marshalling support during election campaigns. Such a system is known as patronage,[29] or the "spoils system."[30] Under a patronage system, an appointive position in government is held at the pleasure of the appointing officer; the position is terminable-at-will.[31] After each election, successful candidates replace the subordinates of their opposition party predecessors with loyal adherents who actively worked during the successful campaign. As long as the "party faithful" continue to work successfully for their patron's reelection, they may retain their positions.

CYCLES OF CHANGE

After the Civil War, the impact of the industrial revolution caused a complete reversal in the attitude toward private sector employer-employee relationships. During the last part of the nineteenth century, wide fluctuations in market stability meant correspondingly wide fluctuations in the demand for labor. Private employers now perceived that their interest in rapid economic growth would be furthered by the same ability to summarily discharge employees as in the public sector.[32] Profitability during periods of depression and falling prices[33] absolutely depended on the freedom to terminate employees at will. In addition, it was generally believed that not only the capitalist employers, but all society would share in the social benefits to result from this growth.[34] Courts thus created a legal structure protecting the employer by interpreting indefinite-term con-

28. *Id.* This was Madison's view, a position which lasted almost one hundred years.

29. The term patronage refers to the control of appointments to offices, or privileges in the public service. The term is based on the use of the word patron to indicate one who stands to another in a relation analogous to that of father or protector; one who lends his influential support to advance the interests of a person. THE OXFORD UNIVERSAL DICTIONARY 1449 (3d ed. 1955).

30. 3 J. PARTON, LIFE OF JACKSON 378 (1860) ("To the victor belong the spoils of the enemy.").

31. Terminable-at-will positions are those for which there is no specified contractual term of employment. Additionally, promises of permanent employment have been held to convey only terminable-at-will status. Lewis v. Minnesota Mut. Life Ins. Co., 240 Iowa 1249, 37 N.W.2d 316 (1949). Even employees who have accepted promises of permanent employment in return for settlement of an injury claim have been held to be terminable-at-will. Adkins v. Kelly's Creek R.R., 458 F.2d 26 (4th Cir. 1972).

32. Feinman, *supra* note 22, at 133-34.

33. *Id.*

34. *Common Law Action, supra* note 24, at 1441.

tracts as terminable-at-will instead of for a yearly hire.[35]

The litigants in the first cases which applied the new principle were middle level employees who had been summarily discharged.[36] Hired under indefinite-term contracts, these plaintiffs assumed a right to employment for at least the traditional year. The courts instead announced the new principle of termination-at-will.[37] The terminable-at-will doctrine meant that employment relationships were governed by the contract law principle of mutuality of obligation. Both parties must be free to terminate the relationship at any time.[38]

This principle was called the "ultimate guarantor of the capitalist's authority over the worker."[39] If employees could be dismissed on a moment's notice, obviously they could not claim a voice in the conditions of work or the use of the labor product. "Educated, responsible, and increasingly numerous, the middle level managers and agents of enterprises might have been expected to seek a greater share in the profits and direction of enterprises."[40] The terminable-at-will rule, therefore, conformed both to economic necessities and to the demand by owners that the law support their absolute control of business.[41]

---

35. The doctrine was formulated by H. Wood, a treatise writer of the late nineteenth century. Although he cited four American cases as authority, none in fact supported his position. Nevertheless, the doctrine was quickly adopted as law by the courts. Feinman, *supra* note 22, at 126-27.

36. Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895) is a typical case. Martin was the head of New York Life's real estate department. He received an annual salary of $10,000. Upon his discharge, he asserted that his indefinite term contract was a yearly one, relying on Adams v. Fitzpatrick, 125 N.Y. 124, 26 N.E. 143 (1891). Although the trial court found for Martin, the decision was reversed on appeal on the ground that an indefinite hiring was presumed to be a hiring at will, and a yearly rate of payment did not establish a presumption of a yearly hire.

37. The principle was given further support by the decisions in Cuppy v. Stollwerck Bros., Inc., 216 N.Y. 591, 111 N.E. 249 (1916), and Watson v. Gugino, 204 N.Y. 535, 98 N.E. 18 (1912). In *Cuppy*, the holding affirmed that a manager hired at a specified salary per year did not have a definite term of hire, contrary to previous expectation. Rather, the contract was terminable at the will of the board of directors. In *Watson*, the court stated,

> The effect of a general contract of hiring, no time being specified, varies in different jurisdictions. In England, it is presumed to be a hiring for a year . . . unless there is a custom relating to the subject. . . . In this state, the rule is settled that, unless a definite period of service is specified in the contract, the hiring is at will; and the master has the right to discharge and the servant to leave at any time. . . . This rule was deliberately adopted, all the judges concurring. . . .

204 N.Y. at 541, 98 N.E. at 20.

38. *See* note 19 *supra*.

39. Feinman, *supra* note 22, at 132-33.

40. Feinman, *supra* note 22, at 133.

41. *Id.*

This employer dominance over the business relationship was reinforced by two Supreme Court decisions during the early twentieth century. Statutes prohibiting discharge for union membership were struck down as unconstitutional interferences with freedom of contract and the employer's absolute right of control over his private property.[42] Thus the absolute right of summary discharge was raised to a liberty and property right guaranteed by the Constitution.[43]

At the same time that employees in the private sector were losing their traditional status protections, abuse of public sector summary discharge was causing a reevaluation of the propriety of executive power.[44] Although the debate in 1789 established the principle of absolute executive power of removal,[45] no President until Andrew Jackson had taken full advantage of it. As a result, by the time of Jackson's election in 1828, the increasingly large federal service operated under a tradition of stability in office.[46] This stability was shaken when Jackson used the power of removal extensively as a swift means of reforming government policy.[47]

Upon subsequent changes of president and party, each attended by large numbers of dismissals and new hirings, the

---

42. *Id.* at 132.

43. In Adair v. United States, 208 U.S. 161 (1908), the Supreme Court struck down a statute prohibiting a common carrier from discharging employees for union membership. Finding that both employer and employee had an equal right to terminate the employment relationship for any reason, the Court stated:

> It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons, neither the public nor third persons have any legal concern.

Id. at 173, quoting T. COOLEY, LAW OF TORTS 278 (1880).

The second case, Coppage v. Kansas, 236 U.S. 1 (1915), involved a state statute outlawing yellow dog contracts, agreements binding the employee to forego union membership as an absolute condition of employment. The Court justified its decision by mutual freedom of contract and the right of private property, especially the "self-evident" proposition that "some persons must have more property than others. . . ." *Id.* at 17.

44. *Common Law Action, supra* note 24, at 1441.

45. Frug, *supra* note 26, at 949.

46. *Id.* at 949-50. The Tenure of Office Act of 1820 established a fixed term of four years for several federal offices. One purpose of the Act was to preserve the reputation of terminated employees by a system of automatic rather than discretionary removal. After its passage, President John Quincy Adams merely reappointed all those appointees automatically dismissed, and James Madison thought the Act an unconstitutional infringement of the executive power. *Id.* at 950-51.

47. *Id.* The election of Andrew Jackson in 1828 represented the first change of party in twenty years. President Adams' practice of reappointing appointees whose terms of office had expired had created an unresponsive, inefficient, sinecure-filled federal service.

spoils system became the routine of American politics.[48] The most extreme example of mass dismissals after a change of party during the mid-nineteenth century was Abraham Lincoln's removal of 1,457 of the 1,639 presidential appointments of the previous administration.[49] Even though the need for reform was obvious, efforts to establish a permanent civil service system met with little success until President Garfield was assassinated by a supposedly disappointed office seeker.[50]

Developments in Statutory Job Protection

Public reaction to the assassination of President Garfield contributed greatly to the eventual passage of the Pendleton Act of 1883, which created the first statutory civil service system.[51] The main provision of the Act established open competitive examinations for entry into the public service,[52] a severe legislative curtailment of executive patronage power. Significantly, the Pendleton Act did not restrict the President's general power to remove employees,[53] under the theory that restrictions on the power to appoint would eliminate the incentive to remove employees for political reasons.[54] Nevertheless, as a result of pressure from the Civil Service Commission, President McKinley signed a Presidential Order in 1897 adding tenure rights to civil service positions. Thereafter, an employee could not be removed from any position subject to competitive examination except for "just cause and upon written charges . . . [and] the accused shall have full notice and an opportunity to make defense."[55] With a few modifications, the Pendleton Act and Presi-

48. *Id.* at 952. *See also* Note, *Federal Employment—The Civil Service Reform Act of 1978—Removing Incompetents and Protecting "Whistle Blowers,"* 26 WAYNE L. REV. 97, 98 (1979).

