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## The Hatch Act Modernization Act: Putting the Government Back in Politics

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# THE HATCH ACT MODERNIZATION ACT: PUTTING THE GOVERNMENT BACK IN POLITICS

*Shannon D. Azzaro\**

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[H]ere in our own country, millions of our own citizens have been denied one of the most basic democratic rights, the right to participate in the political process, because of conditions that haven’t existed for a very long time. . . . The conditions which once gave rise to the Hatch Act as it was before this reform bill passed are no longer present, and they cannot justify the continued muzzling of millions of American citizens.<sup>1</sup>

– President William J. Clinton

## INTRODUCTION

The Hatch Act of 1939 (the “Hatch Act,” or the “Act”), officially named An Act to Prevent Pernicious Political Activities, enacted sweeping prohibitions against certain types of political participation by federal, and later state and local, government employees.<sup>2</sup> The Hatch Act regulates the permissible political activities of government employees.<sup>3</sup> The Act was enacted to achieve four primary goals: (1)

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1. President’s Remarks on Signing the Hatch Act Reform Amendments of 1993, 2 PUB. PAPERS 1694, 1695 (Oct. 6, 1993).

2. Act of July 19, 1940, ch. 640, Pub. L. No. 76-753, 54 Stat. 767. The Hatch Act prohibited activities such as taking any active part in political campaigns, running for partisan political office, using official authority or influence to interfere with an election, or soliciting political contributions, etc. *Id.*

3. 5 U.S.C. § 7324 (2012).

to ensure the political neutrality of government workers by barring partisan political activity by government employees; (2) to prevent partisan elected officials from using government employees for their own political purposes; (3) to prevent the public employees' loyalty from going to a single party or public official; and (4) to insulate public employees against politically motivated job actions.<sup>4</sup> As initially drafted, the Act only applied to federal employees.<sup>5</sup> However, on July 19, 1940, the Hatch Act was amended to apply to employees of state and local governments.<sup>6</sup>

Responding to decades of reform efforts<sup>7</sup> and consistent criticisms of the Hatch Act's broad scope, Congress passed the Hatch Act Modernization Act of 2012 (HAMA) after some incremental reforms and failed attempts at wholesale changes proved to insufficiently address the concerns regarding the Hatch Act's disparate effect on state and local employees and its federal employee penalty provisions.<sup>8</sup> HAMA significantly limited the scope of the original Hatch Act's provisions, returning most of the responsibility for regulating the political activities of state and local government employees back to the states from the federal government.<sup>9</sup> While critics of the Hatch Act's application to state and local employees praise HAMA as a step in the right direction,<sup>10</sup> it lacks a mechanism for reversing the widespread incorporation of the Hatch Act's stricter political prohibitions in state regulations and the political activity policies of government agencies.<sup>11</sup>

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4. James S. Bowman & Jonathan P. West, *State Government "Little Hatch Acts" in an Era of Civil Service Reform: The State of the Nation*, 29 REV. PUB. PERSONNEL ADMIN. 20, 21 (2009).

5. See Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 231–33 (2005).

6. Act of July 19, 1940, ch. 640, Pub. L. No. 76-753, 54 Stat. 767.

7. While many attempts to reform the Hatch Act failed, two incremental reforms were passed in 1974 and 1993, respectively. See *infra* Part I.D, I.F.

8. 5 U.S.C. §§1501–1508 (2012); 5 U.S.C. §§ 7321–7326 (2012). In addition, see *infra* Parts I.D–G for a discussion of reform attempts leading up to HAMA.

9. See *infra* Part I.G.2 (discussing HAMA's impact on state and local employees). This applied with the exception of state employees whose salaries are fully funded by the federal government. *Hatch Act: State, D.C., or Local Employees—Who is Covered/Who is Not Covered*, U.S. OFFICE SPECIAL COUNSEL, <https://osc.gov/pages/hatchact-affectsme.aspx> (select "I am a State, D.C., or Local Employee"; then follow "I" hyperlink) (last visited Feb. 16, 2015) [hereinafter *Covered State and Local Employees*].

10. See *infra* Part I.G for a discussion of HAMA and its supporters.

11. See *infra* Part II.A.1 for a discussion of the disparate state political activities laws, and Part II.B for a discussion of HAMA's impact on bi- and multi-state agencies. The Port Authority of New York and New Jersey is used as a

The government's interest in regulating the political activities of its employees is twofold: first to prevent coercion, and second to preserve the appearance of integrity and neutrality within each department and agency.<sup>12</sup> However, some politicians question whether allegations of political coercion and corruption remain as dangerous today as they were in 1939.<sup>13</sup> For instance, while signing HAMA's predecessor, the Hatch Act Reform Amendments (HARA) in 1993, former United States President Bill Clinton issued an accompanying statement that reflected his belief that many of the Hatch Act's provisions were no longer necessary. Clinton reasoned that many of the concerns that gave rise to the passage of the Hatch Act are no longer sufficient to justify the Act's extensive prohibitions against political participation by federal and state government employees.<sup>14</sup> By including the "vigilant press" in his cited reasons behind loosening restrictions on Hatch Act-covered employees, Clinton presaged the current state of affairs where the media has become an integral part of our everyday lives.<sup>15</sup> Clinton's remarks account for the fact that social and technological developments might provide sufficient deterrence against improper political participation, without some inherent disadvantages of the Hatch Act.<sup>16</sup> Modern society demands the reexamination of the realities of the public workplace and the political engagement of public employees. This Note will not address technology at length; rather it will focus on a discussion of practical policy concerns. However, the rapidly changing climate of media, social media, and technology lays a backdrop for the ripeness and continued relevance of a conversation about the status of political activities policies for public employees.

Advancements in digital communication have dramatically increased societal interconnectedness.<sup>17</sup> Such interconnectedness provides the media with the tools to police the political activities of

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representative example of an agency that still utilizes employment contracts that embody the Hatch Act's former, stricter, prohibitions.

12. See Bloch, *supra* note 5, at 271–74. The author also cites "preventing corruption, ensuring a professional civil service, preserving respect for the government" as rationales behind the Hatch Act. *Id.*

13. See, e.g., Remarks on Signing the Hatch Act Reform Amendments of 1993, *supra* note 1.

14. *Id.*

15. See *Id.*

16. See *Id.*

17. Alex Litovsky, *Wearable Tech Makes for a More Interconnected Workforce*, TOOLBOX.COM (Feb. 18, 2014), <http://it.toolbox.com/blogs/itmanagement/wearable-tech-makes-for-a-more-interconnected-workforce-58985>.

government employees.<sup>18</sup> Armed with portable electronics, the media and voters are quick to expose perceived corruption.<sup>19</sup> Regardless of whether the actions of state employees actually violate the Hatch Act, “the mere appearance of impropriety is often enough to draw negative attention.”<sup>20</sup> Since the media deters at least some intentional misconduct, the Hatch Act as currently applied is unnecessary and provides no unique benefits, yet it causes administrative confusion and unnecessary penalties for various employees.<sup>21</sup>

Technological advancement and interconnectivity can also be a double-edged sword. As a result of these two factors, it is easier than ever for government employees to unwittingly violate the Hatch Act by using their work computers, phones, or e-mail accounts to express their political views in the workplace.<sup>22</sup> E-mails and social media messages are constantly sent to individuals’ cell phones, and the ease of sharing information accompanying “smart phones” increases the probability that government employees might forward messages without carefully considering the recipient(s) and whether the messages include political expressions that violate the Hatch Act.<sup>23</sup> Additionally, the definitions of “on duty,” “off duty,” and “workplace” have become more fluid with the rise of telecommuting.<sup>24</sup>

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18. Jason C. Miller, *The Unwise and Unconstitutional Hatch Act: Why State and Local Government Employees Should be Free to Run for Public Office*, 34 S. ILL. U. L.J. 313, 327 (2010) (“The media and voters are hostile to political machines, and merit-based civil service is now well established. Bloggers and the internet make it possible to expose and combat partisanship without laws restricting candidacies.” (footnote omitted)).

