COMMENTS

Bursting the Speech Bubble: Toward a More Fitting Perceived-Affiliation Standard

Nicholas A. Caselli†

To the victor belong only those spoils that may be constitutionally obtained.[1]

INTRODUCTION

You work for the government, and you have just been summoned to a disciplinary meeting. Your boss, a Democrat facing reelection, suspects that you support her Republican challenger. She cannot know this for certain—you have never admitted your political affiliation or openly endorsed her opponent. Rather, in an office splintered by partisan politics, she merely perceives you and your closest coworkers as rightward leaning. In return for this purported disloyalty, you receive a pink slip.

You sue the government, confident that you have a winning First Amendment case. At your deposition, government lawyers bombard you with questions: Did you actually support the Republican candidate? No. Did you ever donate money to his campaign? No. Did you put a Republican campaign sign in your yard or a Republican bumper sticker on your car? No and no. And did you ever tell anyone at work about your political views or which candidate you supported? No.

Your denials in hand, the government moves for summary judgment. Applicable circuit law requires plaintiffs to have actually engaged in the protected conduct at issue before the conduct may form the basis of an actionable First Amendment retaliation claim. The court grants the government's motion, reasoning that perceived political affiliation, without more, does not satisfy this standard. Your boss evades liability while you

† BS 2012, The University of Scranton; JD Candidate 2015, The University of Chicago Law School.

1 *Rutan v Republican Party of Illinois*, 497 US 62, 64 (1990).

fail to obtain any redress. You were fired for all the wrong reasons, but it seems as though your claim has slipped through the doctrinal cracks.[2]

Public employees who suffer adverse employment consequences for exercising their free speech rights may file suit under the First Amendment retaliation doctrine.[3] Claimants typically must first prove that they engaged in protected conduct and then prove that such conduct causally contributed to the adverse action.[4] An emerging line of cases explores the scenario described above, in which an employer retaliates based solely on his or her *perceptions* of an employee's political loyalties. As actual affiliation may be lacking, these cases confront courts with a pressing doctrinal question: Must employees prove actual affiliation with the party or candidate in question to prevail on a First Amendment retaliation claim, or does perceived affiliation alone suffice?

While the First, Sixth, and Tenth Circuits have permitted perceived-affiliation claims,[5] the Third Circuit has barred such actions.[6] According to the Third Circuit, constitutional protection presumes the existence of actual protected conduct in the first place.[7] Accordingly, for claims based solely on perceived affiliation, the absence of affirmative conduct is necessarily fatal.

This Comment advocates a less formalistic reading of the First Amendment retaliation doctrine's "conduct" requirement.[8] While speech necessarily entails readily observable manifestations, the same cannot be said of affiliation. The latter is more accurately viewed as encompassing one's closely held beliefs and allegiances. Consequently, the fact that individuals exercise

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2 The facts of this hypothetical are loosely based on those from *Dye v Office of the Racing Commission*, 702 F3d 286, 300–01 (6th Cir 2012).

3 See id at 293–94. Procedurally, public employees claiming to have endured a negative employment action in retaliation for exercising free speech rights may file suit under 42 USC § 1983.

4 See *Dye*, 702 F3d at 294.

5 See *Welch v Ciampa*, 542 F3d 927, 939 (1st Cir 2008); *Dye*, 702 F3d at 300; *Gann v Cline*, 519 F3d 1090, 1094–95 (10th Cir 2008).

6 See *Ambrose v Township of Robinson, Pennsylvania*, 303 F3d 488, 495–96 (3d Cir 2002); *Fogarty v Boles*, 121 F3d 886, 890–91 (3d Cir 1997).

7 See *Ambrose*, 303 F3d at 495.

8 Courts have stated that this element of the retaliation doctrine requires the plaintiff to "engage[ ] in constitutionally protected speech or *conduct*," *Dye*, 702 F3d at 294 (emphasis added), or to "show that his *conduct* was constitutionally protected," *Ambrose*, 303 F3d at 493 (emphasis added).

these freedoms in distinct ways counsels for adopting more-tailored standards.

Further, this Comment notes that perceived-affiliation firings resemble political patronage dismissals. Critically, the democratic values animating the Supreme Court's patronage jurisprudence also underlie the First Amendment's associative protections. Thus, while speech claims may be poor comparators, this Comment argues that the Court's political patronage teachings ought to inform resolution of the perceived-affiliation split.

Part I of this Comment reviews background First Amendment concepts relevant to perceived-affiliation claims, such as freedom of speech and association. Part II then outlines the two divergent approaches that circuit courts have taken to the perceived-affiliation issue. Part III evaluates these alternatives. This Comment ultimately concludes that evidence of perceived affiliation should suffice to state a First Amendment retaliation claim. Importantly, such an approach would go a long way toward safeguarding the important democratic values that such suits vindicate.

I. ANIMATING FIRST AMENDMENT CONCEPTS

This Part considers two prominent First Amendment protections: the freedoms of speech and association. A brief overview of the animating case law highlights the factual scenarios to which each of these theories is particularly well suited. Then, after examining the right of association, this Part turns to a specific type of associative claim based on the practice of political patronage. Although some overlap between speech and association inevitably exists, this synopsis seeks, by comparing the rights at stake and the conduct at issue, to illuminate the doctrinal gaps into which perceived-affiliation claims most naturally fit. Ultimately, this Comment contends that, while some courts have effectively likened perceived-affiliation claims to free speech disputes, such claims are more accurately treated as protesting restrictions on associative freedoms and should thus be judged through this latter lens.[9]

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[9] Compare *Ambrose v Township of Robinson, Pennsylvania*, 303 F3d 488, 495–96 (3d Cir 2002) (comparing the case to *Fogarty*, in which the court analyzed the plaintiff's claim under traditional tests for free speech violations), with *Dye v Office of the Racing Commission*, 702 F3d 286, 298–302 (6th Cir 2012) (determining that the lower court erred in blending a protected-speech retaliation analysis with a political-affiliation retaliation analysis).

A. Freedom of Speech

The First Amendment forbids restraints on spoken or written words as well as on expressive conduct.[10] Specifically, although the Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,"[11] it has "acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'"[12] Thus, the First Amendment has been held to protect incendiary statements made at a Ku Klux Klan rally,[13] the burning of American flags,[14] the wearing of antiwar armbands in school,[15] and an individual's decision to not salute the flag.[16]

Context often dictates the scope of protection afforded by the First Amendment. As such, the government typically has possessed greater authority to regulate speech when acting as an employer than when acting in its sovereign capacity.[17] The traditional view held that employees voluntarily surrender their First Amendment rights as an implied condition of public sector employment and thus lack free speech rights while on the job.[18]

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[10] See *Texas v Johnson*, 491 US 397, 404 (1989) (noting that some conduct can contain elements of communication sufficient to garner First Amendment protection). For further discussion of the First Amendment's protection of expressive conduct, see generally David Cole and William N. Eskridge Jr, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv CR–CL L Rev 319 (1994); James M. McGoldrick Jr, *Symbolic Speech: A Message from Mind to Mind*, 61 Okla L Rev 1 (2008); Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 Harv L Rev 2836 (2005).

[11] *Johnson*, 491 US at 404, quoting *United States v O'Brien*, 391 US 367, 376 (1968).

[12] *Johnson*, 491 US at 404, quoting *Spence v State of Washington*, 418 US 405, 409 (1974).

[13] See *Brandenburg v Ohio*, 395 US 444, 446–49 (1969) (per curiam).

[14] See *Johnson*, 491 US at 420.

[15] See *Tinker v Des Moines Independent Community School District*, 393 US 503, 506, 514 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

[16] See *West Virginia State Board of Education v Barnette*, 319 US 624, 642 (1943).

[17] See David L. Hudson Jr, *The First Amendment: Freedom of Speech* § 8:1 at 197–99 (West 2012). See also *Connick v Myers*, 461 US 138, 147 (1983).

[18] See Hudson, *Freedom of Speech* § 8:1 at 197–99 (cited in note 17). See also *Adler v Board of Education of City of New York*, 342 US 485, 492 (1952) ("[Public employees] may work for the school system upon the reasonable terms laid down by the proper authorities of New York."); *McAuliffe v City of New Bedford*, 29 NE 517, 517–18 (Mass 1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

However, this restrictive perspective slowly eroded during the late twentieth century.[19]

Scholars have described *Pickering v Board of Education of Township High School District 205*[20] as the Court's "seminal public-employee free speech case."[21] *Pickering* recounted the tribulations of a high school teacher fired for penning a newspaper editorial that was critical of his school district's spending.[22] To resolve the educator's claim that the school had violated his free speech rights, the Court set forth a balancing test in which it weighed "the interests of the . . . citizen, in commenting upon matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services."[23] The Court held that the school district had violated the teacher's First Amendment rights because the state's interest in "attaining the generally accepted goals of education" could not justify the effective curtailment of speech that touched on issues of such pronounced public importance.[24]

Fifteen years later, in *Connick v Myers*,[25] the Court seized an opportunity to refine the *Pickering* test by elaborating on its "public concern" prong.[26] In a dispute involving an assistant district attorney dismissed for circulating a questionnaire critical of office policies to her coworkers,[27] the Court professed that speech "touch[es] upon a matter of public concern" if it "relat[es] to any matter of political, social, or other concern to the community."[28] However, the Court found no constitutional violation in *Connick*, holding instead that the "questionnaire touched upon matters of public concern in only a most limited sense."[29]

Contemporary analysis of public sector–free speech claims thus typically begins with the court considering whether the

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19 See, for example, *Keyishian v Board of Regents of the University of the State of New York*, 385 US 589, 604 (1967) (holding that a state-mandated loyalty oath in faculty contracts violates the First Amendment).

20 391 US 563 (1968).

21 Hudson, *Freedom of Speech* § 8.2 at 199 (cited in note 17).

22 *Pickering*, 391 US at 565–67.

23 Id at 568.

24 Id at 565, 568, 574 ("In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.").

25 461 US 138 (1983).

26 See id at 147–49.

27 Id at 140–42.

28 Id at 146–47.

29 *Connick*, 461 US at 154.

speech at issue touches on a matter of public concern. If so, the court then applies the *Pickering* balancing test.[30] For instance, the Court held that a police officer's video depicting himself engaging in sexually explicit conduct while in uniform did not satisfy the public-concern prong, and thus the Court did not reach the balancing test.[31] Alternately, the Court held that the remark "if they go for him again, I hope they get him"—made by a clerical employee at a county constable's office in reference to the 1981 assassination attempt on President Ronald Reagan—not only touched on a matter of public concern but also prevailed at the balancing stage.[32] In a more recent case, the Court determined that a deputy district attorney who expressed concerns that a warrant application "contained serious misrepresentations"[33] had no constitutional claim.[34] Rather, the Court held that public employees who "make statements pursuant to their official duties" cease to speak as citizens and effectively concede constitutional insulation.[35] In sum, the *Pickering*/*Connick* test provides the essential framework for disposition of any modern public sector–free speech claim.

