THE JUDGMENT OF HISTORY: FACTION, POLITICAL MACHINES, AND THE HATCH ACT

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"The latent causes of faction are thus sown in the nature of man."

"Man is by nature a political animal."

"Good government is an empire of laws."

In the wake of a disputed presidential election, the departing president makes appointments and difficult-to-reverse decisions in his final days, leaving an uproar behind as he leaves the capital. During the run-up to the election and afterward, partisans of each side make rash predictions and wild charges about the other. As a result of the skirmishes, careers—and even lives—are destroyed.

While this may well describe recent events, this catalogue of horrors actually captures the events of the 1800 campaign for president. An ally enlisted by Thomas Jefferson to offer negative commentary on President Adams called the president “a hideous hermaphroditical character.” Partisans of President Adams responded that victory for Jefferson would lead “the soil [to] be soaked with blood, and the nation black with crimes.” The government workforce is not immune from this partisanship. Adams admittedly sought appointees based in part on their “political principles.”

Jefferson later wrote that he perceived Adams’ “midnight appointments” in the waning hours of his presidency as a personal slight, damaging Jefferson's attempts to implement his preferred policies. Famously, after the election, Alexander Hamilton and Aaron Burr engaged in a duel fatal to Hamilton, and fatal to the political career of Burr.

These examples reflect a passion for partisanship in the American founding era that would seem to eclipse any idealism. A partisan political atmosphere encourages angry political debate and political manipulation of the bureaucracy. Still, the founders wrote about and reflected on

3. JOHN ADAMS, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE COLONIES (1776).
5. ELLIS, supra note 4, at 9.
7. Jefferson privately complained that Adams made appointments in his final days as president “from among my most ardent political enemies, from whom no faithful cooperation could ever be expected.” Id. at 1623 n.27 (citing letter from Thomas Jefferson to Abigail Adams (June 13, 1804)).
8. See ELLIS, supra note 4, at 40–43.
humanity's tendency toward faction, and evinced a certain faith in the ability of the constitutional structure to allow for it without becoming contaminated by it.

Despite the feeling that it has reached its zenith of late, partisanship is as much a part of the American landscape as winter snow in the Midwest and sunshine punctuated by hurricanes in Florida. Unlike with the weather, however, Americans have been doing something about partisanship in the federal workforce since the Washington administration, with a series of laws and policies aimed at cutting off the use of the government workforce for partisan gain.

The Hatch Act is the primary means for limiting partisanship within the federal bureaucracy. The Act limits the partisan political activity of most federal employees and state and local employees employed in connection with federal loans or grants.

This Article traces the development of the Hatch Act (the Act), detailing the long history of complaints about partisanship within the government and various attempts to limit it by law. In limiting the effects of partisanship, the Act applied the insights of The Federalist Papers on the dangers of faction to changed methods of governance. "The latent causes of faction are thus sown in the nature of man," James Madison wrote. The Federalist Papers defended the constitutional system as striking a balance between this tendency towards partisanship and a more noble political nature of man. The passage of the original Hatch Act reflected concern, born of experience, that permitting government employees to participate openly in partisan politics would create dangers for subordinate employees, the rights of the public, and public regard for the government. Today, due to the 1993 amendments to the Hatch Act, government employees are permitted to engage in partisan activity while off duty.

This Article will review the history, provisions, constitutionality, rationale, and recent enforcement of the Hatch Act and previous similar legislation. The United States Office of Special Counsel (OSC) engages in outreach programs to educate employees about the Hatch Act. Employees who have difficulty understanding the legal regime of the Act can, by statute, obtain an individualized advisory opinion from the OSC. The regulations might benefit from some revision to account for changes in technology, particularly e-mail. Although a variety of rationales have been advanced in favor of the Hatch Act before the Court, the Act's protection of the public's First Amendment rights have been somewhat neglected. The Act promotes goals similar to those advocated by the authors of The Federalist Papers: protecting government employees and the public from a politicized bureaucracy. The 1993 amendments to the Act reflect a shift in

9. THE FEDERALIST No. 10 (James Madison), supra note 1, at 79.
policy: rather than imposing a far-reaching ban on employees' partisan political activity, the Act is designed to control abuses. The Supreme Court's analysis of the Hatch Act and similar laws has developed, from early decisions giving great deference to determinations by Congress and the president regarding the management of the government workforce, to more recent opinions suggesting increased judicial scrutiny of the Act's restrictions on the First Amendment rights of employees. This Article also reviews the number of matters investigated by the OSC, which investigates and prosecutes alleged Hatch Act violations. The level of complaints and prosecutions was only slightly affected by the 1993 amendments; more recently, the number of complaints has been on the rise. This trend promises to continue with increased use of high-speed technology, outsourcing, and increased partisanship. Vigorous and consistent enforcement, along with a steady regimen of education and outreach, will stem this tide.

I. THE SPOILS SYSTEM, PARTISANSHIP AND THE HATCH ACT THROUGH HISTORY

Debates over restrictions on the political activities of government employees to ensure effective governance date from the beginning of U.S. history. George Washington is said to have been concerned about the politicization of the civil service.10 In 1791, the House rejected an amendment that would have limited the political activities of inspectors of distilled spirits due to concerns that "this clause will muzzle the mouths of freemen, and take away their use of reason."11 In 1801, President Thomas Jefferson observed "with dissatisfaction officers of the General Government taking on various occasions active parts in the elections of public functionaries, whether of the General or State Governments," according to a federal circular.12 The document stressed that government officers retained their right to vote, but cautioned that they were expected not to "attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and [their] duties to it."13

In the mid-nineteenth century, political patronage in the government

10. AMERICAN ENTERPRISE INSTITUTE LEGISLATIVE ANALYSES, NO. 20, 95TH CONGRESS, HATCH ACT REVISION 1 (1978) [hereinafter HATCH ACT REVISION].
13. Id. at 99.
became the focus of a lengthy national debate. Spurred on in part by the 1881 assassination of President Garfield by a disappointed office seeker, Congress passed the Pendleton Act in 1883 to create a merit-based federal workforce for the positions covered by the act. It ended the heyday of the federal government "spoils system," in which government sinecures were awarded to political allies after winning an election, and provided that no federal employee should be coerced to contribute to a political fund or to provide any political service. The Act authorized the president to issue rules in furtherance of the Act and established the Civil Service Commission (CSC), predecessor to the Merit Systems Protection Board (Board). CSC Rule I, issued by President Arthur, focused on preventing coercion by government employees.

In 1907, President Theodore Roosevelt, a former CSC member, extended the Rule I ban from coercive situations to employees' voluntarily taking an "active part in political management or in political campaigns." The CSC's opinions developed the legal meaning of this rule "in the mode of the common law" in the succeeding decades.

A. The Hatch Act

Since its original enactment in 1939, the Hatch Act has been amended to apply to state and local officials working in connection with federal

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15. Id. at vii (citations omitted).

16. Civil Service Act of 1883, ch. 27, 22 Stat. 403 (1883); see also Hoogenboom, supra note 14, at 236–52 (explaining the reasons behind the Act's passage).

17. Civil Service Act § 2. The Act stated that "no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service" and that "no person in said service has any right to use his official authority or influence to coerce the political action of any person or body." Id.

18. Id. § 12.

19. 8 James D. Richardson, A Compilation of the Messages and Papers of the Presidents, 1789-1897, at 161 (1898).


funds and to allow more off-duty political activity for government workers.

1. Original Enactment

The Hatch Act was enacted in 1939. Taking its name from longtime civil service reform advocate Senator Carl Hatch of New Mexico, the Act codified and extended the Rule I ban on partisan political activity.

The Act codified the Rule I ban on taking an active part in political management or political campaigns and extended it from the "classified" civil service (roughly seventy percent of the one million federal employees) to nearly all employees. The 1939 ban on use of "official authority or influence for the purpose of interfering with" an election remains intact today, as does, in somewhat altered form, the ban on soliciting campaign funds from anyone with business before the agency. The original Act prohibited coercing votes and promising a government position or withholding government relief funds as compensation or punishment for political activity. Penalties for violation of the criminal provisions of the Act included fines and imprisonment. For violation of the ban on use of authority, however, the penalty was removal from office.

The Act was passed in response to controversies over coercion of political donations from federal employees and the misuse of federal funds in the 1936 and 1938 campaigns. The debate was intense on both sides.
One congressman said, "No patriotic American can read this report [on recent campaign practices], detailing a sordid debauchery of the ballot hitherto unknown in this country, without a feeling of deep resentment and without a blush of shame." Opponents expressed equally strong views on the restrictions:

You have heard a great deal of talk here about dictatorship and Hitlerism, but today you are proposing to reach out to millions of people who have never been sought to be touched by the Federal Government in the last 150 years and to gag them and handcuff them in the exercise of their political rights.

Some opposed the bill, calling it an effort to restrict Democratic Party campaign efforts.

Other critics of the Hatch Act charged that the Act unnecessarily banned voluntary activity along with coercion, thereby infringing on employees' rights to free expression. In response to such a critic during the debate over the 1940 amendments, Senator Hatch explained, "I would draw the line [between coercion and voluntary activity] if it could be drawn; but I defy... [anyone] to draw that line." President Roosevelt signed the

worthless items from those who contracted with the government).

34. Id. at 9598 (statement of Rep. Taylor).

35. Id. at 9599 (statement of Rep. Creal). Congressman Hook also invoked Hitler in criticizing the "propaganda campaign" mounted in favor of the Act. Id. at 9609. Congressman Hobbs said that federal employees "should not be compelled to surrender their constitutional rights of liberty and free speech." Id. at 9602. Invocation of Hitler in describing the partisan differences with one's political opponents has enjoyed uninterrupted popularity since that time, resulting in what can be described as the *reductio ad Hitlerum* argument. See, e.g., Liz Halloran, *Furor over Fuhrer; Jews Condemn GOP's Hitler Ads*, HARTFORD COURANT, July 5, 2004, at D1 (describing a Republican Party advertisement juxtaposing various Democratic figures with footage of Hitler, which Republicans claimed that they were merely using footage from an earlier ad comparing President Bush to Hitler that had been submitted in a contest to a liberal organization, MoveOn.org, and briefly posted on its website); Sheryl McCarthy, *Put Bashing on Shelf*, NEWSDAY, Aug. 2, 2004, at A29 (relating Al Gore's accusation that the Bush administration employed "digital Brown Shirts," referring to Hitler's thuggish uniformed allies, to intimidate media coverage of the war in Iraq).

36. See, e.g., 84 CONG. REC. 9634 (1939) (statement of Rep. Sabath) (claiming that the Act was "an ingenious piece of Republican political strategy" designed to "tie the hands of [the Roosevelt] administration," and asking his "[f]ellow Democrats... are you blind to the fact that you were sent here to represent your constituents and to support the administration?"). Many supporters of the Act, though, including Senator Hatch, were Democrats.

Hatch Act into law on August 2, 1939.38

2. 1940 Amendments

The Hatch Act was amended in 1940,39 with the "major purpose"40 of limiting the political activity of federally funded state and local government employees, along with defining the ban on political activity and clarifying that the Act applied to District of Columbia employees.41

State and local government employees receiving federal funding were not covered in the original 1939 Act because the Act's writers wanted to avoid infringing on state employment prerogatives.42 By the same token, the Act's authors wanted to prevent federal money from funding coercive activities at any level.43 The Hatch Act's writers resolved the problem of enforcement by providing for the withholding of federal funds if a state opted not to remove an employee who violates the Act.44

Congress, in 1940, intended to establish a consistent definition of the term "political activity" in the Hatch Act.45 The amendments entrusted enforcement of state and local violations to the CSC to avoid varying interpretation of provisions by various federal agencies administering grants and loans.46 There was a great deal of debate over how to define the term "political activity"—for example, whether it should be defined in the Act or left to the CSC.47 The solution Congress arrived at was the adoption of the rules as previously formulated by the CSC.48 This deprived the CSC of "rulemaking power in the sense of exercising a subordinate legislative role in fashioning a more expansive definition of the kind of conduct that would violate the prohibition against taking an active part in political

("Overt coercion is difficult enough by itself to guard against and detect. The more subtle forms of coercion are almost impossible to regulate, especially when they arise in a climate in which the unspoken assumption is that political conformity is the route to achievement and security.").