19. *Id.*; see also RICK STAPENHURST, *THE MEDIA’S ROLE IN CURBING CORRUPTION* (2000), available at <http://siteresources.worldbank.org/WBI/Resources/wbi37158.pdf>; Jonathan Jacobs, *Chafee Pulls Three RI State Employees from Fundraiser Committee*, GoLocalProv (July 23, 2013), <http://www.golocalprov.com/politics/chafee-pulls-three-ri-state-employees-from-fundraiser-committee/>; Antonio Suarez-Martinez, *Use of the Internet in the Fight Against Corruption: The Google Decision and the Law of Unintended Consequences*, LEXOLOGY (May 29, 2014), <http://www.lexology.com/library/detail.aspx?g=4604832a-51e5-4a53-92b6-3b6bb597eb75>.

20. Jacobs, *supra* note 19.

21. See Miller, *supra* note 18, at 327.

22. See Martin Austermuhle, *Federal Worker Runs Afoul of Law by Tweeting for D.C. Council Candidate*, WAMU 88.5 (Feb. 6, 2014), [http://wamu.org/news/14/02/06/federal\\_worker\\_runs\\_afoul\\_of\\_law\\_by\\_using\\_twitter\\_to\\_back\\_dc\\_council\\_candidate](http://wamu.org/news/14/02/06/federal_worker_runs_afoul_of_law_by_using_twitter_to_back_dc_council_candidate).

23. See *id.*; see also Anna A. Vlasova, *The Hatch Act and the World of Social Media*, A.B.A., [http://www.americanbar.org/groups/young\\_lawyers/publications/the\\_101\\_201\\_practice\\_series/the\\_hatch\\_act\\_and\\_the\\_world\\_of\\_social\\_media.html](http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/the_hatch_act_and_the_world_of_social_media.html).

24. Alice Lipowicz, *Rules for Political Advocacy for Teleworkers in Question*, FCW (May 25, 2012), <http://fcw.com/articles/2012/05/25/telework-hatch-act.aspx>.

The increased probability of unintentional Hatch Act violations chills legitimate free speech and may discourage or invalidate quality political candidates.<sup>25</sup> Confusion over employee coverage under the Hatch Act may arise in many situations, such as when covered workers work alongside an employee who is not covered by the Hatch Act.<sup>26</sup> Increased public discussion of potential Hatch Act violations by public employees also encourages federal, state, and local agencies to safeguard their public image by enforcing political prohibitions that vastly exceed those now required by HAMA.<sup>27</sup>

Dramatic differences in state law regulations enacted in accordance with the Hatch Act exacerbate these issues as agencies seek to apply broad policies to avoid violations of diverse state regulations.<sup>28</sup> Because most states have implemented their own political activities policies, disparities between state and federal policies can also generate confusion among employees.<sup>29</sup> Not only have the states passed a wide variety of political activities laws that may be more or less restrictive than the Hatch Act's requirements, but individual agencies have also imposed their own political activities rules.<sup>30</sup> This Note argues that additional changes to the Hatch Act, despite the progress of HAMA, are necessary to produce predictable limits on political speech for government employees, minimize the chilling of legitimate political discourse, and to eliminate costs associated with current conflicting regulations.

Part I of this Note analyzes the United States' history of regulating the political activities of government employees, state regulations applied in conjunction with the Hatch Act, and the constitutionality of these prohibitions. Part II of this Note addresses Hatch Act implementation problems that remain after HAMA. Examples of

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25. For a discussion of the chilling effect of the Hatch Act, see Miller, *supra* note 18, at 329–30, and *infra* Part II.A.1.

26. Miller, *supra* note 18, at 329–30. For example, a state employee who receives federal grants may be subject to the Hatch Act's provisions in addition to the state's political activity law, while a co-worker who does not receive federal funds would only be subject to the state law. If the state law differs from the Hatch Act, that may lead to confusion, as some employees would face different restrictions.

27. For a discussion of reasons why agencies might want to retain strict prohibitions, see *infra* Part II.B. A main concern is that public image may control policy objectives for bi- and multi-state agencies such as the Port Authority of New York and New Jersey. A case study is used to examine how different agencies address this issue.

28. See, e.g., *infra* Part I.G.1.

29. See *infra* Part I.H (discussing "Little Hatch Acts").

30. See *infra* Part I.H (comparing state policies); *infra* Part II.B (discussing agency policies).

these problems include the chilling of legitimate discourse because of disparate state regulation; the lack of guidance for bi- and multi-state agencies such as the Port Authority of New York and New Jersey (Port Authority), which this Note uses as an example; and the inconsistent adjudication of Hatch Act violations caused by rigid penalty provisions. Part III of this Note analyzes and discusses the viability of four solutions: (1) modification of the Hatch Act's penalty provisions, (2) exemption for all lower-level employees from the Hatch Act's prohibitions, (3) addition of a statute of limitations, and (4) implementation of state guidelines to overcome the disparity in the enforcement of the Hatch Act and "Little Hatch Acts." Part III proceeds to evaluate the practicality of implementing each of these solutions and evaluates how they might be integrated into pending legislation. This Note seeks to resolve the remaining issues with the Hatch Act post-HAMA and to suggest further changes and agency action to clarify the role of political activities laws in the lives of public employees.

### I. FEDERAL REGULATION OF THE POLITICAL ACTIVITIES OF GOVERNMENT EMPLOYEES

An American citizen's right to participate in politics is not entirely free from government regulation.<sup>31</sup> Federal enactments regulating the political activities of government employees have been in place since the late nineteenth century.<sup>32</sup> In the landmark case on regulation of political activities, *United States Civil Service Commission v. National Association of Letter Carriers*, Justice White, writing for the majority, stated, "[n]either the right to associate nor the right to participate in political activities is absolute in any event . . . . Nor are the management, financing, and conduct of political campaigns wholly free from government regulation."<sup>33</sup> While the scope of the government's authority to regulate its employees and their participation in political activities has been challenged judicially and through amendments to the Hatch Act, the government's regulation of its employees' political activities remains to this day.<sup>34</sup>

While on its face the Hatch Act appears to affect only government employees, any law that limits the pool of eligible candidates for

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31. See *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973).

32. See *Pendleton Civil Service Reform Act*, ch. 27, 22 Stat. 403 (1883).

33. *Letter Carriers*, 413 U.S. at 567.

34. See *infra* Parts I.C–G (discussing the constitutional challenges and amendments to the Hatch Act).



office indirectly restricts the right to vote.<sup>35</sup> Modern dissatisfaction with federal regulations prohibiting certain categories of employees from participating in political activities is self-evident, illustrated by a steady stream of amendment proposals and constitutional challenges which sought to limit the scope of the Hatch Act's prohibitions.<sup>36</sup> This Part examines that history of the Hatch Act, constitutional challenges to the Hatch Act, and the evolution of its provisions regarding the political activities of government employees on the state and federal level.