B. Freedom of Association

Unlike the freedom of speech, the right of association is not explicitly mentioned in the First Amendment.[36] While commentators have speculated about whether the First Amendment guarantees an independent associative right, the Supreme Court dispelled any doubt in *National Association for the Advancement of Colored People v Alabama*[37] ("NAACP"). *NAACP* marked one of the Court's earliest and most explicit affirmations of an associative right.[38] The case involved an attempt by the Alabama Attorney General to enjoin the NAACP from operating within state

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30 See Hudson, *Freedom of Speech* § 8.4 at 205–11 (cited in note 17).

31 See *City of San Diego v Roe*, 543 US 77, 78, 84 (2004).

32 *Rankin v McPherson*, 483 US 378, 379–80, 388–92 (1987).

33 *Garcetti v Ceballos*, 547 US 410, 414 (2006).

34 See id at 421.

35 Id.

36 See US Const Amend I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

37 357 US 449 (1958).

38 See John E. Nowak and Ronald D. Rotunda, *Constitutional Law* § 16.41(a) at 1418 (West 8th ed 2010).

bounds.[39] A state court ordered the NAACP to produce the names and addresses of its members.[40] Noting the "vital relationship between freedom to associate and privacy in one's associations,"[41] the Supreme Court held the production order unconstitutional.[42] Because NAACP members had shown that such a revelation would expose them to economic loss, physical violence, and other hostilities, the Court considered the order a "substantial restraint" on the members' right to associate.[43] Since *NAACP*, the Court has repeatedly confirmed that the right of association falls within the First Amendment's purview.[44]

The Court has explored three broad categories of association since *NAACP*. First and foremost, constitutional protections apply to associations formed to exercise explicit First Amendment rights.[45] For instance, the Court has often nullified restraints on associations that fulfill religious or expressive purposes unless such limitations serve a compelling state interest that cannot be furthered through less restrictive means.[46] Next, there are associations whose formation implicates the rights to privacy and autonomy as "protected by the concept of liberty in the due process clauses and as an implicit part of the Bill of Rights guarantees."[47] This category of due-process rights includes the freedom to choose one's spouse and acquaintances.[48] Lastly, the freedom of association safeguards the right of individuals to coalesce for purposes unrelated to any fundamental constitutional right.[49] For example, courts commonly recognize the formation of labor

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39 *NAACP*, 357 US at 452.

40 Id at 453.

41 Id at 462. See also *American Communications Association v Douds*, 339 US 382, 402 (1950) (stating that "[a] requirement that adherents of particular religious faiths or political parties wear identifying arm-bands" is an example of government action that interferes with the freedom of assembly).

42 See *NAACP*, 357 US at 466.

43 Id at 462.

44 See, for example, *Brown v Socialist Workers '74 Campaign Committee (Ohio)*, 459 US 87, 91–92 (1982); *Louisiana v NAACP*, 366 US 293, 296 (1961); *Bates v City of Little Rock*, 361 US 516, 522–23 (1960). See also James W. Torke, *What Price Belonging: An Essay on Groups, Community, and the Constitution*, 24 Ind L Rev 1, 54–59 (1990).

45 See, for example, *Roberts v United States Jaycees*, 468 US 609, 618 (1984).

46 See, for example, id at 623.

47 Nowak and Rotunda, *Constitutional Law* § 16.41(b) at 1418–19 (cited in note 38).

48 See, for example, *Moore v City of East Cleveland, Ohio*, 431 US 494, 505–06 (1977); *Loving v Virginia*, 388 US 1, 12 (1967). See also *Roberts*, 468 US at 618 ("[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.") (citations omitted).

49 See Nowak and Rotunda, *Constitutional Law* § 16.41(b) at 1418 (cited in note 38).

unions and trade associations to achieve economic goals as worthy of protection.[50]

Courts have applied varying levels of scrutiny to state interference with different associations, depending on whether the associations are commercially motivated or of a more intimate, familial nature.[51] In *Roberts v United States Jaycees*,[52] for example, the Court unanimously upheld a state law that prohibited nonprofit organizations from excluding female members.[53] The Court likened the organization at issue to a large enterprise formed for business purposes rather than an intimate, familial association.[54] Because the organization was neither small nor selective, the Court next considered whether the law infringed the members' "freedom of expressive association."[55] The Court decided that the enforcement of the statute amounted to merely an "incidental abridgment," one whose effect was "no greater than [ ] necessary" to achieve the legitimate end of curtailing "invidious discrimination."[56] After *Roberts*, both courts and scholars have commonly conceptualized the freedom to associate as a continuum, with commercially motivated associations receiving the least insulation, and intimate associations and associations formed to exercise First Amendment rights enjoying greater protection.[57]

C. Political Patronage

Importantly, the Court has found that associations formed for political purposes vindicate an essential constitutional freedom and thus fall toward the spectrum's more protective end.[58]

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50 See, for example, *Railway Mail Association v Corsi*, 326 US 88, 91–92, 94 (1945).

51 See Nowak and Rotunda, *Constitutional Law* § 16.41(c) at 1419–21 (cited in note 38).

52 468 US 609 (1984).

53 See id at 612–17, 628–29.

54 See id at 620–21. The Court noted that protecting such personal relationships from state interference is central to any concept of liberty. See id at 618–19 (reasoning that certain "personal bonds" contribute to culture and tradition because they "transmit[ ] shared ideals and beliefs[,] . . . foster diversity and act as critical buffers between the individual and the power of the State," and noting that "individuals draw much of their emotional enrichment from close ties with others," such that constitutional protection "safeguards the ability independently to define one's identity").

55 Id at 622.

56 *Roberts*, 468 US at 628.

57 See Nowak and Rotunda, *Constitutional Law* § 16.41(d) at 1421–22 (cited in note 38).

58 See, for example, *Kusper v Pontikes*, 414 US 51, 56–57 (1973) ("[F]reedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.") (citations omitted); *Sweezy*, 354 US at 250 ("Our form of government is

As such, dismissals of public employees on the basis of political affiliation have been found to severely infringe the freedoms of speech and association.[59] Scholars have broadly defined this illegitimate practice—political patronage—as "the allocation of the discretionary favors of government in exchange for political support."[60] In modern politics, patronage surfaces most conspicuously as a quid pro quo between elected officials promising employment or similar kickbacks and their most prolific contributors. The saying "to the victor go the spoils" hints at the inner workings of a political patronage machine.[61] Significantly, because politicians sustain patronage systems by dismissing political rivals and replacing them with loyal supporters, such practices are functionally analogous to perceived-affiliation firings.

Historians have traced the American patronage system as far back as the presidencies of Washington, Jefferson, and Jackson.[62] Despite the ingrained nature of the practice in American politics, however, the Supreme Court's view of politically motivated firings was decidedly negative when it heard its first major patronage case, *Elrod v Burns*,[63] in 1976. In fact, just three years before *Elrod*, the Court had suggested that partisan cronyism at the federal level must cease: "[P]artisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences."[64]

While much early criticism of political patronage centered on its "corruption and inefficiency,"[65] the Court used *Elrod* to refocus its analysis on the practice's constitutional obstacles.[66] The dispute

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built on the premise that every citizen shall have the right to engage in political expression and association. . . . Exercise of these basic freedoms in America has traditionally been through the media of political associations.").

59 See, for example, *Branti v Finkel*, 445 US 507, 515 (1980); *Elrod v Burns*, 427 US 347, 355 (1976) (Brennan) (plurality).

60 Martin Tolchin and Susan Tolchin, *To the Victor . . . : Political Patronage from the Clubhouse to the White House* 5 (Random House 1971).

61 Id at 323 (attributing this common adage to then-governor William Learned Marcy's remark, "To the victor belong the spoils of the enemy").

62 See, for example, Carl E. Prince, *The Federalists and the Origins of the U.S. Civil Service* 2–6 (New York 1977); Tolchin and Tolchin, *To the Victor* at 323–26 (cited in note 60).

63 427 US 347 (1976).

64 *United States Civil Service Commission v National Association of Letter Carriers*, 413 US 548, 564 (1973).

65 *Elrod*, 427 US at 353–54 (Brennan) (plurality) (noting the historical growth and decline of patronage systems).

66 See id at 354–55 (Brennan) (plurality).

in *Elrod* began with the 1970 Cook County sheriff's election, in which Democrat Richard Elrod replaced a Republican incumbent.[67] The office's de facto patronage system traditionally permitted the new sheriff to replace any of the office's non-civil-service employees[68] if they belonged to the opposition party and failed to obtain the requisite support from the new sheriff's party.[69] The respondents—all Republicans—were discharged or placed in imminent danger thereof upon Elrod's assumption of office.[70] The Court found in favor of the discharged workers, holding these patronage dismissals unconstitutional under the First and Fourteenth Amendments.[71] Specifically, the Court wrote that "patronage dismissals severely restrict political belief and association," and "any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms."[72] In two later cases, *Branti v Finkel*[73] and *Rutan v Republican Party of Illinois*,[74] the Court elaborated on the core principles governing politically motivated firings. The rule that ultimately emerged from this trilogy of cases provides that dismissal, promotion, transfer, recall, and other hiring decisions[75] based on party affiliation and obligations of support are unconstitutional,[76] except when effective performance of the office's duties requires a particular political affiliation.[77]

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67 Id at 350 (Brennan) (plurality).

68 For a definition of "civil service" employee, see 5 USC § 2101(1) ("[T]he 'civil service' consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services."). Underlying most state and federal civil service legislation is "the merit principle": employment decisions relating to civil service employees ought to be made on the basis of merit rather than political patronage. See *Elrod*, 427 US at 351 (Brennan) (plurality).

69 *Elrod*, 427 US at 351 (Brennan) (plurality).

70 Id at 350–51 (Brennan) (plurality).

71 See id at 350, 373–74 (Brennan) (plurality).

72 Id at 372–73 (Brennan) (plurality).

73 445 US 507 (1980).

74 497 US 62 (1990).

75 See *Rutan*, 497 US at 79 (holding that patronage prohibitions extend not only to dismissals but also to various other employment actions).

76 See *Elrod*, 427 US at 372–73 (Brennan) (plurality) (holding that efficiency arguments, among others, do not justify the restraints that patronage systems place on First Amendment liberties).