38. 84 CONG. REC. 10745–47 (1939).
40. Rose, supra note 25, at 511.
41. 86 CONG. REC. 2338–41 (1940).
42. See id. at 2340–41 (statement by Sen. Hatch).
43. See id.
44. See Act of July 19, 1940, ch. 640, § 12(b), 54 Stat. 768 (amending the Hatch Act) (codified as amended at 5 U.S.C. § 1506(a)(2)); see also discussion at 86 CONG. REC. 2340–41 (1940) (explaining why states were not covered, and describing the act as "merely exercising control over Federal funds" in a "reasonable and just" manner).
45. 86 CONG. REC. 2338–41 (1940).
46. Id. at 2341.
47. See, e.g., id.
48. See id. at 2938. The Supreme Court later held that Congress intended to adopt this restatement offered by the CSC rather than all previous CSC decisions. See United States Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 572–75 (1973).
management or political campaigns.49

A clause in the original act providing that "[a]ll such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects"50 was amended in 1940 to include the words "and candidates."51 Congress also determined that employees should retain their right to speak publicly and privately in all matters.52

For fifty years after 1940, Congress passed occasional minor amendments to the Hatch Act. The Act was amended to allow the CSC by unanimous vote to lessen the penalty for violating the Act to a ninety day suspension,53 and then it was further amended to a thirty day suspension.54 A series of attempts at broader change were vetoed.55 In 1974, the restrictions applying to state and local employees were loosened, allowing such employees to: (1) serve as officers of political parties; (2) solicit votes and funds for partisan candidates; and (3) participate in and manage political campaigns, while remaining subject to restrictions on the use of "official authority or influence" to interfere with or affect an election or nomination, and on candidacy in a partisan election.56

3. 1993 Amendments

In 1993, a bill liberalizing the Hatch Act's provisions for federal employees' off-duty political activity was signed into law.57 As a result of

49. Letter Carriers, 413 U.S. at 571–72. Congress' determination to entrust enforcement to the CSC at the same time it withdrew rulemaking authority from the agency led the Letter Carriers court to conclude that Congress "necessarily anticipated" "further development of the law within the bounds of, and necessarily no more severe than, the 1940 rules . . . ." Id. at 575.


52. See 86 Cong. Rec. 2623 (1940) (statement by Sen. Hatch). Senator Hatch said that "we expressly provided that all persons should have the right to express their opinions on all political subjects, and the word 'privately,' which appears in the civil-service rule [Rule I], was deliberately stricken out [so that] no curtailment or abridgment of the right of freedom of speech" would result. Id.


The 1993 law's provisions, most federal employees are now permitted to take an active part in political management and in political campaigns when off duty, while some employees remain subject to the pre-1993 restrictions. The bill also strengthened other statutory provisions punishing coercion of political activity of employees.

The House passed the bill by a large margin, but there was strong opposition in the Senate as the country debated Hatch Act reform. Proponents argued that the amendments would restore essential rights to federal employees, the Act was confusing as applied, and the workforce was more professional and merit-based than it had been when the Act was originally passed. Opponents expressed fears that the proposed liberalization, by punishing only difficult-to-detect coercion, would leave workers susceptible to "subtle pressures to contribute money and time to partisan causes." They also argued that the government and the public would be harmed, and that there was no demand among federal employees for changes to the Act.

The Senate passed a number of amendments more restrictive than the House version of the bill, for example narrowing the permissible solicitation of funds and leaving law enforcement employees further restricted. After a senator threatened a filibuster, thwarting the

58. See discussion infra Part II.
61. See, e.g., id. at S8604 (statement of Sen. Glenn) (setting out the case for passing the amendments).
63. See 139 CONG. REC. S8607 (1993) (statement of Sen. Roth) (noting that proponents of Hatch Act reform “continue to ignore the adverse impact of this legislation on the Government and on the American people and focus attention on the Federal employee.... The truth is... [t]he Hatch Act protects Federal employees from the inside and outside coercion.”).
64. See 139 CONG. REC. H762 (1993) (statement by Rep. Wolf) (asking “[W]ho favors this legislation—labor union bosses? I have not heard any clamor to be 'unhatched' from my Federal [employee] constituents.”). Senator Roth, citing editorials and public interest groups opposed to changes, and surveys suggesting indifference or opposition among federal employees to changing the Hatch Act, said, “[w]hile the Federal employee organizations and the postal unions support change, in contrast to Federal employees as a whole, the weight of other testimony given during hearings held by the committee in the 100th and 101st Congress, and this Congress, stands in opposition to this bill.” Id. at S8608.
65. See id. at H6817 (providing a detailed discussion of the differences between the initial House version and the Senate amendments adopted into law); see also H.R. 20, 103d Cong. (1993) (the bill originally passed by the House); 139 CONG. REC. S8947 (1993)
appointment of conferees, the House voted simply to adopt the Senate's more restrictive version of the bill, forgoing a conference committee.

Early versions of the 1993 amendments would have treated District of Columbia employees in the same manner as state and local officials. A Senate amendment, keeping District employees covered by the Hatch Act rules that apply to federal employees, was adopted into the final law. In the process, a previous provision that exempted District teachers was left out, without explanation (and probably inadvertently). As a result, a District teacher who refused to withdraw his candidacy or to resign from his employment for partisan office despite two warnings from the OSC was ordered removed by the Board in 2002.

B. Agencies Responsible for Enforcement of the Hatch Act

The OSC, the successor to the CSC Office of General Counsel in investigation of Hatch Act violations, was established as an arm of the Board in the Civil Service Reform Act of 1978 and became an independent agency in 1989. The OSC is responsible for guarding the merit system in federal employment and protecting whistleblowers from reprisal. In addition, the OSC provides advisory opinions on the Hatch Act in response to inquiries, investigates allegations of violations, and

(Statement by Sen. Warner) (describing the Senate provisions).


67. See 139 Cong. Rec. H6814, H6827 (1993). Because there was no committee report, floor debates are the only source of insight on congressional intent.


70. Id. at S8671–S8676; see also Briggs v. United States Merit Sys. Prot. Bd., 331 F.3d 1307, 1310 (Fed. Cir. 2003) ("The rationale for [the 1993 removal of the exception for District of Columbia teachers] . . . is unexplained in the legislative history.").

71. See Goldstein, supra note 66, at A8 (stating that an unnamed former Senate employee expressed regret at the omission).


75. 5 U.S.C. § 1212(f) (2000). These advisory opinions are not binding on the Board. The D.C. circuit has written that the advisory opinions "offer essentially a forecast, albeit an educated one, of the way the MSPB would rule if an actual case materialized." Am. Fed'n of Gov't Employees v. O'Connor, 747 F.2d 748, 753–54 (D.C. Cir. 1984), cert. denied, 474 U.S. 909 (1985).

presents complaints of violations of the Hatch Act to the Board. The OSC also issues regulations on filing complaints, allegations, and procedures.

The Board consists of three members appointed by the president. The Board hears complaints submitted by the OSC. The Board also determines penalties for violations of the Act. Employees accused of violations are guaranteed due process, including a hearing. The Office of Personnel Management (OPM) is charged with issuing implementing regulations for the Hatch Act.

The OSC serves an educational function, promoting knowledge of the Hatch Act’s provisions through outreach programs throughout the country. For the Hatch Act to effectively deter misuse of authority and increase reports of violations, and with them prosecutions, government employees must be aware of the Hatch Act’s provisions. OSC outreach programs can help ameliorate any misunderstanding of the Act.

II. PROVISIONS OF THE HATCH ACT

This section will examine the specific political activities permitted and prohibited under the Hatch Act. The rules emerge from the Act, as interpreted in regulations issued by the OPM, court and Board decisions, and OSC advisory opinions. The Act contains separate provisions for federal employees and state and local employees employed in connection with federal funding. The Act applies a heightened level of restrictions to some federal “further restricted employees.”

OPM regulations and OSC interpretations of the statute and these

78. See 5 U.S.C. § 1212(e) (2000) (“The Special Counsel may prescribe such regulations as may be necessary to perform the functions of the Special Counsel. Such regulations shall be published in the Federal Register.”).
regulations detail the precise kinds of political activity prohibited under the Hatch Act. Following the 2004 campaign season, the OSC and the OPM may consider revising the regulations for the sake of clarity and in order to bring them up to date with current technology such as e-mail. The OSC must continue to engage in outreach programs to promote understanding of the Hatch Act. Employees who do not fully understand the Act’s provisions can also obtain an advisory opinion from the OSC. Surveys taken before the 1993 amendments indicated that roughly thirty percent of federal employees would engage in partisan political activity if they were permitted, but only eleven percent actually participated in the wake of the changes to the law. This lower-than-anticipated reported rate of participation may be due in part to incomplete understanding of the rules under the Hatch Act. The OSC’s advisory letters on the use of e-mail while on duty, discussed below, have established an effective standard for preventing misuse. Continuing consultation between the OSC and the OPM to reflect changed technology will help keep the Act’s application clear.

A. Federal Employees and District of Columbia Employees

1. Who Is Covered

All federal executive branch and civil service employees except the president and vice president are subject to the Hatch Act. Employees on leave are subject to Hatch Act restrictions. Hatch Act restrictions on federal workers apply to all District of Columbia employees except the mayor, recorder of deeds, and members of the city council. Those serving in the military are not covered by the Act. While most of those covered

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85. See discussion infra Part II.A.8.
86. 5 U.S.C. § 7322(1) (2000). The statute also specifies that employees of the General Accounting Office (now called the Government Accountability Office), an agency that reports to Congress rather than the executive, are not covered.

Congress specifically considered and rejected a provision which would have exempted from the Hatch Act’s prohibitions those candidates who had taken a leave of absence without pay. The legislative history of the Act further discloses that the intent of the statute was to prohibit partisan candidacy by any covered employee who had not resigned from his or her employment. Id. (citations omitted).
88. 5 U.S.C. § 7322(1)(C); see discussion supra Part I.
89. 5 U.S.C. § 7322(1). The political activities of those serving in the military are
are considered "less restricted employees," some "further restricted employees" are subject to additional provisions.90

2. Permitted Activity of Less Restricted Employees

While the Hatch Act provides for restrictions on the political activity of government employees, the Act and the regulations issued under it stress that employees retain the ability to engage in a degree of political participation.91 Political activity is defined as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group."92 Some core political activities are permitted to all employees covered by the Hatch Act. For example, "[a]n employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates."93 Employees can also engage in a range of political activities while off duty under the Hatch Act. Individual activities such as donating money to a partisan group or candidate94 and attending fundraisers95 are permitted.

Due to the changes made by the 1993 amendments to the Act, less restricted employees can "[t]ake an active part in managing the political campaign of a partisan political candidate or a candidate for political party office,"96 including "supervising paid and unpaid campaign workers."97 They can canvass for votes, endorse candidates, and circulate petitions.98 Serving as party officers and as delegates to conventions and participating in political rallies is also permitted.99

Nonpartisan political activity is permitted for all Hatch Act-covered employees. They can "[b]e politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment [or] referendum,"100 and participate, hold office, and fundraise on behalf of a nonpartisan group as long as the purpose is not for promoting or opposing a political party or candidate in a partisan

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92. 5 C.F.R. § 734.101.
94. 5 C.F.R. § 734.208(a) (2004).
96. 5 C.F.R. § 734.205(f) (2004).
97. 5 C.F.R. § 734.205 ex. 7 (2004).
100. 5 C.F.R. § 734.203(b) (2004) (for less restricted employees), § 734.403(d) (2004) (for further restricted employees).
Employees can also be candidates in nonpartisan elections. Employees are prohibited from being candidates in a partisan election, using official authority to interfere with an election, fundraising for political purposes, and engaging in political activity while on duty—including use of e-mail and partisan voter registration drives.