### A. The Pendleton Act of 1883

The first congressional enactment passed to regulate the political activities of federal government employees was the Pendleton Civil Service Reform Act in 1883 (Pendleton Act).<sup>37</sup> The Pendleton Act served as the predecessor to the Hatch Act in that it laid the groundwork for the Hatch Act's prohibitions against political activity.<sup>38</sup> The Pendleton Act sought to mend holes in the civil service system, which left it vulnerable to corruption.<sup>39</sup> While movements to

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35. See *Bullock v. Carter*, 405 U.S. 134, 143 (1972). This Note will not discuss voting rights at length, as previous Supreme Court decisions have not discussed the Hatch Act's impact on voting rights. See Miller, *supra* note 18, at 332. However, it has been suggested that rational basis may not be the proper level of scrutiny for the candidacy restrictions as, "[s]ince 1947, constitutional law governing voting, ballot access, speech, and the federal spending power has evolved significantly." *Id.* Indeed, the Supreme 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." *Bullock*, 405 U.S. at 143. It has been argued that while the Supreme Court has held in a line of patronage cases—*Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion); *Branti v. Finkel*, 445 U.S. 507 (1980); and *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990)—that there is a First Amendment right to be free from "viewpoint-based retaliation for engaging in political activity," this right is only nominal "if the government can prohibit that same activity by enacting a content-based prohibition like the Hatch Act." Anthony T. Kovalchick, *Ending the Suppression: Why the Hatch Act Cannot Withstand Meaningful Constitutional Scrutiny*, 30 W. NEW ENG. L. REV. 419, 435–36 (2008). Anthony Kovalchick argues that if the original intent of the Hatch Act was to "protect the First Amendment rights of federal employees, it was inherently self-defeating." *Id.* at 436. He further argues that prohibitions on political activity sacrifice the "freedom to believe and associate" for the sake of the "freedom to not believe and not associate." *Id.*

36. See *infra* Parts I.D–E.

37. *Pendleton Civil Service Act*, ENCYCLOPAEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/449725/Pendleton-Civil-Service-Act> (last updated July 30, 2014).

38. See Bloch, *supra* note 5, at 230–31.

39. See *id.* at 229–34.

replace appointments through the spoils system<sup>40</sup> with competitive examinations began in the 1860s, it was not until the 1880s that any substantive civil service reforms were passed.<sup>41</sup> Some point to the 1881 assassination of President Garfield by a “disappointed office seeker” as “an impressive . . . lesson of the need for the overthrow of the spoils system.”<sup>42</sup> After the passage of the Pendleton Act, George William Curtis, a proponent of the bill, stated that prior to its passage:

Every four years the whole machinery of the government is pulled to pieces . . . . The business of the nation and the legislation of Congress are subordinated to the distribution of plunder among eager partisans. President, secretaries, senators, representatives are dogged, hunted, besieged, besought, denounced, and they become mere office brokers.<sup>43</sup>

The Pendleton Act, passed in 1883 by an overwhelming majority, responded to the widespread public demand for civil service reform in reaction to the increased “incompetence, graft, corruption, and theft in federal departments and agencies.”<sup>44</sup> The Act also prohibited the termination of government employees for political reasons and prohibited the solicitation of campaign donations on federal government property.<sup>45</sup> Despite initially covering only those employees in the classified service,<sup>46</sup> the Pendleton Act was soon extended to include almost all federal government employees.<sup>47</sup>

In order to effectuate the Act’s purposes, Congress incorporated a provision into the Pendleton Act that granted the President the authority to issue rules necessary to carry out the Act.<sup>48</sup> This provision established the Civil Service Commission (CSC) as an enforcement agency to oversee compliance with the Pendleton Act, which included regulations to prevent political patronage and coercion.<sup>49</sup> President Arthur issued the first CSC Rule, Rule 1, which

40. The spoils system is the practice of political patronage, wherein the winning political party gives government jobs to loyal supporters and friends. This practice led to the inefficient execution of office-holders’ duties and major upheavals post-election. See WILLIAM DUDLEY FOULKE, *FIGHTING THE SPOILSMEN: REMINISCENCES OF THE CIVIL SERVICE REFORM MOVEMENT* 3–6 (1919).

41. *Id.* at 6–8.

42. *Id.* at 7.

43. *Id.* at 8.

44. See Bloch, *supra* note 5, at 230.

45. Pendleton Civil Service Act of 1883, ch. 27, 22 Stat. 403 (1883).

46. See Bloch, *supra* note 5, at 231.

47. *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 559–60 (1973).

48. *Id.* at 558.

49. *Id.*

focused on preventing coercion by government employees.<sup>50</sup> Rule 1 was amended in 1907 to state that no person in executive civil service shall “use his official authority or influence for the purpose of interfering with an election or affecting the result thereof,” and that persons in the competitive classified service “shall take no active part in political management or in political campaigns.”<sup>51</sup> Following allegations that Democratic Party politicians used Works Progress Administration (WPA) employees and jobs to gain unfair political advantages during the 1938 congressional elections, Senator Carl Hatch sponsored the bill that would become the Hatch Act. The Hatch Act codified the Rule 1 political activity ban and broadened its scope to encompass almost all federal employees.<sup>52</sup> Despite some opposition by the Democratic Party, President Roosevelt signed the Hatch Act into law on August 2, 1939.<sup>53</sup>

### B. The Hatch Act’s Prohibitions and Procedures

A determination that the political activity or election is considered partisan triggered the Hatch Act’s prohibitions against participation in political activity and candidacy.<sup>54</sup> The Office of Special Counsel (OSC), the agency that enforces the Hatch Act, defines political activity as “activity directed at the success or failure of a political party, candidate for partisan political office [or] partisan political group.”<sup>55</sup> Therefore, political activity may occur outside the scope of an election.<sup>56</sup> For example, activities such as soliciting funds for a political party, organizing political rallies, holding office in political clubs, wearing a political button at work, and assisting in partisan voter registration drives are all considered political activities under the Hatch Act.<sup>57</sup> The Hatch Act designates which types of political

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50. 8 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 161 (1898).

51. *Letter Carriers*, 413 U.S. at 559.

52. *See* Bloch, *supra* note 5, at 231.

53. *See id.* at 232–33.

54. *See* 5 C.F.R. § 151.101(g) (2014).

55. *Hatch Act: Federal Employees—Less Restricted Employees*, U.S. OFFICE SPECIAL COUNSEL, <https://osc.gov/pages/hatchact-affectsme.aspx#> (select “I am a Federal Employee”; then follow “II” hyperlink) (last visited Feb. 16, 2015) [hereinafter *Less Restricted Employees*].

56. *See id.*

57. *Hatch Act: Federal Employees—Further Restricted Employees*, U.S. OFFICE SPECIAL COUNSEL, <https://osc.gov/pages/hatchact-affectsme.aspx#> (select “I am a Federal Employee”; then follow “I” hyperlink) (last visited Feb. 16, 2015) [hereinafter *Further Restricted Employees*].

activities are prohibited or permitted for different categories of employees.<sup>58</sup>

The Hatch Act restricts candidacy in partisan elections and candidacy remains restricted for certain federal employees after HAMA; therefore, the existence of a violation depends on whether the election is partisan.<sup>59</sup> The Hatch Act defines a nonpartisan election as “an election at which none of the candidates is to be nominated or elected as representing a political party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected.”<sup>60</sup> State and local election laws create a rebuttable presumption that an election is nonpartisan.<sup>61</sup> This presumption may be rebutted where there is evidence that “a candidate solicits or advertises the endorsement of a partisan political party or uses a political party’s resources to further his or her campaign;” however, such evidence is not always required.<sup>62</sup> An employee may be at risk of violating the Hatch Act and of participating in a partisan election if any candidates running in the election are working with a partisan political party, even if the employee does not himself represent any particular party.<sup>63</sup> Furthermore, the political position for which candidates are running is not outcome determinative, because offices that are filled through nonpartisan election in one district may be filled through partisan election in the next district.<sup>64</sup>

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58. See *Further Restricted Employees*, *supra* note 57; *Less Restricted Employees*, *supra* note 55.