77 See *Branti*, 445 US at 518–20 (clarifying that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved"). For a discussion of government positions for which political affiliation is an appropriate requirement, see *McCloud v Testa*, 97 F3d 1536, 1556–58 (6th Cir 1996) (outlining four categories of government offices covered by the *Branti* exception and providing examples).

These cases effectively condemn the restrictions that patronage firings place on the freedom to associate for political purposes.[78] According to the Court, "political belief and association"—both of which patronage "unquestionably inhibits"—comprise the "core" activities protected by the First Amendment.[79] At least one commentator has observed that "[t]he major constitutional objection to patronage dismissals is the infringement of the freedom of political belief and association."[80] Contrary to patronage practices, the First Amendment guarantees individuals the freedom to hold their own political beliefs and associate with others who share the same convictions without the threat of undue government interference.[81]

D. Judicial Acknowledgement of the Speech/Affiliation Dichotomy

A critical premise underlying this Comment's ultimate contention is the clear distinction between speech and affiliation. The idea that speech and affiliation are discrete rights to be analyzed through different doctrinal lenses finds ample judicial support. One of the most apparent instantiations of this principle is the Court's development of distinct doctrines to govern free speech and political patronage claims. When the Court penned *Elrod* in 1976, *Branti* in 1980, and *Rutan* in 1990, it could have simplified matters by implying that political affiliation is merely a variant of free speech—since the Court had already handed down *Pickering* by that time—but it did not. Furthermore, just three years after *Branti* extended and clarified the political patronage doctrine, the Court maintained segregated lines of analysis in *Connick*.[82] Finally, the Court's carefully chosen language in the patronage trilogy suggests that it intended to develop distinct doctrinal branches.[83]

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78 See *Elrod*, 427 US at 355 (Brennan) (plurality) ("The cost of the practice of patronage is the restraint it places on freedoms of belief and association.").

79 Id at 356, 359 (Brennan) (plurality).

80 Marita K. Marshall, Note, *Will the Victor Be Denied the Spoils? Constitutional Challenges to Patronage Dismissals*, 4 Hastings Const L Q 165, 167 (1977).

81 See generally Robert A. Horn, *Groups and the Constitution* (AMS 1971); Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L J 1 (1964); David Fellman, *Constitutional Rights of Association*, 1961 S Ct Rev 74; Charles E. Rice, *The Constitutional Right of Association*, 16 Hastings L J 491 (1965).

82 See *Connick*, 461 US at 145–50.

83 See, for example, *Branti*, 445 US at 515 ("If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes."); *Elrod*, 427 US at 355 (Brennan) (plurality).

Perhaps the most significant acknowledgement by the Court that affiliation and speech ought to be addressed through different frameworks came in *O'Hare Truck Service, Inc v City of Northlake*.[84] In *O'Hare Truck*, the Court reviewed a claim by a towing company that had been removed from a rotational list of servicers used by the city of Northlake, Illinois.[85] The plaintiff alleged that the city ceased its business relationship with the company because the proprietor failed to financially contribute to the reelection campaign of Northlake's incumbent mayor.[86] The proprietor had placed a campaign poster supporting the mayor's challenger at his place of business.[87] Although it ultimately reversed and remanded the case,[88] the Court noted:

> Our cases call for a different, though related, inquiry where a government employer takes adverse action on account of an employee or service provider's right of free speech. There, we apply the balancing test from [*Pickering*]. *Elrod* and *Branti* involved instances where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of an inquiry more detailed than asking whether the requirement was appropriate for the employment in question. There is an advantage in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by the government.[89]

The quoted passage provides substantial insight into the Court's distinct treatment of speech and affiliation claims.[90] It

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84 518 US 712 (1996).

85 Id at 715.

86 Id at 715–16.

87 Id.

88 *O'Hare Truck*, 518 US at 726 (remanding for determination of the applicable standard—that of *Elrod* and *Branti*, or that of *Pickering*).

89 Id at 719 (citations omitted).

90 On the same day that the Court decided *O'Hare Truck*, it also decided *Board of County Commissioners, Wabaunsee County, Kansas v Umbehr*, 518 US 668 (1996). *Umbehr* involved the same substantive issue as *O'Hare Truck*: "[W]hether, and to what extent, the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of the freedom of speech." Id at 670. Unlike *O'Hare Truck*, *Umbehr* was purely a free speech case, and the Court applied *Pickering*, rather than *Elrod* and *Branti*, to hold that the First Amendment protects government contractors from retaliation for exercising free speech rights. See id at 673 ("We agree . . . that independent contractors are protected [by the First Amendment], and that the *Pickering* balancing test . . . determines the extent of their protection."). The fact that the Court applied *Pickering* in the speech context and *Elrod* and *Branti* in the association context provides further evidence that the Court views protected speech and protected

confirms the Court's application of two different standards and strongly implies that the Court recognizes affiliation and belief as measurably more sacrosanct than speech in the public-employment context.[91] This Comment ultimately argues that, by requiring evidence of affirmative conduct and thereby treating perceived-affiliation claims as speech claims, certain courts have erroneously discounted the reasoning behind this established dichotomy. Instead, perceived-affiliation firings are more properly analyzed as restricting political belief and association.

II. THE POLITICAL-AFFILIATION RETALIATION DOCTRINE

The boundaries of the doctrinal background set forth in Part I have been stretched by a new species of claim in which the plaintiff alleges retaliation based solely on what the employer *perceives* to be the plaintiff's political affiliation. The circuits have adopted varying standards to redress First Amendment retaliation actions, but a successful claim typically requires proof that: (1) the employee engaged in constitutionally protected speech or conduct, (2) the employer took a negative employment action against the employee, and (3) the employee's protected speech or conduct was a motivating factor behind the negative action.[92] Once the plaintiff makes out a prima facie case, the

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affiliation distinctly. Various lower courts have acknowledged this speech/affiliation dichotomy. See, for example, *Warzon v Drew*, 60 F3d 1234, 1238 (7th Cir 1995) ("[T]he patronage cases and the *Pickering* cases have similar but distinct rationales."); *Smith v Da Ros*, 777 F Supp 2d 340, 351 (D Conn 2011) ("The analysis of claims of retaliation on the basis of political affiliation differs slightly from the analysis in cases alleging speech-based retaliation."); *Snyder v Blagojevich*, 332 F Supp 2d 1132, 1139 (ND Ill 2004) ("[A] claim of retaliation based on speech is analytically distinct from . . . [a] patronage claim.").

O'Hare Truck effectively resolved a disagreement among lower courts as to which factual circumstances call for application of the *Pickering* test as opposed to the *Elrod* and *Branti* test. At least one commentator has construed this issue as a debate between the "unified spectrum" and the "separate test" approaches. Craig D. Singer, Comment, *Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U Chi L Rev 897, 904–06 (1992).

[91] See *O'Hare Truck*, 518 US at 719 (stating that the First Amendment inquiry in political-affiliation cases is less probing of the claimant's beliefs than is the inquiry in freedom of speech cases).

[92] See *Dye v Office of the Racing Commission*, 702 F3d 286, 294 (6th Cir 2012); *Welch v Ciampa*, 542 F3d 927, 936 (1st Cir 2008); *Gann v Cline*, 519 F3d 1090, 1092–93 (10th Cir 2008); *Ambrose v Township of Robinson, Pennsylvania*, 303 F3d 488, 493 (3d Cir 2002). The *McDonnell Douglas* framework, which shifts the burden back to the plaintiff to show pretext in most employment-retaliation claims, does not apply to First Amendment retaliation claims. See *McDonnell Douglas Corp v Green*, 411 US 792, 798 (1973) ("[R]espondent should be given the opportunity to demonstrate that petitioner's

burden shifts to the employer to show that the negative action would have been taken absent the protected activity.[93]

Courts employ this First Amendment retaliation doctrine regardless of whether the alleged underlying conduct is speech or affiliation.[94] Consequently, attempts to adapt the rigid framework of that doctrine to an increasingly variegated set of factual circumstances have, as might be expected, engendered several significant complications. This is particularly true of various attempts by courts to apply the doctrine's conduct prong to perceived-affiliation disputes. In the case of speech, the existence of protected conduct may often be easily gleaned from the employee's outward expressions, words, or actions.[95] When confronted with a perceived-affiliation claim, however, conduct is not as readily discerned.[96] Instead, as illustrated in Part I, association may exist solely as the product of an individual's closely held beliefs and convictions—absent any of the outward intimations that accompany and delimit speech.[97]

In light of the inherent differences between speech and affiliation, uniform application of this retaliation standard has provoked a split among circuit courts as to what exactly aggrieved employees must prove in order to satisfy the doctrine's conduct element. One line of judicial thought holds that an employer's retaliation for perceived affiliation is actionable even if the employee has not actually affiliated with the party or candidate at issue. By contrast, at least one circuit has held that, without actual affiliation, no constitutionally protected conduct on which to base a claim exists. This Comment ultimately finds that the former approach more closely aligns with the First Amendment's animating values.

A. The Majority View: Permitting Perceived-Affiliation Claims

Presently, the First, Sixth, and Tenth Circuits have each recognized the validity of a retaliation claim based on the theory of perceived affiliation.[98] In 2012, the Sixth Circuit issued the

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reasons for refusing to rehire him were mere pretext."); *Dye*, 702 F3d at 294–95 ("Unlike in the *McDonnell Douglas* burden-shifting framework, the burden does not shift back to a plaintiff to show pretext in First Amendment retaliation claims.").