4. Candidacy in a Partisan Election

Federal employees subject to Hatch Act limitations may not run for office in a partisan election. If any candidate on the ballot chooses to run for election as a representative of, for instance, the Democratic or Republican Party, the election is considered to be partisan for purposes of the Hatch Act. State and local laws designating an election or office as nonpartisan create a presumption that the election is not covered by the Hatch Act, but “this presumption may be rebutted by evidence showing that partisan politics actually enter the campaigns of the candidates.”

102. 5 C.F.R. § 734.207(b) (2004) (for less restricted employees), § 734.403(b) (2004) (for further restricted employees).
104. 5 U.S.C. § 7323(a)(3).
105. 5 U.S.C. § 7322(2) (2000) (“‘partisan political office’ means any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected . . . .”); see also Special Counsel v. Mahnke, 54 M.S.P.B. 13, 16 (1992) (holding that party affiliation appearing next to the name of any candidate rendered the election partisan).
If partisanship is injected into a race, as through solicitations, statements, or advertisements, that race is then considered partisan. For example, Erhard Mahnke, a city employee subject to the Hatch Act, ran as an independent against an opponent who campaigned as a representative of a party, including his party affiliation on the ballot. Relying on Special Counsel v. Yoho and In re Broering, the Board granted a petition for removal. In 2003, the Board found that a race that was initially nonpartisan became partisan through the content of solicitations for donations and public statements of the candidates. The charged employee in Campbell v. Merit Systems Protection Board sought and received a party endorsement, advertised the endorsement, and used party-owned materials in his candidacy. His Board-ordered suspension was upheld by the Federal Circuit.

Hatch Act prohibitions apply to "any act in furtherance of candidacy," including acts before a formal announcement. Canvassing for votes, circulating petitions for candidacy, and soliciting funding are prohibited under the Act.

The Hatch Act permits the OPM to designate localities within which federal employees subject to the Act can run for office as independent candidates for election to partisan political offices. The OPM has designated a variety of locations within Virginia and Maryland, along with twelve other areas.

5. Use of Official Authority to Influence or Interfere with an Election

Hatch Act-covered employees are not permitted to "use [their] official authority or influence for the purpose of interfering with or affecting the
result of an election."\(^{117}\) Under this provision, employees are barred from promoting the candidacy of a partisan candidate by using an official job title in connection with a campaign, "coerc[ing] any person to participate in political activity," or "soliciting, accepting, or receiving uncompensated individual volunteer services from a subordinate for any political purpose."\(^{118}\)

Soliciting political services of a subordinate violates the Hatch Act because employees are presumed to believe their status with their employer might be affected by their decision to make or refuse to make a political contribution.\(^ {119}\) The Act bars requests because an employee "might feel it would be indiscreet not to comply."\(^ {120}\)

It must be remembered, however, that the government is permitted to defend its policies. The president, and through him the cabinet officers, enjoy wide latitude to require career subordinates to provide support for a defense of administration policies when it can be reasonably related to official duty. There is considerable "play in the joints" in this arena, leaving room for a rule of reason and common sense in determining when bright lines have been crossed.

6. Fundraising

Employees subject to the Hatch Act may not "solicit, accept or receive a political contribution from another person,"\(^ {121}\) with one narrow exception.\(^ {122}\) The ban on fundraising prohibits personal solicitations,\(^ {123}\) and prohibits permitting an "official title to be used in connection with fundraising activities,"\(^ {124}\) including on a group's stationery. Employees may not "solicit, accept, or receive uncompensated volunteer services"\(^ {125}\) from a subordinate, even if offered voluntarily. Some participation in fundraisers, such as giving speeches and donating materials to be auctioned for a campaign, is permitted, although use of official title is not.\(^ {126}\) A covered employee can even organize or manage fundraising activities as

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118. 5 C.F.R. § 734.302 (2004).
121. 5 C.F.R. 734.303(a) (2004).
122. Members of federal labor organizations can solicit, accept, and receive political contributions and services from a person who is not a subordinate for a "multicandidate political committee" as long as solicitation does not take place on duty or in a federal building, and is not directed at a subordinate. 5 U.S.C. § 7323(a)(2)(A) (2000).
123. 5 C.F.R. § 734.303(a).
124. 5 C.F.R. § 734.303(c).
125. 5 C.F.R. § 734.303(d).
126. 5 C.F.R. § 734.208 exs. 2, 8 (2004). Direct solicitation of funds is prohibited.
long as he or she does not "personally solicit, accept, or receive political donations," which includes hosting or inviting people to a fundraiser.127 There are criminal prohibitions on fundraising activities while on duty or from other federal employees.128

7. Activities While on Duty, in a Federal Building, Wearing a Federal Uniform or Insignia, or in a Federal Vehicle

The 1993 amendments to the Hatch Act, permitting greater off-duty political involvement for covered federal employees, prohibited engaging in political activity while on duty.129 The "political activity" prohibited while on duty includes activities undertaken by employees individually, regardless of any connection to partisan candidates or groups.130

In Burrus v. Vegliante, the Second Circuit rejected a district court holding that covered government employees could post signs advocating the election of partisan candidates in non-public areas of a workplace, as long as the activity was not "coordinated with or in concert with a political party or candidate."131 The Second Circuit, in concluding otherwise, drew a distinction between the "political activity" prohibited while on duty under Section 7324 and "'tak[ing] an active part in political management or in political campaigns,'" permitted under Section 7323(a).132 Looking to statutory language, current regulations, legislative history indicating congressional intent to “tighten up” the Hatch Act while on duty, and pre-1993 regulations defining the terms “political activity” and “political management or . . . political campaigns,” the court found that the two terms each had a separate and distinct meaning.133 The Hatch Act was held not to permit covered employees to display in an interior area of a post office a poster depicting one partisan candidate for president as more desirable than an opponent.134

This ban extends to activity in federal buildings,135 while wearing a

127. 5 C.F.R. § 734.208 ex. 7 (2004).
128. See 18 U.S.C. § 602(a)(4) (2000) (making it a felony for a federal officer or employee “to knowingly solicit any contribution” from any other federal officer or employee); see also 18 U.S.C. § 607(a)(1) (2000) (making it a felony “for any person to solicit . . . a donation of money . . . in any room or building occupied in the discharge of official duties by any officer or employee of the United States.”).
131. Id. at 85 (quoting Burrus v. Vegliante, 247 F. Supp. 2d 372, 379 (S.D.N.Y. 2002)).
133. Id. at 88–90.
134. Id. at 90.
uniform or official insignia, or while using a federal vehicle. Wearing a partisan pin, displaying partisan pictures, bumper stickers, and attending partisan political functions are all barred while on duty. A President-appointed, Senate-confirmed employee may hold political events in his office, but the events may not be paid for with appropriated funds.

The prohibition on partisan political activity by employees received some attention during the 2004 election campaign. The OSC issued an advisory opinion to clarify that federal employees may not authorize the use of federal buildings for campaign activities, and may not attend such activities while in a federal building or office. The Hatch Act only applies to activities in a “room or building,” and not to outdoor locations such as national parks. The statute provides no grounds for dividing a federal building into rooms that are and are not covered by the Hatch Act; instead, all rooms in a federal building are covered.

8. Use of E-mail

The use of e-mail to campaign in support of or in opposition to a partisan candidate or group can blur the line between protected expression of an individual’s opinion and prohibited on-duty political activity. OSC letters and opinions have interpreted the Hatch Act and its regulations

139. 5 C.F.R. § 734.306 exs. 2–6 (2004).
141. 5 C.F.R. § 734.306 ex. 11 (2000).
142. 5 U.S.C. § 7324(b). The employee’s position must be in the United States and involve policymaking.
143. OSC has investigated whether employees involved in a “town hall meeting” held by Senator John Kerry and other Democratic politicians in a federal facility may have violated the Hatch Act. See John McCaslin, NASA See-Saw, WASH. TIMES, July 30, 2004; Stephen Barr, Kerry Visit Could Put NASA in the Hot Seat, WASH. POST, Aug. 1, 2004, at C02.
146. See Letter by Ana Galindo-Marrone, supra note 144.
as applied to the use of e-mail. The content and audience of an e-mail message determine its permissibility. Factors in an analysis of the legality of an e-mail under the Hatch Act include whether an e-mail is sent while on duty or from government computers, whether the content of the e-mail amounts to partisan campaigning, and whether the audience of the e-mail indicates a private discussion or a general announcement. The OSC has stressed the case-by-case nature of an inquiry into a complaint of a Hatch Act violation by use of e-mail.

E-mail directed at the success or failure of a partisan candidate or party is permitted in the same manner that "water cooler" discussions are permitted under the Act. For example, an on-duty employee is permitted to e-mail "a few co-workers with whom the employee regularly engaged in friendly political debate . . . [along with] the text of a newspaper column critical of one of the Presidential candidates' tax proposals, with a statement supportive of the columnist's views." This kind of activity, akin to a private discussion, is not considered prohibited by the Hatch Act.

On the other hand, an employee who sent a mass e-mail while on duty to a large number of co-workers clearly advocating for the success of a presidential candidate was found to have violated the Hatch Act.

The OSC and the OPM may need to revisit the Hatch Act's regulations following the 2004 election season. The current regulations do not address issues such as the use of e-mail and telecommuting. Use of a government-owned laptop computer while at home to send mass e-mails to

149. The Hatch Act regulations were last updated before e-mail was in common use. The Act specifically prohibits use of government vehicles, rooms, and buildings for political activity, but does not mention computers. Most alleged Hatch Act violations for e-mail use, however, take place in a government room or building.


To determine whether a communication by E-mail falls under the Hatch Act's prohibition against on-duty political activity, relevant considerations include, but are not limited to: (1) the content of the message (i.e., is its purpose to encourage the recipient to support a particular political party or vote for a particular candidate for partisan political office); (2) its audience (e.g., the number of people it was sent to, the sender's relationship to the recipients); and (3) whether the message was sent in a federal building, in a government-owned vehicle, or when the employee was on duty.

Id.

151. Id.

152. See 5 U.S.C. § 7321 (2000), 5 C.F.R. § 734.101; see also E-mail Advisory Opinion, supra note 150.

153. E-mail Advisory Opinion, supra note 150.

154. Id. The e-mail stressed that time was running out to "bring Nader voters to their senses and get them to vote for the ONLY candidate for President—Al Gore!!!" Id.
co-workers directed at the success or failure of a partisan candidate or group would seem to violate the spirit of the Act. It is not readily apparent, however, that the statute reaches this act, if the act is done while off duty. One possible solution would be to consider use of a government computer in political activity to be "on duty" for purposes of the Hatch Act. Some response, in the regulations or in the statute itself, may be necessary to avoid loopholes for partisan activity in the government workplace.

9. Voter Registration Drives

Voter registration activities in the workplace are permitted, but only as long as they are not directed toward the success or failure of a candidate or political party. Recently, a federal employee union that had been deeply involved with partisan politics sought to conduct voter registration drives in the workplace. The union at issue had endorsed partisan candidates in the past, had become identified with the success or failure of a presidential candidate, and had expressly indicated elsewhere that its voter registration activities were intended to further its political goals. The OSC advised that the union's voter registration activities in the workplace would cause involved federal employees to violate the Hatch Act.