59. See *Further Restricted Employees*, *supra* note 57; *Less Restricted Employees*, *supra* note 55.

60. 5 C.F.R. § 151.101(g) (2014); see also 5 U.S.C. § 1503 (2012).

61. See *Special Counsel v. Yoho*, 15 M.S.P.R. 409, 411–13 (1983), *overruled on other grounds*, *Special Counsel v. Purnell*, 37 M.S.P.R. 184 (1988); see also *Hatch Act: State, D.C., or Local Employees—FAQs*, U.S. OFFICE SPECIAL COUNSEL, <https://osc.gov/pages/hatchact-affectsme.aspx#> (select “I am a State, D.C., or Local Employee”; then follow “III” hyperlink) (last visited Feb. 16, 2015) [hereinafter *State and Local FAQs*].

62. See *McEntee v. M.S.P.B.*, 404 F.3d 1320, 1329 (Fed. Cir. 2005) (holding that the definition of a “partisan political office” “encompasses offices for which candidates are either nominated as representing a party or elected as representing a party,” that formal endorsement or selection by a major political party is not required for the election to be partisan, and that actual conduct of an election may rebut the presumption of a nonpartisan election); *In re Broering*, 1 P.A.R. 778, 779 (1955); see also *State and Local FAQs*, *supra* note 61.

63. See *McEntee*, 404 F.3d 1320; *Special Counsel v. Campbell*, 58 M.S.P.R. 170, 178 (1993), *aff’d*, 27 F.3d 1560 (Fed. Cir. 1994); see also *Miller*, *supra* note 18, at 329.

64. See *Miller*, *supra* note 18, at 329.

Effective January 1, 1978, the CSC's functions were split between the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB).<sup>65</sup> The OSC was formed in 1979 as the investigative and prosecutorial arm of the MSPB. The OSC, now an independent agency,<sup>66</sup> is the entity authorized to issue advisory opinions pursuant to 5 U.S.C. § 1212(f) and to investigate violations of the Hatch Act pursuant to 5 U.S.C. § 1216(a)(2).<sup>67</sup> Once an employee is charged with a violation by the OSC, the charges are adjudicated before the MSPB for corrective and/or disciplinary action.<sup>68</sup> Any "employee or applicant for employment adversely affected or aggrieved by a final order or decision of the [MSPB]" may obtain judicial review.<sup>69</sup> Appeals are to be filed in the United States Court of Appeals for the Federal Circuit.<sup>70</sup> The Hatch Act outlines penalty provisions for violations of the Act for federal and state or local employees independently.<sup>71</sup>

### 1. *Effects on Federal Employees*

While the basic principles behind the regulation of federal and state employees are similar, the Act addresses the distinct categories of employees covered and the specific prohibitions for federal and state employees separately.<sup>72</sup> While there are more restrictions for federal employees, these restrictions change depending upon how the employee is classified.<sup>73</sup> A federal employee may be placed into one of two categories: "further restricted" or "less restricted."<sup>74</sup> "Further restricted" employees consist mostly of employees in intelligence and enforcement-type agencies (except presidential appointees), as well as those in the Senior Executive Service. The Senior Executive Service category also includes Administrative Law Judges, Contract

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65. See Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037, 92 Stat. 3783; Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111.

66. In 1989, Congress enacted the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, which made the OSC an independent agency within the executive branch of the federal government.

67. 5 U.S.C. §§ 1212(f), 1216(a)(2) (2012).

68. 5 U.S.C. §§ 1504-1508 (2012); 5 U.S.C. §§ 7321-7326 (2012).

69. 5 U.S.C. § 7703(a) (2012).

70. *Id.* § 7703(b).

71. *Id.*

72. An Act to Prevent Pernicious Political Activities (Hatch Act), 5 U.S.C. §§ 1504-1508(2012); 5 U.S.C. §§ 7321-7326 (2012).

73. See § 7324(b)(2); see also *Further Restricted Employees*, *supra* note 57; *Less Restricted Employees*, *supra* note 55.

74. *Further Restricted Employees*, *supra* note 57; *Less Restricted Employees*, *supra* note 55.

Appeals Board Members, and Administrative Appeals Judges.<sup>75</sup> All other federal executive branch employees<sup>76</sup> fall under the “less restricted” category.<sup>77</sup>

A less restricted federal employee is still limited in his or her political activities. He may not (1) use his official authority or influence to affect the results of an election; (2) “knowingly solicit, accept, or receive a political contribution from any person;”<sup>78</sup> (3) run for partisan political office; or (4) “knowingly solicit or discourage the participation in any political activity of any person who” has business before the employing office.<sup>79</sup> Less restricted employees may not engage in political activity while on duty or on premises occupied “in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof.”<sup>80</sup> Additionally, less restricted employees are also restricted from engaging in political activity while in uniform, while wearing insignia identifying the employee’s office, or while operating a government or agency vehicle.<sup>81</sup> Further restricted federal employees are prohibited from partaking in the aforementioned activities and are additionally restricted from taking an active part in partisan political campaigns or partisan political

75. *Further Restricted Employees*, *supra* note 57.

76. Additionally, all District of Columbia employees fell under the Less Restricted Employees provisions until the implementation of HAMA. *Less Restricted Employees*, *supra* note 55.

77. *Less Restricted Employees*, *supra* note 55. HAMA includes District of Columbia employees under the provisions for state and local employees. 5 U.S.C. § 1501 (2012).

78. 5 U.S.C. § 7323(a)(2) (2012).

Unless such person is—(A) a member of the same Federal labor organization as defined under section 7103(4) of this title or a Federal employee organization which as of the date of enactment of the Hatch Act Reform Amendments of 1993 had a multicandidate political committee (as defined under section 315(a)(4) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(4))); (B) not a subordinate employee; and (C) the solicitation is for a contribution to the multicandidate political committee (as defined under section 315(a)(4) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(4))) of such Federal labor organization as defined under section 7103(4) of this title or a Federal employee organization which as of the date of the enactment of the Hatch Act Reform Amendments of 1993 had a multicandidate political committee (as defined under section 315(a)(4) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(4))).

*Id.*

79. *Id.* § 7323(a)(4).

80. 5 C.F.R. § 733.106 (2014).

81. 5 U.S.C. § 7324(a) (2012).

management.<sup>82</sup> The penalty for Hatch Act violations by federal employees is limited to a suspension of no less than thirty days or termination.<sup>83</sup>

Not all types of political activity are forbidden under the Hatch Act's provisions. While the Act prohibits further restricted employees from taking an "active part in political management or in political campaigns," it states that the employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates.<sup>84</sup> The Act also permits the OPM to allow employees from the areas in Maryland and Virginia which are in the "immediate vicinity of the District of Columbia," or in a "municipality in which the majority of voters are employed by the Government of the United States," to take an active part in the political management or political campaigns in their municipality or political subdivision.<sup>85</sup> Further, the most recent version of the Act before HAMA allowed less restricted employees to take an "active part in political management or in political campaigns," subject to the aforementioned restrictions.<sup>86</sup> The prohibition against taking an active part in the proscribed political activities is limited to those rules and proscriptions that had been developed under Civil Service Rule 1 up to the date of the passage of the 1940 Act.<sup>87</sup>

## 2. *Effects on State Employees*

The Hatch Act, as originally enacted, regulated the political activities of federal employees.<sup>88</sup> The original statute was changed by a series of amendments in 1940 (1940 Amendments). These amendments broadened the reach of the Hatch Act to include state and local employees whose salary is paid, in whole or in part, by grants from the federal government.<sup>89</sup> They also included officers and

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82. *Further Restricted Employees*, *supra* note 57.