93 See *Dye*, 702 F3d at 294.

94 See, for example, id at 309 (McKeague concurring in part and dissenting in part).

95 See Part I.A.

96 See Part I.B.

97 See Part I. See also *O'Hare Truck*, 518 US at 719.

98 See note 5.

most recent and sweeping opinion in the split. In *Dye v Office of the Racing Commission*,[99] four Michigan state employees alleged that their Democratic supervisors had retaliated against them because they were perceived as supporting a Republican gubernatorial candidate in an upcoming election.[100] While some of the employees openly endorsed the Republican candidate in the workplace, others remained silent yet alleged that they were effectively perceived as sharing the same affiliation.[101] The employees contended that their supervisors began changing their job duties, timekeeping procedures, number of days worked, and travel reimbursements[102] after a meeting at which each employee was explicitly accused of backing the Republican candidate.[103]

Dye presented the Sixth Circuit with an issue of first impression: "[W]hether individuals claiming to have been retaliated against because of their political affiliation must show that they were actually affiliated with the political party or candidate at issue."[104] The court held that the plaintiffs need not make such a showing in order to prevail and, in doing so, overruled the district court.[105] The *Dye* court took issue with several of the district court's primary legal assumptions. It noted that the district court appeared to have erroneously concluded that, because the plaintiffs' free speech claims did not succeed, their affiliation claims must also fail.[106] The Sixth Circuit disagreed, demonstrating that the retaliation standard need not result in the same conclusion for both speech and affiliation claims.[107]

Further, the Sixth Circuit decided that the district court had erred when the latter concluded that the plaintiffs needed to prove actual affiliation in order to prevail.[108] The majority recognized that the First and Tenth Circuits had already deemed perceived affiliation sufficient to state a valid First Amendment retaliation claim and ultimately adopted the same position.[109] Moreover, the Sixth Circuit took issue with the Third Circuit's reliance on a particular Supreme Court decision: *Waters v*

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99 702 F3d 286 (6th Cir 2012).
100 Id at 292.
101 Id.
102 Id at 293.
103 *Dye*, 702 F3d at 300–01.
104 Id at 292.
105 Id.
106 See id at 298.
107 See *Dye*, 702 F3d at 298.
108 See id.
109 See id at 299–300, citing *Welch*, 542 F3d at 938–39, and *Gann*, 519 F3d at 1094.

Churchill.[110] *Waters* did not involve a perceived-affiliation firing, but rather a protected-speech claim brought by a nurse who was fired from the public hospital at which she worked.[111] Though the nurse had allegedly criticized her boss and her department, what she had actually said was contested.[112] The Sixth Circuit called the Third Circuit's reliance on *Waters* "disingenuous" because the portion of the *Waters* opinion that the Third Circuit cited dealt only with due process violations.[113] With these considerations in mind, the Sixth Circuit ultimately concluded that the employees had presented adequate evidence to suggest that their supervisors "operated under the assumption" that the employees were affiliated with the Republican challenger.[114]

Similarly, in *Welch v Ciampa*,[115] the First Circuit recognized a police officer's claim that he was removed from his role as a detective sergeant because superiors perceived him as supporting the opposition candidate for department chief in a recall election.[116] The First Circuit stated that "neither active campaigning for a competing party nor vocal opposition to the defendant's political persuasion are required" to prevail on a First Amendment retaliation claim.[117] The plaintiff had "adduced evidence that officers who did not support the recall election were perceived as opposing it."[118] The court concluded that "[w]hether Welch actually affiliated himself with the anti-recall camp [was] not dispositive since the pro-recall camp attributed to him that affiliation."[119] Thus, for the First Circuit, actual affiliation was not required. Rather, the fact that political ends motivated the employer's action sufficed to establish a claim.

Lastly, in *Gann v Cline*,[120] the Tenth Circuit permitted a perceived-affiliation claim by a county employee who alleged that she was terminated after she did not campaign for the incoming

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110 511 US 661 (1994). See also *Dye*, 702 F3d at 299–300.

111 *Waters*, 511 US at 664 (O'Connor) (plurality).

112 Id at 664–65 (O'Connor) (plurality).

113 *Dye*, 702 F3d at 300. For more on the Third Circuit's discussion of *Waters*, see Parts II.B, III.C.

114 *Dye*, 702 F3d at 298. For decisions examining the rule set forth in *Dye*, see, for example, *Holsapple v Miller*, 2014 WL 525391, *6 (ED Mich), quoting *Dye*, 702 F3d at 300; *Heffernan v City of Paterson*, 2014 WL 866450, *15 (D NJ).

115 542 F3d 927 (1st Cir 2008).

116 Id at 933–35.

117 Id at 939.

118 Id.

119 *Welch*, 542 F3d at 939.

120 519 F3d 1090 (10th Cir 2008).

county commissioner and was thus perceived as opposing his election.[121] The Tenth Circuit reasoned that the critical inquiry in political-affiliation retaliation cases is the employer's motivation: the "only relevant consideration is the impetus for the elected official's employment decision vis-a-vis the plaintiff, i.e., whether the elected official prefers to hire those who support or affiliate with him and terminate those who do not."[122] Moreover, *Gann* rejected two common defense-bar counterarguments: first, that apolitical status cannot constitute a substantial or motivating factor in retaliation actions, and second, that affording relief would open the floodgates of future litigation.[123] In doing so, the Tenth Circuit emphasized the existing doctrinal requirement that claimants establish an adequate causal link between their actual or perceived political beliefs and the eventual adverse action.[124] Ultimately, then, a First Amendment retaliation claim based on perceived political affiliation is a tested theory that at least three circuits have explicitly recognized.

B. The Minority View: Rejecting Perceived-Affiliation Claims

As compared to the approach of the First, Sixth, and Tenth Circuits, the Third Circuit has firmly rejected First Amendment claims in which the allegedly protected conduct is merely perceived. In *Ambrose v Township of Robinson, Pennsylvania*,[125] the Third Circuit rejected the claim of Terry Ambrose, an officer suspended from his job because department officials allegedly believed that he supported a fellow officer in a lawsuit against the township.[126] The police chief suspected that Ambrose wanted to copy documents relevant to the other officer's lawsuit by sneaking into the administrative wing of the police department.[127] While Ambrose admitted entering the administrative wing, he denied copying the documents.[128] Although Ambrose executed an affidavit in support of his colleague and against the township, the Third Circuit determined that he offered no evidence proving that the township was actually aware of the

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121 Id at 1091–92.
122 Id at 1094.
123 See id.
124 See *Gann*, 519 F3d at 1094.
125 303 F3d 488 (3d Cir 2002).
126 Id at 490.
127 Id at 491.
128 Id.

statement.[129] Absent such awareness, the court held that Ambrose's affidavit "could not possibly have constituted a substantial or motivating factor" in his suspension.[130]

The Third Circuit next considered and rejected the district court's theory that "perceived support" could form the basis of a First Amendment retaliation claim.[131] The circuit court reasoned that a plaintiff bringing such a claim could meet his or her burden only if the conduct was constitutionally protected.[132] Conduct can be constitutionally protected, the court stated, only when conduct actually transpired.[133] Perceived affiliation, without more, can thus never suffice. The court relied heavily on its prior decision in *Fogarty v Boles*,[134] in which a public school teacher brought a retaliation claim alleging that he had been punished based on the mistaken belief that he had discussed the presence of illness-causing contaminants at his school.[135] However, because he denied contacting the press, the *Fogarty* court held that "there was no conduct that was constitutionally protected—indeed, there was no conduct—period."[136] The Third Circuit effectively extended its rejection of perceived-speech claims in *Fogarty* to perceived-affiliation claims in *Ambrose* by observing that "[t]he problem" in *Ambrose* mirrored that in *Fogarty*: "there [was] no protected conduct."[137]

Further, the court relied on a single line from the Supreme Court's opinion in *Waters*. The Third Circuit emphasized the Court's admonition that "[w]e have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information."[138] Recall that *Waters* involved a free speech retaliation claim brought by a nurse whose allegedly disruptive conversation was overheard and cited as the basis of her termination.[139] What Waters actually

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129 See *Ambrose*, 303 F3d at 493.

130 Id.

131 Id at 494–96.

132 See id at 495. In support of its conclusion, the *Ambrose* court recognized that "[o]ther courts of appeals similarly have held that there can be no First Amendment claim when there is no speech by the plaintiff." Id.

133 See *Ambrose*, 303 F3d at 495.

134 121 F3d 886 (3d Cir 1997).

135 Id at 887.

136 Id at 890.

137 *Ambrose*, 303 F3d at 496.

138 Id at 495, quoting *Waters*, 511 US at 679 (O'Connor) (plurality).

139 *Waters*, 511 US at 664 (O'Connor) (plurality).

said was disputed.[140] The Court vacated the case and remanded it for further consideration after reviewing applicable standards.[141] It reasoned that courts should not apply First Amendment doctrine to the facts as the employer thought them to be without first considering the reasonableness of the employer's conclusions.[142] This Comment contends that the Sixth Circuit's interpretation of *Waters* finds more contextual support and is better suited to protect valuable First Amendment liberties than is the Third Circuit's.

C. The *Dye* Dissent

The concerns voiced by the Third Circuit in *Ambrose* were echoed in the *Dye* dissent. The dissent commented that the majority's decision was "not supported by political affiliation case law."[143] The dissent instead suggested that, "[b]ecause the Supreme Court has not spoken directly on this issue, and because the case law is ambiguous with respect to whether such a claim is cognizable," the court should hesitate to recognize a cause of action in the perceived-affiliation context.[144] Critically, the dissent argued that any decision on the subject "should certainly take into account the governing principles in the Supreme Court's political patronage dismissal cases, *Elrod*, *Branti*, and *Rutan* (rather than protected speech cases such as *Waters*)."[145] It aptly observed that patronage cases "deal directly with First Amendment protection of the right to political affiliation, and are thus a window into how the Court views such claims."[146]

Although the *Dye* dissent advocated applying patronage jurisprudence to resolve the issue,[147] the dissent's treatment of the pertinent patronage cases is brief and incomplete.[148] Specifically,

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140 Id (O'Connor) (plurality).

141 Id at 682 (O'Connor) (plurality).

142 See id at 677 (O'Connor) (plurality).

143 *Dye*, 702 F3d at 309 (McKeague concurring in part and dissenting in part).

144 Id at 310 (McKeague concurring in part and dissenting in part).

145 Id at 314 (McKeague concurring in part and dissenting in part).

146 Id (McKeague concurring in part and dissenting in part).

147 See *Dye*, 702 F3d at 314 (McKeague concurring in part and dissenting in part).

148 The *Dye* dissent's treatment of political patronage doctrine is in tension with the *Branti* Court's clear statement that "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance," but that "[t]o prevail in this type of an action, it was sufficient, as *Elrod* holds, for respondents to prove that they were discharged 'solely for the reason that they were not affiliated with or sponsored by the Democratic Party.'" *Branti*, 445 US at 517, quoting *Elrod*, 427 US at 350 (Brennan) (plurality). In a footnote

the *Dye* dissent erroneously interpreted the relevant patronage case law as effectively requiring that the government place "affirmative restraints" on an individual employee's ability to affiliate before state interference becomes unconstitutional.[149] In effect, the *Dye* dissent commits the same error as the Third Circuit in *Fogarty* and *Ambrose*: the analysis is too formalistic and superficial, meaning that its application would ultimately result in the premature dismissal of some perceived-affiliation claims. Relatedly, the *Dye* dissent's approach might also be characterized as failing to account for the fundamental distinctions between speech and affiliation, including the different ways in which individuals actually exercise these discrete liberties. Overall, this Comment thus contends that, although patronage case law does in fact provide a window through which perceived-affiliation claims may be scrutinized, its treatment ought to give way to a more exacting, granular analysis of the Court's existing political patronage jurisprudence.