10. Further Restricted Employees

When the Hatch Act was liberalized in 1993, Congress opted to keep

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155. See Am. Fed'n of Gov't Employees v. O'Connor, 589 F. Supp. 1551 (D.D.C. 1984), vacated on other grounds, 747 F.2d 748 (D.C. Cir. 1984); see also Letter from K. William O'Connor, Special Counsel, U.S. Office of Special Counsel, (Apr. 6, 1984) (on file with U.S. Office of Special Counsel); Letter from Scott J. Bloch, Special Counsel, Office of Special Counsel, (Apr. 14, 2004) [hereinafter Voter Registration Drive Advisory I], available at http://www.osc.gov/documents/hatchact/federal/fha-31.htm ("In determining whether a voter registration drive is partisan, OSC considers all of the circumstances surrounding the drive. Some of the factors relevant to this inquiry, as discussed in our 1984 opinion, include: 1) the political activities of the sponsoring organization; 2) the degree to which that organization has become identified with the success or failure of a partisan political candidate, issue or party (e.g., whether it has endorsed a candidate); 3) the nexus, if any, between the decision to undertake a voter registration drive and the other political objectives of the sponsor; 4) whether particular groups are targeted for registration on the basis of their perceived political preference; and 5) the nature of publicity circulated to targets of the drive immediately prior to or during the drive.").

156. See Voter Registration Drive Advisory I, supra, note 155; see also Letter from William E. Reukauf, Associate Special Counsel for Investigation and Prosecution, Office of Special Counsel (May 25, 2004) [hereinafter Voter Registration Drive Advisory II], available at http://www.osc.gov/documents/hatchact/federal/fha-32.htm.

157. See id.

158. Id. Participation in a registration drive is prohibited only in the workplace. Prior to the 1993 amendments, such activity was prohibited at all times.
heightened restrictions in place for employees of a number of agencies.\textsuperscript{159} All activities denied to less restricted employees are also denied to further restricted employees. Some of these agencies have changed their names or have realigned since the 1993 amendments; the status of these agencies’ employees under the Hatch Act is unclear.\textsuperscript{160} The agencies subject to heightened restrictions are generally responsible for law enforcement or national security issues. Some agencies that Congress did not subject to heightened restrictions can opt to abide by similar restrictions.\textsuperscript{161}

These employees retain the right to engage in many political activities.\textsuperscript{162} They are permitted to vote and to work in nonpartisan capacities and campaigns,\textsuperscript{163} to attend political rallies and meetings,\textsuperscript{164} to donate money to partisan groups and candidates,\textsuperscript{165} and to sign nominating petitions.\textsuperscript{166} They also are able to voice their opinions as individuals “privately and publicly on political subjects and candidates” unless their actions are coordinated with a partisan group.\textsuperscript{167}

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\textsuperscript{159} 5 U.S.C. § 7323(b)(2)(B) (2000) lists the agencies whose employees are subject to the additional restrictions: the Federal Election Commission or the Election Assistance Commission, the Federal Bureau of Investigation, the Secret Service, the Central Intelligence Agency, the National Security Council, the National Security Agency, the Defense Intelligence Agency, the Merit Systems Protection Board, the Office of Special Counsel, the Office of Criminal Investigation of the Internal Revenue Service, the Office of Investigative Programs of the United States Customs Service, the Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms, the National Imagery and Mapping Agency, in addition to career appointees, administrative law judges, contract appeals board members, and administrative appeals judges; except those nominated by the president and confirmed by the Senate.

\textsuperscript{160} For example, the National Imagery and Mapping Agency is now called the National Geospatial-Intelligence Agency. The Office of Investigative Programs of the United States Customs Service has been reconstituted as the Bureau of Immigration and Customs Enforcement under the Department of Homeland Security (DHS). The department formerly known as the Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms has been absorbed into the DHS and the Department of Justice.

\textsuperscript{161} See Memorandum for the Secretary of State, 59 Fed. Reg. 54,121 (Oct. 27, 1994) (authorizing the Secretary to limit the political activities of political appointees of the Department of State); Memorandum for the Secretary of Defense, 59 Fed. Reg. 54,515 (Nov. 1, 1994) (authorizing the Secretary to limit the political activities of political appointees of the Department of Defense); Memorandum for the Attorney General, 59 Fed. Reg. 50,809 (Oct. 5, 1994), (authorizing the Attorney General to limit the political activities of political appointees of the Department of Justice).

\textsuperscript{162} See generally 5 C.F.R. §§ 734.402–.405 (2004) for permitted activities of further restricted employees.

\textsuperscript{163} 5 C.F.R. §§ 734.402–.405.

\textsuperscript{164} 5 C.F.R. § 734.404(a)(3).

\textsuperscript{165} 5 C.F.R. § 734.404(a)(4).

\textsuperscript{166} 5 C.F.R. § 734.402(c). Further restricted employees can sign nominating petitions, but they may not circulate them. 5 C.F.R. § 734.411(c) (2004).

\textsuperscript{167} 5 C.F.R. § 734.402.
nonpartisan voter registration drives is also permitted.168

Unlike less restricted employees, however, further restricted employees may not "take an active part in political management or political campaigns."169 These employees may not manage campaigns for partisan office,170 endorse or oppose a candidate in political literature in concert with a partisan group or person,171 or canvass for votes in concert with a partisan groups or person.172 Their activities within political groups are also limited. Serving as an officer of a political party or partisan group,173 as a "delegate, alternate, or proxy" to a party convention,174 and making speeches in support of or opposition to a candidate in concert with a partisan group175 is prohibited.

Further restricted employees are barred from fundraising for a political purpose. They may not "solicit, accept, or receive political contributions," nor sell tickets for partisan events or actively participate in fundraising activities.176

11. Expression of Views

A further restricted employee may "[e]xpress his or her opinion privately and publicly on political subjects."177 As discussed above, the prohibition on "political activity" in Section 7324 reaches individual acts, while the ban on "taking an active part in political management or in political campaigns" for further restricted employees under Section 7323(b)(2)(A) reaches only acts on behalf of or in connection with a political party, partisan groups, or candidates.

Two 1988 circuit court cases help clarify the meaning of this prohibition and of other political activities prohibited to further restricted employees.178 The Eleventh Circuit reviewed United Public Workers v.

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168. See Am. Fed’n of Gov’t Employees v. O’Connor, 589 F. Supp. 1551 (D.D.C. 1984), vacated by 747 F.2d 748 (D.C. Cir. 1984); see also In re Crawford, 1 PAR 262 (1946). These cases indicate that a group may not merely declare its voter registration effort to be nonpartisan to comply with the Hatch Act. See discussion supra Part II.
170. 5 C.F.R. § 734.411(a) (2004).
171. 5 C.F.R. § 734.411(d).
172. 5 C.F.R. § 734.411(c).
173. 5 C.F.R. § 734.409(a) (2004).
174. 5 C.F.R. § 734.409(d).
175. 5 C.F.R. § 734.409(d).
177. 5 C.F.R. § 734.203(a) (2004).
178. See Blaylock v. United States Merit Sys. Prot. Bd., 851 F.2d 1348 (11th Cir. 1988); Biller v. United States Merit Sys. Prot. Bd., 863 F.2d 1079 (2d Cir. 1988). The violations in these cases took place before the 1993 amendments. The employees charged in these cases would today be classified as less restricted employees and would not be subject to the
Mitchell, United States Civil Service Commission v. Letter Carriers and the Hatch Act’s legislative history to find that “the Hatch Act is violated only by actions taken in concerted effort with partisan activity or formal, organized, political groups.” Blaylock, a civilian employee of the Department of the Air Force who had been on unpaid leave for ten years, wrote a series of election-year articles critical of President Reagan and favorable to Democratic challenger Walter Mondale in a magazine for federal employees. The OSC filed a complaint, and the Board upheld an administrative law judge’s finding that the employee had violated the Hatch Act prohibition on taking an active part in political management or in political campaigns. The Eleventh Circuit reversed. The court rejected the government’s argument that the statute’s restriction on “political campaigns” reached repeated activities such as writing a series of articles. The court drew support from the regulations, which forbade only partisan activities, and the 1940 amendments, which were intended to cut off the CSC’s ability to broaden the list of prohibited activities. “It is far more probable,” the court concluded “that Congress intended the statutory term ‘political campaigns’ to refer to the formal efforts of organized political parties to secure the election of their candidates.”

The Second Circuit also held that “[i]t is not enough that the federal employee and the candidate pursue the same political goals independently; the two must work in tandem or be linked together for there to be a

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Section 7323(b)(2)(A) prohibition on taking “an active part in political management or in political campaigns.” The rule advanced in these cases still applies today to further restricted employees.

179. Blaylock, 851 F.2d at 1356.
180. Id. at 1349–50.
181. Id. at 1351.
182. Id. at 1355–56. “[T]he government apparently believes that eight expressions of an individual’s political opinion constitute a campaign; the magic number, however, might well be two, or five hundred.” Id.
183. Id. at 1356.

5 C.F.R. § 733.122(10) prohibits ‘endorsing or opposing a candidate for public office in a partisan election or a candidate for political party office in a political advertisement, a broadcast, campaign, literature, or similar material.’ The placement of the comma between the words ‘campaign’ and ‘literature’ is undoubtedly a typographical error. The regulation appears without the comma in both the Federal Register and the Letter Carriers opinion where the Supreme Court passed on the constitutionality of the implementing regulations. With the comma, the regulation either makes little sense or seems dangerously broad.

(citations omitted). This regulation now appears at 5 C.F.R. § 734.411(d) (2004) without a comma between “campaign” and “literature.”

184. Blaylock, 851 F.2d at 1351–52.
185. Id. at 1355.
violation of the Hatch Act." The court found that the Hatch Act's legislative history "mandate[d] a construction of the Act in favor of First Amendment rights." A Postal Service employee who had been on leave without pay for more than twenty years had endorsed a presidential candidate. The Second Circuit reversed the Board's finding of a violation.

12. Penalties

Federal employees who violate the Hatch Act are subject to removal from their positions. If the Board unanimously concludes that the offense warrants a lesser penalty, the employee can be suspended without pay for no less than thirty days.

Mitigating and aggravating factors considered by the Board in determining a penalty include: (1) the nature of the offense and the extent of the employee's participation; (2) the employee's motive and intent; (3) whether the employee received the advice of counsel regarding the activities at issue; (4) whether the employee ceased the activities; (5) the employee's past employment record; and (6) the political coloring of the employee's activities.

In a recent case, the Board found that because the race was initially nonpartisan and because the respondent took steps to reduce its partisanship upon receiving warning from the OSC, a 120-day suspension was warranted rather than removal.

B. State and Local Employees

The Hatch Act imposes some restrictions on state and local employees who are employed in connection with federal funds. These provisions are not as restrictive as those that apply to federal employees. There are three

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186. Biller v. United States Merit Sys. Prot. Bd., 863 F.2d 1079, 1090 (2d Cir. 1988). The court looked to legislative history, case law, and the Act's purpose, which was preventing machine politics. Id. at 1089.

187. Id. at 1086.

188. Id. at 1081.

189. Id. at 1090.


191. Id.


activities prohibited to covered state and local employees. They may not run for partisan office, coerce donations from other covered employees, or use their official authority to influence the results of an election.

1. Which State and Local Employees Are Covered

The Hatch Act applies to executive branch state and local employees who, as a normal and foreseeable incident of their principal positions or jobs, perform duties in connection with an activity financed in whole or in part by federal loans or grants. The Act does not require that an employee have discretionary authority over federal funds in order to be covered.