49. Frug, *supra* note 26, at 952.

50. *Id.* at 954.

51. Act of Jan. 16, 1883, ch. 27, § 1, 22 Stat. 403, codified at 5 U.S.C. § 1101 (Supp. II 1978).

52. *Id.*

> First, for open, competitive examinations for testing the fitness of applicants for the public service not classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

Other important features were the establishment of the Civil Service Commission and a mandatory probationary period.

53. The Act did prohibit removing employees for giving or refusing to give political contributions of money or services. Otherwise, no restrictions were placed on the executive power of removal.

54. Frug, *supra* note 26, at 955.

55. 14 U.S. CIV. SERV. COMM'N ANN. REP. 24 (1898), *quoted in* Frug, *supra* note 26, at 956.

dent McKinley's order establishing tenure rights through a guarantee of procedural due process became the basis of the current civil service statute, the Lloyd-LaFollette Act, enacted in 1912.[56]

Not until the economic depression of the 1930's and the passage of the National Labor Relations Act of 1935 (NLRA)[57] did the private sector laborer gain a corresponding measure of statutory protection. Passage of the NLRA resulted in the permanent establishment of the right of employees to organize and bargain collectively through representatives of their choice. In addition, specific employer actions which undermined union vitality were prohibited as contrary to the goal of industrial peace.[58]

One standard feature of nearly every collective bargaining agreement is the prohibition of arbitrary dismissal, whereby no employee covered by the agreement may be discharged except for cause. Like the cause requirement in the civil service legislation,[59] this statutory provision has been judicially interpreted to convey to the employee a constructive property right protectible under the due process clauses of the fifth and four-

56. Act of Aug. 24, 1912, ch. 389, § 6, 37 Stat. 555, *as amended*, 5 U.S.C. §§ 7101, 7102, 7501 (1980). 5 U.S.C. § 7501 provides that, in addition to cause,

> [a]ny individual in the competitive service whose removal or suspension without pay is sought is entitled to notice of the action, a copy of the specific charges, time to procure affidavits and to file an answer, and a written decision. In addition, witnesses and a hearing may be provided at the discretion of the hearing officer.

57. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (Supp. III 1979). The Act, also known as the Wagner Act, was the legislature's attempt to halt the deepening depression by encouraging the development of strong labor unions. Cut throat competition and other destructive practices characteristic of the early depression years would be eliminated by organizing industry through trade associations. The associations, or unions, would in turn help to increase mass purchasing power by bargaining for higher wages and shorter hours, thus dividing the available work and spreading employment. BERMAN & GREINER, *supra* note 9, at 890.

58. The heart of the Wagner Act was § 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

59. Statutory authority for contract clauses barring abusive discharge is found in the National Labor Relations Act, §§ 7, 8(a)(1), 29 U.S.C. § 157, 158(a)(1) (Supp. III 1979). In addition, labor arbitrators have developed a "common law of the industry" based on social realities of the employment relationship. They almost uniformly find implied "just cause" in the bargaining contract if no explicit provision is present. *Common Law Action, supra* note 24, at 1448; Summers, *Individual Protection Against Unjust Dismissal: Time For a Statute*, 62 VA. L. REV. 481, 482-83, 499 (1976) [hereinafter cited as Summers].

teenth amendments.[60] The weakness in current statutory protection, however, is that it extends to only about one-third of the working population. Sixty-seven percent of the United States work force, nearly 57 million employees, have no protectible interest in their major source of income.[61]

The seriousness of the employee's inability to protect himself from discharge is directly attributable to the importance of employment itself:

> We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for relief supplied by the various forms of social security. Such dependence of the mass of people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands.[62]

The Revolutionary Decade—the 1970s

After the passage of the National Labor Relations Act, both employment sectors displayed roughly similar pyramid patterns of tenured and untenured positions. At the top of each pyramid were the executives, the decision makers who formulated both

---

60. There was a time when a worker's job was a thing of the hour; he could be hired or fired at will, and his only right was to be paid for the hour he worked. Today, the job has become a thing of value, . . . the worker has come to have what might be called a *property right* in his job. His wages and benefits generally accrue with seniority, which increases the value of his job as time goes on. . . . Like any other property holder in our free, democratic society, he cannot be deprived of his rights except by due process.

Braden, *From Conflict to Cooperation*, in PROCEEDINGS OF THE SIXTH ANNUAL LABOR RELATIONS CONFERENCE 43 (Inst. of Indus. Rel., W. Va. Univ. 1956) (emphasis in original), *quoted in* Summers, *supra* note 59, at 506. *See also* Comment, *Towards a Property Right in Employment*, 22 BUFFALO L. REV. 1081 (1973). The interpretation of the just cause requirement as a property right may also stem from a type of inverse reasoning. Because only life, liberty, and property rights enjoy constitutionally guaranteed due process protection, one can reason that if due process protection is mandated, what is being protected must be one of those specified rights.

61. In 1976, of the 65,000,000 private sector employees, only 21,171,000 were union members and thus covered by collective bargaining agreements. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS STATISTICAL ABSTRACT OF THE UNITED STATES 1979, 410, 427, Tables 681, 704. In the public sector, of the total 15,631,000 federal, state, and local governmental employees, a conservative estimate numbers unprotected patronage employees at over 7,500,000. *Id.* at 313, Table 509; Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-9 (1979) [hereinafter cited as Peck].

62. *Common Law Action, supra* note 24, at 143-44, *quoting* F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (emphasis omitted). For a general discussion of the theory that status and employment relationships have taken the place of land ownership as guarantors of the independence of the individual, *see* Reich, *The New Property*, 73 YALE L.J. 733, 771-73 (1964).

the long-range objectives and the general means of obtaining them. These critical personnel, elected to their political or corporate offices, knew that retention of their positions was directly dependent upon the approval of their respective electorates. At the bottom were the thousands of workers who produced the actual product, the tangible goods or intangible services. These laborers, the foundation of both sectors, were the ones who had demanded and won some form of statutory job security, for although they as a group were critical, the individual himself was fungible.[63]

However, the status of the employees in the vast middle group was still troublesome. Until the 1970s, this group in both sectors held positions solely at the pleasure of the superior. As technology and competition increased, demands by private sector employers for people with particular areas of expertise grew also.[64] Seniority systems and retirement policies developed by employers to promote loyalty, and stability encouraged employees' expectations of job security.[65] One court looked upon such

63. Federal legislative checks, include: The Lloyd-LaFollette Act, 5 U.S.C. §§ 7101, 7102, 7501 (Supp. III 1979); The Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1976); the National Labor Relations Act, 29 U.S.C. §§ 151-68 (Supp. III 1979); The Veterans' Preference Act, 38 U.S.C. § 2021(a) (1976); Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-15 (Supp. III 1979).

64. As the worker increasingly narrows his field of specialization to comply with the needs and demands of a current employer, the range of other employment opportunities for which he is qualified correspondingly diminishes. In addition, employees achieving a high level of expertise are often prevented from finding new positions by covenants not to compete. *See, e.g.*, Hudson Foam Latex Prods., Inc. v. Aiken, 82 N.J. Super. 508, 198 A.2d 136 (1964) (covenant not to enter any competitor's employ for one year after termination of employment held unreasonably broad because geographic area was unlimited). In B.F. Goodrich Co. v. Wohlgemuth, 117 Ohio App. 493, 193 N.E.2d 99 (1963), an employee who had learned trade secrets of space suit manufacture from his former employer was enjoined from taking a position with another of the very few companies in the field. The covenants are not always accompanied by any contractual assurances of a specified term for hire, which leaves the employee doubly vulnerable. The more an employee's personal skill coincides with a present employer's trade secrets, the less free the employee is to change jobs because of a prospective new employer's fear of litigation. Maloney v. E.I. DuPont de Nemours & Co., 352 F.2d 936 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 948 (1966).

