

# THE UNWISE AND UNCONSTITUTIONAL HATCH ACT: WHY STATE AND LOCAL GOVERNMENT EMPLOYEES SHOULD BE FREE TO RUN FOR PUBLIC OFFICE.

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It happens prior to every election. An employee of a local or state government agency decides to run for political office on the employee's own time only to find out that he will lose his job if he actually files to run for office. What would have been an election fight turns into an employment dispute. Some choose to withdraw their candidacy, some choose to continue their race at the expense of their day job, while some are given no choice at all. The covered employees are put in this position because of a federal law called the Hatch Act.<sup>1</sup> The Hatch Act's coverage of state and local government employees often comes as a surprise to those involved because the statute does not provide clear notice regarding who and what is actually covered.<sup>2</sup> Even if the potential candidates are aware of federal grants coming into an agency, they think of themselves as state—not federal—employees and do not necessarily realize that federal grants make state employees answerable to the Hatch Act. If they are aware of the Hatch Act at all, they likely think of its coverage of federal—not state—employees, because the federal provisions are the ones that most often make news.<sup>3</sup> All fifty states impose some restrictions

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1. 5 U.S.C. § 7321, et seq. (2000) (covering federal employees); 5 U.S.C. § 1501–8 (2000) (covering state and local employees).
2. Dennis Pelham, *Two Sheriff Candidates Under Hatch Act Review*, DAILY TELEGRAM, May 28, 2008, available at <http://www.lenconnect.com/news/x784973509/Two-sheriff-candidates-under-Hatch-Act-review> (“[Office of Special Counsel] spokesman James Mitchell said investigations of potential Hatch Act violations peak during election years and most often involve state and local government candidates. Many are not aware the Hatch Act affects them if the agencies they work for receive any federal funds . . .”); Louis Boyle, *Reforming Civil Service Reform: Should the Federal Government Continue to Regulate State and Local Government Employees?*, 7 J.L. & POL. 243, 244 (1991) (“[M]any state and local government employees may not realize that the Hatch Act regulates their political activity as well.”).
3. See, e.g., conservative columnist Robert Novak's discussion of Lurita Alexis Doan: Robert Novak, *Hatch Act Hatchet Job*, WASH. POST, June 4, 2007, at A15; see also Ian Urbina, *V.A. Ban on Voter Drives is Criticized*, N. Y. TIMES, June 13, 2008, available at <http://www.nytimes.com> (enter “V.A. Ban on Voter Drives is Criticized” in search box; then select appropriate article).

on the political activities of government employees<sup>4</sup> and state workers may be more familiar with those provisions than the federal Hatch Act. When a covered employee files to run for office, he or she is usually given a choice—give up your campaign or give up your job—but the stigma of being “an illegal candidate” has nonetheless already attached.

In this paper, I focus on the Hatch Act’s restrictions on candidacies but do not criticize the protections against coercion, campaigning on government time, or misusing federal dollars. This paper specifically focuses on the restrictions on state and local government employees because the federal government’s interest as a grant-maker is weaker than its interest as an employer, the application is confusing to covered employees, the provisions unnecessarily benefit incumbents, and the intrusion into state elections is objectionable. This paper explains what the Hatch Act is in Part I, the effect of the Hatch Act on voter choices in Part II, why the Hatch Act is unwise in Part III, why the Hatch Act’s restriction on state and local candidacies is unconstitutional in Part IV, and offers a proposal for reform that moves restriction on candidacies towards a conflict of interest standard in Part V.

## I. THE HATCH ACT

Proposals to restrict political activities by public employees were debated and rejected in 1791 and have been in controversy ever since.<sup>5</sup> The Hatch 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.”<sup>6</sup> Congress expanded the Hatch Act to cover certain state and local employees the next year because it “wanted to prevent federal money from funding coercive activities at any level.”<sup>7</sup>

There have been many attempts to amend the Hatch Act,<sup>8</sup> but the only success came in 1974 when restrictions were eased on state employees<sup>9</sup> and in

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4. Steven Ebhard, Note, *The Need for the Hatch Act*, 1 HARV. J.L. & PUB. POL’Y 153, 158 (1978); *Broadrick v. Oklahoma*, 413 U.S. 601, 604 (1973).
  5. Boyle, *supra* note 2, at 247–55 (discussing history of restrictions of political activities on government workers); Ebhard, *supra* note 4, at 156–57; Scott Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 227–30 (2005). Scott Bloch was the head of the Office of Special Counsel under the Bush administration. *Id.* at 225.
  6. Bloch, *supra* note 5, at 231; *see also* Ebhard, *supra* note 4, at 157 (“[d]isturbed by the continuing politicization of federal employees, especially in view of their rapidly increasing numbers, Congress passed the Hatch Act in 1939.”).
  7. Bloch, *supra* note 5, at 233.
  8. Ebhard, *supra* note 4, at 153–54.
  9. Federal Election Campaign Act Amendments, Pub. L. No. 93–443, 88 Stat. 1263 (1974).

1993 when restrictions were eased on certain federal employees.<sup>10</sup> The Hatch Act remains “the primary means for limiting partisanship within the federal bureaucracy.”<sup>11</sup> The Hatch Act is a patchwork of regulation and has intricate applications that are difficult to understand. The military is regulated under different provisions.<sup>12</sup> A separate part of the Hatch Act covers both state and local government employees, though these “provisions are not as restrictive as those that apply to federal employees.”<sup>13</sup> Certain private nonprofits, specifically the Community Action Agencies that run Headstart programs, are also brought under the Hatch Act as a condition of their federal grants.<sup>14</sup>

The state and local employee candidacy provisions primarily seek to limit coercion by regulating state and local government employees’ involvement with elections. State and local officials may not use their position or authority to influence elections, coerce employees to support a candidate or party, or be a candidate for elected office.<sup>15</sup> “The bulk of Hatch Act offenses at the state and local level involve candidacy in a partisan election.”<sup>16</sup> According to the statutory text, the candidacy restrictions do not apply to incumbent elected officials or, more specifically, those whose connection with federal dollars comes only through being an elected official.<sup>17</sup> A covered employee is one whose “principal employment is in connection with an activity which is funded in whole or in part by loans or grants made by the United States or a [f]ederal agency . . . .”<sup>18</sup> The question is not whether the employee’s position is principally funded with federal dollars, only whether the position receives any federal funding and is the covered individual’s principal employment. A lawyer who spends seventy-five percent of his time working in private practice and twenty-five percent of his time working as legal advisor to the department of public welfare is not principally employed in connection with a federally-funded activity and thus is outside the Hatch Act’s coverage.<sup>19</sup> One who works for a private company that supplies labor on a contract basis to the

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10. Hatch Act Reform Amendments of 1993, Pub. L. No. 103–94, 107 Stat. 1001 (1993).

11. Bloch, *supra* note 5, at 228.

12. *See, e.g.*, 10 U.S.C. § 973(b) (2000) (officers cannot run for political office), 18 U.S.C. § 593 (2000) (military cannot interfere with elections); *see* discussion in Ebhard, *supra* note 4, at 182–84.

13. Bloch, *supra* note 5, at 250; 5 U.S.C. § 7321 (2009) (federal); 5 U.S.C. § 1501 (2009) (state).

14. 42 U.S.C. §§ 9918(b)(1), 9851(a) (2009).

15. 5 U.S.C. § 1502(a) (2009).

16. Bloch, *supra* note 5, at 252.

17. 5 U.S.C. § 1502(c) (2009).

18. *Id.* § 1501(4).

19. *Anderson v. United States Civil Serv. Comm’n.*, 119 F. Supp. 567, 576 (D. Mont. 1954). Courts have looked at both income and time in deciding what an individual’s principle employment is. *Id.* at 570–73.

government (like a temp agency) is not a covered employee.<sup>20</sup> Part-time employment, though, can be one's principal employment for purposes of coverage under the Act.<sup>21</sup> For example, a city police chief was barred from running for sheriff by the Hatch Act "because the city received \$594 in federal funds. When the city returned the funds, the police chief was allowed to run for office."<sup>22</sup> Thus, one who works full-time for a state or local government in a position with some element of federal funding, or who works part-time but in a position that is still that employee's principal employment, is a covered employee unless he or she works for a temp agency. This demonstrates just how arbitrary and confusing the Hatch Act's enforcement can be.

Officially, enforcement of the Hatch Act is carried out by the Office of Special Counsel ("OSC"). In response to a complaint or tip, the OSC investigates Hatch Act violations.<sup>23</sup> The violations are charged in front of the Merit Systems Protection Board ("MSPB"), which has the authority to hold hearings<sup>24</sup> and to order that the covered employee be removed from his or her position.<sup>25</sup> An MSPB opinion can be challenged in local federal district court.<sup>26</sup> After a Hatch Act violation warranting removal is found, if the state or local agency refuses to remove the employee from the position or appoints the employee to a different position within eighteen months after removal, the agency will lose federal funds equal to two years of the employee's salary.<sup>27</sup> The legislative history shows that the purpose of the rule prohibiting reappointment within eighteen months was designed to plug a potential loophole caused by shifting employees from department to department.<sup>28</sup> Despite this official mechanism, much enforcement occurs through less formal means. Official Hatch Act enforcement actions are relatively few;<sup>29</sup> frequently it is the state or local agency and its supervisors that sanction and terminate employees when a candidacy violates the Hatch Act.

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20. Pelham, *supra* note 2 ("He received a letter on Dec. 28 from an OSC attorney stating the part-time position is not covered by the Hatch Act because he is actually an employee of Manpower Inc., a private company that contracts with the county agency for his services.").

21. *See Smyth v. United States Civil Serv. Comm'n.*, 291 F. Supp. 568 (D. Wis. 1968).

22. Mary Perham, *Sheriff's Dept. Resignations Leave Residents Wondering*, CORNING LEADER (N.Y.), Oct. 26, 2008, available at <http://www.the-leader.com/archive/x398381862/Sheriff-s-Dept-resignations-leave-residents-wondering>.

23. Bloch, *supra* note 5, at 236–37 (details and history of the office).

24. 5 U.S.C. §§ 1504-1505, 1507 (2009).

25. *See, e.g.,* Special Counsel v. Hendricks, 39 M.S.P.R. 9 (1988) (ordering covered employee removed).

26. 5 U.S.C. § 1508 (2009).

27. *Id.* § 1506.

28. Special Counsel v. Tracy, 39 M.S.P.R. 95, 97 (1988).

29. Bloch, *supra* note 5, at 274–75.

An employee has to actually resign to run for office to avoid the sanctions; taking a leave of absence is insufficient. The Eighth Circuit, in *Minnesota v. Merit Systems Protection Board*, held that a covered employee who ran for office under a state law<sup>30</sup> that allowed the employee to take a leave of absence to run for office still violated the Hatch Act.<sup>31</sup> Investigations can even come after the election is over and the candidate has lost.<sup>32</sup> All that must be shown to establish a violation of the Hatch Act is that a covered employee who has not resigned is running or has run for a partisan office.<sup>33</sup> “Abuse of a [s]tate position is not an element of proof in a Hatch Act violation, nor is the absence of actual harm to the [s]tate one of the mitigating factors considered when the determination is made whether removal is warranted.”<sup>34</sup> Even a candidate with a “good faith, albeit mistaken, belief that there was no bar to his candidacy because his salary did not come from federal funds” can be removed<sup>35</sup> because “mistake or misapprehension of the law does not constitute a defense to the charges . . . .”<sup>36</sup> The statutory language and relevant court decisions, however, have recognized some meaningful exceptions to the Hatch Act’s coverage.

“Reviewing the legislative history of [the Hatch Act], we find that Congress intended that this provision be interpreted narrowly.”<sup>37</sup> Furthermore, “Congress intended to restrict the prohibition [on running for office] to a narrowly defined set of cases.”<sup>38</sup> For instance, the Hatch Act does not apply to a person seeking an appointed office.<sup>39</sup> Likewise, being appointed to an otherwise elected office, such as when there is a vacancy, is not covered by the

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30. MINN. STAT. § 43A.32 subd. 2(c) (1984).

31. *Minnesota v. Merit Sys. Prot. Bd.*, 875 F.2d 179 (8th Cir. 1989). The court examined the legislative history and found that Congress intended for a covered employee to be able to run for office only when resigning a position. *Id.* at 183. The legislative history supporting the no-leave-of-absence interpretation is discussed in *Special Counsel v. Kehoe*, 33 M.S.P.R. 56, 62–63 (1987). *See also* *Special Counsel v. Blackburne*, 58 M.S.P.R. 279, 283 (1993) (violation regardless of leave status).

32. *Molina-Crespo v. Merit Sys. Prot. Bd.*, 547 F.3d 651, 655 (6th Cir. 2008).

33. Even a person who has already won a partisan primary before starting to work in a covered position (if the employee started the job after winning the primary but before the general election) is subject to the Hatch Act. *Briggs v. Merit Sys Prot. Bd.*, 331 F.3d 1307 (Fed. Cir. 2003).

34. *Special Counsel v. Winkleman*, 36 M.S.P.R. 71, 73 (1988).

35. *Special Counsel v. Jakiela*, 57 M.S.P.R. 228, 289 (1993) (candidate “failed to exercise his duty to become informed”).

36. *Matter of Ramshaw*, 266 F. Supp. 73, 75 (D. Idaho 1967).

37. *City of Buffalo v. United States Dep’t of Labor*, 729 F.2d 64, 67 (2d Cir. 1984). This is appropriate considering that “the political activities and associations proscribed by the Act would ordinarily enjoy the protection of the [First] [A]mendment.” *Legislative Proscription of Partisan Political Activity of Civil Employees*, 87 HARV. L. REV. 141, 142 n.3 (1973).

38. *City of Buffalo*, 729 F.2d at 67.

39. *Id.* at 67–68.

Hatch Act.<sup>40</sup> Additionally, covered employees may run for an office *within* a political party<sup>41</sup> “even if the election is held during a partisan primary.”<sup>42</sup> Essentially, a covered employee can run in the primary to be a Democratic National Convention delegate or serve as the county Republican Party chair, but cannot run for a public office as either a Democrat or Republican. Employees of educational or research institutions, such as colleges or public schools, are explicitly exempted from the Hatch Act.<sup>43</sup> Also significant is that the Hatch Act only covers the executive branch of a state or local government.<sup>44</sup>

Nonpartisan candidacies are permitted<sup>45</sup> but it must be for a truly nonpartisan office. For instance, a Pennsylvania candidate who ran on the ballot as *both* a Democrat and a Republican still violated the Hatch Act.<sup>46</sup> If the election is nonpartisan under state law, it is presumably nonpartisan under the Hatch Act.<sup>47</sup> If any candidate in the race is nominated or endorsed by a political party, however, that presumption can be rebutted.<sup>48</sup> For example, even though candidates for the Michigan Supreme Court run on a nonpartisan ballot, “[b]ecause the candidates for [j]ustice of the Michigan Supreme Court are nominated at partisan political conventions, the presumption that the general election is nonpartisan has been rebutted. Accordingly, covered employees are prohibited from being candidates for [j]ustice of the Michigan Supreme Court.”<sup>49</sup> To resolve unclear situations like this, one can request an advisory opinion from the OSC.<sup>50</sup> “The Act does not cover state employees whose connection with federally-funded activities is merely a casual or accidental occurrence of employment, because such a *de minimis* connection

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40. 39 Op. Att’y Gen. 423 (1940).