83. *Hatch Act: Federal Employees—Penalties*, U.S. OFFICE SPECIAL COUNSEL, <https://osc.gov/pages/hatchact-affectsme.aspx#> (select "I am a Federal Employee" then follow "III" hyperlink) (last visited Feb. 16, 2015). However, this penalty structure only applies to complaints initiated before January 27, 2013 pursuant to the HAMA. *Id.*

84. *See* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 559 (1973).

85. 5 U.S.C. § 7325 (2012) (note that the language regarding the exemption for the District of Columbia itself was part of HAMA).

86. 5 U.S.C. § 7323 (2012).

87. *Letter Carriers*, 413 U.S. at 575–76.

88. *See State and Local FAQs*, *supra* note 61.

89. Act of July 19, 1940, ch. 640, Pub. L. No. 76-753, 54 Stat. 767.

employees of state and local agencies “whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States.”<sup>90</sup> The 1940 Amendments dramatically expanded the reach of the Hatch Act because law enforcement officers in receipt of a federal grant or state agencies receiving funding from a related federal program were included as covered employees.<sup>91</sup>

The 1940 Amendments<sup>92</sup> meant that the Hatch Act restricted the political activity of individuals principally employed by state or local executive agencies who work in connection with programs financed in whole or in part by federal loans or grants.<sup>93</sup> When an employee held two or more jobs, the individual’s form of “principal employment” was defined as the job that accounts for the most work time and the most earned income.<sup>94</sup> A majority of employees covered under the Hatch Act work in programs connected to important federal projects, such as those related to public health, public welfare, housing, urban development, public works, agriculture, defense, transportation, and law enforcement.<sup>95</sup> In addition, the Hatch Act also applies to employees of private, nonprofit organizations that work in connection with Head Start or Community Services Block Grant programs.<sup>96</sup> Notably, employees covered by the Hatch Act are still subject to the restrictions of the Hatch Act while on any type of leave (annual, sick, administrative, or without pay) or furlough.<sup>97</sup>

State and local employees faced similar prohibitions as federal employees under the Hatch Act, as altered by the 1940 Amendments; however, there are significant differences between the Act’s

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90. *Letter Carriers*, 413 U.S. at 561.

91. *Covered State and Local Employees*, *supra* note 9.

92. Please note that while subsequent amendments such as HARA and HAMA have altered the Hatch Act, they did not replace the act itself; therefore the act is still referred to as the Hatch Act.

93. *Covered State and Local Employees*, *supra* note 9. This provision has been altered by the passage of HAMA. *See infra* Part I.G.

94. *Covered State and Local Employees*, *supra* note 9. Under HAMA, state and local employees must have their salaries fully funded by the federal government to fall under the Hatch Act. *See infra* Part I.G.

95. *Covered State and Local Employees*, *supra* note 9.

96. *Id.*; *see also* 42 U.S.C. § 9851(a) (2012); 42 U.S.C. § 9918(b)(1) (2012). Under 42 U.S.C. § 9904(e) (1982), the Hatch Act applied to Head Start and Community Services Block Grant Program participants. This provision was repealed by HARA, Pub. L. No. 103-94, § 6, 107 Stat. 1001, 1005 (1993); however, the Hatch Act regulation was reinstated in a similar form in 1998. Pub. L. No. 105-285, title II, § 201, 112 Stat. 2747 (1998).

97. *See Covered State and Local Employees*, *supra* note 9.



application to state and local employees and federal employees.<sup>98</sup> State employees, like federal employees, are subject to the prohibition on using authority to influence or interfere with an election or nomination, running for partisan election,<sup>99</sup> and asking state or local officials to give to an organization for political purposes.<sup>100</sup> However, unlike federal employees, who are consistently covered, the status of a state employee may change.<sup>101</sup> Further, state and local employees are more likely to have co-workers who are not “Hatch Act-covered.”<sup>102</sup> Generally, federal employees are more restricted than state and local employees, and even more so after many amendments have distinguished the regulations that apply to state and local employees.<sup>103</sup>

The MSPB<sup>104</sup> dictates that an employee is covered by the Hatch Act when, “as a normal and foreseeable incident of his principal employment, [the employee] performs duties in connection with an activity financed in whole or in part by federal loans or grants.”<sup>105</sup> “If an employee meets this standard, the source of the employee’s salary is irrelevant.”<sup>106</sup> This means that an employee who worked with a program that received a federal grant, such as a police officer who uses a police dog funded by Homeland Security, would fall under the pre-HAMA Hatch Act.<sup>107</sup> Such employees would then be subject to

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98. *See id.*

99. This provision is no longer in effect post-HAMA. *See infra* Part I.G.

100. *Covered State and Local Employees, supra* note 9.

101. The coverage of a particular state or local employee depends on whether they work in connection with federal funds. *See Covered State and Local Employees, supra* note 9.

102. *See id.*

103. Over the years, the restrictions that apply to state and local employees have diminished. *See infra* Parts I.E–G (discussing the various amendments).

104. The MSPB is a quasi-judicial agency established in 1979 to replace the United States Civil Service Commission. Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454, 92 Stat. 1111. The MSPB adjudicates cases brought by the U.S. Office of Special Counsel (OSC). The OSC is the independent federal agency that investigates and prosecutes violations of the Hatch Act and other prohibited personnel practices. *See About*, U.S. OFFICE SPECIAL COUNSEL, <https://osc.gov/Pages/about.aspx> (last visited Feb. 16, 2015).

105. *State and Local FAQs, supra* note 61 (citing *Special Counsel v. Gallagher*, 44 M.S.P.R. 57, 61 (1990)).

106. *State and Local FAQs, supra* note 61 (citing *Special Counsel v. Williams*, 56 M.S.P.R. 277, 283–84 (1993), *aff’d*, *Williams v. M.S.P.B.*, 55 F.3d 917 (4th Cir. 1995)).