65. *Common Law Action, supra* note 24, at 1445. This encouragement to employees to remain with a company rather than seek employment elsewhere turns especially bitter in circumstances such as in Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959). Plaintiff was fired one year before retirement, after 45 years of service. He lost all rights in his pension (except the right to a return of his contributions) even though he had often been persuaded to stay with the company by such arguments as the wonderful pension rights he would have coming to him upon retirement. Because the contract he had signed in 1911 contained a mutual termination-at-will clause, the court upheld the contract despite the subsequent promises and his reliance upon them. *But see* Chinn v. China Nat'l Aviation Corp., 138

intra-corporate provisions as so pervasive that they suggest a "new climate prevailing generally in the relationship of employer and employee"[66] which the courts can no longer ignore.

In addition, the civil rights movement of the 1960s created a climate from which emerged two significant types of curtailment of employer power to discharge. First, the school desegregation cases[67] focused public attention on the equal protection clause of the fourteenth amendment. Although public sector employees achieved eventual success in job security litigation through claims to due process protection of their liberty rights,[68] the power of the fourteenth amendment itself was affirmed by its use to eliminate government fostered discrimination. Congress, using its commerce power, extended this protection to the private sector through statutory enactments prohibiting race, ethnic, sex, and age discrimination in both hiring and discharge situations.[69] Second, judicial decisions denied an employer the power to discharge for reasons contrary to public policy, such as taking leave for jury service, refusing to vote as directed, refusing to falsify records or commit perjury, agreeing to testify against the employer, and filing a worker's compensation claim.[70] This judicial attitude acknowledging a general public policy, although by no means unanimous,[71] has been the means of establishing the balancing approach to solve private sector employment conflicts in place of the near automatic application of the termination-at-will principle.[72] The only drawback to the

---

Cal. App.2d 98, 291 P.2d 91 (1955) (offer of new severance benefits as an inducement to remain with company held to be offer of unilateral contract accepted by employee who remained). Retirement benefits are a form of deferred compensation, so to the extent that the employer unjustly deprives the employee of these benefits, he has become unjustly enriched.

66. Monge v. Beebe Rubber Co., 114 N.H. 130, 132, 316 A.2d 549, 551 (1974).

67. *E.g.*, Swann v. Board of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968); Griffin v. Prince Edward County School Bd., 377 U.S. 218 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954).

68. Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976); Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972).

69. *E.g.*, Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1976) (debtors); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (Supp. II 1979) (aged); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (Supp. III 1979) (prohibiting discharge based on race, color, religion, national origin, or sex); Military Selective Service Act of 1967, 50 U.S.C. App. § 459(b) (1976) (veterans).

70. Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (filing worker's compensation claim); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (good faith limitation supports state policy of improving labor relations); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (refusal to request release from jury duty).

71. Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977).

72. Although not articulated as such, it appears as though the courts'

public policy exception is its limited application.[73] Challenges to the termination-at-will principle[74] and confident predictions that American courts will soon abandon it[75] do not alter the fact that most private sector employees in the United States have no protection against dismissal "for good cause, for no cause, or even for cause morally wrong."[76]

The Private Sector: Underestimating the Employee

There is no doubt that most legal commentators[77] and many courts[78] believe that the balance of power between the private sector employer and employee must be shifted. Even the most outspoken, however, acknowledge that the employer has significant interests in his business which must be considered when

---

aversion to the "anti-public policy" reasons for discharge, aside from situations of patent lawbreaking, is based on the conviction that certain facets of an employee's life ought to be immune from intrusion by the employer. In sum, these facets seem to reflect the very rights and privileges "so important to a free society that they are constitutionally protected from government encroachment [but] vulnerable to abuse through an employer's power." Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1407 (1967) [hereinafter cited as Blades]. Examples would include freedom from self-incrimination, political free choice, freedom of speech, and freedom to participate in the processes of government.

It has been proposed that states enact more statutes prohibiting discharge for specified activities. Aside from the impossibility of anticipating all the appropriate prohibitions, reasonable requests by an employer would probably vary from job to job. Even a general statutory statement of the offense would be difficult to enact, for the biggest obstacles to a legislative enactment in this area are the lack of a cohesive lobbying group to press for it and the strong lobbies of interest groups bound to oppose it. *Id.* at 1432-34.

73. Suggestions have been made to significantly expand employee rights by regarding the extensive governmental intrusion into the private sector, either by awards of contracts or extensive licensing and regulation, as the creation of a quasi-public sector of employment. Such a label would trigger all the fourteenth amendment due process rights now denied to private sector employees. Only one case clearly espouses this view, Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir. 1975), *cert. denied*, 423 U.S. 892 (1975). The denial of certiorari, of course, does not mean that the Supreme Court tacitly approves of the holding. But it shows a possible movement in a direction Professor Blades called "visionary" in 1967. Blades, *supra* note 72, at 1431.

74. *E.g.*, Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 470 (1980): "[T]ermination of an employee for no cause at first blush shocks the conscience."

75. Peck, *supra* note 61, at 1. ("One of the safest [predictions] that can be made").

76. Payne v. Western Atlantic R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

77. *See, e.g.*, Blades, *supra* note 72; Summers, *supra* note 59; *Non-Statutory Causes of Action, supra* note 15; *Employee's Interests, supra* note 5.

78. *See* cases cited in note 70 *supra*.

establishing a balancing approach. The flexibility to meet competition through efficient and profitable operation is achieved through control over personnel decisions and the general work force.[79] The privilege to discharge at will supports these important employer interests; without the privilege, incompetent, inefficient, or incompatible employees could not be discharged as swiftly as necessary, thus impairing the employer's right to control his work force.[80]

On the opposite side of the scale is the individual's interest in his employment. In addition to the employer fostered expectations of job security on which the employee has placed his reliance,[81] the psychological importance of job security must be given weight. A person's work not only serves "a useful economic purpose but plays a crucial role in the individual's psychological identity and sense of order."[82] The employee's self-esteem is based largely on the expectation of stable employment.[83] In addition, the longer he remains at the job, the more substantial his benefits. Pension rights, health and medical benefits, extra vacation time, preferred shifts, profit-sharing plans, and other fringe benefits are usually tied directly to length of service.[84] Consequently, the stability of the employee's entire future may depend totally on his freedom from arbitrary discharge.

The proper point of balance between two interests is determined by measuring the harm accruing to one side if the other predominates. Since the entire history of the terminable-at-will principle illustrates the inequities that result when employer interests dominate,[85] the only measure to be drawn here is the reverse pattern, in which employee interests dominate. Then an assessment of the injury to the employer by forbidding arbitrary discharge can be measured against the already known injury that termination-at-will causes the employee.

The employer's freedom to hire and fire at will has already

---

79. Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).

80. *Employee's Interests, supra* note 5, at 79-80.

81. *See* notes 64 and 69 and accompanying text *supra*.

82. REPORT OF SPECIAL TASK FORCE TO SECRETARY OF HEW, WORK IN AMERICA, 4-6, *quoted in* Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 339 (1974) [hereinafter cited as *Implied Contract Rights*].

83. *Implied Contract Rights, supra* note 82, at 339-40.

84. *See* Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C.L. REV. 457, 476-79 (1979).

85. J. GALBRAITH, AMERICAN CAPITALISM 114 (2d ed. 1956). The great economic power of the employers is supported by the weapon of absolute power of dismissal, which becomes increasingly potent as occupational mobility decreases.

been considerably eroded by various statutory enactments[86] as well as the existence of union collective bargaining agreements forbidding arbitrary discharge.[87] In addition, employees hired for a specified rather than an indefinite term have always been able to sue for wrongful discharge when terminated before the expiration of the contract.[88] Together, these three factors indicate that employers do not consider the loss of the privilege, even under such broad circumstances, to create substantial efficiency or profitability problems. Because of that fact, it is difficult to see why courts have so doggedly upheld the termination-at-will principle[89] unless some overriding public interest supports the necessity of arbitrary discharge. In fact, however, the social or public policy interests favor the employee, as indicated in a series of decisions which expressly denied the previously upheld right of discharge.[90] Finally, two cases and a persuasive commentary propose that an implied-in-law covenant of good faith and fair dealing would provide a workable standard by which to judge the competing interests.[91] Discharges would be permitted for just cause, the only legitimate business reason for any firing.[92]

---

86. *See* note 63 *supra* for statutes barring discriminatory discharge.