III. TOWARD A MORE FITTING PERCEIVED-AFFILIATION STANDARD

This Part first demonstrates why patronage law should inform the instant split. It then considers the democratic values that animate the Court's patronage cases. Using these underlying values to guide the analysis, this Part ultimately evaluates the two approaches that circuit courts have taken to resolve the perceived-affiliation issue. Importantly, this assessment finds that the Third Circuit's approach suffers from a number of doctrinal shortcomings in light of several prominent First Amendment tenets. Overall, this Part concludes that the democratic values motivating the Court's patronage jurisprudence necessarily prescribe that perceived-affiliation claims fall within a relaxed understanding of the conduct requirement.

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that is equally powerful, the *Elrod* Court wrote, "No such regulation [of expressive conduct] is involved here, for it is association and belief *per se*, not any particular form of conduct, which patronage seeks to control." *Elrod*, 427 US at 363 n 17 (Brennan) (plurality) (emphasis added).

[149] *Dye*, 702 F3d at 314 (McKeague concurring in part and dissenting in part).

A. Why Patronage Jurisprudence Should Inform the Perceived-Affiliation Split

Multiple considerations compel the conclusion that perceived-affiliation cases are more akin to political patronage claims than to free speech disputes. For instance, both general associative acts as well as the specific decision to affiliate politically implicate one's closely held beliefs and personal fidelities.[150] Unlike speech, neither association in general nor political affiliation in particular necessarily requires any outward exercise or manifestation of protected conduct.[151] Importantly, both patronage and perceived-affiliation cases ultimately hinge on the costs that individuals and society bear when the rights of belief and association are restricted.[152]

Several pertinent consequences naturally follow from these fundamental similarities. It is likely, for example, that the perceived-affiliation circuit split has arisen primarily because the existing First Amendment retaliation doctrine, which requires the presence of constitutionally protected conduct, does not fully account for the subtle yet important differences between speech and affiliation. As such, much rests on how strictly a given circuit chooses to interpret the prima facie conduct element in perceived-affiliation cases as compared to other contexts. Inevitably, a stringent, speech-like conduct requirement will leave unprotected gaps at the margin, making it easier for employers to discharge employees who cannot satisfy such a demanding legal requirement. Further, since the presence of affiliation simply cannot be as easily gleaned as the presence of speech, the inflexible application of a strict conduct requirement contradicts the First Amendment's inherently adaptive reach.[153] Because "exercising" or "engaging" in protected affiliation materializes differently than exercising or engaging in protected speech, courts should adopt a broader view of what acts satisfy the First Amendment retaliation doctrine's protected-conduct requirement. Jurists need a more fitting, adaptive, and encompassing

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150 See Parts I.B, I.C.

151 See Parts I.B, I.C.

152 Compare *Dye*, 702 F3d at 302–05, with *Elrod*, 427 US at 355–57 (Brennan) (plurality).

153 Compare, for example, *Pickering*, 391 US at 564–65 (protecting concrete, public speech: a letter), with *NAACP*, 357 US at 458–59 (protecting amorphous, potentially confidential association: membership in the NAACP and its broader implications).

model to better analyze associative claims and remedy existing shortcomings.

This Comment argues that judges and counsel should focus more closely on the Court's preeminent political patronage and affiliation cases—*Elrod*, *Branti*, and *Rutan*. As the *Dye* dissent noted, "Those cases deal directly with First Amendment protection of the right to political affiliation, and are thus a window into how the Court views such claims."[154] Based on the rights at stake and the nature of the underlying conduct, patronage jurisprudence is superior to free speech jurisprudence as a comparator. Another reason that courts should turn to patronage jurisprudence is that such cases clearly recognize the distinctions between speech and association, as well as the operational consequences that such a distinction precipitates.[155] Violation of the First Amendment's associative protection of political affiliation, for instance, does not require that the government engage in outright coercion or place affirmative restraints on the freedom of belief.[156] Rather, it suffices that the targeted individuals suffer negative consequences solely because they were perceived as lacking the requisite political affiliation.[157]

These germane patronage cases may also have significant ramifications once transposed into the perceived-affiliation arena. For one, employees cannot constitutionally be discharged "solely for the reason that they were not affiliated" with a given party.[158] This strongly insinuates that, when an employee claims politically based retaliation, the appropriate inquiry should focus not on whether the employee was actually affiliated with the given party, but rather on the employer's intent in taking an adverse employment action. The patronage cases thus evince a preference for motive-based analysis.[159] This follows not only from the passages outlined above but also from the fundamental

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154 *Dye*, 702 F3d at 314 (McKeague concurring in part and dissenting in part).

155 See note 148.

156 See *Branti*, 445 US at 517.

157 See *Elrod*, 427 US at 363 (Brennan) (plurality).

158 *Branti*, 445 US at 517, quoting *Elrod*, 427 US at 350 (Brennan) (plurality).

159 For a detailed discussion of motive-based analysis in the Court's First Amendment jurisprudence, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U Chi L Rev 413, 414 (1996) (arguing that "First Amendment law . . . has as its primary, though unstated, object the discovery of improper governmental motives," and stating that "[t]he doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them"). Justice Kagan suggests that First Amendment doctrine is best understood and explained as a type of "motive-hunting." Id.

observation that, when an employer fires a worker solely for political reasons, the employee's First Amendment liberties are infringed regardless of whether he or she can demonstrate actual affiliation.[160]

Accordingly, circuits should allow the Supreme Court's political patronage case law to inform their treatment of perceived-affiliation retaliation claims. The perceived-affiliation issue necessarily requires an analysis of the bounds of protection afforded speech and affiliation. In the context of constitutional safeguards, the Court has already seemingly drawn very apparent connections between the liberties and values at stake and the corresponding substantive and procedural safeguards necessary to protect them. This is especially true in the context of patronage dismissals, which often share many similarities with perceived-affiliation disputes.[161] Those disputes, like political-affiliation retaliation claims, also inevitably turn on the individual's right to affiliate and the democratic values that such a right advances.

To facilitate this analytical approach, the following Section examines the motivating First Amendment values that emanate from *Elrod*, *Branti*, and *Rutan*. Given the commonalities between perceived-affiliation and patronage-dismissal claims, analysis of the appropriate legal standard against which the former ought to be judged should take these animating concerns into account. Largely, these constitutional considerations illuminate the ways in which different perceived-affiliation standards might either foster or undermine the freedoms of political belief and association. In the end, this Comment's application of patronage doctrine to the perceived-affiliation circuit split suggests that courts ought to reject the Third Circuit's view and instead permit perceived-affiliation claims.

B. Applying the Democratic Values That Motivate Patronage Law

Given the many factual and doctrinal similarities shared by patronage dismissals and perceived-affiliation firings, courts seeking to resolve the latter should utilize patronage law's animating

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[160] See *Elrod*, 427 US at 372–73 (Brennan) (plurality) ("[P]atronage dismissals severely restrict political belief and association. . . . [A]ny contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms.").

[161] See, for example, *Gann*, 519 F3d at 1094 (analyzing a perceived-affiliation dispute in the context of the political patronage framework).

values to guide their analyses. These doctrinal underpinnings, offered in the Supreme Court's political patronage trilogy, include such democratic concerns as: (1) minimizing the costs of belief and association, (2) promoting the efficient functioning of government and the electoral process, (3) incentivizing robust debate and the competition of ideas, and (4) erecting barriers to indirect regulation.[162]

1. Minimizing the costs of belief and association.

The *Elrod* Court began its constitutional analysis by observing that "[t]he cost of the practice of patronage is the restraint it places on freedoms of belief and association."[163] After reviewing the political requirements imposed on the respondents,[164] the Court centered its analysis on two costs: the explicit accounting costs resulting from loss of employment, and the implicit opportunity cost associated with foregoing one's true political convictions.[165] Importantly, these particular costs are functionally similar to those imposed by perceived-affiliation firings. Most evidently, employees who are members of the nonincumbent party necessarily risk their livelihoods and the quantifiable benefits of employment by maintaining their affiliation, supporting nonincumbent candidates, or advocating for nonincumbent policies.[166] Patronage requirements also impose opportunity costs on employees by requiring them to forgo expression of their true beliefs.[167] In fact, the Court has gone so far as to liken patronage requirements to "coerced belief."[168] These costs also constrain the ability of nonincumbent-party employees to associate with others of the same political persuasion.[169]

In essence, the *Elrod* Court viewed its ruling as an opportunity to minimize the costs of carrying out one's constitutionally guaranteed rights of belief and association. It expressed particular

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162 See *Elrod*, 427 US at 355–60 (Brennan) (plurality).

163 Id at 355 (Brennan) (plurality).

164 Retention of one's job in the Cook County Sheriff's Office at that time required employees to pledge political allegiance to the Democratic Party, work for or contribute financially to the campaigns of other Democratic candidates, or receive sponsorship from the Democratic Party. Id (Brennan) (plurality).

165 See id at 355–56 (Brennan) (plurality).

166 See *Elrod*, 427 US at 355 (Brennan) (plurality).

167 See id (Brennan) (plurality) ("Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs.").

168 Id (Brennan) (plurality), citing *Buckley v Valeo*, 424 US 1, 19 (1976).

169 See *Elrod*, 427 US at 355–56 (Brennan) (plurality).

concern with the plight of low-income workers, noting that "the average public employee is hardly in the financial position to support his party and another."[170] Due to the "substantial power" wielded by public employers during a time of such high unemployment, the Court posited that such conditions on employment "need not be particularly great" before they impose impermissible costs on First Amendment rights.[171]

Applied to perceived-affiliation firings, *Elrod*'s emphasis on minimizing the costs of belief and association requires eliminating the chilling effects on association that such dismissals impose. Affiliation-based firings indisputably entail societal costs because they raise the marginal cost of engaging in association relative to speech and thereby function to restrain otherwise-valuable conduct. This process distorts the "market" for First Amendment expression, artificially increasing the likelihood that employees will choose to engage in political speech—because it is better protected—instead of association. Thus, political speech (relative to association) is experiencing an asset "bubble"—driven by a heightened judicial reliance on speech-based constitutional tenets. Only by bursting this speech bubble and locating First Amendment analyses in their appropriate doctrinal domains will the market for expression return to equilibrium.[172]

If courts do not hold employers liable for perceived-affiliation firings, there would likely be an uptick in employee willingness to suppress such constitutionally guarded rights. Employees wary of being perceived as sporting a particular affiliation would refrain from engaging in any associative or expressive conduct that might signal their political leanings. Further, such a regime would likely encourage politically apathetic employees to remain inactive.[173] On the other hand, those employees

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[170] Id at 355 (Brennan) (plurality).