107. Joe Davidson, *Bill Would Update Hatch Act, Which Regulates Federal Worker Involvement in Politics*, WASH. POST, Mar. 7, 2012, [http://www.washingtonpost.com/politics/bill-would-update-hatch-act-which-regulates-federal-worker-involvement-in-politics/2012/03/07/gIQA67D2xR\\_story.html](http://www.washingtonpost.com/politics/bill-would-update-hatch-act-which-regulates-federal-worker-involvement-in-politics/2012/03/07/gIQA67D2xR_story.html).

punishment for any violation.<sup>108</sup> Notably, however, if the employee's conduct does not satisfy this standard, he or she may still be subject to punishment if the salary the employee receives is federally funded.<sup>109</sup>

The adjudicative and punitive process for state and local employees differs from that for federal employees.<sup>110</sup> For state or local employees, the statute provides that when the MSPB provides a notice of determination that the employee has violated Section 1502 of the Hatch Act and that the violation warrants removal, the employee must be removed from employment within thirty days.<sup>111</sup> If the employee is not terminated, federal funding in the form of grants or loans shall be withheld from the employing agency in an amount equal to two years' pay at the rate the employee was receiving at the time of the violation.<sup>112</sup> If, after timely removal, the employee has been appointed within eighteen months to any office or employment in another state or local agency, which does not receive federal funding, the same amount will be withheld from the initial agency.<sup>113</sup> Additionally, if the employee has been appointed within eighteen months to a state or local agency that receives federal funds, the same amount will be withheld from that agency.<sup>114</sup>

The 1940 Amendments also allow states to further regulate their own employees, including those employees covered by the Hatch Act.<sup>115</sup> Most states have passed their own political activities laws, which have been commonly dubbed "Little Hatch Acts" because they are typically modeled after the federal act.<sup>116</sup> "Little Hatch Acts" vary by state, but they often carry similar prohibitions to the Hatch Act, except that they apply only to state and local employees.<sup>117</sup> Additionally, many local governments and municipalities have also implemented their own regulations regarding the political activities of

108. *See* 5 U.S.C. § 1506 (2012).

109. *See State and Local FAQs*, *supra* note 61.

110. *See* § 1506.

111. *Id.* § 1506(a).

112. *Id.* § 1506(b).

113. *Id.*

114. *Id.*

115. *See Hatch Act: State, D.C., or Local Employees—Hatch Act Modernization Act Guidance for State and Local Employees*, U.S. OFFICE SPECIAL COUNSEL, <https://osc.gov/pages/hatchact-affectsme.aspx#> (select "I am a State, D.C., or Local Employee" then follow "VI." hyperlink) (last visited Feb. 16, 2015) [hereinafter *HAMA Guidance*].

116. *See Staff and Political Activity—Statutes*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx> (last updated Feb. 2015).

117. *Id.*

public employees.<sup>118</sup> These state and local regulations became particularly relevant after later changes to how state and local employees were treated under the Hatch Act.<sup>119</sup>

### C. Constitutional Challenges to the Hatch Act's Prohibitions

The passage of the Hatch Act and the 1940 Amendments—and their application to particular employees and actions—has spawned constitutional challenges that have reached the Supreme Court.<sup>120</sup> A pair of cases in 1947 first dealt with the constitutionality of the Hatch Act.<sup>121</sup> In these cases, the Supreme Court explored what interest the federal government has over its own employees and state employees, and whether this interest interferes with an employee's First Amendment rights.<sup>122</sup> Ultimately, the Supreme Court upheld the constitutionality of the federal employee provisions of the Hatch Act in *United Public Workers of America v. Mitchell*, and the state and local provisions in *Mitchell's* companion case *Oklahoma v. United States Civil Service Commission*.<sup>123</sup> Both cases addressed the Hatch

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118. See, e.g., *Callaghan v. City of S. Portland*, 76 A.3d 348 (Me. 2013).

119. For a discussion of later changes to the status of state and local employees under the Hatch Act, see *infra* Parts I-F-G.

120. While this section focuses on cases heard by the Supreme Court, there are a number of circuit court cases regarding the Hatch Act. See, e.g., *Molina-Crespo v. M.S.P.B.*, 547 F.3d 651 (6th Cir. 2008); *Williams v. M.S.P.B.*, 55 F.3d 917 (4th Cir. 1995); *Blaylock v. M.S.P.B.*, 851 F.2d 1348 (11th Cir. 1988).

121. See *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947); *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127 (1947).

122. See *Mitchell*, 330 U.S. 75; *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127; *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973).

123. See *Mitchell*, 330 U.S. 75. *Oklahoma v. United States Civil Service Commission* held that the Hatch Act does not violate the sovereignty of states under the Tenth Amendment. 330 U.S. 127, 142. As of the date of publication, while some cases have applied for certiorari on related issues, there are currently none before the Supreme Court. One promising attempt to garner judicial intervention on the issue of whether states could make independent personnel decisions based on perceived violations of the Hatch Act failed to obtain certiorari. See *Utah Dep't of Human Servs. v. Hughes*, 2007 UT 30, 156 P.3d 820, *cert denied*, 552 U.S. 826 (2007); see also *Petition for Writ of Certiorari, Hughes v. Utah Dep't of Human Servs.*, 552 U.S. 826 (2007) (No. 06-1717), 2007 WL 1850378. Another presented questions of “whether the Hatch Act as applied to congressional candidacies illegally imposes a fourth qualification for eligibility to Congress in violation of the Qualifications Clause, U.S. Const. Art. I, Sec. 2, cl.2,” “whether the Hatch Act should be construed to exclude federal candidacies from the Act's ban on seeking partisan elective office,” and “whether the Hatch Act is unconstitutionally overbroad by prohibiting candidacies of all federal employees regardless of grade of employment, job function or job responsibility.” *Petition for Writ of Certiorari*, at \*ii, *Merle v. United States*, 541 U.S. 972 (2004) (No. 03-934), 2003 WL 23119176. While it is possible that a related case

Act's applicability to certain employees on the basis of the First Amendment, the Due Process Clause of the Fifth Amendment, and rights reserved to the people in the Ninth and Tenth Amendments.<sup>124</sup>

*Mitchell* was the first in a line of cases addressing the constitutionality of the Hatch Act.<sup>125</sup> In *Mitchell*, members of a union brought an action to prevent enforcement of a portion of Section 9(a) of the Hatch Act, which states “[n]o officer or employee in the executive branch of the Federal Government . . . shall take any active part in political management or in political campaigns.”<sup>126</sup> Only one appellant, Poole, had actually been charged with a violation in connection with his position on a committee for a political party and position as a poll worker and paymaster for party poll workers. Because of this distinction, the other appellants’ issues were dismissed.<sup>127</sup>

Poole argued that the Hatch Act violated his First Amendment right to free speech and Fifth Amendment right to due process, and that the Ninth and Tenth Amendments reserved a right to political activity to the people.<sup>128</sup> The Court acknowledged that the First and Fifth Amendments were implicated, but was not swayed by Poole’s attempt to differentiate between political activity after hours and political activity on the job.<sup>129</sup> Justice Reed, writing for the majority, asserted that First Amendment rights “are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery.”<sup>130</sup> Justice Reed weighed the First and Fifth Amendment rights against “a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government.”<sup>131</sup> Poole also argued that his actions were nonpartisan; however, the Court responded that it would accept that Congress considered even nonpartisan activity to be dangerous.<sup>132</sup> In the majority opinion, Justice Reed wrote, “[c]ourts

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may garner Supreme Court attention, given the prospective nature of cases not currently before the Supreme Court, this Note will not discuss Supreme Court intervention at length.

124. *Mitchell*, 330 U.S. 75; *Oklahoma v. U.S. Civil Serv. Comm’n.*, 330 U.S. 127.

125. *See generally Mitchell*, 330 U.S. 75.

126. *Id.* at 82.

127. *Id.* at 89–90.

128. *Id.*

129. *Id.* at 95.

130. *Id.*

131. *Id.* at 96.