State and local-administered programs that commonly receive grants and loans from the federal government, subjecting employees to Hatch Act provisions, include education, training and employment, social services, health, transportation, environmental protection, community and regional development, housing, emergency preparedness, homeland security, agriculture, and law enforcement programs.

Employees of private nonprofit organizations can be covered by the Hatch Act if the federal statute through which the organization receives funds directs that the organization shall be considered to be a state or local agency for purposes of the Hatch Act. The Head Start and Community Service Block Grant statutes include such a provision.

When an employee holds two or more jobs, principal employment is determined by reference to salary received and hours worked at various jobs. Employees remain covered by Hatch Act restrictions when on annual leave, sick leave, leave without pay, administrative leave, or furlough. "Principal employment" relates to an employee's primary position—for example, whether for Hatch Act purposes he is considered a sheriff or an insurance salesman—and not to primary duties within public

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194. 5 U.S.C. § 1501 (2000); see also Special Counsel v. Gallagher, 44 M.S.P.B. 57 (1990); In re Hutchins, 2 P.A.R. 160, 164 (1944).
195. See 5 U.S.C. § 1501; see also Williams, 55 F.3d at 920–21; Gallagher, 44 M.S.P.B. at 57.
Some state and local employees are specifically exempted from particular provisions of the Hatch Act. Employees who work for educational or research institutions such as state universities are not covered by the Act at all. Publicly elected officials, including city mayors, governors, lieutenant governors, and heads of municipal and state executive departments, are permitted to run for office. Such elected officials remain bound by the other Hatch Act prohibitions on interfering with elections and soliciting other covered employees for political donations.

2. Provisions of the Hatch Act Applying to State and Local Employees

The Hatch Act and its regulations list a number of permitted and prohibited political activities for covered state and local employees. Employees may not run for office in a partisan election, coerce donations from other covered employees, or use official authority to influence the outcome of an election. The bulk of Hatch Act offenses at the state and local level involve candidacy in a partisan election.

Each state and local employee "retains the right to vote as he chooses and to express his opinions on political subjects and candidates." Covered state and local employees are also permitted to engage in nonpartisan political activity, including candidacy.

Covered state and local employees may not be candidates for public office in a partisan election. If any candidate on the ballot represents a political party, regardless of state or local law, the Hatch Act forbids candidacy by covered state and local employees. The Hatch Act prohibition on candidacy applies to any act in furtherance of candidacy prior to formal announcement, such as soliciting funds.

204. Id.
205. 5 U.S.C. § 1502(a).
206. See chart infra Part VI.
207. 5 U.S.C. § 1502(b).
210. 5 U.S.C. § 1503 (Candidacy is permitted "if none of the candidates is to be nominated or elected at such election as representing a party . . . ."); see also Special Counsel v. Mahnke, 54 M.S.P.B. 13, 16 (1992).
The use of an official position to benefit or to oppose a candidate in a partisan campaign is prohibited.\textsuperscript{213} Recently, this issue has rarely been litigated separately from the issue of coercion, discussed below. A district court dealing with a wrongful termination suit found that a plaintiff had "likely" violated this provision by allowing the mayor's name to be painted on city buses and by going on campaign-related walking tours with the mayor.\textsuperscript{214} On appeal, it was found to be "unclear" and irrelevant whether a violation had occurred.\textsuperscript{215}

Covered employees may not "directly or indirectly coerce" campaign contributions of time or money from other covered employees.\textsuperscript{216} In 1990, the Board approved an OSC recommendation that the director of the Niagara Frontier Transportation Authority and two colleagues should be removed from their posts for coercing subordinates into making campaign donations.\textsuperscript{217} The Board reaffirmed "the long-established rule that it is inherently coercive for a supervisor to ask a subordinate to contribute to a political cause."\textsuperscript{218} The employees testified that they "performed work... because [a defendant, the employees' superior] asked them to do so and they hoped to improve their standing if they agreed or feared the effect on their jobs if they declined."\textsuperscript{219} Another colleague violated the Hatch Act by repeatedly discussing campaign contributions with employees "under circumstances where [subordinate employees] reasonably felt coerced."\textsuperscript{220}

3. Procedure and Penalties

Federal agencies involved in loaning or granting funds must report to the OSC any activity of state and local officers that the agency has reason to believe violates the Hatch Act.\textsuperscript{221} If an OSC investigation uncovers evidence of a violation of the law warranting prosecution, the OSC files a written complaint for disciplinary action with the Board.\textsuperscript{222} The employee has the right to contest the charges, including the right to a hearing before

\begin{itemize}
\item \textsuperscript{213} 5 U.S.C. § 1502(a)(1).
\item \textsuperscript{214}  McKechnie v. McDermott, 595 F. Supp. 672, 675 (N.D. Ind. 1984).
\item \textsuperscript{215} Shondel v. McDermott, 775 F.2d 859, 862–63 (7th Cir. 1985) (Judge Posner wrote, "[b]ut we shall not have to get deeper into this thicket, except to note that no proceedings have been brought against McKechnie for violation of the Hatch Act.").
\item \textsuperscript{216} 5 U.S.C. § 1502(a)(2).
\item \textsuperscript{217} Special Counsel v. Gallagher, 44 M.S.P.B. 57 (1990).
\item \textsuperscript{218} Id. at 66.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id. at 69.
\item \textsuperscript{221} 5 U.S.C. § 1504 (2000). Private individuals may also submit complaints about Hatch Act violations.
\item \textsuperscript{222} Id.
the Board.  

The Board determines if there has been a violation of the Act and if removal is warranted as a punishment for violation. In part because the federal government probably lacks the authority to direct a state or local entity to dismiss an employee, the statute contemplates withholding federal funds in lieu of dismissal of the employee. If the state or local agency opts not to remove the offending employee, it faces withholding of funds in the amount of two years of the employee’s salary. "Candidacy for partisan political office is... one of the most conspicuous and unequivocal violations of the Hatch Act,’ usually warranting removal unless strong mitigating factors are shown." Courts have repeatedly upheld Board orders for removal for employees who “ignored repeated warnings” that their candidacies would violate the Hatch Act.

III. CONSTITUTIONALITY OF THE HATCH ACT AND ITS PREDECESSORS

The Hatch Act and its predecessors have uniformly been upheld against constitutional challenges from covered government employees invoking the First and Tenth Amendments, as well as other constitutional provisions. Generally, in each Supreme Court case the majority stresses the importance of governmental efficiency and impartiality, deferring to the experience-based judgment of Congress and the president on how best to achieve these goals. Dissenters begin their inquiry with the language and doctrine of the First Amendment, arguing that the clause prohibits Hatch Act-type restrictions on employees’ political activity in the name of government efficiency. In upholding the Hatch Act, the Supreme Court has not fully addressed the possibility, advanced by some scholars, that the Act is a restriction on government activity of the sort envisioned and mandated by the First Amendment.

224. Id.
225. 5 U.S.C. § 1506 (2000); see Oklahoma v. United States Civil Serv. Comm’n, 330 U.S. 127, 143 (1947) ("While the United States is not concerned with and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.").
229. Id.
A. Ex Parte Curtis

The constitutional validity of restrictions on the political activities of government employees first came before the Supreme Court in *Ex Parte Curtis* in 1882. The Curtis Court passed judgment on the constitutionality of an 1876 law prohibiting executive branch employees from any exchange of items for political purposes. The Court, citing a series of similar laws over nearly 100 years, upheld the law as a constitutional promotion of government efficiency.

The act was upheld as a valid exercise of Congress' power to "make all laws necessary and proper to carry into effect the powers that are delegated." The Court, minimizing the impact of the law, wrote that it rested "on the same principle" as a series of restrictions on the outside professional activities of government employees enacted over the years, including in the first Congress. "The evident purpose of congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties," Justice Waite wrote. "Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the..."

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230. Ex Parte Curtis, 106 U.S. 371, 373 (1882) ("[T]his is the first time the constitutionality of such legislation [restricting the outside activities and rights of public employees] has ever been presented for judicial determination.").
231. Id. at 371.
232. Act of Aug. 15, 1876, ch. 287, § 6, 19 Stat. 143, 169 (1876) ("That all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from, any other officer or employee of the Government, any money or property or other thing of value for political purposes; and any such officer or employee, who shall offend against the provisions of this section shall be at once discharged from the service of the United States; and he shall also be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not exceeding five hundred dollars.").
233. Curtis, 106 U.S. at 372 (citing U.S. Const. art. 1, § 8).
234. Id. at 371–72.

The act is not one to prohibit all contributions of money or property by the designated officers and employees [sic] of the United States for political purposes. Neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges.

Id.
236. Curtis, 106 U.S. at 373.
legitimate means to such an end.\textsuperscript{237} The Court also reasoned that forbidding political donations promoted public employees' "feeling of independence under the law condu[ive] to faithful public service."\textsuperscript{238} Justice Bradley dissented, arguing that the law went against the "spirit" of the First Amendment.\textsuperscript{239} Bradley stressed that the law prevented employees from making completely voluntary donations to political causes they wanted to support.\textsuperscript{240} Bradley did not believe that the practice's extended history deserved deference, writing, "[i]f similar laws have been passed before, that does not make it right.\textsuperscript{241}

\textbf{B. United Public Workers v. Mitchell}

The Supreme Court upheld the Hatch Act against a First Amendment challenge in \textit{Mitchell} in 1947.\textsuperscript{242} Various executive branch employees challenged the constitutionality of the provision that is codified today at 5 U.S.C. § 7323(b)(2)(A), which at the time prohibited all federal executive branch employees from "tak[ing] any active part in political management or in political campaigns."\textsuperscript{243} The \textit{Mitchell} Court advanced an indistinct but highly deferential standard of review on the grounds that Congress and the President are responsible for management of the civil service. "The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress,"\textsuperscript{244} Justice Reed wrote for the Court. "Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions.\textsuperscript{245}

\begin{footnotes}
\item[237] \textit{Id.}
\item[238] \textit{Id.} at 373.
\item[239] \textit{Id.} at 377 (Bradley, J., dissenting). Bradley wrote:

\[ \text{[t]he freedom of speech and of the press, and that of assembling together to consult upon and discuss matters of public interest, and to join in petitioning for a redress of grievances, are expressly secured by the Constitution. The spirit of this clause covers and embraces the right of every citizen to engage in such discussions, and to promote the views of himself and his associates freely, without being trammeled by inconvenient restrictions.}\]

\textit{Id.}
\item[240] \textit{Id.} at 376 ("It prevents the citizen from co-operating with other citizens of his own choice in the promotion of his political views. To take an interest in public affairs . . . is every citizen's duty.").
\item[241] \textit{Id.} at 378.
\item[243] \textit{Id.} at 82. The provision now applies only to further restricted employees.
\item[244] \textit{Id.} at 102.
\item[245] \textit{Id.}
\end{footnotes}
The Court conceded that the Hatch Act resulted in "a measure of interference... with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments," but concluded that "it is accepted constitutional doctrine that these fundamental human rights are not absolutes." The restrictions on federal employees' political activities were longstanding and limited in the Court's view.

The Court looked to historical practice to determine the constitutionality of Congress' action, as in Curtis, finding that "[t]he regulation of such activities... has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion."

The political branches' perception of a need for the Act was sufficient to establish its constitutionality:

Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection. Another Congress may determine that on the whole, limitations on active political management by federal personnel are unwise. The teaching of experience has evidently led Congress to enact the Hatch Act provisions. To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system.

246. Id. at 95. Plaintiffs also challenged the Act as a vague and indefinite deprivation of liberty violating the Fifth Amendment.

247. Id.

248. Id. at 79, 80, 96, 99, 102–103.

249. Id. at 100. There is a:

wide range of public activities with which there is no interference by the legislation. It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success.

Id.

250. The Court wrote that in fact, "[t]he conviction that an actively partisan governmental personnel threatens good administration has deepened since Ex parte Curtis."