41. 5 C.F.R. § 734.101 (2009); 5 C.F.R. § 151.101 (2009).

42. Office of Special Counsel, Advisory Opinion, OSC File No. AD-08-0199 (June 18, 2008) (on file with the author).

43. 5 U.S.C. § 1501(4)(B) (2009).

44. *Id.* § 1501(2).

45. *Id.* § 1503.

46. Special Counsel v. Yoho, 15 M.S.P.R. 409, 410–11 (1983).

47. *Id.*; see also Office of Special Counsel Advisory Opinion, *supra* note 42.

48. McEntee v. Merit Sys. Prot. Bd., 404 F.3d 1320 (Fed. Cir. 2005) (citing Special Counsel v. Mahnke, 54 M.S.P.R. 13, 15 (1992)) (if at least one of the candidates in the race is partisan, then it is a partisan race and candidacy is prohibited).

49. Office of Special Counsel Advisory Opinion, *supra* note 42.

50. *Id.* The OSC makes a variety of advisory opinions available on its website at <http://www.osc.gov>; The OSC’s response time is commendable. I requested an advisory opinion and received a detailed response within four weeks.

does not justify application of the Act.”<sup>51</sup> Nevertheless, the Hatch Act’s provisions do thwart many candidacies and consequently have an effect on the choices available to voters.

## II. THE HATCH ACT’S EFFECTS ON VOTER CHOICES

### A. Good Candidates are Barred

Although voters ultimately decide what qualities make a candidate desirable, many of these desirable traits are found in candidates excluded by the Hatch Act because these candidates are ones who know and understand the workings of the government. Those covered by the Hatch Act are also disproportionately likely to be U.S. citizens, which means that the Hatch Act is more likely to cover individuals who may actually become candidates. No one may take the civil service exam or be given an appointment with the federal government unless “such person is a citizen or national of the United States.”<sup>52</sup> The rule with state and local government employees is a little more complex, but it is probably fair to say that they are disproportionately likely to be citizens.<sup>53</sup> Furthermore, given that many government bureaucracy jobs are “white collar,” the Hatch Act probably covers a pool that is disproportionately likely to be college educated. The existence of veteran’s preference programs suggests that covered employees are disproportionately likely to have served their country in uniform.<sup>54</sup>

Most significantly, as government workers, covered employees are apt to know and care about the workings of the government. They may be more

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51. *Williams v. Merit Sys. Prot. Bd.*, 55 F.3d 917, 920 (4th Cir. 1995) (emphasis in original) (internal citation and footnote omitted). It is worth noting that this addresses a *de minimis* connection, not a *de minimis* amount of funding.

52. 5 C.F.R. § 7.3 (2009):

(a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States. (b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States. (c) OPM may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments.

53. *See Sugarman v. Dougall*, 413 U.S. 634 (1973) (states may not prohibit aliens from all civil service jobs); *Ambach v. Norwick*, 441 U.S. 68 (1979) (state may limit school teacher positions to citizens and those with manifested intention to apply for citizenship); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (state may require police officers to be citizens).

54. *See, e.g.*, Federal Jobs Net, *Veterans Preference & VRA Programs*, <http://federaljobs.net/veterans.htm> (last visited Mar. 7, 2010); Minnesota House of Representatives Research Dep’t, *Veteran’s Preference in State and Local Government*, <http://www.house.leg.state.mn.us/hrd/pubs/ss/ssvetspref.htm> (last visited Mar. 7, 2010).

civically minded, have an insider's appreciation of what is right and wrong with a government agency, offer ideas for reform from the inside that were ignored by others, be adept at managing the bureaucracy, know where to cut waste, and understand government budgets.<sup>55</sup> As the First Circuit explained, the "experience and insight garnered from day-to-day grappling with the bureaucracy could well make these individuals particularly attractive to the voters."<sup>56</sup> A deputy sheriff or assistant prosecuting attorney could someday be an excellent elected sheriff or elected prosecutor. Civil service can be, in part, a training program for public service, but not for covered employees.

#### B. Candidacies Thwarted

As of March 2002, there were 21,000,000 total civilian governmental employees, with almost three million of those being federal government employees and approximately eighteen million state and local government employees.<sup>57</sup> Many of these are covered by the Hatch Act, but a few are not: some of these state and local employees work at agencies that do not receive federal dollars; sometimes an elected official or supervisor can tweak the covered employee's job responsibilities to avoid federal funding to make it so the employee can run for office;<sup>58</sup> and sometimes an employee can change

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55. If one accepts an alternative, stereotypical view that government workers are lazy, slothful, and incompetent, it is not fatal to my argument as the voters are the ones who ultimately decide which candidates are desirable.

56. *Mancuso v. Taft*, 476 F.2d 187, 194 (1st Cir. 1973).

57. United States Census Bureau, *Compendium of Public Employment: 2002* (2004), available at <http://www.census.gov/prod/2004pubs/gc023x2.pdf>. Simply put, "the number of citizens who find employment in the public sector has grown tremendously over the years." *Mancuso*, 476 F.2d at 194.

58. Noah Fowle, *Hatch Act Outdated? Charlevoix's Sheriff's Department Feels Targeted*, NEWS REVIEW (Petoskey, Mich.), June 25, 2008, available at: [http://www.petoskeynews.com/news/article\\_f0942c28-3e38-5df3-a17f-3b055cf27ee7.html](http://www.petoskeynews.com/news/article_f0942c28-3e38-5df3-a17f-3b055cf27ee7.html).



positions to avoid federal funding and make a run for office.<sup>59</sup> Despite such maneuvers, Hatch Act complaints have in fact risen in recent years.<sup>60</sup>

“Conflicts with the Hatch Act [became] an issue in several county sheriff election races in Michigan” over the course of the 2008 election.<sup>61</sup> Two Republican candidates for Lenawee County sheriff were under review for eligibility to run for partisan office under the Hatch Act.<sup>62</sup> One was a deputy in the sheriff’s department and the other was a city police chief.<sup>63</sup> Republican and Democratic candidates ran into problems with the Hatch Act in 2008 and 2009.<sup>64</sup>

The Hatch Act influenced races in other parts of Michigan in 2008<sup>65</sup> and affected government employees in other states too. A village trustee in New York was forced to resign “because he is a corrections officer at the county jail which houses federal inmates.”<sup>66</sup> Different covered employees will react differently when confronted with the choice between their job or their campaign for elected office.

Some covered employees will withdraw their candidacy rather than risk unemployment.<sup>67</sup> For instance, the Butler County, Missouri Emergency

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59. Richard Dujardin, *Full Slate Battling for Seats on School Committee*, PROVIDENCE JOURNAL, Sept. 2, 2008, available at: <http://www.projo.com> (enter “Full Slate Battling for Seats on School Committee” in search box; then click on appropriate article). Arguably, the situation where an employee is shifted to a different position or has job responsibilities changed to make it so he or she can run for office could be a sign of the very kind of partisan behavior in government that the Hatch Act should protect against. An official who supervises the funding can also report, either untruthfully or mistakenly, that the position involves no federal funding when it actually does. See Commentary, *Ex-Sheriff Cleveland Got Free Ride on Hatch Act*, NORTH COUNTRY GAZETTE (New York), Jan. 13, 2009, available at: [http://www.northcountrygazette.org/2009/01/13/free\\_ride/](http://www.northcountrygazette.org/2009/01/13/free_ride/) (sheriff who violated Hatch Act provisions related to coercion and abuse of public authority was given a free ride because of incorrect reports that his office had not received federal money); see also Commentary, *The Cleveland Dodge*, NORTH COUNTRY GAZETTE (New York), Dec. 26, 2007, available at: <http://www.northcountrygazette.org/2007/12/26/the-cleveland-dodge>.

60. Bloch, *supra* note 5, at 274–76.

61. Pelham, *supra* note 2.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Bart’s Bid to Bury the Hatch Act in Smalltown America*, SooToday.com, Sept. 5, 2008, [http://www.sootoday.com/content/news/full\\_story.asp?StoryNumber=34282](http://www.sootoday.com/content/news/full_story.asp?StoryNumber=34282) (“[s]everal local officials and residents in northern Michigan have been affected by Hatch Act restrictions on participating in partisan elections.”); Monica Van Dobeneck, *Skip Memmi Withdraws from Derry Supervisors’ Race Due to Hatch Act*, Pennlive.com, July 20, 2009, [http://www.pennlive.com/midstate/index.ssf/2009/07/skip\\_memmi\\_withdraws\\_from\\_derr.html](http://www.pennlive.com/midstate/index.ssf/2009/07/skip_memmi_withdraws_from_derr.html) (noting candidate withdrawing in 2009 off-year election).

66. Perham, *supra* note 22.

67. See, e.g., *Police Chief Won’t Seek Office*, HARTFORD COURANT (Connecticut), May 18, 2009, available at <http://www.courant.com/news/local/mr/cromwell/hc-cromwell-chief-0519.artmay19,0,5356956.story>.

Management Agency Director Rick Sliger dropped out of the 2008 Sheriff's race because the Hatch Act would have cost him his job.<sup>68</sup> Sliger, who did not realize that the Hatch Act applied to him when he filed, was required to subsequently withdraw.<sup>69</sup> Sliger "did not think the [F]ederal Hatch Act would apply to his situation because he is paid by the county—not the federal government."<sup>70</sup> Paul Hiott, a candidate for St. Lucie County, Florida, had never even heard of the Hatch Act.<sup>71</sup> "I thought I had all my bases covered," Hiott explained.<sup>72</sup> Unknown to Hiott, his position as director of the county's veteran services agency, which received federal funding, put him under the Hatch Act.<sup>73</sup> As a result, he was forced to abandon his campaign for county commissioner.<sup>74</sup>

Some covered employees choose to continue their races and give up their day jobs. For instance, Frank Farry "resigned from his \$74,587-a-year job as assistant township manager in Middletown," a suburb of Philadelphia, to run for state representative.<sup>75</sup> Two members of the Steuben County, New York sheriff's department had to resign to run for office.<sup>76</sup> For many, this is a tremendous sacrifice to make, giving up a certain day job for an uncertain dream of holding elected office. Even a certain victory may not be enough to motivate a candidate to give up the candidate's day job for a part-time

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68. David Silverberg, *Butler County EMA Director Withdraws from Race*, DAILY AMERICAN REPUBLIC (Missouri), May 22, 2008, available at <http://www.semissourian.com/apps/pbcs.dll/article?AID=/20080522/NEWS01/432563483/-1/news01>.

69. *Id.*

70. *Id.*

71. Eric Pfahler, *Hatch Act Ends Candidate's Bid for St. Lucie County Commission*, TREASURE COAST PALM (Florida), Aug. 5, 2008, available at <http://www.tcpalm.com/news/2008/aug/05/30gthatch-act-ends-candidates-bid>.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Farry Resigns Township Post*, BUCKS COUNTY COURIER TIMES, May 28, 2008, available at <http://www.phillyburbs.com/pb-dyn/news/111-05282008-1540282.html> (candidate giving up job to run for office).

76. Mary Perham, *Hatch Act Not a New Issue*, CORNING LEADER (New York), Oct. 24, 2008, available at <http://www.the-leader.com/archive/x398379230/Hatch-Act-not-a-new-issue>; Perham, *supra* note 22.

position.<sup>77</sup> Sometimes a candidate requests a review of his or her own status,<sup>78</sup> though often it is a candidate's opponent that tries to make an issue when his or her candidacy violates the Hatch Act.<sup>79</sup> These challenges by opponents can spill over into state courts as well.<sup>80</sup> Indiana, for example, disqualifies candidates prohibited from running for office by the Hatch Act and allows any voter to bring a challenge to disqualify the candidate.<sup>81</sup>

Some covered employees are not given a choice, but are terminated for running for office. Paul Spaniola had been an assistant prosecutor in Mason County, Michigan for seven years.<sup>82</sup> Mason County's prosecutor's office is a small office, with just the elected prosecutor and two assistant prosecuting attorneys.<sup>83</sup> Less than a week after he filed papers to challenge his boss in the

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77. One such example is Marita Somero, a federal employee who was an uncontested candidate for Township Trustee. *Ex-Trustee Candidate Appointed to Bingham Board*, LEELANAU NEWS (Mich.), Jan. 23, 2009, available at <http://leelanaunews.com/drupal/?q=node/4098>. Somero declined to be sworn in as the winning, unopposed partisan candidate rather than give up her position. Ultimately, the board decided to appoint her to fill the vacancy created by her own withdrawal, rather than the other applicants, thus avoiding the federal employee provisions of the Hatch Act. *Id.*
78. Pelham, *supra* note 2 ("Retired sheriff's captain Jack Welsh requested a review by the OSC last fall to determine if his part-time work for the Lenawee County Department of Emergency Management created a conflict.").
79. See, e.g., Austin Arceo, *State Supreme Court Denies Motion to Hear Burke Election Challenge*, TRIBUNE STAR (Terre Haute, Ind.), Feb. 12, 2008, available at [http://www.tribstar.com/news/local\\_story\\_043141440.html](http://www.tribstar.com/news/local_story_043141440.html); Dujardin, *supra* note 59; *Chief Withdraws from First Selectman Race*, EYEWITNESS NEWS 3, May 18, 2009, <http://www.wfsb.com/politics/19497478/detail.html>. Even a review that clears a candidate of any alleged wrong doing is also a surprise. See Erin France, *Walker Surprised by Federal Probe*, PINE BLUFF COMMERCIAL (Pine Bluff, Ark.), Dec. 30, 2008, available at <http://www.pbcommercial.com/articles/2008/12/30/news/news4.txt> (federal employee first learned that he was the subject of a federal investigation for running for nonpartisan office upon receiving letter clearing him).
80. The fascinating case of *Burke v. Bennett* is a good example. *Burke v. Bennet*, 896 N.E.2d 505 (Ind. Ct. App. 2008), *aff'd*, 907 N.E.2d 529 (Ind. 2009). The loser brought a claim that the winner of the mayoral race should have been disqualified from running in the first place for a Hatch Act violation. *Id.* For a detailed discussion of the case, see Simon J. Dodd, *When Two Wrongs Do Make a Right: The Strange Case of Burke v. Bennett*, Jan. 10, 2008, available at <http://ssrn.com/abstract=1082846>. See also Parete v. Hunt, 731 N.Y.S.2d 503 (N.Y. App. Div. 2001) (Hatch Act violation may be basis for state employee to withdraw from race). See also Jennifer Cahill, *Vanderburgh County Judge Hears Hatch Act Case*, NEWS 25, Jan. 8, 2009, <http://www.news25.us/dsp+story.cfm?storyid=10665>. (Vanderburgh County GOP seeking disqualification of county councilman); Thomas Langhorne, *Judge Delays Decision in Hatch Act Trial*, COURIER PRESS (Evansville, Ind.), Jan. 8, 2009, available at <http://www.courierpress.com/news/2009/jan/08/hatch-act-trial-breaks-closing-arguments>.
81. IND. CODE § 3-8-1-5(c)(6) (2005). Wisconsin explicitly allows public employees to run for office, and prohibits local governments from barring public employees from being candidates, except that these protections do not apply to those under the Hatch Act. WIS. STAT. § 66.0501 (2009).
82. Steve Begnoche, *Candidacy Costs Chief Asst. Prosecutor His Job*, LUDINGTON DAILY NEWS (Mich.), May 20, 2008, available at [http://www.ludingtondailynews.com/news.php?story\\_id=40162](http://www.ludingtondailynews.com/news.php?story_id=40162).
83. *Id.*