132. *Id.* at 100–04.

will interfere only when such regulation passes beyond the general existing conception of governmental power.”<sup>133</sup>

The Court’s holding established a deferential standard of review, ultimately leaving the management of civil service employees to Congress and the President.<sup>134</sup> Justice Reed wrote, “Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.”<sup>135</sup> This deferential standard has continued. However, in several more recent circuit court cases, particularly in the Eleventh and Second Circuits, increased judicial scrutiny has become commonplace.<sup>136</sup> Despite these decisions, the history of the Hatch Act’s development has been steeped in deference.<sup>137</sup>

The Supreme Court upheld *Mitchell*<sup>38</sup> in *Letter Carriers*, and held that the First Amendment does not invalidate a law barring partisan political conduct by federal employees.<sup>139</sup> The government, the Court asserted, maintains an interest in the speech of its employees that is stronger than that of citizens in general.<sup>140</sup> The Court stated, “an Act

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133. *Id.* at 102.

134. Bloch, *supra* note 5, at 256.

135. *Mitchell*, 330 U.S. at 99.

136. Bloch, *supra* note 5, at 248–49 (citing *Blaylock v. M.S.P.B.*, 851 F.2d 1348 (11th Cir. 1988)); *Biller v. M.S.P.B.*, 863 F.2d 1079 (2d Cir. 1988). For example, the Second Circuit in *Biller* found that the Hatch Act’s Legislative history “mandate[d] a construction of the Act in favor of First Amendment rights.” *Biller*, 863 F.2d at 1086.

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

138. *Mitchell*, 330 U.S. 75 (holding that an employee could be prevented from holding a party office, working at the polls, and acting as party paymaster for other party workers).

139. *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 556 (1973).

140. *Id.* at 564 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (holding that the government has an interest in regulating the conduct and speech of its employees that differs from its interest in citizen speech, and that there must be a balance between the employees’ interests as citizens in commenting on matters of public concern and the interest of the government in promoting efficient services to the public)). When balancing the Hatch Act with the First Amendment, it may be helpful to look to the area of patronage and the constitutional law related to it to inform our study of how the Hatch Act can survive constitutional scrutiny. The Hatch Act was established in the tradition of favoring merit over patronage. In a series of opinions on the issue, the Supreme Court has consistently held that patronage policies in hiring and firing low-level government employees are unconstitutional. For example, in *Elrod v. Burns*, the Court held that public employers could not dismiss non-policymaking employees because of their political affiliation, as it would violate the First Amendment. 427 U.S. 347, 372–73 (1976) (plurality opinion). The Court quoted *Board of Educ. v. Barnette*, 319 U.S. 624

of Congress going no farther would in our view unquestionably be valid.”<sup>141</sup> It further proposed that a statute would be valid if it forbid activities such as organizing or actively participating in fundraising for a political party, running for partisan public office, managing a partisan political campaign, or soliciting votes for a partisan candidate.<sup>142</sup>

The Court in *Letter Carriers* appealed to legislative history to assert that it is the will of Congress to have broader regulation to protect employees.<sup>143</sup> Writing for the majority, Justice White cited the 1972 Senate hearings regarding proposed legislation liberalizing the political activities prohibitions<sup>144</sup> and posited that “[p]erhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it. Nor, in our view, does the Constitution forbid it.”<sup>145</sup> The congressional inaction cited

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(1943), a prior case where it had considered the same issue, in stating that “(i)f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Elrod*, 427 U.S. at 356. Subsequently, in *Branti v. Finkel*, the Court held that a public employer could dismiss an employee if it is able to show that party affiliation was “an appropriate requirement for the effective performance of the public office involved.” 445 U.S. 507, 518 (1980). Following *Branti*, the Court in *Rutan v. Republican Party of Ill.* held that “promotion, transfer, recall, and hiring decisions involving low-level government employees may [not] constitutionally be based on party affiliation.” 497 U.S. 62, 65 (1990).

141. *Letter Carriers*, 413 U.S. at 556.

142. *Id.*

143. *Id.* at 566 (“It may be urged that prohibitions against coercion are sufficient protection; but, for many years, the joint judgment of the Executive and Congress has been that, to protect the rights of federal employees with respect to their jobs and their political acts and beliefs, it is not enough merely to forbid one employee to attempt to influence or coerce another.”).

144. Hearings were held during the 92nd Congress before the Committee on Post Office and Civil Service regarding S. 3374 and S. 3417. William Hibsher, *Assault on Hatch Act Signals Political Activity for Government Workers*, 47 ST. JOHN’S L. REV. 509, 528 (1973). While the bill was reintroduced during the next session, the bill never made it past committee. See *S.235—Federal Employees Political Activities Act: Summary*, CONGRESS.GOV, <https://beta.congress.gov/bill/93rd-congress/senate-bill/235> (last visited Feb. 16, 2015).

145. *Letter Carriers*, 413 U.S. at 567. The Chairman of the Civil Service Commission stated that, “the prohibitions against active participation in partisan political management and partisan political campaigns constitute the most significant safeguards against coercion . . .” *Id.* at 566–67 (citation and internal quotation marks omitted).

by the Court did not last long, as seen in the first wave of reforms the following year.<sup>146</sup>

#### D. Federal Election Campaign Act Amendments of 1974

In 1974, Congress substantially altered the status of state and local government employees under the Hatch Act, ostensibly in response to *Mitchell* and *Letter Carriers*.<sup>147</sup> The Federal Election Campaign Act Amendments of 1974 (FECA Amendments) made several important changes.<sup>148</sup> First, state and local government employees were now able to run in non-partisan elections.<sup>149</sup> Second, the language prohibiting state and local government employees from taking “an active part in political management or political campaigns” was replaced with language prohibiting being “a candidate for elective office.”<sup>150</sup> Therefore, unlike their federal counterparts, state and local employees were now able to campaign for and hold office in political organizations.<sup>151</sup>

#### E. Hatch Act Amendment Attempts: 1976, 1977, 1988, and 1990

Following the FECA Amendments, it only took two years before another Hatch Act amendment made its way through the House and

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146. See Louis Lawrence Boyle, *Reforming Civil Service Reform: Should the Federal Government Continue to Regulate State and Local Government Employees?*, 7 J.L. & POL. 243, 256 (1991) (“Although Congress passed no reforms in the 1960s, it established a commission to study the matter, and many of their recommendations were included in later reform proposals. Due to the continuing protests from the states, it is not surprising that, when Congress again became zealous about reform after the Watergate incident in 1972, it turned its attention once again to reforms in the Hatch Act and even included two reforms in the same measure. In 1974, Congress amended the Hatch Act to resolve some of the states’ concerns by loosening somewhat the restrictions on the political activity of state and local government employees.”).

147. *Id.* at 256–57. Boyle also cites the Watergate incident as a driving force behind the reforms. *Id.* at 256.

148. Act of October 15, 1974, Pub. L. No. 93-443, 88 Stat. 1263.

149. *Id.* at § 401, 88 Stat. at 1290 (“Section 1502(a)(3) of this title does not prohibit any state or local officer or employee from being a candidate in any election if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected.”).

150. *Id.*; see also 5 U.S.C. § 1502. Federal employees remained prohibited from taking an active part in political management or political campaigns for nearly two decades. See *infra* Part I.F (discussing how HARA’s reforms impacted federal employees).

151. § 401, 88 Stat. at 1290; see also 5 C.F.R. 151.101(i) (2014) (defining elective office as “any office which is voted upon at an election . . . but does not include political party office”).