87. National Labor Relations Act, 29 U.S.C. §§ 151-169 (Supp. III 1979).

88. *See* Nuelsen v. Sorensen, 293 F.2d 454, 461 (9th Cir. 1961) (specified term contract may be terminated only for statutorily recognized cause; only for such a termination may compensation be totally cut off).

89. *See, e.g.*, Percival v. General Motors Corp., 539 F.2d 1126 (8th Cir. 1976) (discharge for revealing false corporate records upheld); Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439 (7th Cir. 1964) (no enforceable claim after long service with corporation); Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959) (no enforceable claim after discharge without cause after 45 years service); Odell v. Humble Oil & Ref. Co., 201 F.2d 123 (10th Cir. 1953), *cert. denied*, 345 U.S. 941 (1953) (discharge of employees for testifying before grand jury held not actionable); Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977) (discharge for refusal to falsify medical records upheld).

90. *See* Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (discharge of doctor for difference of opinion on drug testing on human subjects upheld as not in violation of specific expression of public policy); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (discharge of employee who objected to selling product with potential defect upheld). *See also* Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960) (discharge of employee accepting jury duty upheld); *but see* Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 255 Pa. Super. Ct. 28 (1978) (discharge of employee accepting jury duty reversed).

91. Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); *see generally Employee's Interests*, *supra* note 5.

92. This just cause standard is the same due process standard established by the civil service statutes and the collective bargaining agreements under the National Labor Relations Act.

The Public Sector: Overshooting the Mark

In direct contrast to the current lack of due process protection for the private sector employee[93] is the over protected status of the public employee.[94] Both positions, ironically, display an exact reversal of the original philosophies governing the two employment spheres.[95] Inroads into the originally complete executive power to hire and fire public employees at will began with the passage of the Tenure in Office Act in 1820[96] and the civil service statutes in 1883.[97] Within the last several years, further inroads have been made into the remaining areas of traditionally autonomous executive patronage power.[98] Although positions not expressly covered by the various federal, state, and local civil service statutes[99] are labelled exempt, such positions are not automatically patronage jobs, for other groups of public employees are protected by collective bargaining agree-

93. *See* notes 58-60 and accompanying text *supra*.

94. See R. VAUGHN, THE SPOILED SYSTEM (1975) for a portrait of the bureaucratic immobility and procedural difficulties in effecting a discharge from the federal civil service.

> [T]he civil service system is a basic cause of the peculiar inability of the government to improve its standard of performance. The critical fact of civil service today is that covered employees are rarely discharged from government employment for inadequately doing their jobs. The civil service system has provided the equivalent of life tenure (at least until retirement) once a brief probation period is passed, absent what the government considers a serious act of misconduct. As a result, government no longer effectively enforces a minimum level of quality in the work performance of its employees.

Frug, *supra* note 26, at 945.

95. See notes 26-28 and accompanying text *supra*, and notes 22-35 and accompanying text *supra* for a comparative historical picture of both employment sectors.

96. *See* note 46 *supra*.

97. *See* notes 51-56 and accompanying text *supra*.

98. Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976); Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972); Shakman v. Democratic Org. of Cook County, 481 F. Supp. 1315 (N.D. Ill. 1979).

99. The major federal civil service statute is the Lloyd-LaFollete Act, Act of Aug. 24, 1912, ch. 389, 37 Stat. 555, codified at 5 U.S.C. §§ 7101, 7102, 7501 (Supp. III 1979). The Civil Service Reform Act of 1978 appears at 5 U.S.C.A. §§ 1110-8913 (West Supp. 1979). State statutes provide either general coverage, *e.g.*, ARIZ. REV. STAT. ANN. § 41-783 (Supp. 1980); CONN. GEN. STAT. ANN. (West) §§ 5-193-268 (Supp. 1980); N.Y. CIVIL SERVICE LAW (McKinney, Supp. 1980), or limited class coverage, *e.g.*, OKLA. STAT. ANN. tit. 74, §§ 801-839 (West) (Supp. 1980) (sole discretion of governor). Local statutes either require coverage for units of specified size or type, *e.g.*, ALASKA STAT. § 29.23.550 (1972) (all local employees covered); N.Y. CIVIL SERVICE LAW (McKinney, Supp. 1980) (all subdivisions covered). Illinois appears to be a hybrid: ILL. REV. STAT. ch. 127, par. 63(b) 104 (1979) (all offices and positions of employment in the service of the state covered unless specifically exempted).

ments[100] or statutory tenure granted after a specified probation period.[101] Even without these exceptions, however, estimates place the number of unprotected patronage employees at seven and one-half million, or nine percent of the United States work force. Using conservative estimates to fill gaps in reported statistics, experts conclude that while only one-third of the private sector work force enjoys some form of tenured job security, slightly less than three-fifths of the public work force is similarly protected.[102]

This high level of job protection was not easily won, however. Not until the government adopted some of the functions and thus the status of a private sector employer did it display an internal inconsistency between its assumption of the power to exercise the arbitrary rights of the private employer and its acknowledged duty to deal fairly with its citizens.[103] As long as the government's main function consisted of taxation and economic regulation, its official intrusion into an individual's autonomy usually affected only the traditional, constitutionally protected rights to liberty and property.[104] These rights were strictly interpreted, liberty as freedom from physical restraint, and property as land, chattels and choses in action. Any government infringement of these rights triggered a constitutionally guaranteed due process hearing.[105]

Once the government began expanding its services and welfare activities during the New Deal, none of the new disability, retirement, unemployment and welfare benefits qualified for due process protection because they did not fit into the strict

---

100. The growth of public sector unions has resulted in collective bargaining coverage for such groups as teachers, police officers and firemen. Examples are the Illinois Education Association (IEA), affiliated with the National Education Association (NEA), and the national Fraternal Order of Police. *See generally* Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885 (1973).

101. *E.g.*, MARION, N.C. PERSONNEL ORD. art. II, § 6 (1970) provides that a permanent city employee (one with six months satisfactory job performance) may be discharged for specified violations only after notice, opportunity to improve, and a final notice containing specific reasons for dismissal.

102. Peck, *supra* note 61, at 9. It is interesting to note that one of the main reasons given for support of the constitutionality of civil service tenure was "[t]he sheer number of government employees." Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 THE SUP. CT. REV. 261, 284.

103. Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees*, 19 U.C.L.A. L. REV. 1052, 1068-74 (1972) [hereinafter cited as *Arbitrary Dismissals*].

104. S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 593 (1979) [hereinafter cited as BREYER & STEWART].

105. *Id.*

interpretation of liberty or property.[106] Unable to reach the status of rights, these programs were regarded as privileges dispensed as government largess, not traditional property.[107] Only a deprivation or impairment of traditional constitutionally guaranteed rights qualified for a due process hearing.[108] This distinction, known as the right-privilege doctrine,[109] drew a sharp line between constitutionally mandated governmental duties, called rights, and discretionary, optional acts and programs, called privileges.[110] While duties were enforceable through judicial due process review, discretionary acts were not generally reviewable.[111] The courts considered any attempt to establish a right to a "discretionary benefit," such as welfare, unemployment compensation, education, public employment or a regulatory license, as an absolute contradiction in terms. No judicial due process review could be commanded to challenge the withdrawal or refusal of such a privilege. An individual could not claim or retain that to which he had no constitutional right.[112]

Additionally, the government considered itself free to demand almost any price as a condition of qualifying for or retaining the benefit, including an employee's waiver of

106. The expansion of government functions to include a wide range of advantageous opportunities meant that deprivation of these advantages could work severe hardships. Because the common law would provide no redress for denial of these advantages by a private individual, no protection accrued when the government denied them. BREYER & STEWART, *supra* note 104, at 594. *See generally* Reich, *supra* note 62, at 734-39.

107. BREYER & STEWART, *supra* note 104, at 594.

108. *Id.*

109. *Id.* at 595. *See also* Van Alstyne, *Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) [hereinafter cited as Van Alstyne].

110. The foundation for this distinction is found in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803):

> The conclusion . . . is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for remedy.