Id. at 97–98.

251. Id. at 102–103.

252. Id. at 99 (citations omitted). The Court later repeated this rationale:
Mitchell's deference extended to its examination of the law's breadth. Poole, the lone plaintiff granted standing to challenge the Act's constitutionality by the Court, was a technical worker with little if any authority over policy or contact with the public. The Court supplied its own possible rationales for the law as written. Regardless of the Act's arguable overbreadth as applied to any one employee, "[e]vidently what Congress feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively." Given the "long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion," the Court could not "say with such a background that these restrictions are unconstitutional.

The Court upheld the Act against various specific constitutional challenges. The Ninth and Tenth Amendments had little reach on the theory advanced by the Court. It noted that "[t]he essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery."

Justice Douglas dissented, as did Justice Black joined by Justice Rutledge. Both dissents argued that all of the petitioners were threatened with immediate and irreparable harm, and thus that all of them had standing to sue. Both Black and Douglas expressed concern over the number of

Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.

Id. at 103.

253. Id. at 86–93. Poole was the only plaintiff to have actually violated the Act. The others claimed that the Act chilled their future activity. The dissenters concluded that the other plaintiffs should have been granted standing. Id. at 109, 115–20.

254. See id. at 101 ("The complaint states that [Poole] is a roller in the mint. We take it this is a job calling for the qualities of a skilled mechanic and that it does not involve contact with the public.").

255. See id. at 101 ("Congress may have thought that Government employees are handy elements for leaders in political policy to use in building a political machine.").

256. Id. at 101.

257. Id. at 103.

258. See id. at 96 ("[W]hen objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken."). The Court addressed Tenth Amendment objections to the Hatch Act's application to state and local officials in Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947), discussed below.

259. Id. at 95.

260. Id. at 109, 116–18.
workers affected by the restrictions and the specific activities in which they were denied permission to participate.\textsuperscript{261} Government employees were not "second class citizens," Black and Douglas stressed.\textsuperscript{262}

Justice Black argued that the Hatch Act's restrictions on political activity went far beyond the restrictions upheld in Ex parte Curtis.\textsuperscript{263} Congress should "punish the coercers,"\textsuperscript{264} rather than millions of federal employees because of the risk of corruption or coercion, Black wrote. Justice Douglas acknowledged that political rights may need "to be qualified by the larger requirements of modern democratic government," but argued that such "restrictions should be narrowly and selectively drawn."\textsuperscript{265}

C. Oklahoma v. United States Civil Service Commission

The Court held that the Hatch Act provisions applying to state and local officials did not violate the Tenth Amendment in Oklahoma v. United States Civil Service Commission,\textsuperscript{266} a case decided the same day as Mitchell. Oklahoma cited the "possible forfeiture[s] of state office" in arguing that the Act violated the Tenth Amendment.\textsuperscript{267} The Court upheld the Act's method of enforcement, saying that "[w]hile the United States is not concerned with, and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed."\textsuperscript{268} Such provisions in federal laws were "not unusual" and unobjectionable.\textsuperscript{269}

D. United States Civil Service Commission v. Letter Carriers

In Letter Carriers,\textsuperscript{270} the Supreme Court reversed a district court holding that the Hatch Act's statutory definition of "political activity" was unconstitutionally vague and overbroad, and that later Supreme Court

\textsuperscript{261.} Id. at 106–09, 121–23.
\textsuperscript{262.} Id. at 111, 124.
\textsuperscript{263.} See id. at 112 ("Indeed, the Curtis decision seems implicitly to have rested on the assumption that many political activities of government employees, beyond merely voting and speaking secretly, and would not, and could not under the Constitution, be impaired by the legislation there at issue.").
\textsuperscript{264.} Id. at 113 n.8.
\textsuperscript{265.} Id. at 126.
\textsuperscript{266.} 330 U.S. 127 (1947).
\textsuperscript{267.} Id. at 142.
\textsuperscript{268.} Id. at 143.
\textsuperscript{269.} Id. at 144. The Court also rejected Oklahoma's claim that the CSC's ruling was an invalid arbitrary and capricious finding of a violation by the state employee at issue. Id. at 144–45.
holdings had undermined *Mitchell*. After reviewing the history of political restrictions on government employees, *Letter Carriers* expressly reaffirmed *Mitchell*. The Court found that the interests of the government, determined by reference to previous cases and the Act’s legislative history, outweighed the interests of the employees at issue. The Hatch Act’s 1940 clause defining “partisan political activity” in terms of previous CSC decisions was held to incorporate a restatement of these decisions rather than, as the district court had found, every conflicting CSC pronouncement.

Like the *Mitchell* Court, the *Letter Carriers* Court viewed the Hatch Act as presenting a conflict between obviously important interests of the government and the First Amendment rights of employees, with the government interests sufficient to vindicate the Act. “Neither the right to associate nor the right to participate in political activities is absolute,” Justice White wrote for the Court. The government had an interest in maintaining a bureaucracy that operated “without bias or favoritism,” was perceived to do so, and was not “employed to build a powerful, invincible, and perhaps corrupt political machine.” Employees’ interests were not disregarded by the Act, the Court pointed out. Citing legislative history, Justice White wrote that the Act helped to “make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs.”

*Letter Carriers* rejected the district court’s holding that the Hatch Act

271. Id. at 553–54.
272. Id. at 557–63. The Court maintained that it deferred not only to Congress, but to “the judgment of history.” Id. at 557.
274. See *Letter Carriers*, 413 U.S. at 564–67 (discussing the government’s decision to limit partisan political activities by federal employees).
275. Id. at 572.
276. See id. at 554 (“As the District Court recognized, the constitutionality of the Hatch Act’s ban on taking an active part in the political management or political campaigns has been here before.”).
277. Id. at 567.
278. Id. at 565.
279. See id. (asserting that the government had an interest in preserving “confidence in the system of representative Government . . . [from being] eroded to a disastrous extent.”).
280. Id.
281. Id. at 566.
and its regulations were vague and overbroad. The Court looked to the regulations interpreting the Act, acknowledging that "[t]here might be quibbles about the meaning of taking an 'active part in managing' or about 'actively participating in... fund-raising' or about the meaning of becoming a 'partisan' candidate for office," but concluded that the wording was clear enough. "[T]here are limitations in the English language with respect to being both specific and manageably brief." The provisions at issue were "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." To illustrate the clarity of the provisions, the Court set out a series of specific activities prohibited and permitted by the regulations.

The Court looked to legislative history to find that the Act's provision, now codified at Section 7323(b)(4), defining "active part in political management or in a political campaign" in terms of CSC decisions issued before July 19, 1940, was neither vague nor overbroad. The district court had held that this provision unconstitutionally adopted numerous, and sometimes contradictory, CSC findings into law. The Supreme Court concluded instead that the provision was clearly "intended to deprive the Civil Service Commission of rulemaking power in the sense of exercising a subordinate legislative role ...." The Act adopted a restatement of CSC decisions rather than every ruling, the Court found, referring to the Act's legislative history. Civil Service Commission decisions and regulations issued after the Act were "necessarily anticipated" by Congress, and were "within the bounds of ... the 1940 rules." The Act and its regulations were not overbroad because the restrictions were "clearly stated" and

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282. Id. at 577–78.
283. Id. at 578–79.
284. Id. at 579. The Court also held that the district court erred in voiding any more of the law than the provision found unconstitutionally vague.
285. Id. at 579. A Supreme Court case decided the same day as Letter Carriers upheld 5–4 the provisions of Oklahoma's "little Hatch Act" restricting its own employees. Justice Stewart switched sides, voting with the three Letter Carriers dissenters. He joined Justice Brennan's dissent focusing on the state regulations' failure to clarify the state statute's ambiguous terms. Brodick v. Oklahoma, 413 U.S. 601, 621, 624–27 (1973).
286. Letter Carriers, 413 U.S. at 568–76.
287. See id. at 571 ("[T]he District Court held the prohibition against taking an active part in political management and political campaigns to be itself an insufficient guide to employee behavior ....").
288. Id. at 571. In 1940, as Congress deprived the CSC of rulemaking power, it granted the agency authority to investigate and enforce state and local violations. See also Act of July 19, 1940, Pub. L. No. 76–753, § 4, 54 Stat. 767 (1940).
289. See Letter Carriers, 413 U.S. at 572 ("It is also apparent, in our view, that the rules that had evolved over the years from repeated adjudications were subject to sufficiently clear and summary statement for the guidance of classified service.").
290. Id. at 575.
related to the problem Congress intended to target.\textsuperscript{291}

Justice Douglas dissented, joined by Justices Brennan and Marshall. The dissent focused on the “ambiguity” of certain regulations, arguing that “the critical phrases lack precision.”\textsuperscript{292} Justice Douglas noted that First Amendment doctrine had advanced since Mitchell.\textsuperscript{293} He advocated a more restrictive view of the government’s power to limit political activity: “In the areas of speech, like religion, it is of no concern what the employee says in private to his wife or to the public in Constitution Hall.”\textsuperscript{294}

\textit{E. Other Cases}

The Supreme Court has discussed the Hatch Act in analysis of other laws, offering some insight into how the Hatch Act might fit into developing First Amendment doctrine. Lower courts have rejected less common constitutional objections to the Hatch Act.

After Mitchell, the Supreme Court elevated the level of scrutiny it applied to restrictions on the First Amendment rights of government employees. In \textit{Pickering v. Board of Education}, the Court held that “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”\textsuperscript{295} The Court offered a balancing test: “The problem in any case is to arrive at a balance between the interests” of the employee as citizen and the interests of the government as employer, “in promoting the efficiency of the public services it performs through its employees.”\textsuperscript{296} Factors in the analysis included the relevance of the speech to the job, the damage the speech caused to the employee’s “proper performance of his daily duties,”\textsuperscript{297} and the interference with the government function at issue.\textsuperscript{298}

In \textit{United States v. National Treasury Employees Union (NTEU)}, the Court struck down limitations on receipt of honoraria by federal employees at the GS-15 level and below.\textsuperscript{299} The \textit{NTEU} Court raised scrutiny for the

\begin{itemize}
  \item 291. \textit{Id.} at 580.
  \item 292. \textit{Id.} at 596.
  \item 293. \textit{See id.} at 597 (“[W]hat may have been unclear to some in Mitchell should by now be abundantly clear to all. We deal here with a First Amendment right to speak, to propose, to publish, to petition Government, to assemble.”). Justice Douglas also pointed out that since Mitchell, “a host of decisions have illustrated the need for narrowly drawn statutes that touch First Amendment rights.” \textit{Id.} at 598.
  \item 294. \textit{Id.} at 597.
  \item 296. \textit{Id.}
  \item 297. \textit{Id.} at 572.
  \item 298. \textit{Id.} at 573.
\end{itemize}
statute because it affected "citizen comment upon matters of public concern . . . made outside the workplace, and involv[ing] content largely unrelated to their government employment," and because "this ban chills potential speech before it happens." Specifically, the government had to "show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government." This the government could not do, because the "vast majority of the speech at issue in this case does not involve the subject matter of Government employment and takes place outside the workplace."