November general election, she fired him for violating the Hatch Act.<sup>84</sup> Spaniola filed to run as a Democrat; the incumbent was a Republican.<sup>85</sup> Thus, the Hatch Act allows an incumbent to run as a Republican and fire her Democratic opponent.<sup>86</sup>

It is impossible to know exactly how many candidacies never happen because of the Hatch Act. Some covered employees have their election hopes terminated without generating a story, investigation, or any record that they ever hoped to run for office. Tom Leonard is exactly such a covered employee.<sup>87</sup> Leonard is an assistant prosecuting attorney in Genesee County, Michigan, having formerly worked as a judicial clerk for the Genesee Probate Court. He lives two counties away in Clinton County. Leonard hoped to run for county commissioner (a partisan office) in Clinton County. There was no conflict of interest as the Clinton County Board of Commissioners has no authority over Genesee, no obvious financial dealings with Genesee, and is not even in the same media market as Genesee.<sup>88</sup> The elected prosecutor in Genesee County is a Democrat,<sup>89</sup> Leonard wanted to run as a Republican.<sup>90</sup> Were Leonard allowed to run, there would be no appearance that the elected prosecutor was using federal funds to support a partisan Democratic agenda because a candidate in a different county running in a different party does not have any appearance of partisan corruption.

However, after learning of Leonard's intent to run, his boss, the elected prosecutor, correctly spotted it as a potential Hatch Act violation and told him that he would have to resign his full-time job as an assistant prosecutor to run for a part-time office in rural Clinton County. Leonard was forced to end his

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84. *Id.*

85. *Id.*

86. *Id.* Spaniola actually won his race, though, with a healthy nineteen point margin. Election Results, LUDINGTON DAILY NEWS, <http://www.ludingtondailynews.com/stories.html> (last visited May 21, 2009).

87. Tom Leonard is a personal friend. Because his candidacy was thwarted early on, it never made the news. How many other potential candidates like Tom Leonard are stopped before publicly announcing is unknown.

88. *Compare* Flint media market, Matrix Media, [http://www.matrixmediaservices.com/top100/flint\\_mi.php](http://www.matrixmediaservices.com/top100/flint_mi.php) (last visited Mar. 23, 2010) *and* Lansing media market, Matrix Media [http://www.matrixmediaservices.com/top100/lansing\\_mi.php](http://www.matrixmediaservices.com/top100/lansing_mi.php) (last visited Mar. 23, 2010).

89. Paul Janczewski, *Area Prosecutor Pulls Double Duty When Laying Down 'Law'*, THE FLINT-GENESEE COUNTY LEGAL NEWS, Nov. 21, 2008, available at <http://www.co.genesee.mi.us/prosecutors/News-%20Legal%20News%20Profile%20of%20Prosecutor%20Leyton.htm>.

90. Ironically, Leonard is now the chair of the Clinton County Republican Party. See Clinton County Republican Party, <http://www.ccrp.us/> (last visited Mar. 23, 2010). The Hatch Act allows Leonard to hold a leadership position in a political party, but not to hold a local elected office. The potential for partisanship by an assistant prosecutor intuitively seems greater when that prosecutor is leading a political party, rather than serving in an elected position in another jurisdiction that happens to be partisan by coincidence.

candidacy. Because of would-be candidates like Leonard who drop out before ever appearing on the political radar, it is difficult to calculate how many candidacies the Hatch Act thwarts each year. Even if the Hatch Act only thwarts a few candidacies, it still contributes to the growing shortage of candidates in America today.

### C. Shortage of Candidacies

There is a significant and growing shortage of candidates for elected office in the United States today, as Richard Winger of *Ballot Access News* points out:

One of the scandals of elections in the United States is that the Democratic and Republican Parties field so few nominees for state legislative posts. This year [2008], there are 5,773 regularly-scheduled state partisan legislative elections. In 2,281 of those elections, either the Democratic Party, or the Republican Party, has no nominee. That means that 39.5% of the legislative races have no Democratic-Republican contest.<sup>91</sup>

The number of uncontested U.S. House races has increased over the last two decades.<sup>92</sup> The situation in Arkansas is particularly troublesome. So few candidates filed to run for the state legislature that “before a single . . . vote was cast,” Democrats were assured a majority in the state house.<sup>93</sup> “Overall, 76 of the 118 [state legislative] seats up for election [were] uncontested, about 65 percent.”<sup>94</sup> Worse yet, “no one in Arkansas’ congressional delegation drew a major party opponent this year.”<sup>95</sup> The situation is similarly bad in other

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91. Richard Winger, *Republicans, Democrats Fail to Run Against Each Other in 39.5% of State Legislative Elections This November*, *BALLOT ACCESS NEWS*, Oct. 24, 2008, available at <http://www.ballot-access.org/2008/10/24/republicans-democrats-fail-to-run-against-each-other-in-395-of-state-legislative-elections-this-november/>. “This is the worst competitive posture since 2000. The percentage in previous even-numbered years has been: 2006 - 37.6%; 2004 - 38.7%; 2002 - 36.9%; 2000 - 40.6%; 1998 - 41.1%; 1996 - 32.7%; 1994 - 35.8%; 1992 - 32.8%; 1990 - 35.9%; 1988 - 36.6%.” *Id.*

92. The number of uncontested house races goes up and down, but went from nineteen in 1982 to fifty-five in 2006; *See* Fairvote, <http://www.fairvote.org/?page=2113> (last visited Mar. 23, 2010).

93. Rob Moritz, *Most Legislative Seats Uncontested in May 20 Primary*, *ARKANSAS NEWS BUREAU*, May 11, 2008, available at <http://test.arkansasnews.com/archive/2008/05/11/News/346171.html>.

94. *Id.*

95. *Id.* Given the small number of votes that minor party candidates receive in any given election, this has practically the same effect of being entirely uncontested.

state<sup>96</sup> and local races.<sup>97</sup> For instance, one Texas newspaper commented, to “many of Lubbock County[, Texas]’s elected officials, election day is simply a formality.”<sup>98</sup>

Local elected officials may someday run for state representative, state legislators may run for the U.S. House or Senate, and senators may become presidents. A shortage of candidates, or quality candidates, at the most local of levels may trickle up to affect the range of options voters have at the highest level. Moreover, “the degree to which voters are not offered choices on the ballot raises significant questions about the health of a democracy.”<sup>99</sup> Soviet-style elections where only one party, or one candidate, appears on the ballot are not desirable.<sup>100</sup> A vote is meaningless unless it includes a choice among candidates. A functional democracy is noisy, and that noise is a product of competition among candidates.<sup>101</sup> A shortage of candidates creates an unhealthy silence, and “a democratic society cannot function without the political participation of its inhabitants.”<sup>102</sup> The fact that “gerrymandering and incumbency advantage have rendered many individual congressional and state legislative seats uncompetitive,”<sup>103</sup> rather than the Hatch Act’s prohibition on candidacies, is probably more responsible for the shortage of candidates. However, the Hatch Act likely contributes to the problem by increasing the risk (a covered employee losing his or her day job) of running for an unwinnable seat in a way that certainly causes many candidates to forgo running and even terminates some candidacies. Frank Farry was willing to pay a \$74,587 filing fee in the form of his job; many candidates are not.<sup>104</sup>

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96. Consider the twenty-four uncontested Ohio legislative candidacies in 2004 analyzed by The Rest of Us, <http://www.therestofus.org/ohio/analysis.html> (last visited Mar. 23, 2010).

97. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 419 (2007).

98. Logan Carver, *Many Lubbock County Races to be Uncontested*, AVALANCHE-JOURNAL (Tex.), Jan. 3, 2008, available at [http://www.lubbockonline.com/stories/010308/loc\\_231126707.shtml](http://www.lubbockonline.com/stories/010308/loc_231126707.shtml).

99. Peverill Squire, *Uncontested Seats in State Legislative Elections*, 25 LEGIS. STUD. Q., 131, 131–46 (2000).

100. “If insufficient numbers of people participate in the political process, democracies decay, republicans collapse, and free societies falter.” Anthony Kovalchick, *Ending the Suppression: Why the Hatch Act Cannot Withstand Meaningful Constitutional Scrutiny*, 30 W. NEW ENG. L. REV. 419, 470 (2008).

101. See Jason C. Miller, *Regulating Robocalls: Are Automated Calls the Sound of, or a Threat to, Democracy?* 16 MICH. TELECOM. TECH. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1309780>.

102. Kovalchick, *supra* note 100, at 469.

103. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J. L. & POL. 419, 419 (2007).

104. *Farry Resigns Township Post*, BUCKS COUNTY COURIER TIMES, May 28, 2008, available at <http://www.phillyburbs.com/pb-dyn/news/111-05282008-1540282.html>. Of course, ballot access regulations (actual filing fees, petition requirements and limits on third parties), limits on third party ballot access and the difficulty of complying with campaign and campaign finance regulations also

Even if the Hatch Act's impact on candidacies was very limited, it is simply unwise to have a policy that discourages candidacies when there is a shortage of candidates unless a compelling reason for that policy exists.

### III. THE HATCH ACT IS UNWISE

The Hatch Act is unwise because it produces bad policy outcomes by reducing competition, adding unnecessary restrictions, insufficiently targeting restrictions where they are necessary, and producing absurd results when applied. The shortage of candidacies is beneficial to incumbents, and the incumbent-protecting nature of the Hatch Act is itself unwise because it decreases and weakens competition. Competition serves to hold elected officials accountable. The Hatch Act implicitly protects incumbent members of Congress from challenges by government employees<sup>105</sup> and explicitly protects incumbent state and local elected officials by exempting them, but not their subordinates, from the candidacy restrictions.<sup>106</sup> The incumbent-protecting nature of the Hatch Act would not be objectionable if the candidacy restrictions were absolutely necessary to protect democracy. But they are not.

The Hatch Act's local and state government candidacy restrictions may not even be necessary at all anymore. The media and voters are hostile to political machines, and merit-based civil service is now well established.<sup>107</sup> Bloggers and the internet make it possible to expose and combat partisanship without laws restricting candidacies. The United States Supreme Court has already ruled that state and local governments cannot discharge, threaten, promote, or make hiring decisions based on an employee's partisan affiliation.<sup>108</sup> Studies show patronage and coercion would not return, and

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add to the cost a candidate must be willing to pay.

105. "This attempt by incumbents to insulate themselves from electoral challenges from government employees has gone virtually unnoticed by many Americans. Nevertheless, the time has come for the Hatch Act to be exposed for the incumbent-protectionist sham that it is." Kovalchick, *supra* note 100, at 421.

106. 5 U.S.C. § 1502(c) (2009).

107. "Moreover, with the entrenched merit system of hiring and promotions, the restoration of political freedoms for government employees will not result in a return to the patronage system which existed over a hundred years ago." Louis Boyle, *Reforming Civil Service Reform: Should the Federal Government Continue to Regulate State and Local Employees?*, 7 J. L. & POL. 243, 277 (1991).

108. "To the victor belong only those spoils that may be constitutionally obtained. *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. Today we are asked to decide the constitutionality of several related political patronage practices—whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support. We hold that they

additionally, all states have so-called “little Hatch Acts” in place that avoid partisanship without necessarily going as far as the federal law.<sup>109</sup> Even if the Hatch Act does not violate the Tenth Amendment, the state and local government provisions inherently raise federalism problems. “The regulation of the political activity of state and local government employees by the federal government was never a good idea.”<sup>110</sup>

The Hatch Act is not focused on achieving its objective and reaches more conduct than necessary to achieve its goal, just as banning all computers to stop people from accessing child pornography on the internet would do. According to one critic, the anti-coercion rationale of the Hatch Act “is akin to banning sexual intercourse for the purpose of preventing rape.”<sup>111</sup> Perhaps a better analogy is that if one desires to ban religious discrimination in the workplace, one simply bans workplace religious discrimination rather than prohibiting employees from attending religious services on the weekend. The Hatch Act seeks to ban partisanship in the civil service, and could do so simply by banning partisanship in the civil service rather than by prohibiting candidacies for partisan office on the employee’s own time. The Hatch Act is concerned with coercion, but it covers employees that are in no position to coerce anyone—a low-level employee with no supervisory functions, or perhaps even with no coworkers in his or her department, is still banned from running.<sup>112</sup> The Hatch Act actually seems to open up an opportunity for superiors to coerce their subordinates into not challenging them in elections if the department receives federal funds because in some cases it actually gives superiors a legal basis to fire their subordinates for such a challenge.

Furthermore, the potential misuse of federal funds is not an entirely compelling justification for the Hatch Act. “Based on the reasoning underlying the Act, any individual who receives federal funds could lose his right to participate politically. The Hatch Act thus could be extended to

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may not.” *Rutan v. Republican Party*, 497 U.S. 62, 64-65 (1990).

109. Boyle, *supra* note 107, at 288. Some of these acts, such as the Michigan law discussed *infra*, (MICH. COMP. LAWS § 15.401, (2009) do not suffer from the same problems of the federal version. Other state restrictions on political activities are extreme enough to raise their own potential problems. See MO. REV. STAT. § 84.830 (2009) (prohibiting all political contributions by Kansas City police officers); *but see* *Pollard v. Bd. of Police Comm’rs*, 665 S.W.2d 333 (Mo. 1984) (upholding statute) and *Reeder v. Kansas City Bd. of Police Comm’rs*, 796 F.2d 1050 (8th Cir. 1986) (upholding statute).

110. Boyle, *supra* note 107, at 287.

111. Anthony Kovalchick, *Ending the Suppression: Why the Hatch Act Cannot Withstand Meaningful Constitutional Scrutiny*, 30 W. NEW ENG. L. REV. 419, 471 (2008). An even closer analogy might be drawn by noting that, even though drinking and driving is a problem, the legislature has not banned alcohol or automobiles, only their simultaneous use.