111. *Id.*

112. In McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), dismissal of a city policeman for engaging in political activities in violation of a city regulation was upheld. Justice Holmes's reasoning in that case still serves as the most famous statement of the right/privilege distinction: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517-18.

constitutionally guaranteed liberties.[113] The grant of public employment, a discretionary benefit, held no constitutional protection. Consequently, the government was under no compulsion to provide any justification for demanding that the recipient relinquish guaranteed rights, such as freedom of speech and association, as a qualification for receiving the job;[114] such relinquishments were simply labelled as waivers.[115] For the government to justify its actions would have meant supplying reasons for the denial or withdrawal of the largess, which in turn would necessitate a hearing. This hearing was precisely what the government maintained was not due to recipients of gratuitous benefits.

Even as the right-privilege distinction came under increasing criticism,[116] the government continued to limit its compliance with constitutional protections in the area of employment. This limitation was accomplished by a division of its activities into two different functions and labelling them as either governmental (law making or regulatory functions) or proprietary (employer or office manager functions).[117] When the government acted in its governmental capacity, its activities affected the same fundamental rights as those protected under the discredited right-privilege distinction, and the full extent of due

113. Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 311-15 (1974).

114. *Id.*

115. "Without more, an appointed public employee takes his job subject to the possibility of summary removal by the employing authority . . . . Those who, figuratively speaking, live by the political sword must be prepared to die by the political sword." American Fed'n of State, County & Mun. Employees v. Shapp, 443 Pa. 527, 528-29, 280 A.2d 375, 377-78 (1971).

116. In Keyishian v. Board of Regents, 385 U.S. 589 (1966), Justice Brennan quoted from the Second Circuit opinion which stated that although public employment may be denied altogether, a position may not be withheld on an unreasonable basis just because it is a privilege. He then listed a series of cases in which the right-privilege theory had been expressly rejected: Baggett v. Bullitt, 377 U.S. 360 (1964) (loyalty oath); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961) (vagueness of loyalty oath denial of due process); Shelton v. Tucker, 364 U.S. 479 (1960) (forced listing of all organizations joined or supported impaired right of free association); Speiser v. Randall, 357 U.S. 513 (1958) (loyalty oath as condition of tax exemption denial of due process); Slochower v. Board of Educ., 350 U.S. 551 (1956) (dismissal upon invoking right against self-incrimination violative of constitutional rights); Wieman v. Updegraff, 344 U.S. 183 (1952) (loyalty oath).

117. Proprietary powers are those used to administer the internal affairs of the government. One of the most blatant examples of the freedom from Bill of Rights restrictions previously attributed to proprietary actions of government was voiced by the Tennessee Supreme Court in the Scopes Monkey Trial: "In dealing with its own employees engaged upon its own work, the State is not hampered by the limitations of . . . the Fourteenth Amendment to the Constitution of the United States." Scopes v. State, 154 Tenn. 105, 112, 289 S.W. 363, 365 (1927).

process protections therefore applied. When acting in its proprietary capacity as an employer, however, the government handled its affairs arbitrarily.[118] By regarding its "employer" status as equivalent to that of private employers, the government held itself free to discharge employees without notice, hearing, or cause.[119] The governmental-proprietary distinction was simply a renaming of the right-privilege distinction.[120]

Unconstitutional Conditions: The Path to Public Employment Security

The fundamental flaw in the government's management of its proprietary functions was in the assumption that it could, in certain circumstances, cease being "the government."[121] While private sector employers may impose on their employees any conditions which are not illegal,[122] the government may not. "The government as [proprietor] is still the government. It must not act arbitrarily, for, unlike private [employers], it is subject to the requirements of due process of law. Arbitrary action is not due process."[123] The government may not evade the limitations built into the charter that gave it existence. Those

---

118. In Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961), an employee on a United States Naval base was summarily discharged from her position as a cook after being denied a security badge. When she filed suit alleging that she had been dismissed arbitrarily and without due process, the Supreme Court stated,

> [T]he governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment. . . . In that proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control.

Id. at 896.

119. *Arbitrary Dismissals, supra* note 103, at 1072.

120. Even after the right-privilege distinction had been discredited, the governmental-proprietary distinction still had viability because of the analogy to employer powers in the private sector. In 1970, a Montana district court judge stated, "I think that the United States, in its sovereign capacity, has a right in the hiring of employees, to fix the conditions of the hiring. . . . I do not believe that due process enters into the contract between the United States and its employees." Herriges v. United States, 314 F. Supp. 1352, 1355 (D. Mont. 1970). *But see* Purdy v. State, 71 Cal. 2d 566, 582-84, 456 P.2d 645, 656-57, 79 Cal. Rptr. 77, 88-89 (1969) (private employer analogy expressly rejected).

121. *Arbitrary Dismissals, supra* note 103, at 1072. *See* Van Alstyne, *Constitutional Rights of Public Employees: A Comment on the Inappropriate Use of an Old Analogy*, 16 U.C.L.A. L. REV. 751 (1969) for a discussion of Justice William O. Douglas's attack on the analogy to private sector employer powers.

122. *See* note 89 *supra*.

123. Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955) (summary eviction from public housing for refusal to disavow list of subversive organizations overturned).

limitations, expressed in the words, "No person shall . . . be deprived of life, liberty or property without due process of law,"[124] restrict the government unless it can present a compelling reason why the individual must waive his guaranteed rights.[125]

The major argument by which recipients of government benefits have established constitutionally protected rights in those benefits has been the doctrine of unconstitutional conditions.[126] Under this doctrine, the government may not demand that an individual waive any of his constitutional rights as a condition of receiving governmental benefits.[127] By its invocation, citizens have established that no government benefit may be denied as a result of the exercise of fundamental freedoms.

When viewed from the perspective of public employment, the fundamental freedom through which patronage employees have established job security is the right of free political association.[128] Ironically, the earliest cases to uphold the right of free political association involved summarily discharged government employees with past links to Communist organizations.[129] Not until the 1970s did the Supreme Court squarely face the less emotional but numerically far more significant patronage system. By that time protectible rights in many other forms of gov-

124. U.S. CONST. amends. V and XIV, § 1.

125. *E.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968); Elfbrandt v. Russell, 384 U.S. 11 (1966); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952).

126. Van Alstyne, *supra* note 109, at 1445-49.

127. The doctrine of unconstitutional conditions protects the citizens' absolute, constitutionally explicit rights and prevents their involuntary waiver as a condition of receiving a government benefit. The government may not do indirectly that which it is expressly forbidden to do directly: "If the state may compel the surrender of one constitutional right as a condition of its favor, it may in like manner compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926).

128. Although not specifically mentioned in the Constitution, freedom of political association is derived from the right to freedom of speech. In United States v. Robel, 389 U.S. 258 (1967), the Supreme Court held unconstitutional a federal statute making it a crime for a Communist Party member to continue employment with a private sector employer whose plant had been designated a defense facility. Such an employee either had to give up his job or his party membership. "[T]he operative fact upon which the job disability depends is the exercise of an individual's right of association, which is protected by the provisions of the First Amendment." *Id.* at 263. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces the freedom of speech." NAACP v. Alabama, 357 U.S. 449, 460 (1958). Freedom of political association was expressly recognized in Williams v. Rhodes, 393 U.S. 23 (1968).

129. United States v. Robel, 389 U.S. 258 (1967).

ernment benefits had been established,[130] so the results of the first challenges to patronage were long awaited and often predicted conclusions.[131]

DEFINING LEGITIMATE PATRONAGE

The Policymaker Controversy

An investigation into patronage cases reveals a long history[132] of judicial attempts to draw the line between positions regarded as confidential or policymaking and those that are not. The latter group became the target of the first constitutional challenges based on restrictions of the freedom of political association serving absolutely no compelling or rational governmental interest.[133] Categorizing confidential/policymakers at one end of the continuum and the obvious nonconfidential/nonpolicymakers at the other end was simple. The first patronage case in which political affiliation was acknowledged to be an inappropriate qualification for employment concerned jobs far removed from the decision making process[134] of maintenance personnel, bailiffs, security guards, drivers' license examiners and clerical workers.[135] In contrast, those positions deemed

130. Goss v. Lopez, 419 U.S. 565 (1975) (public education); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment benefits); Speiser v. Randall, 357 U.S. 513 (1958) (tax exemption).