All nine justices appeared to be willing to uphold the Hatch Act, either as a manner of protecting employees' rights, or as a reasonable balance of the government's interest in avoiding "impropriety and the appearance of impropriety" with employees' interest in publishing and speaking on unrelated topics. Citing Letter Carriers' concern that the Hatch Act would help keep employees "free from pressure," the NTEU Court concluded that "the Hatch Act aimed to protect employees' rights, notably their right to free expression, rather than to restrict those rights." Additionally, there had been "demonstrated ill effects of Government employees' partisan political activities" leading up to adoption of the Hatch Act, in contrast to the situation in NTEU. The honoraria limitations imposed a cost not only on federal employees, but also on the "the public's right to read and hear what the employees would otherwise have written and said," the Court found. The honoraria limitations extended to messages that have "nothing to do with their jobs and do[ ] not even

300. Id. at 466.
301. Id. at 468.
302. Id. at 455 (internal quotations and citations omitted).
303. Id. at 470.
304. Id. at 471-72.
305. Id. at 494 (Rehnquist, C.J., dissenting).
306. Id. at 471 (emphasis in original). Justice Rehnquist, in a dissent defending the government's ability to ban the honoraria at issue consistent with the First Amendment, termed the majority's discussion "a strange characterization" of the Hatch Act given its restrictions and punishments for violators. Id. at 498. The dissent noted, accurately, that the majority overlooked the primary justifications for the Hatch Act offered in Letter Carriers: "Although protection of employees from pressure to perform political chores certainly was a concern of the Hatch Act, it was by no means the only, or even the most important, concern." Id. at 493 (internal reference omitted).
307. Id. at 471; see also id. at 483 (O'Connor, J., concurring in part and dissenting in part) ("[W]e upheld provisions of the Hatch Act against a First Amendment challenge only after canvassing nearly a century of concrete experience with the evils of the political spoils system.") (citations omitted).
arguably have any adverse impact on the efficiency of the offices in which they work.\textsuperscript{309}

Some language has suggested that the history of partisan political activity of government employees has led to a particular exception to expected First Amendment scrutiny. In \textit{Federal Communications Commission v. League of Women Voters}, the Court stressed that history had proven the need for the Hatch Act, writing that it "evolved over a century of governmental experience with less restrictive alternatives that proved to be inadequate to maintain the effective operation of government."\textsuperscript{310}

The Sixth Circuit held that the Hatch Act's imposition of different penalties on state and federal employees did not violate the Equal Protection Clause because it was a rational response by Congress to diminished federal power regarding state and local employees.\textsuperscript{311} The Third Circuit in \textit{Merle v. United States}\textsuperscript{312} rejected a claim that the Hatch Act, by restricting the rights of some citizens to run for office, violates the Qualifications Clause\textsuperscript{313} of the Constitution. After concluding that the Hatch Act prevents covered state employees from running for federal offices, the court noted that covered employees could run if they resign from their jobs.\textsuperscript{314} In \textit{Burrus}, the Second Circuit held that a union bulletin board in an interior work area was a non-public forum, subject to reasonable regulation.\textsuperscript{315}

\textit{F. The Hatch Act, the First Amendment, and Campaigning in Federal Facilities}

The Hatch Act prohibits federal employees from engaging in partisan activity while in public buildings.\textsuperscript{316} In cases when the government has opened a building to public debate and discussion, these bans can present questions under First Amendment limits on the government's ability to limit speech in public areas. The OSC issued an advisory opinion on

\textsuperscript{309} \textit{Id.} at 465.
\textsuperscript{310} \textit{See} Fed. Communications Comm'n \textit{v. League} of Women Voters, 468 U.S. 364, 400 (1984). The statutory provision at issue in that case, forbidding noncommercial educational stations that received federal funds to engage in editorializing, was found to violate the First Amendment. \textit{Id.} at 395.
\textsuperscript{311} \textit{See} Alexander \textit{v. United States Merit Sys. Prot. Bd.}, 165 F.3d 474, 485 (6th Cir. 1999).
\textsuperscript{312} \textit{See} Merle \textit{v. United States}, 351 F.3d 92, 96–97 (3d Cir. 2003).
\textsuperscript{313} \textit{U.S. Const.} art. I, § 2, cl. 2.
\textsuperscript{314} \textit{See} Merle, 351 F.3d at 96–97.
\textsuperscript{315} \textit{Burrus v. Vegliante}, 336 F.3d 82, 91 (2d Cir. 2003).
\textsuperscript{316} 5 U.S.C. § 7324(a)(2) (2000) ("An employee may not engage in political activity in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof.").
campaigning in federal facilities.\textsuperscript{317} In particular, there has been some concern about restricting partisan activities in federal buildings that are frequently used by non-employees, such as facilities intended for use by veterans, National Park Service sites, and visitors' centers at these sites.\textsuperscript{318}

Under the First Amendment, government restrictions of speech in a public forum, such as a sidewalk or street, will be upheld if they are content-neutral time, place, and manner restrictions that are narrowly tailored to serve a significant government interest and leave open alternative channels of communication.\textsuperscript{319} Content-based restrictions will be upheld only if the government can show that the regulation is narrowly drawn to serve a compelling state interest.\textsuperscript{320} Restrictions in a designated public forum, an area that the government has designated as a place of expressive activity opened to the public or certain speakers or for the discussion of certain subjects,\textsuperscript{321} are subject to the same scrutiny as regulations of a public forum.\textsuperscript{322} A state can choose to close off an area that formerly served as a limited public forum.\textsuperscript{323} The government can restrict speech in a nonpublic forum "as long as a regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."\textsuperscript{324}

Determination of the bounds of the forum at issue in a given case will depend on the circumstances.\textsuperscript{325} Still, some broad conclusions about different kinds of facilities are possible. Application of the Hatch Act to some facilities open to the public, such as facilities for veterans, raises few concerns because these areas have not been designated as areas for expressive activity.\textsuperscript{326}

Opening a building to some speakers does not automatically create a


\textsuperscript{318} Hatch Act prohibitions are limited to activity in a "room or building," and would not reach activity at outdoor facilities such as parks. 5 U.S.C. § 7324(a)(2).


\textsuperscript{323} \textit{Perry}, 460 U.S. at 45.

\textsuperscript{324} \textit{See id.} at 37.

\textsuperscript{325} When a speaker seeks limited access to a public building, courts will perform a "tailored approach to ascertaining the perimeters of a forum within the confines of the government property" as needed. \textit{Cornelius}, 473 U.S. at 801.

\textsuperscript{326} \textit{Id.} at 802, 805.
designated public forum. Evidence that historic buildings have been used for political events may show that there is a government policy of opening these facilities for expressive activity, creating a designated public forum. Even when a designated public forum is created, only "entities of similar character" can also claim a right to access. The Hatch Act would yield to First Amendment requirements that a federal building designated as a public forum be open to similar speakers engaging in similar activities; however, to comply with the Hatch Act, governments may close to general discussion areas that had formerly been designated public fora.

G. The Hatch Act: A First Amendment-Mandated Statute?

Courts have analyzed the Act as an encroachment on First Amendment rights of government employees. The Hatch Act, though, also protects the public's First Amendment rights. Laws restricting the free speech rights of government employees are subject to a balancing test, evaluating the interests of the government as employer and the interests of the employee as a citizen. The interests of the government in the Hatch Act include promoting impartiality and fairness in administrating the law. From the perspective of the public, this can be restated, more forcefully, as an interest in protecting the public's due process and free speech rights from partisan enforcement of laws.

If the public fears that a partisan bureaucracy conducts investigations and prosecutions on the basis of party affiliation or expression of views, there is a chilling effect on the freedoms of speech and association. Partisan government could also make demands for partisan support or favors from the public, as they have of subordinate employees. On a broader scale, a bureaucracy pursuing the goals of a party rather than of elected officials renders government less accountable to voters.

This additional rationale for the Hatch Act, implied but not examined in Letter Carriers, is an additional reason for the Act's validity. Given that Congress may not make a law abridging freedom of speech, or of the press, or of the right of the people peaceably to assemble, it cannot maintain a bureaucracy that works the same infringement. On this view, the Hatch Act defends the rights protected by the First Amendment.

327. Perry, 460 U.S., at 48 (holding that "selective access does not transform government property into a public forum").
328. Id. at 47.
332. Note that, since the amendments passed in 1993, the Act covers a limited number of activities of off-duty employees.
There are grounds to criticize this conception of the Hatch Act. Even scholars who defend the Hatch Act on grounds that it protects the public have conceded that "[t]here are . . . very few indications that Congress in 1939 believed that protection of the individual citizen was a major reason for supporting the act." Still, protecting the public has been a concern of Congress in debates about the Hatch Act. Given the expansion of federal power and activity since 1939, the risk of government bureaucracy infringement of the public's First Amendment rights has expanded in ways that even the Hatch Act's framers did not fully appreciate.

The idea that the Hatch Act is justified by history is only necessary if the Act is viewed as an infringement on First Amendment rights; this argument is unnecessary if the Act is properly regarded as protecting those rights. Letter Carriers offered a lengthy history of restrictions on political activity in support of its conclusion that it was the "judgment of history" that the government had a strong interest behind the Hatch Act. Similarly, League of Women Voters characterized the Act as having "evolved over a century of governmental experience." Rather than reflecting a "reasonable" prerogative of government to limit some rights protected by the First Amendment, as indicated in Mitchell, Letter Carriers, and the NTEU dissent, the Hatch Act can be regarded as a limitation on government power as mandated by the First Amendment.

334. See Letter Carriers, 413 U.S. at 565 (citing "fair and effective government" as a rationale for the Hatch Act). Opponents to the amendments in 1993 cited protecting the public from coercion as a reason to avoid amending the law. See also 139 Cong. Rec. H761 (1993) (Statement by Rep. Wolf) (arguing that even well-intentioned employees could have a coercive effect on the public if they engaged in off-duty partisan activity).
335. Letter Carriers, 413 U.S. at 557.
337. For the proposition that the First Amendment limits the power of the government to interfere with public debate, see U.S. Const. amend. I ("Congress shall make no law . . . 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."); see also U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 817 (2000) (stating that under the First Amendment's Free Speech Clause, "[t]he citizen is entitled to seek out or reject certain ideas or influences without Government interference or control."); Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 116 (1991) ("The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.") (citations and quotations omitted); Bigelow v. Virginia, 421 U.S. 809, 829 (1975) ("The policy of the First Amendment favors dissemination of information and opinion, and the guarantees of freedom of speech and press were not designed to prevent the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters.") (citations and quotations omitted). For the
This interpretation is in keeping with the insights of the Framers on the capacity of partisanship in the government to infringe on the rights of the public.

IV. THE HATCH ACT AND THE FEDERALIST PAPERS

The Hatch Act's restrictions on political activities of government employees can be seen as a modern adaptation of the Framers' efforts to guard against faction in the government. The "faction" described in The Federalist Papers would today be rendered "partisanship." While The Federalist Papers defended the structures of government in the Constitution as a means of containing faction, the Hatch Act instead limits partisan activity as a matter of law and policy. This section will explore the rationale for checking governmental partisanship as expressed in The Federalist Papers and as reflected in the Hatch Act.

A. The Federalist Papers and Controlling Faction

Madison and Hamilton believed that faction was an inevitable consequence of human nature, unlike others who believed that enlightened statesmen deliberating in an open-minded manner on the public good could determine proper policy. Madison defined faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." Faction, then, was

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339. See THE FEDERALIST NO. 1, at 34 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Ambition, avarice, personal animosity, party opposition, and many other motives not more laudable than these, are apt to operate as well upon those who support as those who oppose the right side of a question."); see also THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961) ("The latent causes of faction are thus sown in the nature of man"); THE FEDERALIST NO. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint.").

340. See Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539, 1540 (1988) ("The characteristically republican belief in deliberative democracy continues to influence both legal doctrine and contemporary evaluations of the political process.").

undesirable because of its adverse impact on the rights of others. If the powers of governance were too narrowly concentrated, Madison wrote, it would be easier for a faction to “concert and carry into effect schemes of oppression.”

Hamilton and Madison advocated the three-branch, federal system of government as the best way to achieve effective governance while controlling the negative impact of faction.\(^{343}\) Today, these observations are nearly universally accepted.