112. “It would certainly be ludicrous for one to contend that a federal employee running for public office might feel pressured or coerced to participate in his or her own campaign.” *Id.* at 447.



farmers and businessmen who receive federal funds, or to welfare and social security recipients.”<sup>113</sup> Once again, if the Hatch Act seeks to prevent the misuse of federal funds, it can and does do so (through the other provisions) without prohibiting a candidate from running for office on his or her own time. The Hatch Act’s vagueness and the confusion it causes may have a chilling effect,<sup>114</sup> even on employees who are not covered because they do not understand the exceptions. These exceptions demonstrate how absurd the Hatch Act is.

A covered employee can run for Mayor of Detroit (or the Detroit City Council), which is a nonpartisan position, but not for Mayor of New York (or the New York City Council) because it is partisan.<sup>115</sup> Moreover, a covered employee can run for Mayor of Detroit, but cannot run for a township trustee position in a small community in Michigan because those positions are partisan. A covered employee cannot run for the Michigan Supreme Court, where the presumption of nonpartisanship is rebutted, but can run for the Michigan Court of Appeals, where the presumption of nonpartisanship would hold up. A covered employee can run for probate judge in states where that position is nonpartisan, but cannot run where it is partisan.<sup>116</sup> If *any* candidate in the race is nominated by a political party, then a covered employee cannot run, even as an independent or nonpartisan candidate.

Tom Leonard, the assistant county prosecutor, cannot run for partisan office. But when he was a judicial clerk for the same county government, he could run because the Hatch Act does not apply to the judiciary. It is not just the employee that matters under the Hatch Act, but also the employer. For example, a chemist for the State of Florida, assuming any federal funds worked its way into the position, could not run for partisan office. But a chemist at Florida State University, working in a position that received federal grants, could run for office. Even more absurd, an elected (incumbent) county prosecutor, who actually oversees federal funds, can run for Congress, but an assistant county prosecutor, even one in a different county, cannot if (as is likely) federal funds find their way into the office. And, if the assistant prosecutor has the misfortune of running against his or her own boss for the congressional seat, the elected prosecutor may use the Hatch Act to fire his or

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113. Louis Boyle, *Reforming Civil Service Reform: Should the Federal Government Continue to Regulate State and Local Government Employees?*, 7 J.L. & POL. 243, 286 (1991).

114. *Id.* at 278.

115. See *Special Counsel v. Blackburne*, 58 M.S.P.R. 279, 281 (1993) (noting that New York City elections are partisan and thus within the Hatch Act’s candidacy prohibition).

116. *Special Counsel v. Winkleman*, 36 M.S.P.R. 71, 72 (1988) (partisan probate judge candidacy prohibited).

her opponent. The application of the Hatch Act to specific circumstances seems absurd, but its impact on voters may actually make it unconstitutional.

#### IV. THE HATCH ACT CANNOT SURVIVE MODERN CONSTITUTIONAL SCRUTINY

##### A. The Hatch Act has Been Upheld in the Past

In 1947, the United States Supreme Court upheld the constitutionality of the federal employee provisions of the Hatch Act in *United Public Workers of America v. Mitchell*,<sup>117</sup> and, in a companion case decided the same day, upheld the state and local provisions in *Oklahoma v. United States Civil Service Commission*.<sup>118</sup> Facing challenges based on the First Amendment, the Due Process Clause of the Fifth Amendment,<sup>119</sup> and the “political rights reserved to the people by the Ninth and Tenth Amendments,”<sup>120</sup> the Court held the Hatch Act to be constitutional.<sup>121</sup> The Court rejected Oklahoma’s claim that the Hatch Act was “an interference with the reserved powers of the state” under the Tenth Amendment.<sup>122</sup>

Justice Black dissented in both *Mitchell* and *Oklahoma*, arguing that millions of employees could “take no really effective part in campaigns that may bring about changes in their lives, their fortunes, and their happiness”<sup>123</sup> simply because their agency received federal funds and that “laws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public.”<sup>124</sup> While Justice Black’s dissent sounds reasonable to modern ears, *Mitchell* and *Oklahoma* remain good law.<sup>125</sup> In 1974, the Supreme Court reaffirmed the cases on essentially the same grounds in *U.S. Civil Service Commission v. National Association of Letter Carriers*.<sup>126</sup>

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117. *United Pub. Workers of America v. Mitchell*, 330 U.S. 75 (1947).

118. *Oklahoma v. Civil Serv. Comm’n*, 330 U.S. 127 (1947).

119. *Mitchell*, 330 U.S. at 95.

120. *Id.* at 94.

121. *Id.* at 103.

122. *Oklahoma*, 330 U.S. at 142–43 (Black, J. dissenting).

123. *Mitchell*, 330 U.S. at 107.

124. *Id.* at 110.

125. *See generally Mitchell*, 330 U.S. 75; *see generally Oklahoma*, 330 U.S. 127.

126. *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548 (1973).

Subsequently, the Hatch Act has survived other attacks based on the Qualifications Clause,<sup>127</sup> different treatment of state and federal employees,<sup>128</sup> different treatment of incumbents,<sup>129</sup> wealth based classifications,<sup>130</sup> and the different treatment of the District of Columbia.<sup>131</sup> Thus, for many, “there can be no doubt that the Court did specifically and definitely decide the Hatch Act was constitutional.”<sup>132</sup> The Hatch Act has also been praised for *protecting* First Amendment rights.<sup>133</sup> The Seventh Circuit held that “at some deep level both the Hatch Act and the doctrine of interpretation of the First Amendment that protects the political freedom of government employees could be said to be unified in a concern with abuses of power by incumbent office holders . . . .”<sup>134</sup> Some believe that the First Amendment essentially requires the Hatch Act to protect government workers.<sup>135</sup>

The Fourth Circuit, however, was sympathetic to plaintiffs challenging the constitutionality of the Hatch Act, but felt compelled to accept the binding Supreme Court precedent.<sup>136</sup> “Despite the clear implication of First

127. *Merle v. United States*, 351 F.3d 92, 96–97 (3d Cir. 2003) (Hatch Act does not violate Qualifications Clause).

128. *Alexander v. Merit Sys. Prot. Bd.*, 165 F.3d 474, 485 (6th Cir. 1999) (different penalties on state and federal employees did not violate Equal Protection Clause under rational basis review).

129. *Molina-Crespo v. Merit Sys. Prot. Bd.*, 486 F. Supp. 2d 680, 693–94 (N.D. Ohio 2007). The district court only considered whether an incumbent would have to resign to run for re-election to the post he was currently holding. *Id.* They did not consider the irrationality of an elected prosecutor and an assistant prosecutor being treated differently if both were running for Congress. In affirming the ruling below, the Sixth Circuit provided a better explanation of the distinction between non-incumbents and incumbents. *Molina-Crespo v. Merit Sys. Prot. Bd.*, 547 F.3d 651, 659 (6th Cir. 2008). The interest in preventing the *appearance* of partisanship in administering federal funds is weaker with incumbents because they are already partisan officials administering federal funds. *Id.*

130. *Molina-Crespo*, 547 F.3d at 660.

131. *Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1317–18 (Fed. Cir. 2003) (rational basis exists for exempting state and local teachers, but not Washington, D.C. teachers, from the Hatch Act). The District of Columbia Hatch Act Reform Act of 2009, introduced by Representative Eleanor Holmes Norton, would change this. H.R. 1345, 111th Cong. (2009).

132. *Palmer v. United States Civil Serv. Comm’n*, 297 F.2d 450, 452–53 (7th Cir. 1962). This position is not without its critics. “Because of fundamentally misguided legislation and an unprincipled line of judicial decisions, the federal Hatch Act has systematically chilled government employees’ participation in partisan political activity for over seven decades.” Kovalchick, *supra* note 100, at 420.

133. One could also argue that the Hatch Act serves the purpose of the Guarantee Clause, but this is not mentioned in the case law. “The United States shall guarantee to every State in this Union a Republican Form of Government . . . .” U.S. CONST. art. IV, § 4, cl. 1. One plaintiff claimed that the Hatch Act *violated* the Guarantee Clause, but that was rejected by the 7th circuit. *Palmer*, 297 F.2d at 454.

134. *Shondel v. McDermott*, 775 F.2d 859, 869 (7th Cir. 1985).

135. Bloch, *supra* note 5, at 266–67 (“The Act is a restriction on government activity of the sort envisioned and mandated by the First Amendment.”); Bloch, *supra* note 5, at 254.

136. *N. Va. Reg’l Park Auth. v. United States Civil Serv. Comm’n.*, 437 F.2d 1346, 1350 (4th Cir. 1971).

Amendment rights by the Hatch Act, the Court has essentially applied a rational basis test in cases involving constitutional challenges to the Act's validity."<sup>137</sup> Where rational basis is applied, such as where the classification is not suspect or no fundamental right is involved, it is very difficult to get the court to set aside a law,<sup>138</sup> although there are a few exceptions.<sup>139</sup>

Rational basis, however, is not the proper level of scrutiny for the Hatch Act's candidacy restrictions. Since 1947 constitutional law governing voting, ballot access, speech, and the federal spending power has evolved significantly. The Court's fundamental right-to-vote jurisprudence did not develop until after 1947.<sup>140</sup> Moreover, the Supreme Court's decisions contained "no discussion of the impact of the restrictions on voting rights."<sup>141</sup> Though the Hatch Act is assumed to be constitutional, if it were subject to modern scrutiny the state and local government employee candidacy restrictions would fail. Furthermore, under a proper *Pickering* analysis of the impact on the speech rights of the employees, the Hatch Act's state and local candidacy restrictions should be invalidated. But because the Court has upheld the Hatch Act before with little respect for the employee's speech rights, raising the rights of voters is more likely to succeed as a constitutional challenge to the Hatch Act.

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137. Kovalchick, *supra* note 100, at 421; *see also* *N. Va. Reg'l Park Auth.*, 437 F.2d at 1349 (noting that *United Pub. Workers of America v. Mitchell*, 330 U.S. 75 (1947) and *Oklahoma v. Civil Serv. Comm'n.*, 330 U.S. 127 (1947) applied a rational basis standard).
138. *Clements v. Fashing*, 457 U.S. 957, 963 (1982) "Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." (applying rational basis review); *see also* *Alexander v. Merit Sys. Prot. Bd.*, 165 F.3d 474 (6th Cir. 1999) (applying rational basis review).
139. For instance, in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), the U.S. Supreme Court invalidated statutes under rational basis review. Although this paper shows how some of the Hatch Act's coverage is irrational, because it is not motivated by animus it is unlikely to elicit a "heightened" rational basis review. The Hatch Act's internal inconsistencies, loopholes, and different treatment of incumbents, though, could lead to a successful rational basis challenge if it calls into doubt the legislature's judgment. *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1086 (2003) ("When the court sees the legislature's judgments as inconsistent with each other, this need to partly defer to the legislature apparently disappears, and the court becomes more willing to apply its own judgment") (citing *Caldor's, Inc. v. Bedding Barn, Inc.*, 417 A.2d 343, 353 (Conn. 1979) (invalidating Sunday closing law under rational basis due to patchwork of exemptions)); *see also* *Sabri v. United States*, 541 U.S. 600, 611-14 (Thomas, J., concurring) (expressing doubts about whether an anti-bribery statute with only an attenuated connection to protecting federal funds met rational basis).
140. *See, e.g.*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).
141. *Mancuso v. Taft*, 476 F.2d 187, 197 (1st Cir. 1973); *see also* *Molina-Crespo v. Merit Sys. Prot. Bd.*, 547 F.3d 651, 657-58 (6th Cir. 2008) (not considering rights of voters in evaluating constitutionality of Hatch Act).

B. The Hatch Act's State and Local Candidacy Restrictions are Invalid Under a *Pickering* Balancing

Although “the free speech rights of public employees are not absolute,”<sup>142</sup> they are protected.<sup>143</sup> The U.S. Supreme Court has held that, while employee speech can be limited, “it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.”<sup>144</sup> Thus, when a public employer discharges a worker for what he or she says, it may violate the First Amendment. Under the *Pickering* test, the Court seeks “to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees . . . .”<sup>145</sup>

The first step of a *Pickering* analysis asks whether the employee was disciplined for speaking on a matter of public concern. Specifically, to prevail, the employee must demonstrate that he or she was disciplined because of the speech.<sup>146</sup> There is no question of causation under the Hatch Act because covered employees are terminated simply for running for office. Something that implicates the First Amendment is involved when the employee declares that he or she is running for office. “Running for office is ‘a communicative act.’”<sup>147</sup> A candidate says something just by running for office.<sup>148</sup> Furthermore, political candidacy is a matter of public concern and discussion of political candidates lies at the core of the protections provided by the First

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142. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979).

143. *Connick v. Myers*, 461 U.S. 138, 143 (1983) (“It has been settled that a state cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.”) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605–06 (1967); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Branti v. Finkel*, 445 U.S. 507 (1980)).

144. *Pickering*, 391 U.S. at 574.

145. *Id.* at 568.

146. *Heil v. Santoro*, 147 F.3d 103, 109 (2d Cir.1998).

147. *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir. 1977). The Sixth Circuit, on the other hand, does not consider running for office to be a protected communicative act. *Carver v. Dennis*, 104 F.3d 847, 850–51 (6th Cir. 1997). But where an employee is discharged for things he or she says while campaigning, that is an injury cognizable according to the First Amendment. *Murphy v. Cockrell*, 505 F.3d 446, 450 (6th Cir. 2007) (two deputies in the same office ran against each other for the top position; the winner then fired the loser).

148. *Mancuso v. Taft*, 476 F.2d 187, 196 (1st Cir. 1973) (“The individual’s expressive activity has two dimensions: besides urging that his views be the views of the elected public official, he is also attempting to become a spokesman for a political party whose substantive program extends beyond the particular office in question.”).

Amendment.<sup>149</sup> Some also view the decision to run for partisan office as implicating the right to associate with a political party.<sup>150</sup> That the Hatch Act may not treat candidacy as a public concern worthy of protection is not conclusive under a *Pickering* analysis.<sup>151</sup> A covered employee loses his or her job under the Hatch Act because she chooses to express herself by running for office.

The federal government's role as the one providing the funding, rather than the one officially terminating the employee, does not change the analysis at this point. In *Velazquez*, the Court invalidated a law that restricted legal arguments that attorneys who worked for a grant recipient could make, finding that the fact that attorneys could withdraw did not change the fact that Congress was deciding which arguments were acceptable or unacceptable through the funding.<sup>152</sup> Nor is this a case where the federal government is simply picking that which it wants to subsidize; this regulation requires that an employee be removed from office for what he or she says.<sup>153</sup> Federal law requires an employee to be terminated for declaring candidacy, which is tantamount to speaking out on a matter of public concern.