131. Schoen, *Politics, Patronage, and the Constitution*, 3 IND. LEGAL F. 35 (1969) [hereinafter cited as Schoen].

132. As far back as 1926, the Supreme Court linked the executive power to discharge with policymaking and execution. Myers v. United States, 272 U.S. 52 (1926).

133. "Under the doctrine of unconstitutional conditions, it is well established that public employment cannot be conditioned upon the waiver of specific constitutional rights unless the state can present a compelling reason why such a waiver is necessary." *Arbitrary Dismissals, supra* note 103, at 1069. The state's interest in maintaining efficiency has been held to be insufficiently compelling to force an employee to waive rights to freedom of speech or religion. Pickering v. Board of Educ., 391 U.S. 563 (1968) (criticizing a superior); Ball v. City Council of Coachella, 252 Cal. App. 2d 136, 60 Cal. Rptr. 139 (1967) (joining employees' association); Hollon v. Pierce, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (1967) (exercising religion). In United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), the government's interest in maintaining the quality of public service and in not permitting employees to use their positions to advance partisan causes was considered compelling enough to justify restriction of political expression.

134. The decision in Illinois State Employees Union v. Lewis, 473 F.2d 561, 579 (7th Cir. 1972), was admittedly one without direct precedent. (Kiley, J., dissenting).

135. A suit brought in Pennsylvania during the previous year, American Fed'n of State, County & Mun. Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971) had denied protection from dismissal for the 3,500 non-policymaking Republican employees discharged by the newly elected Democratic governor.

confidential or policymaking included department executives, agency heads, and personal staff members.[136]

While accurately characterizing the extremes, courts had considerable difficulty in pinpointing the crucial factors in the middle range of patronage positions. Scope of responsibility was one tentative criterion.[137] The greater the number of executive-type responsibilities included in a given position, especially discretionary decision making, the more certain that the position was policymaking[138] and therefore properly subject to summary dismissal.[139] However, decision making responsibility would not be considered policymaking if those decisions were made strictly in accordance with a set of agency guidelines.[140] Executives, agency heads, and staff members with high public exposure and authority to speak for and bind the elected official had obvious policymaking functions.[141] The broadest description concerned the patronage employee whose political affilia-

136. This description includes personal secretaries and other personal staff members who have access to confidential documents although they may not be directly involved in decision making. Finkel v. Branti, 457 F. Supp. 1284 (S.D.N.Y. 1978).

137. Elrod v. Burns, 427 U.S. 347, 353 (1976). The quantitative number of responsibilities alone was not determinative, but also the clarity and rigidity of the rules by which decisions were made.

138. In Ramey v. Harber, 431 F. Supp. 657 (W.D. Va. 1977), the court identified a policymaker as "one who controls or exercises a role in the decision-making process as to the goals and general operating procedure of the office." *Id.* at 666 n.15.

139. Newcomb v. Brennan, 558 F.2d 825 (7th Cir. 1977) (deputy city attorney with all the duties and responsibilities imposed by law on the elected superior, held sufficiently close to policymaking responsibilities of superior to justify summary dismissal); *accord*, Jafree v. Scott, 372 F. Supp. 264 (N.D. Ill. 1974) (assistant attorney general had same responsibilities and authority as chief legal officer of the state; dismissal upheld).

140. Indiana State Employees Ass'n v. Negley, 357 F. Supp. 38 (S.D. Ind. 1973), was a suit in which several former employees of the Indiana Department of Public Instruction challenged their summary discharge when the newly elected Republican Superintendent of Public Instruction took office. Although the plaintiffs attempted to characterize themselves as non-policymaking, the district court held that their duties clearly placed them in the policymaking category. The plaintiffs were Title I or Title II Consultants and Coordinators in the Federal Projects Division, and their duties included processing grant applications from local educational agencies with respect to millions of dollars in federal funds, conducting program reviews of local agencies, and participating in the drafting of the state federal grant plan. In support of their non-policymaking claims, the plaintiffs asserted that their duties were so completely governed by statutes, regulations, and guidelines that they were allowed no room for discretion. The court, noting that they evaluated the merits of applications and exercised great discretion in recommending approvals, refused to credit their description of their positions and declared them sufficiently policymaking to be proper subjects of discharge when the Democratic administrator of their department was replaced by a Republican.

141. Finkel v. Branti, 457 F. Supp. at 1291.

tion was used to promote, enhance, fulfill, or vindicate the power of the appointing executive; such a subordinate on any level would be so closely allied to the elected official that the appropriateness of summary dismissal could not be seriously challenged.[142]

New Standards, New Burdens

The Supreme Court recently decided two cases dealing directly with asserted rights in patronage positions, *Elrod v. Burns*[143] and *Branti v. Finkel*.[144] In *Elrod*, several nonpolicymaking employees filed suit against the newly elected sheriff after their summary discharge. *Branti* involved two Assistant Public Defenders discharged without a hearing because the new Public Defender belonged to the opposite political party.[145] The *Elrod* plaintiffs successfully based their challenge of dismissal on the total lack of discretionary decision making in their jobs. The *Branti* plaintiffs refined the *Elrod* standard by asserting that although discretionary decision making was a large part of their responsibility, the decisions themselves were unconnected with their political beliefs.[146]

Elrod and *Branti* together have established the principle that no government employee may be discharged from his position on the basis of political affiliation unless such affiliation is demonstrably appropriate for effective job performance.[147] The position is one for which political affiliation is proper if political orientation could motivate a decision contrary to the interest of the superior. *Branti* is more than a logical extension of *Elrod*, however. The *Branti* holding not only has expanded the number of patronage workers who may now demand a hearing upon discharge,[148] it has altered the nature of the hearing itself. The significance of this alteration lies in the shift in the allocation of the burden of proof.

---

142. Each of the named activities involves a philosophic commitment to the elected superior. Staff members performing these functions are personal employees of the executive. They are expected to have such allegiance to the executive himself that no question of their retaining their appointments after his departure from office could arise.

143. 427 U.S. 347 (1976).

144. 445 U.S. 507 (1980).

145. Plaintiffs presented evidence that both Branti and his predecessor Public Defender had described plaintiffs as "competent attorneys . . . satisfactorily performing their duties as Assistant Public Defenders." Finkel v. Branti, 457 F. Supp. at 1292.

146. Branti v. Finkel, 445 U.S. at 519.

147. *Id.* at 518.

148. *Elrod*'s holding was confined to obvious non-policymakers. *Branti* assumes protection absent proof to the contrary. The key language is "whether the hiring authority can demonstrate. . . ." 445 U.S. at 518.

After *Elrod*, the dismissed employee had to prove that (1) his dismissal had been politically motivated,[149] and (2) his position was so far removed from the policymaking, confidential level that a requirement of particular party affiliation was an unconstitutional infringement of his freedom of political expression.[150] After *Branti*, however, the burden of proof is now on the public official to prove that a particular political affiliation is a necessary job qualification.[151] This shift is indicative of the general change in judicial attitude toward government benefits. Government employees have finally achieved the same level of protected rights in their job as welfare recipients,[152] the unemployed,[153] students,[154] the disabled,[155] and the aged[156] in their respective benefits.

REDEFINING AND BALANCING THE INTERESTS

The Supreme Court has invested public sector employees with far more security in their positions than is enjoyed by most private sector employees,[157] security considered by the Framers of the Constitution to be diametrically opposed to the public interest.[158] Evidence shows that protection from arbitrary discharge for private sector employees would be in the public interest,[159] yet the courts still mechanically adhere to the anach-

149. The first part of the *Elrod* test was taken directly from Illinois State Employees Union v. Lewis, 473 F.2d 561, 567 (7th Cir. 1972): "[R]ecognition of plaintiff's claim will not . . . require the state . . . to assume the burden of explaining or proving the grounds for every termination. It is the former employee who has the burden of proving that his discharge was motivated by an impermissible consideration."

150. The proof presented for this second element would go toward refuting the defendant's assertion and proof of a compelling government interest significant enough to warrant restriction of that particular plaintiff's right to free political association. Elrod v. Burns, 427 U.S. at 363.

151. *See* note 148 *supra*.

152. Goldberg v. Kelly, 397 U.S. 254 (1970).

153. Sherbert v. Verner, 374 U.S. 398 (1963).

154. Goss v. Lopez, 419 U.S. 565 (1975).

155. Mathews v. Eldridge, 424 U.S. 319 (1976).

156. Wheeler v. Montgomery, 397 U.S. 280 (1970).

157. *See* notes 147-51 and accompanying text *supra*.