[171] Id at 359 n 13 (Brennan) (plurality) ("Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason.").

[172] Note that this metaphor is not making a normative judgment about the absolute value of speech or association but rather stressing the importance of the freedom to choose—without penalty—between the two.

[173] See *Branti*, 445 US at 517, citing *Elrod*, 427 US at 350 (Brennan) (plurality). But see *Branti*, 445 US at 527–28 (Powell dissenting) ("Patronage appointments help build stable political parties by offering rewards to persons who assume the tasks necessary to the continued functioning of political organizations."); *Visser v Magnarelli*, 530 F Supp 1165, 1174 (NDNY 1982):

who openly advocate for nonincumbent policies would likely cease doing so. Otherwise, if fired, they would have to be prepared to shoulder the heavy evidentiary burden of proving a causal link between their firing and their affiliation. Society would experience a resultant net loss of productive democratic conduct due to the inhibitive effects of unchecked perceived-affiliation firings.

Perceived-affiliation firings also silence opposing viewpoints. This outcome is undesirable, of course, because a well-functioning society should spur engagement with the democratic process among all its members through free association and belief.[174] Such engagement typically filters out less effective ideas in favor of stronger ones and ultimately results in efficiency gains.[175] Such reasoning harks back to the classical idea that citizens ought to be able to air their thoughts in a marketplace of ideas with minimal transaction costs.[176]

Still, some observers might argue that permitting retaliation based on perceived affiliation but simultaneously prohibiting it when the employee can make an affirmative showing of affiliation could incentivize an outpouring of conspicuous affiliation. For instance, observing their employer taking unchecked adverse employment actions against silent coworkers might spur nonaffiliated or nonexpressive employees to cease straddling the fence and to make their affiliations known. There are at least two problems with this outcome, however. First, the decision to affiliate ideally stems from an individual's interest in personal autonomy, which, in turn, is grounded in the First Amendment's associative protections.[177] Autonomy interests suggest that employees should be free to choose when—if at all—to publicize their political orientation.[178] Second, if employees rush

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> [P]atronage encourages politics. A candidate's supporters, motivated in part by the possibility of a job or job advancement, engage citizens in dialogue on the political controversies of the day. By contrast, the cutback in permissible patronage practices by the Court . . . only hastens the breakdown of political parties and increases voter apathy.

174 See *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting).

175 See id (Holmes dissenting).

176 See id (Holmes dissenting).

177 See James E. Fleming, *Securing Deliberative Autonomy*, 48 Stan L Rev 1, 36 (1995) (arguing that freedom of conscience and deliberative association "underwrite deliberative autonomy"). See also *Palko v Connecticut*, 302 US 319, 326–27 (1937) ("[O]f freedom of thought and speech . . . one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.").

178 This ideal may not hold true in all situations. See Part III.B.4.

to affiliate in order to obtain constitutional protection, the basis for such affiliation will be hastily conjured or wholly contrived. This is problematic because society values the free exchange of political convictions not only for its own sake but also for the vigorous, well-reasoned discourse that often accompanies it.[179] Such a phenomenon also has serious ramifications for personal privacy, a concern treated more fully in Part III.B.4's discussion of indirect regulation.

2. Promoting efficiency in government and the electoral process.

In addition to the imposition of costly restraints on First Amendment conduct, the *Elrod* Court also addressed the propensity of patronage systems to hamper the efficient functioning of government and elections.[180] Such concerns for government efficiency readily bear on the perceived-affiliation issue as well. Primarily, the Court's analysis on this point reveals discontent with political first-mover advantages sustained solely through strategic-entry deterrence.[181] That is, the Court observed that patronage tips the electoral scales in favor of the incumbent party.[182] Critically, the *Elrod* Court noted that with the increased pervasiveness of government employment had also come increased dependence of a greater swath of the population on such opportunities.[183] The incumbent party in a patronage system thus would enjoy the ability to quash subsequent challengers by conditioning government jobs on political favors.[184]

Even more troubling to the Court was the method of strategic-entry deterrence by which incumbents maintain their primacy. The Court noted that tying employment to partisan allegiance functionally deters support for competing political parties that would otherwise be advanced by existing or prospective employees.[185] Powerful, resource-laden political machines could then significantly influence the government and the electoral process, as they would enjoy the ability to effectively "starve political

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179 See *New York Times Co v Sullivan*, 376 US 254, 270 (1964) ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.").

180 See *Elrod*, 427 US at 356 (Brennan) (plurality).

181 See id (Brennan) (plurality).

182 See id (Brennan) (plurality).

183 See id (Brennan) (plurality).

184 See *Elrod*, 427 US at 356 (Brennan) (plurality).

185 See id (Brennan) (plurality).

opposition" through patronage requirements, especially at the local government level.[186] This hypothesized regime would essentially enable entrenchment of incumbent policies and ideals through tacit political maneuvering.[187] Thus viewed, the *Elrod* Court's ruling was partly an attempt to forestall parties from amassing political capital solely by avoiding competition with more-efficient parties and platforms through the erection of steep entry barriers.

In the context of perceived-affiliation firings, this distaste for ingrained bureaucratic regimes bolstered by inefficient barriers to entry militates for affording claimants greater constitutional protection. Because politically animated justifications substitute for merit-based ones, broadening the scope of protection to include perceived-affiliation claims would likely improve institutional efficiency. Affording employees greater protection would effectively pressure employers to hire or fire based on more objectively appropriate grounds than political affiliation. As a result, permitting perceived-affiliation retaliation claims would likely result in fewer politically motivated firings. As might be expected, elections based on merit rather than on political clout would likely enhance the government's effective operation and provide the citizenry with better-adapted mechanisms to bring about electoral change.

At a very basic level, politically motivated firings also impose great burdens on government employers in the form of searching, hiring, and retraining costs, which institutions ultimately pass on to taxpayers. Further, the expense of political firings necessarily includes losses in specialization that are associated with turnover. Unlike a meritocracy, patronage machines often result in the promotion of less qualified employees. In the long run, then, holding government employers more accountable for political firings would likely stem the costs that society endures as the result of inefficient, politically motivated firings.[188] Recognizing perceived-affiliation claims would thus foster a more efficient government.

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[186] Id (Brennan) (plurality).

[187] For further discussion of entrenchment in executive-branch channels, see id at 369 (Brennan) (plurality) ("Patronage can result in the entrenchment of one or a few parties to the exclusion of others.").

[188] See *Elrod*, 427 US at 364–65 (Brennan) (plurality).

3. Incentivizing robust debate and the competition of ideas.

Though the *Elrod* Court targeted the pernicious entrenchment spawned by political machines, it also expressed fear that patronage would deteriorate the core democratic exchanges that vitalize a free citizenry. As opposed to the individual costs that restraints on association and belief levy, the Court's concern here was primarily with the larger impact of such restraints on the democratic system. Principally, the Court recognized that safeguarding affiliation would solidify our nation's commitment to open discourse and the unfettered exchange of ideas. These First Amendment guarantees evince our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[189] and ultimately assure that "[c]ompetition in ideas and governmental policies is at the core of our electoral process."[190] Patronage requirements are thus inherently "inimical to the process which undergirds our system of government,"[191] "paternalistic,"[192] and "at war with the deeper traditions of democracy embodied in the First Amendment."[193]

Thus, the operative doctrine on politically motivated firings—whether patronage claims or perceived-affiliation actions—ought to recognize the fundamental notion that a democratic society thrives when competition, rather than monopoly, underpins the marketplace of ideas. As contrasted with monopoly, competition in ideas necessarily tests opposing viewpoints, hones proffered arguments, and disposes of weaker alternatives.

Rooted in the work of John Milton and John Stuart Mill,[194] the canonical concept of the "marketplace of ideas" first surfaced in the Court's jurisprudence in Justice Oliver Wendell Holmes Jr's dissenting opinion in *Abrams v United States*.[195] Holmes wrote that "the ultimate good desired is better reached by free

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189 Id (Brennan) (plurality), quoting *New York Times*, 376 US at 270.

190 *Elrod*, 427 US at 357 (Brennan) (plurality), quoting *Williams v Rhodes*, 393 US 23, 32 (1968).

191 *Elrod*, 427 US at 357 (Brennan) (plurality).

192 *Illinois State Employees Union v Lewis*, 473 F2d 561, 576 (7th Cir 1972).

193 *Elrod*, 427 US at 357 (Brennan) (plurality), quoting *Illinois State Employees Union*, 473 F2d at 576. The Court also recognized that the system of political patronage at issue unavoidably ran against prior precedent, which invalidated government action inhibiting belief and association by conditioning public employment on political fidelity to a certain party. See *Elrod*, 427 US at 357–58 (Brennan) (plurality).

194 See John Milton, *Areopagitica: A Speech to the Parliament of England, for the Liberty of Unlicensed Printing* 174–75 (Richard Stevens 1819) (T. Holt White, ed); John Stuart Mill, *On Liberty* 11 (Longmans 1880).

195 250 US 616 (1919).

trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[196] This notion reemerged eight years later in *Whitney v California*,[197] when Justice Louis Brandeis wrote that the "discovery and spread of political truth" requires the ability to "think as you will" and "speak as you think."[198] For Brandeis, free speech and association protected against "dissemination of noxious doctrine."[199] The marketplace of ideas has since pervaded First Amendment jurisprudence, always emphasizing the dual aims of truth and competition.[200]

Instituting a perceived-affiliation regime that punished this employer retaliation at a greater rate would incentivize some employees at the margin to exercise their First Amendment rights more freely. Otherwise, those employees would not readily engage in protected conduct because of the steep transaction costs imposed by a stricter evidentiary standard. Consequently, applying the approach gleaned from patronage case law to the perceived-affiliation split may effectively nudge the quantity and cost of affiliation back toward their equilibrium positions in the marketplace of ideas.[201] Likewise, observers might view the looser

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196 Id at 630 (Holmes dissenting). See also *United States v Rumely*, 345 US 41, 56 (1953) (Douglas concurring) ("Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas.").

197 274 US 357 (1927).