After it has been shown that the employee was speaking on a matter of public concern, the government then has the burden of showing that the speech sufficiently threatened the government's effective operation to the point that the particular discipline was justified.<sup>154</sup> The federal government's interest in

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149. See, e.g., *Wiggins v. Lowndes County, Miss.*, 363 F.3d 387, 390 (5th Cir. 2004) ("Political speech regarding a public election lies at the core of matters of public concern protected by the First Amendment."); *Aucoin v. Haney*, 306 F.3d 268, 274 (5th Cir. 2002) ("There is no doubt that campaigning for a political candidate relates to a matter of public concern."); *Vojvodich v. Lopez*, 48 F.3d 879, 885 (5th Cir. 1995) ("There can be no question that the claimed activity, associating with political organizations and campaigning for a political candidate related to a matter of public concern"); *Kovalchick*, *supra* note 100, at 433 ("A citizen's speech for or against the election of a political candidate is obviously speech regarding a matter of public concern.").

150. *Mancuso*, 476 F.2d at 196 ("The right to run for office also affects the freedom to associate").

151. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 571-72 (1968) ("More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

152. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 546 (2001). "It is no answer to say the restriction on speech is harmless because, under LSC's interpretation of the Act, its attorneys can withdraw. This misses the point. The statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider." *Id.*

153. "Regulations directly restrict speech; subsidies do not." *Id.* at 552 (Scalia, J., dissenting).

154. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 466 (1995).

state and local employees is that of a grant maker, not an employer. Thus, its interest in the state and local candidacy restrictions is weaker than its interest in similar restrictions on federal employees. The federal interest in seeing that federal funds are not administered in a corrupt, partisan way and in avoiding the appearance of corruption seems strong enough to justify some regulation of grant-funded state employee speech. But that interest is not strong enough to justify the state and local candidacy restrictions. A covered employee may have only a tiny fraction of his or her salary coming from federal funds. Those federal funds may be administered by his or her supervisor, who is an actual partisan elected official.<sup>155</sup> That employee may be running for a seat on the township parks and recreation board in an entirely different jurisdiction than the one the employee works in, creating no real potential to abuse federal funding and no appearance that the federal dollars are manipulating elections. Termination is the most extreme action an employer can take. Though all violations of the Hatch Act's candidacy restrictions could result in termination of the covered employee, not all candidacy violations have actual potential to disrupt government functions or decrease efficiency.

More importantly, when the speech at issue is not related to the actual employment at issue, the government's interest is weaker.<sup>156</sup> Covered employees who become candidates are disciplined for what they do outside of work.<sup>157</sup> And as Justice Douglas observed, it is hard to "see how government can deprive its employees of the right to speak, write, assemble, or petition once the office is closed and the employee is home on his own."<sup>158</sup> But the Supreme Court has disagreed in the context of the Hatch Act.<sup>159</sup>

The Supreme Court has held "that the state's burden in justifying a particular discharge varies depending upon the nature of the employee's

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155. The Hatch Act would seemingly allow the supervisor to fire the covered employee even if the real motivation was that the supervisor disagreed with the candidate's party affiliation. This is not normally acceptable under modern First Amendment jurisprudence. *Melzer v. Bd. of Educ. of City Sch. Dist.*, 336 F.3d 185, 193 (2d Cir. 2003) (citing *Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996) ("When the government prevails in the balancing test, the employee may still carry the day if he can show that the employer's motivation for the discipline was retaliation for the speech itself, rather than for any resulting disruption.")).

156. *Pickering*, 391 U.S. at 574 ("However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.").

157. Kovalchick, *supra* note 100, at 454 ("Candidates run for political office in their capacities as private citizens rather than in their capacities as government employees.").

158. *Broadrick v. Oklahoma*, 413 U.S. 601, 619 (1973) (Douglas, J., dissenting).

159. Scott Bloch has treated the Hatch Act as an intentional exception to the normal scrutiny. "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." Bloch, *supra* note 5, at 263.

expression.”<sup>160</sup> Not all employee speech is protected.<sup>161</sup> In *Letter Carriers*, the Court paid little attention to the speech rights of government employees.<sup>162</sup> The Court found the government’s interest in seeing the laws fairly administered to be “fundamental” and found that partisanship stands in the way of fairness.<sup>163</sup> Moreover, the government has a strong interest in maintaining the appearance of fairness.<sup>164</sup> Though the Court mentioned the government’s interests, “the balancing test that had been applied in *Pickering* was never truly applied in *Letter Carriers*.”<sup>165</sup> The Court did not apply *Pickering*, but instead relied on past precedent and a strongly asserted interest to apply rational basis review.<sup>166</sup>

*Letter Carriers* only considered the federal government’s interest in keeping *federal* employees from running for partisan office. The Supreme Court has never considered the burden on a state employee’s speech rights by the federal government.<sup>167</sup> The Sixth Circuit recently addressed this issue, though, in *Molina-Crespo v. Merit Systems Protection Board*.<sup>168</sup> The Sixth Circuit, following in the footsteps of *Letter Carriers*, applied rational basis review.<sup>169</sup> The court was heavily influenced by Sixth Circuit precedent (which other circuits do not follow)<sup>170</sup> which does not recognize running for office as implicating the First Amendment at all.<sup>171</sup>

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160. *Connick v. Myers*, 461 U.S. 138, 150 (1983).

161. *Melzer v. Bd. of Educ. of City Sch. Dist.*, 336 F.3d 185, 199 (2d Cir. 2003) (okay to terminate teacher for membership in group that advocates adult having sex with boys).

162. *U.S. Civ. Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548 (1973).

163. *Id.* at 564–65 (“It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party.”).

164. *Id.* at 565 (“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.”).

165. Kovalchick, *supra* note 100, at 430.

166. *Letter Carriers*, 413 U.S. at 565. Justice Douglas implied the Court should have used a balancing test. *Id.* at 598 (Douglas, J., dissenting). “Such a deferential standard was a far cry from the balancing test that would later be applied in *Pickering*.” Kovalchick, *supra* note 100, at 430.

167. *Molina-Crespo v. U.S. Merit Sys. Prot. Bd.*, 547 F.3d 651, 656 (6th Cir. 2008) (noting that the Supreme Court has never addressed the exact constitutionality of the candidacy restrictions violating the rights of state and local government employees).

168. *Id.*

169. *Id.* at 658 (“The Act’s prohibition on candidacy for elective office is rationally related to the government’s interest because it allows the government to remove actual or apparent partisan influence from the administration of federal funds.”).

170. *Murphy v. Cockrell*, 505 F.3d 446, 450 (6th Cir. 2007) (noting that other circuits disagree with the conclusion that where an employee is fired strictly because of the fact of that employee’s rival candidacy, the First Amendment has not been violated.).

171. *Molina-Crespo*, 547 F.3d at 657 (“Running for political office . . . does not implicate a fundamental right, and strict scrutiny is inapplicable.”).



Judge Boggs was willing to go farther than the rest of the panel. He sought to apply strict scrutiny to the Hatch Act.<sup>172</sup> Boggs recognized that “Congress’s interests in regulating state employees through the Act is different than its interests in regulating federal employees.”<sup>173</sup> However, Boggs found that the Hatch Act served compelling government interests and could survive strict scrutiny.<sup>174</sup> Specifically, the plaintiff Molina failed to offer examples of “narrower, but effective, restrictions”<sup>175</sup> and only attacked the Hatch Act’s restrictions. As discussed in Part V(B), *infra*, there are narrower restrictions that effectively achieve the government’s interest in efficiency, avoiding corruption, and maintaining an appearance of fairness.

Judge Boggs is correct. The federal government is restricting the speech rights of state government employees and the Act should be analyzed under something more significant than rational basis review. At the very least, because “the federal government acts as a sovereign rather than as an employer . . . there is no basis whatsoever for applying a standard that is less rigorous than the *Pickering* balancing test.”<sup>176</sup> Even if the Hatch Act is special and should not be subject to regular *Pickering* analysis because of behavior that happened seventy-five years ago during the New Deal, courts should engage in some sort of balancing between the government’s interests as an employer and the employee’s speech rights.<sup>177</sup> But they have not.

The Hatch Act cannot survive a *Pickering* balancing or any meaningful modern scrutiny on First Amendment grounds, but it will not have to do so. Because the Hatch Act was upheld in the 1940s, courts are reluctant to consider its impact on employee speech rights. At least one court holds that political candidacy does not implicate First Amendment rights at all. A court can try to avoid deciding whether a person has a right to be a candidate by applying the *Pickering* balancing test and analyzing the candidacy as speech.<sup>178</sup> But whether it is analyzed as speech or something other than speech, courts should consider whether candidacy itself is protected.

### C. Fundamental Right to Candidacy?

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172. *Id.* at 665 (Boggs, J., concurring).

173. *Id.* at 664.

174. *Id.* at 665 (“In addition to limiting actual influence, the Act also inspires confidence in the government by eliminating the appearance of influence.”).

175. *Id.*

176. Kovalchick, *supra* note 100, at 465.

177. *Magill v. Lynch*, 560 F.2d 22, 27 (1st Cir. 1977) (requiring a balancing approach); *Alderman v. Phila. Hous. Auth.*, 496 F.2d 164, 171 n. 45 (3rd Cir. 1974) (noting that some type of balancing process is required).

178. *Jordan v. Ector County*, 516 F.3d 290 (5th Cir. 2008).

In *Clements v. Fashing*, the U.S. Supreme Court upheld a Texas statute that prohibited certain elected officials from running for a conflicting public office until they had concluded their service in the other office; in so doing, the Court held that candidacy was not a fundamental right.<sup>179</sup> “Far from recognizing candidacy as a ‘fundamental right,’” the Court declared, “we have held that the existence of barriers to a candidate’s access to the ballot ‘does not of itself compel close scrutiny.’”<sup>180</sup> It has become very clearly established that “the right to run for public office, unlike the right to vote, is not a fundamental right.”<sup>181</sup> But perhaps it should be.<sup>182</sup>

As Justice Douglas explained, “[v]oting is clearly a fundamental right. But the right to vote would be empty if the State could arbitrarily deny the right to stand for election.”<sup>183</sup> Thus, the Court has held that “the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.”<sup>184</sup> Though some see a significant difference between voting

179. *Clements v. Fashing*, 457 U.S. 957 (1982).

180. *Id.* at 963 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). Other courts had been more willing to treat candidacy as a fundamental right. *See Mancuso v. Taft*, 476 F.2d 187, 196 (1st Cir. 1973) (“We hold that candidacy is both a protected First Amendment right and a fundamental interest.”).

181. *Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990) (treating age restriction as *de minimis* restriction); *Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1312 (Fed. Cir. 2003) (“[T]he government responds that the Hatch Act does not prohibit Briggs from speaking on political matters; it only prohibits him from being a partisan candidate, and, unlike free speech, there is no fundamental right to be a political candidate.”); *Alexander v. Merit Sys. Prot. Bd.*, 165 F.3d 474, 484 (6th Cir. 1999) (“[T]he Supreme Court has never recognized a fundamental right to express one’s political views by becoming a candidate for office.”); *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir. 1977) (Three Supreme Court decisions “indicate that plaintiff’s interest in seeking office, by itself, is not entitled to constitutional protection. Moreover, since plaintiff has not alleged that by running for Congress he was advancing the political ideas of a particular set of voters, he cannot bring his action under the rubric of freedom of association which the Supreme Court has embraced.”) (internal citation omitted); *Bart v. Telford*, 677 F.2d 622, 624 (7th Cir. 1982) (“The First Amendment does not in terms confer a right to run for public office, and this court has held that it does not do so by implication either.”).

182. *See Nicole Gordon, The Constitutional Right to Candidacy*, 25 U. KAN. L. REV. 571 (1977). Perhaps instead the Court could focus on a “protected right to participate in a competitive political environment . . . .” Ellen D. Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1163, 1164 (2007). One court actually linked the right to an individual’s liberty interest in pursuing an occupation. *Becton v. Thomas*, 48 F. Supp. 2d 747, 758 (W.D. Tenn. 1999) (“The freedom to run for political office is sufficiently akin to the freedoms listed in *Meyer* to qualify as a liberty interest protected by the Due Process Clause. American history has clearly demonstrated that a political career, no matter how short-lived, is one of this country’s ‘common occupations of life.’”). In any case, there is something about political candidacies in general, and competition in elections in particular, that the Court should protect.

183. *Lubin v. Panish*, 415 U.S. 709, 721–22 (1974) (Douglas, J., concurring) (internal citations omitted).

184. *Bullock*, 405 U.S. at 143; *see also Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (“[O]ur primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson’s candidacy and the views he espoused.”).

and running for office,<sup>185</sup> courts often speak about a right to run for office.<sup>186</sup> Candidacies are worth protecting, even if running for office is not a fundamental right.<sup>187</sup> “However, to say that the right to candidacy is not fundamental is not to say that a rational basis analysis applies.”<sup>188</sup> A federal district court recently explained that the “right to run for County Commissioner is a ‘substantial’ and ‘important,’ although not ‘fundamental,’ right protected by the First Amendment to the U.S. Constitution.”<sup>189</sup> Nevertheless, to successfully challenge a restriction, a candidate should assert the rights of voters or explicitly link the claim to the rights of voters.<sup>190</sup> As another federal district court explained:

A plaintiff’s injury is diminished where, as here, he or she asserts the rights of a candidate only. Normally, the rights of voters and the rights of candidates do not lend themselves to neat separation. Here, however, Mr. Medina has asserted only his rights as a candidate. He has not attempted to assert his rights as a voter nor has he attempted to assert the rights of those

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Not everyone agrees that candidate restrictions affect voters. Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 184–85 (2008) (“Candidates have no fundamental right to be on the ballot—participation in our democracy stems from every citizen having the ability to cast a vote, not run for office. It follows that laws that make distinctions regarding who can be a candidate do not touch upon a fundamental right because they only impact voters peripherally.”). This view ignores the fact that a voter cannot really participate in a democracy with an empty ballot.