158. *See* note 26 *supra*.

159. Evidence shows that discharge from employment affects an employee's self-esteem, since work plays a crucial role in the individual's psychological identity and sense of order. There are also indications that job satisfaction has a positive correlation with length of employment. Therefore, the removal of threats to job security should enhance job satisfaction. Job satisfaction, in turn, correlates positively with low absenteeism, an accepted indicium of worker productivity and efficiency. Thus, the available evidence points to the conclusion that pro-

ronistic termination-at-will doctrine.[160] Conversely, in the area of public employment, compelling government interests have always been legitimate restrictions on individual rights.[161] However, the Court appears to have lost sight of the most compelling government interest of all, the public stake in representative government, because of its effort to guarantee specific rights to individuals.[162] The Court's error in both situations results from its incorrect analysis of what factors belong in the balance.

The private sector balance between the justified interests of the employee in keeping his job and those of the employer in maintaining control over his business is influenced by the "freedom of contract"[163] myth. Freedom of contract had vitality early in the twentieth century because it served the dominant needs of society at that time. The terminable-at-will agreements, which protected the employers' interests while giving lip service to employee freedom to change jobs and better himself, were tolerable to the employee because jobs were abundant.[164] Today, rising unemployment coupled with decreased job mobility renders this concept illusory.[165] The unusually valuable em-

---

tection against arbitrary discharge is of significant benefit to both the worker and the employer.

Furthermore, . . . a decision to discharge reached by due process is more likely to be a good decision than one reached arbitrarily.

. . .

Thus, there appears to be no reason why the expectation of job security should not be realized by all public employees, especially since the public at large also stands to gain.

Smith & Gebala, *Job Security for Public Employees*, 31 WASH. & LEE L. REV. 545, 565-66 (1974) (citations omitted). Although this article deals with public employment, the sources cited for the quotation deal with private employment or employment in general. *See, e.g.*, REPORT OF SPECIAL TASK FORCE TO SECRETARY OF HEW, WORK IN AMERICA (1972); J. TIFFIN & E. MCCORMICK, INDUSTRIAL PSYCHOLOGY (5th ed. 1965).

160. Simmons v. Westinghouse Elec. Corp., 311 So. 2d 28 (La. Ct. App. 1975) (alleged discharge for union sympathies upheld); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (discharge for persistently warning superiors that they were manufacturing a dangerous product upheld). *See also* Comment, *Employment at Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 213-14 (1974).

161. United Pub. Workers v. Mitchell, 330 U.S. 75 (1946).

162. *See* notes 25, 66-67 and 129 and accompanying text *supra*.

163. "Freedom of contract was a cruel illusion because of the extreme differences in bargaining power been employers and employees." Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1826 (1980). The author continues by alleging that the freedom of contract slogan no longer permits total abrogation of fair and reasonable behavior. *But see* Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959) (discharge after 45 years upheld on basis of original contract despite several verbal promises in the interim).

164. Feinman, *supra* note 22, at 130-34. *See generally* Blades, *supra* note 72.

165. *See* Blades, *supra* note 72, at 1411-12.

ployee is the only one with sufficient bargaining power to obtain contractual job security.[166] Consequently, the private sector balancing process is distorted by the Court's incorrect assessment of the voluntary nature of contracting.[167]

The Supreme Court's public sector balancing also misperceives the interests involved. In *Branti*, the Court balanced the government's interest in the power to terminate employees at will[168] against the individual's freedom of political association.[169] If efficient and competent performance of government jobs is seen as the only government interest served by termination-at-will power,[170] the individual will prevail as long as he can demonstrate the requisite level of job skills. Public employees have succeeded in establishing rights against the employer/government simply because the employer *is* the government, and as such is restricted in the manner in which it may deal with its citizens.[171] As long as government efficiency is the only criterion, a patronage system can never be demonstrated to be sufficiently superior to a merit system to justify the infringement upon the individual's freedom of political association.[172] Efficiency does not qualify as a compelling governmental interest.[173]

---

166. *Id.* at 1411.

167. This situation appears to be ripe for imminent correction. Three developments support the view that abandonment of the terminable-at-will contract is at hand: (1) the proposal for a new tort remedy, Blades, *supra* note 72; (2) the proposal for a new statute providing for arbitration of discharge cases, Summers, *supra* note 59, at 519-532; (3) growing judicial dissatisfaction with the harsh results of strict application of the termination-at-will principle. Peck, *supra* note 61, at 1-3.

168. The articulated government interest in *Branti* was in the authority to demand that a person's private beliefs conform to those of the hiring authority. Branti v. Finkel, 445 U.S. at 515-16. This interest is effectuated by the power to terminate the employment at will.

169. Branti v. Finkel, 445 U.S. at 515.

170. The only proper government objective in public employment is the efficient and competent performance of government jobs. And the only factors rationally related to the government's proper objective in public employment are those bearing on a person's qualification to perform the government job for which he is hired. When the decision to hire or fire is based wholly or partially on the fact of a person's political affiliation, . . . the government's power to hire and fire is exercised by reference to irrelevant facts lacking a rational relationship to a proper government objective.

Schoen, *supra* note 130, at 76-77. This reasoning is reflected in Branti v. Finkel, 445 U.S. at 517.

171. *Arbitrary Dismissals, supra* note 103, at 1074.

172. In fact, the opposite may be true. The patron dispenses jobs according to what the applicant has given in return. Usually this is votes, not personal loyalty. Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 320-21 (1974).

173. But it does qualify as a rational basis for a statutory classification. In Califano v. Jobst, 434 U.S. 47 (1977), the Supreme Court held that effi-

What the Court has forgotten is the third factor in the public sector balance, the "societal"[174] or public interest. Society as a whole is interested in loyal, responsible, efficient public service; so far, the public interest parallels that of the government.[175] The true character of the public interest emerges only if summary discharge of employees is evaluated. It is vital that a sufficient number of positions in the public sector be terminable at will, not just at the will of the appointive officer, but at the will of the electorate.

At election time, meaningful voter participation would be lost if only chief executives could be removed after each term of office.[176] Without the freely acknowledged, continuing power of the people to change an existing government or establish an entirely new government, the philosophic foundation upon which the nation was built is weakened.[177] Man, through the exercise of reason, perceives that his freedom—the protection and guarantee of his basic rights—can be accomplished only through

---

ciency and administrative convenience were sufficient to uphold a discriminatory test for social security benefit retention.

174. Often mentioned by courts and commentators, this interest is usually dealt with superficially. One of the societal interests was served by patronage's quasi-welfare function, whereby the needy received a subsistence for ward party work and immigrants were assimilated into the community. This quasi-welfare function is of historical interest only. The other societal interests discussed are the same as the governmental interests: loyal performance of duties, administrative responsibility, and responsiveness to governmental superiors. Note, *A Constitutional Analysis of the Spoils System—The Judiciary Visits Patronage Place*, 57 IOWA L. REV. 1320, 1326 (1972).

175. Even Justice Powell's *Branti* dissent, while perceiving the public interest as far more significant than a generalized stake in "good government," still viewed the major political parties as the most important victims of the potential bad effects of the *Branti* holding. Justice Powell saw the commitment to national political parties as a guarantee of sufficient personnel changes after each election. The political parties are important because the campaigning by the parties provides a forum for public debate, and the election success of one party assures the cooperation necessary between executive and legislative branches to effect policy changes. This thinking raises the parties to near constitutional status and disturbingly confuses means with ends. Justice Powell also saw the *Branti* decision as a limitation on the ability of the voters to structure the operation of their democratic system as they chose. His example, however, was extremely limited. He viewed the holding as mandating a unilateral alteration of the number of elected vs. appointive positions; for example, the voters in Rockland County, the location of the original dispute in Branti v. Finkel, will now have to legislate that all assistant public defenders be elected positions in order to maintain partisan politics as the basis of choosing holders of those positions. Branti v. Finkel, 445 U.S. at 521-34 (Powell, J. dissenting).

176. "When the people voted . . . John Quincy Adams [out of office], they undoubtedly intended to vote that most of [his subordinates] should go with him." Frug, *supra* note 26, at 950.