198 Id at 375 (Brandeis concurring).

199 Id (Brandeis concurring). See also *The King v Secretary for Home Affairs*, 2 KB 361, 382 (1923) ("You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous."); *Whitney*, 274 US at 377 (Brandeis concurring):

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

200 See, for example, *Hustler Magazine, Inc v Falwell*, 485 US 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective."); *First National Bank of Boston v Bellotti*, 435 US 765, 810 (1978) (White dissenting) ("[Corporate] expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas."); *Lamont v Postmaster General*, 381 US 301, 308 (1965) (Brennan concurring) ("[T]he right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").

201 See Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 S Ct Rev 1, 4 (explaining that, on one view of Holmes's marketplace analogy, "the crucial concept is 'equilibrium,' the balance of valuations at any given moment," wherein "[t]he benefit of free

affiliation standard as inherently antiregulatory. That is, government actors would not be able to set or manipulate the quantity or price of associative conduct using exogenous, quasi-regulatory tools. In this manner, then, the marketplace of ideas under a rule that permits perceived-affiliation claims would also likely eliminate externalities on nonmarket actors who would otherwise benefit if more individuals shared their expressions. If fostered by a more fitting perceived-affiliation retaliation standard, each of these considerations could contribute to the discernment of truth and the robust debate that characterize a free market for association.

4. Erecting barriers to indirect regulation.

Another consideration that militates for permitting perceived-affiliation claims is the Court's long history of nullifying government restrictions that effectively function as regulations on First Amendment freedoms.[202] In fact, the *Elrod* Court explicitly recognized the "fixed star in our constitutional constellation" that no government official may "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[203] For instance, because the First Amendment safeguards the freedoms of speech, association, and political belief, the Court has reiterated that the right of citizens to aggregate in order to form political parties must also be sheltered from undue state interference.[204]

This restriction on government intervention pertains to both direct and indirect methods of state manipulation. The *Elrod*

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speech is its role in generating the individual choices regarding ideas, and the public awareness of those choices, that add up to the equilibrium of the moment").

[202] See, for example, *Elrod*, 427 US at 357 (Brennan) (plurality), quoting *Mitchell*, 330 US at 100 ("Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office.") (quotation marks omitted); *Cafeteria and Restaurant Workers Union v McElroy*, 367 US 886, 898 (1961) (noting that the government cannot refuse employment because of prior membership in a particular political party); *Wieman v Updegraff*, 344 US 183, 186, 191 (1952) (striking down a state-mandated loyalty oath that required government employees to denounce any affiliation with Communists).

[203] *Elrod*, 427 US at 356 (Brennan) (plurality), quoting *West Virginia State Board of Education v Barnette*, 319 US 624, 642 (1943).

[204] See *Elrod*, 427 US at 357 (Brennan) (plurality) ("[F]reedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.") (quotation marks and citations omitted).

Court found patronage requirements particularly troublesome because of their propensity to indirectly enable a set of backdoor regulations on political belief and association that would violate the Constitution if implemented directly.[205] To illustrate, the Court reviewed two pertinent constitutional decisions covering practices factually similar to patronage dismissals.[206] In *Keyishian v Board of Regents of the University of the State of New York*,[207] the Court invalidated a New York statute forbidding members of "subversive" organizations from obtaining government positions.[208] The Court held that denying public employment solely on the basis of political association violates the First Amendment.[209] Similarly, in *Perry v Sindermann*,[210] the Court rejected what were effectively limitations placed on an educator's free speech rights that materialized when the school's board of regents refused to renew the contract of a professor who publicly disagreed with the board's policies.[211] The *Perry* Court deemed such a constitutional obstruction "impermissible."[212]

Both patronage firings and perceived-affiliation firings pose the same threat of backdoor curtailment of individual liberties that the Court outlawed in *Keyishian* and *Perry*.[213] Specifically, the Court's efforts to forbid indirect regulation of First Amendment conduct should influence the resolution of the perceived-affiliation split along two metrics: preventing the unraveling of personal privacy, and instilling adequate deterrence. First, failing

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205 See id at 357–60 (Brennan) (plurality).

206 See id (Brennan) (plurality).

207 385 US 589 (1967).

208 Id at 589, 609–10.

209 See id at 609–10.

210 408 US 593 (1972).

211 See id at 594–97 ("[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.").

212 Id at 597, quoting *Speiser v Randall*, 357 US 513, 526 (1958) ("For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'") (brackets in original). This indirect-regulation argument similarly framed a major part of the Court's decision in *Branti*. See *Branti*, 445 US at 514–15. The *Branti* Court held that claimants need not prove that they were "coerced into changing, either actually or ostensibly, their political allegiance." Id at 517. Rather, they need show only "that they were discharged 'solely for the reason that they were not affiliated with or sponsored by the Democratic Party.'" Id, quoting *Elrod*, 427 US at 350 (Brennan) (plurality).

213 As further judicial acknowledgment of the speech/association dichotomy, the Court decided *Perry* under the auspices of freedom of speech, whereas it termed *Keyishian* a freedom of association dispute.

to recognize a cause of action for affiliation-based firings may erode individual privacy rights through the phenomenon known as "unraveling."[214] Unraveling refers to the effectively forced disclosure of certain otherwise-private characteristics—political affiliation, marital status, or family plans—by individuals in a competitive pool, such as a roster of job applicants or interviewees.[215] The threat of unraveling first materializes when certain individuals realize that disclosing or signaling these characteristics to employers positively impacts their chances of being hired.[216] The potential advantage of such techniques comes as little surprise. Low-cost signaling mechanisms like disclosure effectively minimize the risks associated with hiring decisions and enable easy sorting among candidates.[217] As more candidates perceive the implicit gains of signaling, the unraveling proceeds until disclosure becomes a de facto requirement for employment. In other words, "disclosure is no longer a choice because the signaling economy attaches stigma to staying silent."[218]

Thus, it is likely that failing to foreclose perceived-affiliation firings would incentivize employees who would otherwise prefer not to reveal their political affiliation to instead disclose or fabricate such an affiliation in order to decrease the likelihood that employers will target them. This unraveling would effectively transpire in two stages. Initially, employees or candidates belonging to the incumbent party and looking to safeguard their employment prospects likely would disclose their affiliation to emphasize this connection. After this initial stage, the unraveling process would essentially force employees of the incumbent party who would prefer to keep their affiliation private to instead reveal. Otherwise, by remaining silent, these employees would forfeit their political advantage, making themselves indistinguishable

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[214] See Scott R. Peppet, *Unraveling Privacy: The Personal Prospectus and the Threat of a Full-Disclosure Future*, 105 Nw U L Rev 1153, 1176–77 (2011); Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 Harv L Rev 2010, 2030–31 (2013) ("Over time [ ] unraveling may ensue . . . prompting the individuals with the least discreditable information profiles . . . to disclose. The unraveling process comes to an end when the only people who have not disclosed their personal information are the people whose disclosure would merely confirm the 'worst case scenario.'").

[215] See Peppet, 105 Nw U L Rev at 1176, 1190 (cited in note 214).

[216] See id at 1176–77.

[217] See id at 1177–78.

[218] Id at 1176. For a closer look at the erosion of autonomy and privacy through "voluntary" disclosures, see Strahilevitz, 126 Harv L Rev at 2030–31 (cited in note 214) (detailing the unraveling that ensues when imperfect markets incentivize "voluntary" disclosures).

from silent members of the nonincumbent party. Similarly, members of the nonincumbent party might be incentivized to fabricate affiliation with the incumbent party, thus compromising their true beliefs. In these ways, the costs of remaining silent once unraveling takes hold are simply too vast. Such a potent unraveling of personal privacy, autonomy, and honesty strongly counsels for adoption of a regime outlawing such firings and removing such incentives to disclose or dissemble. Doing so would align with the Court's proscription on indirect regulation of other recognized constitutional rights.

Next, the argument against backdoor regulation might also be framed in terms of deterring employer wrongdoing. That is, some observers may suggest that sweeping damage awards in actual-affiliation cases could sufficiently deter employers, such that granting a cause of action for perceived-affiliation claims might not alter behavior in any meaningful way at the margin.[219] Claims of retaliation based on political affiliation will sometimes meet the requisite burden of proof to hold employers liable. From this perspective, perceived-affiliation firings are the rare exception rather than the general rule. When firing on the basis of political affiliation, the argument suggests, an employer will eventually dismiss a worker who is able to present sufficient evidence of protected conduct and a causal connection to the subsequent negative action. As such, the employer will then be forced to pay damages that likely exceed the costs associated with retaining the worker in the first place. This implicit threat is enough to prevent affiliation firings from becoming a widespread industry practice. Recognizing a cause of action for perceived-affiliation firings might do nothing more than open employers to a barrage of meritless claims involving complex facts, which may prove prohibitively costly to litigate.

However, if the pool of nonaffiliated or nonexpressive employees is comparatively large in relation to those who have indicated their affiliation, then reliance on such a deterrent theory may be misplaced. Further, such a regime would incentivize employers to pursue those employees who do not produce adequate indicia of affiliation. This leads to a similar self-regulating

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[219] For an example of this effect in another context, see Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J Legal Stud 691, 712–13 (1990) ("Tort law deters [negligent] behavior by requiring wrongdoers to pay full damages (which often greatly exceed the cost of precaution taking) when injuries do occur and victims come forward.").

problem. The employer itself may be able to control the level of expression permitted in the workplace, including the extent to which manifestations of allegiance are adequately recorded or destroyed in anticipation of future litigation. The employment context, in which employers enjoy some measure of control over their agents, inherently differs from typical tort settings in which victimization is largely randomized and parties share no preexisting relationship. Given employers' familiarity with and control over the pool of potential victims,[220] it is unlikely that employers are sufficiently deterred without a perceived-affiliation remedy. Rejecting such a safeguard leaves the class of nonaffiliated or nonexpressive employees defenseless.

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Overall, patronage dismissals share much in common with perceived-affiliation firings. Most importantly, the values that animate the Court's patronage jurisprudence also neatly extend to the perceived-affiliation realm. Recognizing a cause of action for perceived-affiliation firings would help meet such goals as minimizing the costs of belief and association, as well as promoting the efficient functioning of the government and elections. Perceived-affiliation claims can also strengthen society's commitment to free debate and competition in ideas as well as block government attempts at indirect regulation. Consequently, applying the values that motivate patronage law to the perceived-affiliation split strongly favors permitting perceived-affiliation claims.

C. Bursting the Speech Bubble: Rejecting the Third Circuit's Approach

The analysis above demonstrates that the Third Circuit's rejection of perceived-affiliation claims is an inadequate approach. It does not offer the optimal level of First Amendment protection that an efficiently functioning, free society demands. Rather, such an approach has effectively given rise to an asset bubble in the value of political speech relative to association.[221] By increasing

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[220] See Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 Georgetown L J 1719, 1747 (1989) ("[C]ourts tend to treat § 1983 plaintiffs and defendants as autonomous strangers who have no prior relationship with one another—even though the defendant is a government or government employee.").