Some of The Federalist Papers’ predictions and assumptions proved to be less prescient as centuries passed. Neither Hamilton nor Madison foresaw, for instance, the Civil War and the Fourteenth Amendment or the industrial revolution’s globalization of economic activity and contribution to the nationalization of American politics, much less the Great Depression and the New Deal’s federal government response.\(^{344}\) Madison wrote in The Federalist 51 that the executive branch would be weak relative to the legislature.\(^{345}\) Hamilton also wrongly believed that the federal government would lack the public support and the inclination to gain power over such matters of local concern as “[t]he administration of private justice between the citizens of the same State [and] the supervision of agriculture . . . .”\(^{346}\) States would command greater loyalty than the federal government in the same manner that “a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large.”\(^{347}\)

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342. Id. at 81.
344. See Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 453-72 (1995) (describing increased interstate commercial activity and a new legal understanding that substantive due process was increasingly regarded as an enforcement of policy preferences rather than impartial legal judgment as rationales for a changed understanding of the Commerce Clause). Other scholars have come to different conclusions. See, e.g., Bruce Ackerman, We the People: Foundations (1991) (arguing that the high level of public support and mobilization during the New Deal justified changes in understanding of the Constitution just as much as an amendment); Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985) (maintaining that there was no textual basis, and thus no justification, for the changes of the New Deal); Laurence H. Tribe, American Constitutional Law (2d ed. 1988) (calling the New Deal a return to the understanding of the Commerce Clause put forth by Justice Marshall).
345. The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (Madison or Hamilton wrote that the Constitution sought to address this by “some qualified connection between this weaker department and the weaker branch of the stronger department,” referring to the links between the president and the Senate, such as in making treaties and the vice president holding the office of president of the Senate.).
347. Id. at 119.
Therefore, it would "always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities." Hamilton also believed that those serving in the federal government would not be inclined to assert control over matters of local concern in the first place. "The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition," Hamilton wrote. The federal government would draw those interested in broader matters such as "commerce, finance, negotiation, and war."

Today, these assumptions do not hold nearly the sway they did in the late eighteenth century. The federal executive is the most powerful branch of the most powerful level of American government. The federal government regulates numerous matters such as "the supervision of agriculture" envisioned by Hamilton to be the purview of local governments.

As Hamilton and Madison would have predicted, the control over a large number of government workers and programs by the executive led to abuses. Changes in American governance demanded new, more specific safeguards to supplement the structural checks on faction.

1. "Partisan Activity" in the Bureaucracy and "Faction"

"Partisan activity" in the bureaucracy, as opposed to "faction," required the policy adjustment of the Hatch Act rather than the structural design discussed in The Federalist Papers. The Federalist Papers dealt

348. Id. at 119 ("[T]he people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union; unless the force of that principle should be destroyed by a much better administration of the latter."). The national scale of economic activity, and the depth of the dislocation during the Great Depression, led the federal government to become the primary regulator of matters Hamilton considered to be of purely local concern. See Lessig, supra note 344, at 453–72.


350. Id.

351. Id.

352. For a competing view on the motives underlying the Hatch Act, see Rafael Gely & Timothy D. Chandler, Restricting Public Employees' Political Activities: Good Government or Partisan Politics?, 37 Hous. L. Rev. 775, 808–09 (2000) (citing uniform Republican voting for the Act in 1939, and considerably stronger Democratic than Republican support for the Hatch Act amendments passed by Congress in 1976, 1990, and the amendments signed into law in 1993). The authors conclude that "when enacting laws restricting the political activities of political employees, legislators respond to some underlying motivation as represented by the individual legislator's party alliance, rather than some abstract concept of 'good government.'" Id. at 810. This interpretation captures some of the partisanship in the debates over the Act, but it also overlooks the depth of emotion displayed in the debates over restrictions on the activities of government employees.

353. See discussion supra Part.IV.
with faction in the composition of government and formulation and application of laws. The Constitution addressed the broadest of these concerns. The Hatch Act, enacted during an era of expansion of federal power and political dominance by one party, addressed only application of laws and policy. The Act's authors responded to scandals involving coercion of subordinates and misuse of positions of authority for partisan gain. The Hatch Act is a check on faction as a matter of law and policy rather than structure of the federal three-branch system of checks and balances.

V. RATIONALES FOR THE HATCH ACT

Defenders of the Hatch Act have offered a number of rationales for limiting the appearance of partisanship within the government. Preventing corruption, ensuring a professional civil service, preserving respect for the government, and protecting employees from being coerced into political activity are the most cited reasons for the Act. While these rationales are here described separately, they are tightly interrelated.

A. Fighting Corruption and Partisan Machines

The political activities of the new executive agencies and departments, especially the Works Progress Administration, led Congress to enact the Hatch Act. As the Supreme Court explained,

perhaps the immediate occasion for the enactment of the Hatch Act in 1939 ... was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine ... [and that] substantial barriers should be raised against the party in power—or the party out of power, for that matter—using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its political structure and political campaigns.

While some observers have defended political machines, Congress

354. See sources cited supra, at note 33.
356. See Rutan v. Republican Party of Ill., 497 U.S. 62, 102–09 (1990) (Scalia, J., dissenting) (“Corruption and inefficiency, rather than abridgement of liberty, have been the major criticisms leading to enactment of the civil service laws—for the very good reason
and the Supreme Court have expressed the belief that partisan machines in
government administration cause the problems addressed below.

B. Ensuring a Professional Civil Service to Protect Citizens

Preventing government employees from engaging in political activity
ensures that they may not be retained or rejected on the basis of their
political activities. The Supreme Court has repeatedly recognized this as a
constitutionally valid reason for Congress to have enacted the Hatch
Act.357 As the Supreme Court explained, "Congress recognizes danger to the
service in that political rather than official effort may earn advancement
and to the public in that governmental favor may be channeled through
political connections."358 A civil service dedicated to carrying out policy
formulated by elected officials makes those officials more accountable to
voters.359

As discussed previously, the Hatch Act prevents an unprofessional
bureaucracy from infringing on the First Amendment rights of the public.
In the eyes of some analysts, protecting the rights of citizens is the decisive
factor in favor of the Hatch Act.360 "When government bureaucracy
becomes partisan, it intrudes in the marketplace of ideas,"361 in the words of
one scholar, invoking Justice Holmes' famous dictum.362
C. Preserving the Appearance of Nonpartisanship and Respect for Governance

A bureaucracy bent on partisan advantage rather than impartial application of laws and policies can diminish the government’s accountability and respectability in the eyes of voters. The Supreme Court explained, "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."363

D. Preserving the Rights of Employees Not to be Coerced into Political Activity or Making Political Donations

Hatch Act supporters have argued that restricting the ability of employees to participate in partisan political activity would protect their rights overall, given the abuses and coercion in the past.364 The philosophical debate over the First Amendment’s guarantee of government employees’ rights versus its guarantee of government restraint in the arena of political discussion becomes an empirical question. Experience led Congress to conclude that the restrictions promoted workers’ liberty. Said one Congressman, “I am for [the Act] because I sincerely believe that it is restoring to millions of WPA workers who have been coerced and abused in recent years their rights as American citizens.”365 Some have criticized the 1993 amendments, arguing that they are similar to other anti-coercion laws that, by forbidding only explicit threats or promises, do little to thwart a coercive atmosphere.366
The Hatch Act, limiting the influence of partisanship in the federal workplace and application of laws, is an extension of the founders’ views on the importance of containing faction to a changing federal government. The rise in the personnel and reach of the executive branch resulted in misuse of funds for partisan purposes. Rather than a new structural check on the powers of the executive, Congress created legal limits on the activities of executive employees to curb coercion and misuse of funds.

VI. EMPIRICAL REVIEW

The charts below show the data collected by the OSC on Hatch Act matters.

<table>
<thead>
<tr>
<th></th>
<th>Federal Matters</th>
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<th>Federal resigns</th>
<th>Federal withdrawals</th>
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601 in which town council members “had been convicted for systematically rewarding Democratic party supporters with town jobs”). The convictions were overturned on the grounds that there must be an explicit promise of a job for a political supporter or an explicit threat that workers who did not support the campaign would be fired. Segal concluded that “when patronage is at its most oppressive, political bosses need to be the least explicit.” Id.
The Hatch Act

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The fiscal year begins on October 1 of the previous calendar year, so presidential election campaigns are split into the calendar year in which they take place and the previous year. The OSC does not gather data on the party affiliation of reported offenses.

While variations could be attributable to any number of unrecorded
factors given the small numbers, some patterns do emerge from the data. Candidacy is the most frequent topic at the federal, state, and local levels. There was a significant increase in all matters in 2000–2001, apparently to a permanently higher level, especially regarding state and local candidacy. This followed a decrease in Hatch Act matters from 1993 until 1997. The decrease extended to activities such as state and local candidacy, which saw no change in the law. Many complaints are disproved, or are about persons or employees over whom the OSC lacks jurisdiction. The OSC receives a roughly equal number of federal and state and local matters, though the balance fluctuates greatly. Generally, the OSC refers for prosecution more federal than state and local Hatch Act offenders. Presidential election years generally, but not always, see an increase in matters.

The effects of the 1993 amendments to the law permitting an increased level of political activity are unclear. There was a decline in Hatch Act complaints across the board in the early to mid-1990s. Matters have since recovered to pre-1993 levels. The decline extended to some state and local Hatch Act matters, so it may not be attributable to the 1993 amendments, which did not affect the state and local part of the Act. Unsurprisingly, complaints about soliciting votes and endorsing candidates dropped off after 1993, as these activities became legal for a large swath of employees. There were no immediately apparent negative consequences of the 1993 amendments, as use of authority matters remained constant. Partisan candidacy matters dropped off after 1993, though the ban was unaffected by the 1993 reform. Campaign management matters remained stable, even though the provisions were liberalized.

Patterns of enforcement seem to explain changes in the level of complaints much better than do changes in the law. Roughly fifteen percent of complaints lead to an action of some sort—a prosecution, withdrawal from a race, or resignations from employment. This number varies widely. Increasing rates of action correspond with increased numbers of complaints. For example, in fiscal year 2000, nearly a third of the complaints filed led to prosecutions, withdrawals, or resignations, up from twelve percent the previous year. In fiscal year 2002, the number of complaints almost doubled. The action rate was generally low between fiscal year 1993 and fiscal year 1997, and the number of complaints fell by more than fifty percent.

Complaints under the federal Hatch Act have risen in recent years. There was an increase in fiscal year 2001 in the number of complaints about unlawful activity while in a government building or car, and while on duty or wearing insignia. This statistic was not recorded until 1999. Its surge was due in part to increased use of e-mail to engage in political
activity. Complaints about misuse of authority have also risen.

This trend is likely to continue as new technologies offer ways to make partisan campaigning and, as a result, violating the Hatch Act easier to do. Continued outreach efforts by the OSC will be necessary to avert widespread violations. Updating and disseminating new regulations would also help keep employees informed of the prohibitions of the Hatch Act.

VII. CONCLUSION

The Hatch Act helps protect the rights of government employees and the public's right to an impartial bureaucracy that does not chill its right to free expression. This somewhat neglected rationale for the Hatch Act is mindful of The Federalist Papers—that unchecked partisanship within the government will endanger the public's rights. The Supreme Court has upheld the Hatch Act as a valid means of pursuing the goal of an efficient bureaucracy. More recently, the Court has endorsed the Act as protective of employees' rights and necessitated by history, despite increased judicial scrutiny of restrictions on government employees and federal government-funded entities.

There might be some benefit to a reexamination of Hatch Act regulations to account for changed technology. Hatch Act complaints have been on the rise in recent years, due in large part to the rise of e-mail. With consistent enforcement and increased education to federal and state and local employees, it is hoped that the future will see a decrease in prosecutions.

367. See discussion supra Part.IV.