177. Wright, *The Relation of Law in America to Socio-Economic Change*, 28 ARK. L. REV. 440, 447-54 (1975).

government. By submitting his grievances to the law instead of resorting to self help, he barters a small measure of his freedom in return for the assurance that the remaining large measure will be preserved.[178] This reminder of ultimate power is the true public interest in the three-factor balance in public sector employment.

PLACING *BRANTI* IN PERSPECTIVE: A SECOND LOOK

Applied mechanically, the *Branti* test of necessary demonstration of the appropriateness of political affiliation could undermine our representative government.[179] Applied judiciously, it can provide the proper measure of job security necessary in today's society.[180] If challenged, the discharging executive must give reasons for dismissal other than party affiliation; consequently, positions unconnected to goal or policy formulation, but essential for continuity and smooth efficiency in the functioning of the bureaucracy, are now granted a type of quasi-civil service security.[181] Those positions connected with the formulation and implementation of the philosophy and objectives of the office holders do not warrant any right to this due process, for they are the legitimate patronage appointments. Consequently, the *Branti* holding has not absolutely guaranteed job security to anyone but top-level elected officials. What has been mandated is a due process review. If challenged, the discharging executive must present either (1) proof that political affiliation is a proper criterion for the position, or (2) a statement of legitimate reasons for discharge other than political affiliation. This modest requirement would bring the level of job security for public employees into line with that predicted as appropriate for the private sector.[182] It also appears to be an acceptable accomodation of all three interests involved in public employment.

It is questionable whether all judges will properly use the *Branti* holding to accomplish only that degree of job security compatible with the demands of the other interests to be bal-

178. *Id.*

179. "If a government does not carry out the ends for which it is established or if it violates or impinges upon those basic rights, then the people have the power to change it or, if need be, to establish a new government that will be responsive to the people." *Id.* at 449. The framers of the Constitution were exercising this very right when they replaced the Articles of Confederation with a new Constitution and a new governmental structure.

180. *See* note 159 *supra*.

181. The requirement of justification is similar to the civil service requirement of cause for dismissal. Because this requirement is judicially rather than legislatively imposed, it does not transform the newly protected group of employees to civil service status employees.

182. *See* Peck, *supra* note 61, at 1.

anced. *Branti*, taken alone, can be liberally interpreted as a political emasculation of the electorate's role in democratic government. Other prominent cases, however, notably those affirming the importance of each individual vote, are proof that the Court recognizes the necessity of electoral potency. Cases deciding the issue of apportionment have established that each representative in a given elected body must represent roughly the same number of electing voters.[183] A second line of cases has upheld the importance of minority parties and independent candidates to the health of the electoral process.[184] Third parties have often served as channels of innovative ideas ultimately adopted by the successful majority party and have thus been labelled as symptoms of the health of society.[185] The availability of alternatives is the key to representative democracy.

There is no doubt that the *Branti* decision will cause changes in patronage employment. That the burden of proof is now on the elected officials shows that the judiciary has assumed the challenge of interest balancing in judging the fairness of politically motivated dismissals from public employment. The goal of all employees, the right to a hearing establishing the reasons for discharge, has been achieved by patronage employees. For the employee, the hearing provides an opportunity to correct possibly false information. For the official, it forces an honest appraisal of each employee, which can only add to the loyalty and stability of his staff. One sure effect of *Branti* will be to eliminate mass firings following each major election.[186]

---

183. Reynolds v. Sims, 377 U.S. 533 (1964) (one person, one vote); Wesberry v. Sanders, 376 U.S. 1 (1964) (congressional districts must be apportioned equally to accomplish equal weight for each vote); Gray v. Sanders, 372 U.S. 368 (1963) (votes for minority candidates for state-wide office must be accumulated to prevent invalidation by county electoral system); Baker v. Carr, 369 U.S. 186 (1962) (debasement of individual vote by unequal apportionment violates equal protection guarantee of fourteenth amendment).

184. Moore v. Ogilvie, 394 U.S. 814 (1969) (requirement that each candidate's petitions contain at least 200 signatures from each of fifty counties held discriminatory); Williams v. Rhodes, 393 U.S. 23 (1968) (unequal ballot access requirements for majority vs. minority parties held violative of equal protection clause); Shakman v. Democratic Org. of Cook County, 481 F. Supp. 1315 (N.D. Ill. 1979) (use of patronage workers to campaign for incumbents created unfair disadvantage to minority and independent candidates).

185. Williams v. Rhodes, 393 U.S. 23, 39 (1968).

186. The number of large city patronage jobs has been revealed in several lawsuits challenging patronage dismissals. In 1972, Mayor Richard J. Daley of Chicago apparently controlled 30,000 to 35,000 jobs in Illinois. Pennsylvania Governor Shapp dismissed 3,500 Republicans, while Illinois Governor Ogilvie dismissed 10,000 Democrats. After other elections, Pennsylvania Governor Scranton dismissed 7,800 Democrats, and Illinois Secre-

The main danger in the *Branti* decision is that political commitment will be judged a necessary qualification only at the highest decision making levels. The resulting effect could be to entrench nearly all current appointees into a permanently unreviewed occupancy of their positions. More serious, the position itself could then be argued to be exempt from the necessity of political affiliation under all circumstances. The source of democratic vitality, the power of peaceful revolution, must not be stifled by such encroachment on the scope of possible change.

CONCLUSION

As society becomes more complex, any movement altering society's traditional structure necessitates adjustments and accommodations in increasingly remote spheres of influence. Because conflicts that threaten the ability to earn a living have particularly widespread consequences, any shift in the balance of power between employer and employee must be preceded by a clear understanding of the probable effect of any particular decision.

In truth, neither party really "wins" in employer-employee litigation. The fairest outcome to be achieved is a solution sufficient to correct the immediate wrong without destroying the delicate balance between all the affected parties and interests. "In the realm of adjudicatory procedure, a widely recognized aspect of procedural fairness is equality of opportunity to be heard."[187] Assuming the goal of procedural fairness to be fairness and accuracy of result, the essential component of such a judicial decision is wide-ranging information concerning reciprocal influences. Practically, this result depends upon each attorney recognizing that part of his responsibility is to argue each individual employment conflict case as it is located in the larger, societal context.

Interest balancing, then, demands that all affected interests have an opportunity to be heard, whether state action is involved or not. The necessity of due process review before the government may discharge almost any employee insures that "[l]aw is something more than mere will exerted as an act of power. . . . Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether

---

tary of State Lewis dismissed 4,000 Democrats. Brest, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 93 n.39 (1976).

187. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 52 (1976).

manifested as the decree of a personal monarch or an impersonal multitude."[188]

Such constitutionally guaranteed protections may not be directly invoked against a private sector employer, yet in terms of power, giant corporations dwarf some states.[189] The centralization of economic power in the great modern corporations demands that current thinking about privately held business and the public interest must change. The economic power of corporations influences resource allocation, product safety, amount of legally permitted waste and pollution, conditions of work, wages, and prices charged for goods and services.[190] If potential deprivation of desired freedoms was the reason for the elaborate system of checks, balances, and government-restraining amendments,[191] equally destructive private sector power should be subjected to some judicial scrutiny.

That private economic power may be restrained by government in the public interest has been established many times through Congress's use of the Commerce Clause power.[192] Similar restraints should be enacted to establish a due process guideline protecting private sector employees from the arbitrary exercise of their employers' discharge power. In the final analysis though, such a process is mandated not because of constitutional rights or statutory protections; it is mandated simply because it is the only means to solution based on principles of intelligent decision making.

Sarane C. Siewerth

188. Hurtado v. California, 110 U.S. 516, 535-36 (1884).

189. R. BARBER, THE AMERICAN CORPORATION 19-20 (1970).

190. A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY at xxxiv (1968).

191. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 2 (1978).

192. *E.g.*, 15 U.S.C. § 1 (1975) (combinations of companies in restraint of interstate and foreign commerce); 15 U.S.C. § 2 (1975) (monopolization of trade or commerce); 15 U.S.C. § 13 (1978) (discrimination in prices, services, or facilities as violating Clayton Act); 15 U.S.C. § 18 (1978) (acquisition of corporate stock or assets violative of Clayton Act).