185. *Bates v. Jones*, 131 F.3d 843, 851, (9th Cir. 1997) (O’Scannlain, J., concurring with en banc decision) (right to candidacy is an improper overextension of the right to vote); *Speer v. City of Oregon*, 847 F.2d 310, 312 (6th Cir. 1988) (“The right to vote generally compels much stricter scrutiny as a fundamental right than does the right to offer one’s self as a candidate for public office.”).
186. *Flinn v. Gordon*, 775 F.2d 1551, 1554 (11th Cir. 1985) (“Although he certainly had a constitutional right to run for office and to hold office once elected, he had no constitutional right to win an election.”), *cert. denied*, 476 U.S. 1116 (1986); *see also Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990) (recognizing “the right to run for public office”), *cert. denied*, 499 U.S. 919 (1991).
187. *Clements v. Fashing*, 457 U.S. 957, 978 n.2 (1982) (Brennan, J., dissenting) (“Although we have never defined candidacy as a fundamental right [for equal protection purposes,] we have clearly recognized that restrictions on candidacy impinge on First Amendment rights of candidates and voters.”) (citations omitted).
188. *Brazil-Breashears v. Bilandic*, 53 F.3d 789, 792 (7th Cir. 1995); *see also Mancuso v. Taft*, 476 F.2d 187, 195 (1st Cir. 1973) (“The activity of seeking public office is among those protected by the First Amendment”).
189. *Medina v. City of Pharr*, No. M-06-94, 2006 U.S. Dist. LEXIS 70070 (S. D. Tex. Sept. 27, 2006).
190. Many courts have recognized that “candidates have standing to represent the rights of voters.” *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 422 (E.D. Mich. 2004) (citing *Pa. Psychiatric Soc’y v. Green Spring Health Servs. Inc.*, 280 F.3d 278, 288 n.10 (3d Cir. 2002) (stating that “candidates for public office may be able to assert the rights of voters”); *Walgren v. Bd. of Selectmen of Amherst*, 519 F.2d 1364, 1365 n.1 (1st Cir. 1979) (observing that “we have in the past indicated that a candidate has standing to raise the constitutional rights of voters.”); *Mancuso*, 476 F.2d at 190 (same). *See also Torres-Torres v. Puerto Rico*, 353 F.3d 79, 82 (1st Cir. 2003).

who may have chosen to associate to express their support for him. The right to be a candidate simply carries less significance.<sup>191</sup>

The right to run for public office is often linked to the right of voters to vote for a candidate for that office, but it is also linked to the right of voters to express support for that candidate. The Sixth Circuit also held that candidacy was not a fundamental right.<sup>192</sup> However, a few years later, the court recognized a problem with its precedent. The Sixth Circuit's holding "appears inconsistent with a First Amendment right to support the candidate of one's choice."<sup>193</sup> Specifically, a government employee would have the right to support whichever candidate she desires, unless that employee is herself the candidate, and further, an employee would be "protected from retaliation for supporting any candidate other than herself."<sup>194</sup> Although the court recognized the problem, the three-judge panel nevertheless lacked the authority to reverse a prior ruling and continued its inconsistent treatment of candidate-related speech.<sup>195</sup> Several other circuits have avoided this inconsistency and held that the First Amendment protects a candidate's right to run for office.<sup>196</sup> Public employee candidacy restrictions have also been invalidated on First

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191. *Medina v. City of Osawatomie*, 992 F. Supp. 1269, 1276 (D. Kan. 1998) (internal citation omitted).

192. *Carver v. Dennis*, 104 F.3d 847, 853 (6th Cir. 1997).

193. *Myers v. Dean*, 216 Fed. App'x. 552, 554 (6th Cir. 2007).

194. *Id.* (recognizing that other circuits have recognized a First Amendment-linked right to run for office). But where the candidate is terminated for the things she says during her candidacy, not the mere fact of her candidacy, even the Sixth Circuit will protect her against termination based on First Amendment rights. *Murphy v. Cockrell*, 505 F.3d 446, 450 (6th Cir. 2007); *see also* *Greenwell v. Parsley*, 541 F.3d 401, 404 (6th Cir. 2008) ("Clearly, cases involving political speech by public employees proceed on a continuum; drawing a clear line between the simple announcement of a candidacy, which does not trigger protected political speech, and an announcement coupled with speech critical of one's opponent (and boss), which does trigger constitutional protection, is not an easy task.").

195. *Myers*, 216 Fed. App'x. at 555.

196. *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir. 1977) (holding that the "plaintiff's interest in running for Congress and thereby expressing his political views without interference from state officials . . . lies at the core of the values protected by the First Amendment."), *cert. denied*, 434 U.S. 968 (1977); *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981) (recognizing "the First Amendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's views to the electorate"), *cert. denied*, 457 U.S. 1120 (1982); *Finkelstein v. Bergna*, 924 F.2d 1449, 1453 (9th Cir. 1991) ("Disciplinary action discouraging a candidate's bid for elective office represent[s] punishment by the state based on the content of a communicative act protected by the first amendment.") (internal quotation marks and brackets omitted), *cert. denied*, 502 U.S. 818 (1991); *Minielly v. State*, 411 P.2d 69, 73 (Or. 1966) (en banc) ("Running for public office is one of the means of political expression which is protected by the First Amendment"); *Myers*, 216 Fed. App'x. at 554-55. Arguably, "the right to engage in political activity is, in many respects, even more fundamental than the right to cast a vote." Kovalchick, *supra* note 100, at 467.

Amendment grounds in the past by state courts.<sup>197</sup> And, of course, affected candidates think their First Amendment rights have been violated when they are prohibited from running for office.<sup>198</sup>

While there is absolutely an expressive quality to running for office,<sup>199</sup> limits on candidate qualifications should be assessed for their impact on the right to vote. The right to candidacy need not be fundamental, and the government may often have reasons for limiting that freedom where there is a conflict of interest, or campaigning causes an employee to “devote less than his full time and energies to the responsibilities of his office,” and “to render decisions and take actions that might serve more to further his political ambitions than the responsibilities of his office.”<sup>200</sup> Scrutinizing candidate qualifications based on their impact on the right to vote is also easier to administer because one standard will apply to election laws and ballot restrictions; and when a restriction on a candidate is truly burdensome, it will affect voters. Were a court to examine the impact of the Hatch Act on voters’ choices, it would find that the Hatch Act severely limits the available candidates.

#### D. Why the *Anderson/Burdick* Test Applies to Candidacy Restrictions

In *Crawford v. Marion County Election Bd.* the U.S. Supreme Court recently “reaffirmed *Anderson*’s requirement that a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule.’”<sup>201</sup> The greater the burden imposed on voters, the stricter the scrutiny the law will face<sup>202</sup> under the *Anderson/Burdick* test.<sup>203</sup> The Court adopted a balancing test because,

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197. *Minielly*, 411 P.2d at 78; *Kinnear v. San Francisco*, 392 P.2d 391, 392 (Cal. 1964) (en banc).

198. See Jeff Mill, *Attorney: Act was Misread*, MIDDLETOWN PRESS (Conn.), May 15, 2009, available at <http://www.middletownpress.com/articles/2009/05/15/news/doc4a0e36a6ca15e944376228.txt> (affected candidate’s attorney claiming rights were violated).

199. What better way to show disapproval with your Congressman than running against him?

200. *Clements v. Fashing*, 457 U.S. 957, 968 (1982).

201. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

202. *Id.*; see also *Norman v. Reed*, 502 U.S. 279, 288–89 (1992) (severe restriction not justified by narrowly drawn state interest of compelling importance).

203. In his lead opinion, which the Chief Justice and Justice Kennedy join, Justice Stevens describes it as the *Anderson* test, which quotes *Burdick*. *Crawford*, 128 S. Ct. at 1616. Justice Scalia’s opinion, which was joined by Justices Thomas and Alito, treats it as the *Burdick* test. *Id.* at 1624 (“To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick* . . .”). I am agnostic as to the proper name of the standard and both opinions agree that the precise interests of the state should be measured

although “the State is left with broad powers to regulate voting,”<sup>204</sup> the right to vote is fundamental. Some regulation of voting and the candidates that voters may choose is necessary for orderly and proper administration of elections.

Laws that affect candidates always have some “correlative effect on voters.”<sup>205</sup> Thus, the Supreme Court has consistently subjected candidacy restrictions to a balancing test because of their effects on voters:

In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters. In assessing challenges to state election laws that restrict access to the ballot, this Court has not formulated a litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions. Our ballot access cases, however, do focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the “availability of political opportunity.”<sup>206</sup>

*Anderson/Burdick’s* balancing test is an appropriate standard for analyzing restrictions on candidates. A standard should recognize that the government may have strong interests,<sup>207</sup> especially when dealing with government employees,<sup>208</sup> but require the government to show precisely how an employee running for office encroaches on those interests. The government should not be permitted to show only a general, ephemeral fear of “partisanship” or “coercion,” but a specific showing of how this employee’s campaign, or the campaign of an employee like this one’s, will encroach upon

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against the burden, with more severe burdens receiving stricter scrutiny.

204. *Williams v. Rhodes*, 393 U.S. 23, 34 (1968).

205. *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

206. *Clements v. Fashing*, 457 U.S. 957, 964 (1982) (internal citations omitted).

207. *Magill v. Lynch*, 560 F.2d 22, 27 (1st Cir. 1977) (“It appears that the government may place limits on campaigning by public employees if the limits substantially serve government interests that are ‘important’ enough to outweigh the employees’ First Amendment rights.”), *cert. denied*, 434 U.S. 1063 (1978).

208. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (“When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.”).

the government's interest.<sup>209</sup> Confronted with a candidacy case, the Seventh Circuit balanced the plaintiff's individual rights against the interests of the public body.<sup>210</sup> The court found the state's interest in that particular case was substantial and the burden on the individual was minor.<sup>211</sup> It is particularly appropriate to apply *Anderson/Burdick's* balancing test to the Hatch Act's candidacy restrictions because *Anderson* involved laws that kept candidates off the ballot and *Burdick* dealt with the right to vote clearly linked to (write-in) candidates. Even if a balancing test is not applied to pure questions of candidacy, it still applies here as the Hatch Act's restrictions on candidacies can be linked to the rights of voters.

Requiring an employee to resign his or her job to run for office (especially a part-time office) has an impact on the availability of candidates from which voters choose. In a Voting Rights Act case, the U.S. Supreme Court held that "[b]y imposing substantial economic disincentives on employees who wish to seek elective office, the Rule burdens entry into elective campaigns and, concomitantly, limits the choices available to . . . voters."<sup>212</sup> Thus, because the Hatch Act has an impact on the rights of voters by affecting their choice of candidates through imposing substantial economic disincentives on running for office, it is subject to the *Anderson/Burdick* test.

#### E. The Hatch Act is Unconstitutional Under *Anderson/Burdick*

Restrictions on candidates are analyzed for their impact on voters. In weighing the impact on voters against the precise interests of the government, it is important to first decide how to measure the impact on voters. In this regard, the Court is split. Justices Stevens and Kennedy, as well as Chief Justice Roberts, considered the impact on individual voters that were affected

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209. See, e.g., *Medina v. City of Pharr*, No. M-06-94, 2006 U.S. Dist. LEXIS 70070, at \*15–16 (S.D. Tex. Sept. 27, 2006). ("Although the interests defended by the City are undeniably important, absent any allegation that Medina's campaign would specifically encroach upon them, they cannot be vindicated by the policy at the expense of Medina's rights."). *Segars v. Fulton County*, 644 F. Supp. 682, 687 (N.D. Ga. 1986) (striking down a county policy against employee running for mayor in a town fifty miles away because the county only had speculation, not actual evidence that dual responsibility might create potential for conflict).

210. *Breashears v. Bilandic*, 53 F.3d 789, 792 (7th Cir. 1995).

211. *Id.* ("The State of Illinois has a substantial interest in maintaining the integrity of the judicial branch. The Policy serves this interest in that it enhances the efficiency of the workforce and prevents against actual, as well as the appearance of, impropriety.")

212. *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 39 (1978) (policy adopted to require African-American teacher to take unpaid leave of absence to run for state representative was a restriction on voting). Even if this quote is dicta, when viewed realistically and based on the experience of actual thwarted candidacies, the Hatch Act's provisions clearly impose an economic disincentive to run for office that affects the choices of voters.

by the photo identification requirement at issue in *Crawford*.<sup>213</sup> Justices Scalia, Thomas, and Alito did not find the impact in individual voters relevant at all, but instead looked at the “categorical” impact on all voters.<sup>214</sup>

Stevens found that voters could likely avoid being harmed by the requirement<sup>215</sup> and that the availability of provisional ballots mitigated whatever harm would be caused by the photo ID requirement.<sup>216</sup> Justice Stevens was concerned that the burden could not be proven as it was not clear how many voters were actually harmed by a photo identification requirement and no voter was able to show that he or she had actually been denied the right to vote because of it.<sup>217</sup> Stevens’s opinion found that without a record showing more of a burden, the Court was obligated to find that the burden was not severe.<sup>218</sup> Justice Scalia found “that the burden at issue is minimal and justified”<sup>219</sup> and that requiring voters to possess a “free photo identification” was “simply not [a] severe” burden on the right to vote.<sup>220</sup>

The Hatch Act has a significant or even severe burden on voters whether individual voters or voters at-large are considered. The burden on an individual voter who wishes to become a candidate, or who wishes to vote for that candidate, but is blocked from running by the significant economic disincentive caused by the Hatch Act is severe. That voter is simply denied the opportunity to cast a personally meaningful vote when a candidate who is otherwise willing to run is not able to pay the “filing fee” of giving up his or her day job.<sup>221</sup> Most significantly, unlike *Crawford* where there was not a specific plaintiff who had been actually and concretely denied the right to vote

213. “The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483.” *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1620 (2008).

214. *Id.* at 1623. (Scalia, J., concurring) (“[B]ut when we began to grapple with the magnitude of burdens, we did so categorically and did not consider the peculiar circumstances of individual voters or candidates.”).

215. “Presumably most voters casting provisional ballots will be able to obtain photo identifications before the next election.” *Id.* at 1621 n.19.

216. “The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted.” *Id.* at 1621.

217. *Id.* at 1622 (“[T]he evidence in the record does not provide us with the number of registered voters without photo identification . . .”).

218. He found “on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.” *Id.* at 1623.

219. *Id.* at 1624 (Scalia, J., concurring).

220. “The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not ‘even represent a significant increase over the usual burdens of voting.’” *Id.* at 1627 (Scalia, J., concurring).

221. The Court’s hostility to actual filing fees as the sole means of qualifying a candidate can be seen in *Bullock v. Carter*, 405 U.S. 134, 136 (1972) (finding \$1000, \$1424.60, and \$6300 filing fees unconstitutional) and *Lubin v. Parish*, 415 U.S. 709, 718 (1974) (\$701 filing fee).



due to the photo ID requirement,<sup>222</sup> there are many actual concrete examples of candidacies thwarted and voters who lost the opportunity to vote for that candidate because of the Hatch Act's anti-candidacy provisions.<sup>223</sup> Thus, if the burden is measured on individual voters, the Hatch Act's impact is severe.

If the impact on all voters is the proper measure, the Hatch Act's burden is still severe. When the Hatch Act thwarts a candidacy, it affects all voters in that jurisdiction by denying them the opportunity to vote for that candidate and decreases the availability of political alternatives, whether or not voters actually wish to vote for that alternative. "Even in jurisdictions in which participants are legion, the political process suffers when the voices of a few are silenced."<sup>224</sup> But in many districts the choices are few and the Hatch Act's burden is more severe on all voters there. In any case, the Hatch Act's candidacy restrictions affect millions of potential candidates by imposing a severe economic disincentive that prevents numerous actual candidacies in a way that burdens both individual voters and voters generally. Proponents of the Hatch Act would argue that the burden is not severe because a covered employee can simply resign if he or she wants to run or the agency could reject federal funding. Of course, resigning one's day job to run for a part-time office is a severe burden, but it is the burden on voters, not on the employee, that is examined. And the burden on voters is significant where their choices are reduced. The Supreme Court did not consider the burden on voters when it examined the Hatch Act in the past. In *Molina-Crespo*, where the Sixth Circuit recently upheld the constitutionality of the state and local candidacy restrictions of the Hatch Act, the impact on the rights of voters was not asserted or discussed.<sup>225</sup> If the rights of voters are asserted, the Hatch Act should be held unconstitutional.