[221] See Part III.B.

the marginal cost of association through a heightened judicial reliance on speech-based constitutional tests, this speech bubble threatens to stymie association and distort the market for First Amendment expression. Only by bursting this speech bubble and locating First Amendment analyses in their appropriate doctrinal domains can courts lower the price of association relative to political speech, gradually restoring this market to its equilibrium position. Given the force of the democratic values that animate the Supreme Court's patronage jurisprudence, the Third Circuit's minority approach ought to be abandoned for the reasons detailed below.[222]

Most apparently, the Third Circuit's approach fails to give adequate credence to the true nature of affiliation claims. Unlike speech, affiliation does not naturally manifest itself through outward intimations. The analysis conducted in Part III.B provides several reasons why forcing revelation of one's closely held fidelities amounts to inefficient policy that is unsupported by the most comparable legal doctrine: patronage case law.

This evaluation thus suggests that the Third Circuit's approach rests on a much-too-stringent interpretation of the retaliation doctrine's conduct requirement. Because affiliating conduct need not be perceptible, the conduct requirement's usage in such contexts should be distinguished from those involving claims of retaliation for political speech. The Third Circuit's approach essentially requires proof of affirmative conduct before permitting either species of First Amendment retaliation suit—a demand that erroneously conflates two distinct doctrines. In the case of affiliation, affirmative conduct is not a necessary condition for the genuine exercise of constitutional liberties.

Another plainly unsatisfactory consequence of the Third Circuit's approach is that it effectively bars certain claims that would be valid if viewed through a looser conduct lens. Accordingly, the Third Circuit's methodology is not only undesirable on a case-by-case basis, but it also largely impedes those democratic liberties and free market ideals that the First Amendment is

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[222] A recent district court opinion in the Third Circuit noted that "*Ambrose* articulated a general rationale—no First Amendment retaliation without First Amendment conduct"—that applies equally to both speech and affiliation claims. *Heffernan v City of Paterson*, 2014 WL 866450, *15 (D NJ). Although the court observed that "[t]here is a certain logic to *Dye*," out-of-circuit case law could not persuade it to depart from *Ambrose*. Id at *17–18. Therefore, because Third Circuit precedent "articulates no principled basis for treating [speech and affiliation] differently," the district court found itself bound by *Ambrose* absent en banc reconsideration. Id at *15.

intended to foster. Such a judicial course of conduct has systemic implications, as it inevitably influences the incentives of all individuals who are party to a public-employment relationship. Interpreting the First Amendment retaliation doctrine's conduct requirement stringently thus has the potential to reverberate to every corner of the public-employment environment.

To be sure, the Third Circuit's insistence on affirmative conduct is not entirely without reason. The Third Circuit might worry, for instance, that making perceived-affiliation retaliation claims actionable without imposing a high threshold of proof would expose employers to incessant, costly litigation. Job seekers would ultimately bear that cost, as employers would elect to cut back on employment opportunities or benefits in order to adjust for the anticipated litigation losses. However, another provision of the retaliation doctrine's judicially crafted framework suffices to quell this concern. Perceived-affiliation retaliation claims still require proof by a preponderance of the evidence that a causal connection existed between the employee's protected conduct and the subsequent negative employment action. Such a requirement should adequately safeguard the interests of government employers by insulating them from frivolous claims. Even if courts lower the prima facie bar for alleging an affiliation-based retaliation claim, the doctrine's demanding causal threshold would remain unaltered.[223]

In addition, recall the Third Circuit's reliance on the *Waters* decision in justifying its approach to the perceived-affiliation issue.[224] As the Sixth Circuit persuasively explained, it is not clear that *Waters* stands for the proposition that government employers can never be held liable when acting on the basis of substantively incorrect information, nor is it clear that such a proposition, even if true, should extend to the political-affiliation context.[225] The Third Circuit focused primarily on the last line of the following passage for the proposition that bad faith intent on the part of the employer is insufficient to establish a colorable claim:[226]

> [W]e do not believe that the court must apply the *Connick* test only to the facts as the employer thought them to be,

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[223] For further discussion of this inherent safeguard, see *Gann*, 519 F3d at 1094.

[224] See text accompanying notes 110–14, 138–42.

[225] See *Dye*, 702 F3d at 299–300, citing *Ambrose*, 303 F3d at 495. See also *Ambrose*, 303 F3d at 495, citing *Waters*, 511 US at 679 (O'Connor) (plurality).

[226] See *Fogarty*, 121 F3d at 890.

> without considering the reasonableness of the employer's conclusions. . . . It is necessary that the decisionmaker reach its conclusion about what was said in good faith, rather than as a pretext; but it does not follow that good faith is sufficient. *Justice Scalia is right in saying that we have often held various laws to require only an inquiry into the decisionmaker's intent . . . [but] this has not been our view of the First Amendment*.[227]

Contrary to the Third Circuit's interpretation, when read in context, it does not appear that this dicta was intended by the *Waters* plurality as a full exculpation of employment decisions made in bad faith. Rather, it seems much more plausible that the Court meant to convey that good faith alone will not save an employer whose conclusions about what was said are objectively unreasonable. That is, the employer's conclusions still have to be reasonable, even if they are made in good faith. The *Waters* plurality's assertion that good faith alone cannot save unreasonable employment decisions in the protected-speech context certainly does not justify the Third Circuit's conclusion that bad faith intent is irrelevant in perceived-affiliation cases. Rather, on its face, this language appears to place a more objective, scrutinizing burden on public employers whose motives for dismissing a worker potentially violate the First Amendment.[228]

The Third Circuit also relied on the emphasized sentence from the following passage:[229]

> We disagree with Justice Stevens' contention that the test we adopt "provides less protection for a fundamental constitutional right than the law ordinarily provides for less exalted rights." *We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information*. Where an employee has a property interest in her job, the only protection we have found the Constitution gives her is a right to adequate procedure. And an at-will government employee—such

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[227] *Waters*, 511 US at 677 (O'Connor) (plurality) (emphasis added).

[228] See id at 677–78 (O'Connor) (plurality) ("If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care."). See also Kagan, 63 U Chi L Rev at 413–14 (cited in note 159).

[229] See *Ambrose*, 303 F3d at 495.

> as Churchill apparently was—generally has no claim based on the Constitution at all.[230]

In context, this remark by the Supreme Court seems to relate to due-process safeguards rather than to First Amendment protections, as the Sixth Circuit aptly observed in *Dye*.[231] In fact, the *Waters* plurality offered this statement in response to a hypothetical posed by Justice John Paul Stevens regarding a hospital employee fired for reasonable, yet mistaken, reasons.[232] The Court seems to be debating the appropriate level of procedure required in cases in which a mistaken justification leads to effective termination of a property right in one's job.[233] It is not clear that the Court is addressing mistaken information relating to First Amendment–protected speech or association claims. The Court's disposition seems too cursory for that to be the case.[234]

Also, as the *Dye* dissent points out,[235] *Waters* may not be an appropriate case from which to draw an analytical model. *Waters* was a protected-speech case. There, the existence of speech was undisputed.[236] The inquiry was into exactly what was said based on two variations of a conversation.[237] The Supreme Court cases on patronage dismissals—*Elrod*, *Branti*, and *Rutan*—are more analogous to perceived-affiliation claims. After all, the factual settings of patronage disputes often resemble perceived-affiliation claims. Each of these considerations weighs in favor of rejecting the Third Circuit's interpretation of *Waters* and abandoning that court's formalistic approach to interpreting the doctrine's conduct requirement.

Ultimately, then, this Comment contends that the proper inquiry is not whether an employee who claims retaliation based

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230 *Waters*, 511 US at 679 (O'Connor) (plurality) (emphasis added) (citations omitted).

231 See *Dye*, 702 F3d at 300, quoting *Dambrot v Central Michigan University*, 55 F3d 1177, 1189 n 9 (6th Cir 1995).

232 Compare *Waters*, 511 US at 679 (O'Connor) (plurality), with id at 695–96 (Stevens dissenting).

233 Compare *Cleveland Board of Education v Loudermill*, 470 US 532, 542 (1985) (holding that a state's decision to terminate an employee without a hearing violated the Fourteenth Amendment Due Process Clause), with *Board of Regents of State Colleges v Roth*, 408 US 564, 578 (1972) (holding that a state's decision to not rehire an employee without a hearing did not violate the Fourteenth Amendment Due Process Clause).

234 Compare *Waters*, 511 US at 679 (O'Connor) (plurality) (alluding to a dichotomy between constitutional and procedural considerations), with *Pickering*, 391 US at 574–75 (appealing to First Amendment precedent), *Connick*, 461 US at 154 (grounding the Court's holding in existing First Amendment jurisprudence).

235 See Part II.C.

236 See *Waters*, 511 US at 664 (O'Connor) (plurality).

237 See text accompanying notes 110–12.

on perceived affiliation was actually associated with the party or candidate in question. Such a standard is too stringent and formalistic, and lacks any reasonable nexus with the underlying rights at stake. Rather, courts ought to consider whether the employer fired the employee merely because he or she was perceived as lacking the appropriate political affiliation. Analyzing perceived affiliation through this lens is the only approach that remains faithful to the democratic values that animate both the First Amendment's associative protections and the Court's established patronage jurisprudence.

CONCLUSION

The perceived-affiliation split confronts jurists with a conflict whose resolution is significant not just for its own sake, but also, and more importantly, for the theoretical inquiries that it provokes as to the First Amendment's outer bounds and core values. Such a focus invites a commonsense solution to a core constitutional puzzle. Gleaning direction from the Supreme Court's patronage jurisprudence, potential guiding considerations include: (1) minimizing the costs of belief and association, (2) promoting the efficient functioning of government and the electoral process, (3) incentivizing robust debate and the competition of ideas, and (4) erecting barriers to indirect regulation.

By adhering to these fundamental values, courts can employ patronage law to inform resolution of the perceived-affiliation split. Specifically, promotion of these important democratic ideals favors judging First Amendment–perceived-affiliation retaliation claims against a more fitting protected-conduct standard. This requires rejecting the Third Circuit's strict approach to the retaliation doctrine's conduct requirement and instead permitting plaintiffs to bring perceived-affiliation claims whether or not they have actually affiliated themselves with the candidate or party at issue. In doing so, courts can seize a meaningful opportunity to both vindicate valuable First Amendment rights and strengthen society's commitment to the free exchange of ideas.