In *Mains v. City of Rochester*, a federal district judge invalidated a Rochester, New York ordinance that prohibited teachers and school district employees from running for city council or mayor unless they first resigned.<sup>226</sup> Applying the *Anderson/Burdick* test, the court found that by excluding 4,000 potential candidates from the voters, the burden was "enormous" and

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222. It remains unclear whether an "as applied" challenge from an individual voter denied the right to vote because of the photo ID requirement and unable to cast a provision would succeed.

223. See examples *supra* Part II(b). These are only a few recent examples from the 2008 election, there are certainly many more.

224. Kovalchick, *supra* note 100, at 470.

225. *Molina-Crespo v. Merit Sys. Prot. Bd.*, 547 F.3d 651, 657-58 (6th Cir. 2008).

226. *Mains v. City of Rochester*, No. 03-CV-6363T(F), 2004 U.S. Dist. LEXIS 14826 (W.D.N.Y. Jul. 23, 2004).

“onerous.”<sup>227</sup> The Hatch Act covers millions of employees and its burden is just as onerous as Rochester’s. Though “the Hatch Act is not an absolute prohibition against political activity by local government employees,”<sup>228</sup> it is an absolute prohibition on covered employees seeking a partisan office. Its proponents cite how limited the Hatch Act is as a positive, arguing that “rather than imposing a far-reaching ban on employees’ partisan political activity, the act is designed to control abuses.”<sup>229</sup> But in attempting to control these abuses, the Hatch Act imposes a severe burden and under *Anderson/Burdick* will be subject to “fairly strict scrutiny.”<sup>230</sup> Under fairly strict scrutiny, government regulations often fail.

In *Crawford*, the State’s interest was clear. “There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters.”<sup>231</sup> The interests behind the Hatch Act’s candidacy restrictions in general, and the state and local employee candidacy restrictions in particular, can be questioned.

The interests behind the Hatch Act are “[p]reventing corruption, ensuring a professional civil service, preserving respect for the government, and protecting employees from being coerced into political activity . . . .”<sup>232</sup> However, the Hatch Act’s “employee-protective rationale provided much stronger justification for a proscriptive rule than the [g]overnment’s general interest in workplace efficiency.”<sup>233</sup> These interests apply to the federal employee provisions. “When it comes to regulating the political activities of state employees, however, the federal government does not have the same interest in promoting efficiency or public confidence in state government as a whole but, rather, has an interest in removing partisan political influence from the administration of federal funds.”<sup>234</sup> The interest behind Rochester’s

227. *Id.* at \*14–16. Three decades prior to this the First Circuit invalidated the City of Cranston’s candidacy prohibitions for city employees applying *Bullock* for exactly the same reason—it infringes on voter choices. *Mancuso v. Taft*, 476 F.2d 187, 193-94 (1st Cir. 1973).

228. *Melendez v. N.Y. City Hous. Auth.*, 720 N.Y.S. 2d 491, 493 (N.Y.A.D. 2001).

229. Bloch, *supra* note 5, at 229.

230. *Mains*, 2004 U.S. Dist. LEXIS at \*15.

231. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1619 (2008).

232. Bloch, *supra* note 5, at 271; Ebhard, *supra* note 4, at 188–95 (Hatch Act exists to promote impartiality, appearance of impartiality, efficiency, non-coercion of employees, and stop political machines).

233. *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 475–76 n.21 (2006).

234. *Alexander v. Merit Sys. Prot. Bd.*, 165 F.3d 474, 485 (6th Cir. 1999); *see also Fela v. Merit Sys. Prot. Bd.*, 730 F. Supp. 779, 780 (N.D. Ohio 1989). There is also an interest in avoiding the appearance of partisanship in the administration of federal funds. *See United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973) (“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

policy preventing school employees from running for city office was to prevent conflicts of interest, but the court rejected this because there was insufficient evidence of actual conflicts of interest.<sup>235</sup>

Furthermore, there is insufficient evidence of partisanship in the administration of state funds caused by the partisan candidacies of non-incumbent state and local government employees to justify the Hatch Act's candidacy restrictions.<sup>236</sup> Proponents of the Hatch Act would argue that the interest in stopping partisanship or coercion in the administration of federal funds is compelling and supported by the abuses prior to its enactment. But this interest relates to the whole of the Hatch Act, not the particular restrictions on candidacies. The fact that there was abuse of government monies prior to the enactment of the Hatch Act probably justifies *some* regulation of partisanship, but absent a showing that candidacies are the problem, the treatment does not fit the disease.<sup>237</sup> Moreover, the change of the legal landscape since 1940 also undermines the application of the state and local candidacy restrictions in 2010. Most covered employees are now allowed to participate in partisan political activities, such as being the chair of the county Democratic Party, which would seem to undermine the anti-coercion justification.<sup>238</sup> Most significantly, the Supreme Court has ruled that continued government employment cannot be conditioned on allegiance to a political party and, except for policy-making employees for whom partisanship is

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to a disastrous extent.”).

235. *Mains*, 2004 U.S. Dist. LEXIS at \*16–20.

236. If one were to look for partisanship in the administration of federal funds, then the partisan elected sheriff may be a better target than the deputies covering road patrols who have no supervision of, or authority over, the federal funds.

237. These restrictions might also reach employees where the justification for restricting their political activities is much weaker. The Supreme Court of Canada declared that the Canadian version of the Hatch Act, which prohibited employees from working towards any partisan cause, was unconstitutional precisely because the law reached more public servants than necessary and thus restricted freedom of expression too much:

The restriction of partisan political activity is rationally connected to the objective, but s. 33 is not a measure carefully designed to impair freedom of expression as little as reasonably possible. The result of the broad general language of s. 33 is that the restrictions apply to a great number of public servants who, in modern government, are completely divorced from the exercise of any discretion that could in any manner be affected by political considerations. Section 33, then, is over-inclusive and, in many of its applications, goes beyond what is necessary to achieve the objective of an impartial and loyal civil service.

*Osborne v. Canada (Treasury Bd.)*, [1991] 2 S.C.R. 69 (Can.). Canada's democracy has, apparently, survived with fewer restrictions on the after-work political activities of public employees. The U.S. might as well.

238. Kovalchick, *supra* note 100, at 451.

actually a job requirement, state and local governments may not hire based on party.<sup>239</sup>

Therefore, to justify a significant economic disincentive on millions of government workers running for office (which places a severe burden on all voters), the federal government can claim that it thwarts candidacies of low-level workers to prevent partisanship in the administration of federal funds, even though: those funds may be actually supervised by partisan elected officials, all government workers have the right to be active partisan leaders, and coercive behavior based on party affiliation already violates the First Amendment. Rochester's candidacy restrictions were unconstitutional and so are those of the Hatch Act. The weak amorphous interest in blocking partisanship, with means that are far from narrowly tailored, is insufficient to sustain the Hatch Act under *Anderson/Burdick*.

#### F. Modern Federalism Concerns

"The power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first place . . . ."<sup>240</sup> The Hatch Act is, after all, linked explicitly to federal funding and seeks to protect the abuse of that federal funding.<sup>241</sup> "Thus, Congress may 'encourage' states to do certain things that it cannot command them to do."<sup>242</sup> However, not all conditions linked to federal funding are constitutional.

"There are limits on the power of Congress to impose conditions on the [s]tates pursuant to its spending power . . . ."<sup>243</sup> Specifically, in *South Dakota v. Dole*, decided decades after the Hatch Act's regulation of states was first upheld, the Court "recognized that in some circumstances the financial

239. See, e.g., *Branti v. Finkel*, 445 U.S. 507 (1980).

240. *Sabri v. United States*, 541 U.S. 600, 608 (discussing an anti-bribery statute).

241. *Alexander v. Merit Sys. Prot. Bd.*, 165 F.3d 474, 485 (6th Cir. 1999) (spending power is source of regulation); *Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1310 (Fed. Cir. 2003) ("Extension was an exercise of Congress's spending power"); Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 45 n.116 (1988) (The Hatch Act "should be sustained against the challenge of unconstitutional conditions because it is designed to protect the United States against abuses by recipients of federal moneys."). The Hatch Act's mission, though, may be even broader. See George D. Brown, *Stealth Statute-Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 272 (1998) ("It is possible, then, to read *Oklahoma* for the proposition that Congress can utilize a state or local government's receipt of federal funds as a hook to impose the 'broad policy objective' of honest public services upon that government.").

242. Jesse Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J.L. & PUB. POL'Y 460, 463 (1995).

243. *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 n.13 (1981).

inducements offered by Congress might be so coercive as to pass the point at which pressure turns into compulsions.”<sup>244</sup> Though *Dole* says there are limits, rarely is a statute found that exceeds those limits. “In practice, the Court finds that the spending is not . . . ‘unduly coercive’ because the entity that received the federal funds could always reject them.”<sup>245</sup> Though the individual candidate probably lacks the ability to reject the federal funds, an agency could simply choose not to accept a federal grant or to suffer the financial penalty.<sup>246</sup> Arguing before the Eighth Circuit, an attorney for the Merit System Protection Board once again reiterated that states do, in fact, have a choice and can simply choose to take the financial penalty.<sup>247</sup> Of course, whether the financial penalty is measured as twice the salary of a single employee in a single incident, or all covered employees in the jurisdiction, or all federal grants the state receives makes a difference. Yet this is probably insufficiently coercive to render the Hatch Act unconstitutional under *Dole* absent an independent constitutional bar.<sup>248</sup> And still, something seems wrong.

The ability of the federal government to effectively regulate local elections and local government behavior when it is not intervening to protect citizens’ federal constitutional rights seems to inherently raise federalism problems,<sup>249</sup> and it seems as if the Tenth Amendment should have some significance.<sup>250</sup> In many communities,<sup>251</sup> by effectively excluding a significant pool of candidates, the Hatch Act changes the nature and character of the

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244. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

245. Ronald Rotunda & John Nowak, 1 *Treatise on Const. L.* § 5.7(a)(ii)(6) (4th ed. 2008). *See, e.g.*, *Sabri v. United States*, 541 U.S. 600, 608 (2004) (not finding federal statute unduly coercive).

246. “Under the Hatch Act the state is not even under compulsion to discharge an employee who has violated the statute. If the state wishes to retain such employee, it may do so; the only penalty is the withholding of federal loans or grants equal to two years’ compensation of the offending employee.” *Neustein v. Mitchell*, 52 F. Supp. 531, 532 (1943).

247. *Minnesota v. Merit Sys. Prot. Bd.*, 875 F.2d 179, 184 (8th Cir. 1989).

248. *Dole*, 483 U.S. at 210 (“The power may not be used to induce the States to engage in activities that would themselves be unconstitutional.”).

249. “Congress has no general constitutional authority to regulate the conduct of state and local government employees.” Kovalchick, *supra* note 100, at 459 (citing *Printz v. United States*, 521 U.S. 898, 929–35 (1997)).

250. Epstein, *supra* note 241, at 45 n.116 (“The Supreme Court . . . sustained the statute on the ground that the tenth amendment is a truism.”).

251. In rural areas with substantial numbers of covered employees and low pay for elected officials such that an official cannot afford to give up their day job, the Hatch Act may effectively remove civil servants from serving on the city council or county commission. *See* discussion of Representative Stupak’s bill *infra* Part V(a). Another possible effect may be to skew the composition of part-time election positions towards retirees.

representative government.<sup>252</sup> And this intrusion that regulates states as states is all done in the name of keeping politics out of the administration of federal funds.<sup>253</sup> Federal funds are often administered by the politicians themselves, such as elected sheriffs and prosecutors. The federal government's interest seems too weak to justify the level of intrusion into fundamental areas of state sovereignty.<sup>254</sup> Even if the interest is sufficient to meet constitutional scrutiny, it is insufficient to justify the Hatch Act as a matter of policy and Congress should amend it.

## V. REFORMING THE HATCH ACT

### A. Current Attempts to Reform

The Hatch Act certainly has critics who question its constitutionality.<sup>255</sup> “The Hatch Act is 180 degrees from what our constitution gives us, [sic] you have to prove yourself innocent under the Hatch Act,” according to Charlevoix County, Michigan sheriff candidate Don Schneider, and those “who are upfront and honest about this whole thing are being punished.”<sup>256</sup> Others have more specific complaints, such as criticizing the Hatch Act for only covering executive, not legislative or judicial employees.<sup>257</sup> Still others criticize the Hatch Act for placing a candidate within its coverage when only a small

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252. Deborah Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 54 n.305 (1988) (treating Hatch Act as federally-imposed “qualifications for state office”).

253. The Hatch Act intrudes on the rights of a state to make its own decisions about hiring, employment, and qualifications for candidacies. “That is, the withholding of funds burdens the exercise of the state’s sovereign right to employ persons as it wishes.” Mitchell Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 53 (2001). Because the Act regulates local officials, as well as the election of Representatives in Congress and Senators, it cannot be said to operate under the Congressional power to regulate federal elections in Art. I, Sec. 4 of the U.S. Constitution.

254. *But see* Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 101 (2003–2004) (“Although Congress did not have the constitutional authority to impose the requirement directly on the states, it could attach conditions to the states’ receipt of federal benefits by requiring those who administer funds for national needs to abstain from active political partisanship. The federal government’s interest in eliminating corruption from all levels of government does not undermine the authority of the states, but rather enhances the integrity of all governments.”) (internal quotation omitted).

255. *See, e.g.*, Kovalchick, *supra* note 100; *see also* Carolyn M. Abbate, *It’s Time to “Hatch” a New Act: How the OSC’s Interpretation of the Hatch Act Chills Protected Speech*, 18 FED. CIR. B.J. 139, 154 (2008) (proposing minor change to allow more work-place free expression).

256. Fowle, *supra* note 58.

257. Perham, *supra* note 22 (“The act pins down potential abuse of power only in the executive branch of government, and does not apply to legislators and members of the judiciary, Guglielmi said.”).

amount of federal dollars are involved.<sup>258</sup> Of course, some government employees would like to see change. The chairman of the New York Sheriff's Association said he could "see its purpose when it was first enacted," but feels that the Hatch Act "needs to be revisited."<sup>259</sup> There is a perception that the Hatch Act's scope is increasing and that it hits law enforcement the hardest because of the number of federal grants law enforcement agencies receive.<sup>260</sup> Others are more concerned about the Hatch Act's impact on specific communities, rather than specific professions.

Congressman Bart Stupak (D-MI) is "concerned about the confusion caused by the way this law is applied to employees who work in connection with federally funded programs . . . ."<sup>261</sup> Stupak introduced a bill<sup>262</sup> that would exempt those running in counties with a population of less than 100,000 from the Hatch Act's candidacy restrictions.<sup>263</sup> Stupak feels that "the Hatch Act, in its current form, may severely limit which residents can serve in local office."<sup>264</sup> The limits may be more substantial in rural areas.<sup>265</sup> In rural communities, elected positions simply do not pay enough to allow a candidate to leave his or her government job.<sup>266</sup>

Congressman Danny Davis is sympathetic to Stupak's desire to reform the Hatch Act, but suggests that "the larger question at hand is to what extent should citizens be restricted from pursuing elected public office for the purpose of promoting efficient and effective governance."<sup>267</sup> To Davis, "[l]ike the right to vote, the right to be a candidate for an elected office is also fundamental to our unique democratic republic."<sup>268</sup> Furthermore, Davis

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258. *Id.* ("Hogan said federal funds should constitute a large segment of a department's funding before an employee is prevented from running for office.")

259. Perham, *supra* note 76.

260. *Id.*

261. *Bart's Bid to Bury the Hatch Act in Smalltown America*, *supra* note 65.

262. Stupak's bill would add the following to the Hatch Act's state and local government provisions:  
§ 1502(a)(3) does not prohibit any State or local officer or employee from being a candidate for any office of any local unit of general purpose government which has a population of less than 100,000 (determined in accordance with regulations under § 1302(d) based on the most recent population data available under § 183(a) of title 13).

H.R. 2154 (2009); H.R.4272 (2007).

263. *Bart's Bid to Bury the Hatch Act in Smalltown America*, *supra* note 65.

264. Fowle, *supra* note 58.

265. Perham, *supra* note 22 ("And it limits the pool of available candidates, especially in a county this size.")

266. *Washington Report*, Federal Managers Association, Sept. 15, 2008, <http://www.fedmanagers.org/public/report.cfm?id=111>.

267. *Id.*

268. *Id.*

recognized that the Hatch Act can be confusing to covered state and local government employees.<sup>269</sup>

Congressman Stupak's bill represents a good-faith attempt to remedy some of the problems of the Hatch Act (and it has sparked some discussion) but it is not the right solution. There is no reason that a covered employee should be allowed to run in a county with a population of 99,999 but not in a county with a population of 100,001. By making it easier for some candidacies to happen, Stupak's bill could reduce the drive to reform the Hatch Act because rural leaders would no longer have an interest in reform. Moreover, the proposal does not address conflicts of interest. There may be times when there is a genuine conflict of interest with a candidacy. Stupak's bill is not the right reform because there are better ways to fix the problems.

#### B. Proposal: Towards a Conflict of Interest Standard

To the extent that one believes that the federal government should attach conditions on grants to states, the government does have a legitimate interest in conditioning its funds so that they do not subsidize partisan or nonpartisan political corruption or coercion. This interest can be advanced without an outright ban on candidacies. The Hatch Act's limitations on coercion, the political use of funds, and abuse of official authority should be maintained. The Court has consistently held that under the First Amendment supervisors cannot terminate government employees for partisan reasons.<sup>270</sup> With these protections in place, a blanket ban on partisan candidacies is unnecessary.

The appearance of partisanship alone cannot be a sufficient motivation for preventing candidacies, because covered employees are already allowed to be active partisans. They are allowed to hold leadership positions within political parties and to be active in political campaign management. The real interest behind the Hatch Act's state and local candidacy restrictions is in preventing allowable off-duty partisanship from spilling into the workplace. When a covered employee is a candidate for partisan office, it may be much more likely—or at least appear more likely—that the candidate will abuse his or her position and access to funds because the employee has a stronger personal incentive to do so. But the real problem is where the covered employee has an actual conflict of interest, both because of the increased opportunity to use the position for political gain and the appearance of unfairness involved when there is an actual conflict. Conflicts of interest should not be subsidized with

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269. *Id.*

270. *See, e.g., Branti v. Finkel*, 445 U.S. 507 (1980).



federal funds because they create an increased likelihood of wasting federal funds. Candidacy restrictions that focused on preventing conflicts of interest—even nonpartisan ones—would be more narrowly tailored than blanket candidacy restrictions. These restrictions would maintain fairness, ensure the appearance of fairness, and prevent the waste of funds without unnecessarily limiting voter choices. Michigan’s “little Hatch Act” is a good example of a conflict of interest standard, and a Hatch Act reform should be modeled on this example or something similar.<sup>271</sup>

The candidacy restrictions in Michigan’s “little Hatch Act” focus primarily on actual conflicts or situations likely to become actual conflicts.<sup>272</sup> Covered employees may generally run for office but must take a leave of absence, rather than resign, to run for offices where there may be a conflict.<sup>273</sup> State employees may take a leave of absence to run for state office, but are otherwise free to run for local government positions. Similarly, local government employees are free to run for state and most local government offices, but must take a leave of absence to run for local government office only when running for office in the government for which the employee works.<sup>274</sup> There should be no distinction between partisan and nonpartisan offices and no exception for educators. The Hatch Act should be amended to adopt this approach, which is a more narrowly-tailored way to achieve the government interests behind the Hatch Act.<sup>275</sup>

By moving towards a conflict of interest approach, the irrational distinction between partisan and nonpartisan offices would be eliminated. An assistant county prosecutor could run for either the Michigan Court of Appeals

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271. The current version of Canada’s Hatch Act is also closer to a conflict standard. Under sections 114–16 of the Public Service Employment Act, government employees may run for office after receiving permission to take a leave of absence, which will be granted if it does not impair the ability of the employee to perform his or her duties. Public Service Employment Act, 2003 S.C., c. 22, §§ 12, 13 (Can.), available at <http://laws.justice.gc.ca/eng> (enter title of the Act in search box).

272. MICH. COMP. LAWS § 15.401, *et seq.* (2009).

273. There is a significant economic difference between an unpaid leave of absence and a resignation. An outright resignation carries the additional risk that the covered employee will not find work if he or she loses the election, or will face an extra delay after the election in finding work. A leave of absence is more like an unpaid vacation. By increasing the disincentive to run for office, the Hatch Act reduces more candidacies. Indiana, on the other hand, requires a leave of absence for candidates for local office and a total resignation for state and federal-level candidates. “Any employee in the classified service who becomes a candidate for local office shall, upon request, be granted a leave of absence; any employee in the classified service who is elected to a state or federal public office shall be considered to have resigned from the service.” IND. CODE § 4-15-2-40 (c) (2009).

274. Of course, an employee who wins office after taking a leave of office may have to resign the job if it is an incompatible office. *See, e.g.*, MICH. COMP. LAWS § 15.181, *et seq.* (2009).

275. Perhaps it would make more sense, in the interest of avoiding confusion on the part of state employees, for the federal restrictions to apply only in states that have not adopted state laws that are as strong as the federal standards.

or the Michigan Supreme Court. A covered state employee could run for the Mayor of Detroit, Mayor of New York, or a local township board position, so long as official authority or government funds were not used to support the campaign. Furthermore, Tom Leonard could run for county commissioner on his own time without taking a leave of absence because he is running in a different county than the one which employs him. An assistant prosecutor from one county could run for Congress in an open seat against the elected prosecutor from another county without the elected official being able to file a Hatch Act complaint against the assistant.

The assistant prosecutor running against his own boss in Mason County, Michigan, though, would have to take a leave of absence. His boss could not fire him for filing, but the leave of absence is certainly necessary, otherwise the actual conflict in a three person office where two are running against each other would disrupt the functions of the office.<sup>276</sup> Deputy county sheriffs may have to appropriately take a temporary leave of absence to run for sheriff in that county, otherwise the candidate's day job overlaps too much with the campaign to prevent conflicts. A bright line rule based on common sense and conflicts of interest without myriad exceptions, like Michigan's "little Hatch Act," will be less confusing, easier to understand, and less surprising to covered employees. It will also line up more closely with the Hatch Act's original focus on preventing coercion and the misuse of funds. Moving towards a conflict of interest standard will not allow every state and local government employee to run for office under any circumstance, but it will produce better results than the Hatch Act and provide voters with more choices. Some people oppose any reforms, though, and prefer to keep the status quo.

### C. Opposition to Hatch Act Reforms

The conservative Heritage Foundation has long been an opponent of reforming the Hatch Act.<sup>277</sup> The Heritage Foundation opposed the 1993 amendments and predicted doom and gloom if federal employees were allowed to volunteer on political campaigns on their own time, though their predictions

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276. *Minielly v. State*, 411 P.2d 69, 73 (Or. 1966) (en banc) (“[T]here would be nothing unconstitutional in preventing a public employee from running for elective office against his superior. It is difficult to imagine anything that could be more disruptive of efficiency and discipline of the public service.”); *Kinnear v. San Francisco*, 392 P.2d 391, 392 (Cal. 1964) (en banc) (running against own superior unique situation).

277. *Carter's Election Reform Proposal*, HERITAGE FOUNDATION, Apr. 20, 1977, <http://www.heritage.org/Research/GovernmentReform/IB1.cfm>.

have not apparently come true.<sup>278</sup> The Heritage Foundation believed that Hatch Act reform “would undermine freedom of political opinion of federal workers, and subject many employees to serious political pressure in the workplace.”<sup>279</sup> Support for the Hatch Act’s regulations against partisanship may, in fact, be motivated by partisanship. Republicans may have supported the Hatch Act and opposed reform as a way to block federal workers from supporting (and running as) Democrats.<sup>280</sup> Also, “[t]here is a great deal of concern, well justified, over the power repeal of the Hatch Act would place in the hands of government employee unions.”<sup>281</sup>

There is also the general concern that partisanship would “create dangers for subordinate employees, the rights of the public, and public regard for the government.”<sup>282</sup> Or that “a bureaucracy pursuing the goals of a party rather than of elected officials renders government less accountable to voters.”<sup>283</sup> However, the arguments made in opposition to Hatch Act reforms—namely that partisan corruption is bad or that partisan behavior interferes with the operation of the government—apply to the Hatch Act’s prohibition on coercion or using government funds.<sup>284</sup> These arguments justify the Hatch Act in general, not the candidacy provisions in particular. When a candidate is removed under the candidacy provision, the “termination is based not on workplace disruptions or adverse effects on the government’s operations, but solely because a [covered] employee chooses to run for a partisan political office.”<sup>285</sup> The federal government can only justify imposing candidacy restrictions on state and local governments when the candidacy poses a conflict or disrupts the functions of the office.

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278. Robert Moffit, *Gutting the Hatch Act: Congress’s Plan to Re-Politicize the Civil Service*, HERITAGE FOUNDATION, July 7, 1993, <http://www.heritage.org/Research/PoliticalPhilosophy/IB180.cfm>. (“If current Hatch Act restrictions on partisan political activities by federal employees are eliminated, Americans no longer will be able to depend on a federal career civil service insulated from partisan political pressures and partisan interests. Without strong legal protection from such influences, the reputation of an independent and non-partisan civil service itself will be tarnished and progressively undermined.”).

279. Robert Rector, *Inviting Tammany Hall to the Potomac: Rolling Back the Hatch Act*, HERITAGE FOUNDATION, Jan. 2, 1987, <http://www.heritage.org/Research/GovernmentReform/IB134.cfm>.

280. See Rafael Gely & Timothy Chandler, *Restricting Public Employees’ Political Activities: Good Government or Partisan Politics?*, 37 Hous. L. Rev. 775, 808–09 (2000); Bloch, *supra* note 5, at 270 n.352.

281. Ebbard, *supra* note 4, at 195 n.281.

282. Bloch, *supra* note 5, at 228.

283. *Id.* at 266.

284. *Legislative Proscription of Partisan Political Activity of Civil Employees*, *supra* note 37, at 147 n.34.

285. Kovalchick, *supra* note 100, at 4.

## VI. CONCLUSION

The use of government resources to influence elections or advance the interests of a particular party is alarming. The financial resources of the government dwarf those of any political party, and if those in power can use taxpayer funds to influence elections, democratic government is simply not safe. When the party becomes the state, the use of state time and resources with the power of incumbency can guarantee one party perpetual domination. Restrictions on the political activities of government employees and on the use of federal funds are necessary to protect a republican form of government. These restrictions should be narrowly drawn to serve the precise interest in preventing the political misuse of federal funds. Though the United States Supreme Court has upheld the Hatch Act, the state and local candidacy provisions have never been challenged under the Court's modern election jurisprudence. Applying *Anderson/Burdick*, a court would find, as with Rochester's candidacy restrictions, that the precise interests behind the state and local provisions of the Hatch Act are insufficient to justify the severe burden on voters.

Arguably, this calls into question the constitutionality of the Hatch Act's regulation of federal employees as well. However, the federal government's interests as an employer are sufficiently stronger than its interests as a mere grant maker and will likely save the coverage of federal employees. Under a *Pickering* analysis, the federal government's interests as an employer in promoting efficiency and the appearance of fairness are clearly much greater when it is actually employing the covered individual, rather than merely funding a tiny portion of the individual's salary. The employee's interest in commenting on matters of public concern through the communicative act of candidacy is strong, but the federal government could likely satisfy its burden here. Under *Anderson/Burdick*, the injury to voters by the coverage of federal employees is less because fewer individuals are covered and thus fewer candidacies are theoretically thwarted. The precise interests are still somewhat questionable, but the federal employee provisions have fewer loopholes than the state provisions and the anti-partisanship interest is more compelling as an employer than as a grant-maker because the partisanship is more easily attributed to the individual's full-time employer. Moreover, federalism concerns that suggest grants should not prevent state and local employees from running for office may work in favor of restrictions on federal employees.

The federal government may have an interest in keeping its employees from holding state and local offices to prevent a blurring of the distinct state/federal lines of authority—when an assistant United States Attorney is also the elected county prosecutor the distinction between federal and state

prosecutions is weakened. Perhaps the coverage of federal employees does more than necessary, but the federal government's interest is at least marginally stronger, federalism concerns are not present, and these restrictions are more likely to survive serious constitutional scrutiny.

The Hatch Act's state and local government employee candidacy restrictions, on the other hand, do far more than necessary to advance the precise interests of preventing partisanship and coercion in the administration of federal funds and, arguably, do not advance it at all when the anti-coercion and other provisions of the Hatch Act are considered. Either way, the candidacy restrictions cannot be justified in an environment where there is a shortage of candidacies. Perhaps worse, the Hatch Act's candidacy restrictions unnecessarily protect incumbents by adding an additional disincentive for millions of covered employees to run for office. Restrictions on voting and candidacy should exist to make elections more fair, or maybe even more competitive, but the Hatch Act's candidacy restrictions have the opposite effect. Accordingly, the Hatch Act should be amended to allow state and local government employees to run for public office.