Senate. In 1976, the Hatch Act Amendments bill was proposed in an attempt to lift most restrictions on federal employees' ability to run for office or support partisan candidates.<sup>152</sup> Additionally, this bill had added sections "designed to prevent political coercion of Federal employees by their superiors."<sup>153</sup> However, President Ford vetoed the legislation. Upon doing so, he stated:

If this bill were to become law, I believe pressure could be brought to bear on Federal employees in extremely subtle ways beyond the reach of any anti-coercion statute so that they would inevitably feel compelled to engage in partisan political activity. This would be bad for the employee, bad for the government, and bad for the public.<sup>154</sup>

In 1977, as a presidential candidate, Jimmy Carter promised federal labor unions that he would sign the Hatch Act reform plan that President Ford had vetoed the year before.<sup>155</sup> However, during his presidency, he had second thoughts about the reforms.<sup>156</sup> After the legislation passed in the House, Jimmy Carter asked Senator Abraham Ribicoff to sit on the Hatch Act revision bill so that the Senate would not be able to vote on it.<sup>157</sup> The bill never came to a vote.<sup>158</sup>

Unsuccessful amendments to the Hatch Act were also proposed in 1988 and 1990. The Hatch Act Reform Amendments of 1988 would have allowed off-duty federal workers to run for office, manage campaigns, and raise money for candidates and political parties.<sup>159</sup> They also would have been able to endorse candidates as long as they did not use their job titles.<sup>160</sup> While the bill passed in the House, it

152. James M. Naughton, *Ford Vetoes Bill to Ease Hatch Act*, N.Y. TIMES, Apr. 13, 1976, available at <http://query.nytimes.com/mem/archive/pdf?res=FA0A12FC3F5F117A93C1A8178FD85F428785F9>.

153. *Id.*

154. President's Remarks Upon Vetoing the Hatch Act Amendments Bill, 2 PUB. PAPERS 1114-15 (Apr. 12, 1976).

155. Mike Causey, *Candidates' Promises, Especially to Federal Workers, Are Not Guarantees*, WASH. POST, Aug. 4, 1988, <http://www.washingtonpost.com/archive/local/1988/08/04/candidates-promises-especially-to-federal-workers-are-not-guarantees/1df34635-a403-4404-9ff2-ddfe545b4b8a/>.

156. *Id.*

157. *Id.*

158. *Id.*

159. *H.R.3400—Hatch Act Reform Amendments of 1988*, CONGRESS.GOV, <https://www.congress.gov/bill/100th-congress/house-bill/3400> (last visited Feb. 16, 2015). The Hatch Act Reform Amendments of 1988 were introduced to the House as the Federal Employees' Political Activities Act of 1987. *Id.*

160. Mike Causey, *Revising The Hatch Act*, WASH. POST, Oct. 4, 1987, <http://www.washingtonpost.com/archive/local/1987/10/04/revising-the-hatch-act/82c63ed9-768c-46f7-836b-7b8c7b0d6fb7/>.



never made it out of committee in the Senate.<sup>161</sup> However, the bill was reintroduced in 1989 as the Hatch Act Reform Amendments of 1990 and passed in the Senate with changes,<sup>162</sup> which were approved by the House.<sup>163</sup>

The proposed legislation of 1990, Hatch Act Reform Amendments of 1990, came very close to becoming law.<sup>164</sup> It was one of the most successful attempts to substantively reform the Hatch Act's restrictions on political activities since the Act was enacted fifty-one years prior.<sup>165</sup> Under the bill, federal employees would have been allowed to hold office in political groups, publicly endorse candidates, organize fundraisers and political meetings, and distribute campaign literature.<sup>166</sup> They would, however, still have been barred from seeking public office or participating in political activities in the workplace.<sup>167</sup> Upon returning the bill without a signature, President George H. W. Bush stated:

History shows that such a reversal in the role of partisan politics in the ethic of public service would inevitably lead to repoliticizing the Federal work force . . . . Public servants who are subjected to direct or indirect partisan political pressures understandably would often be reluctant to file criminal complaints against their superiors or peers, possibly putting their livelihoods in jeopardy. They deserve better protection than that.<sup>168</sup>

The Senate upheld President Bush's veto by a two-vote margin.<sup>169</sup>

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161. *H.R. 3400 (100th): Hatch Act Reform Amendments of 1988*, GOVTRACK, <https://www.govtrack.us/congress/bills/100/hr3400> (last visited Feb. 16, 2015).

162. Notably, the changes made to H.R. 20 included permitting D.C. area employees to participate in local political activities and barred employment in non-elected positions of those who the MSPB determined had violated the Act on two occasions. See H.R. Res. 20, 101st Congress (1990).

163. *H.R. 20 (101st): Hatch Act Reform Amendments of 1990*, GOVTRACK, <https://www.govtrack.us/congress/bills/101/hr20> (last visited Feb. 16, 2015).

164. *Id.*

165. Richard L. Berke, *Senate Upholds Veto of Bill on U.S. Workers in Politics*, N.Y. TIMES, June 22, 1990, <http://www.nytimes.com/1990/06/22/us/senate-upholds-veto-of-bill-on-us-workers-in-politics.html?pagewanted=2&src=pm> (stating that while the House overrode the veto 327 to 93, the vote of 65 to 35 in the Senate was two votes short of overriding the veto).

166. *Id.*

167. *Id.*

168. Message to the House of Representatives Returning Without Approval the Hatch Act Reform Amendments of 1990, 1 PUB. PAPERS 830, 831 (June 15, 1990).

169. See Berke, *supra* note 165.

### F. The Hatch Act Reform Amendments of 1993

Finally, in 1993, President Clinton signed and passed HARA.<sup>170</sup> With a Democrat as President for the first time in twelve years,<sup>171</sup> HARA passed with strong support from Senate and House Democrats.<sup>172</sup> During the 103rd Congress, both chambers had a Democratic majority.<sup>173</sup> HARA permitted federal employees and postal workers to manage campaigns, fundraise, and hold positions within political parties on their own time.<sup>174</sup> These changes were accompanied by the assurance that “Hatch Act-covered” employees would still be unable to run for partisan political election and that the federal workplace would remain off limits to partisan political activity.<sup>175</sup>

While HARA made significant changes to the Hatch Act, eventually officials inside the OSC sought reform.<sup>176</sup> One of the main contentions was that HARA’s prohibition on partisan political participation by state and local employees operated as an incumbent protection device and that necessary reforms were overlooked.<sup>177</sup> They claimed that the prohibition effectively acted as an incumbent protection device by preventing many qualified candidates from running,<sup>178</sup> especially in certain smaller localities where many public

170. See Remarks on Signing the Hatch Act Reform Amendments of 1993, *supra* note 1.

171. President Ford and President H. W. Bush, both Republicans, vetoed the only two bills that made it through both chambers. See *supra* Part I.E for a discussion of previous attempts at Hatch Act reform. It is particularly relevant that all of the failed attempts at reform (with the exception of the legislation that died under Jimmy Carter) were under Republican presidents. The situation in 1993, with a Democrat as President and a Democratic majority in both chambers, was prime for the passage of HARA.

172. See 139 CONG. REC. S 8,937 (daily ed. July 20, 1993) (statement of Sen. Robert Dole); 139 CONG. REC. S 8,881 (daily ed. July 16, 1993) (statement of Sen. Edward Kennedy); *H.R. 20 (103rd): Hatch Act Reform Amendments of 1993*, GOVTRACK, <https://www.govtrack.us/congress/votes/103-1993/h437> (last visited Feb. 16, 2015).

173. See *Congress Profiles: 103rd Congress (1993–1995)*, U.S. HOUSE REPRESENTATIVES, <http://history.house.gov/Congressional-Overview/Profiles/103rd/> (last visited Feb. 16, 2015).

174. See Remarks on Signing the Hatch Act Reform Amendments of 1993, *supra* note 1.

175. *Id.*

176. Josh Gerstein, *Carolyn Lerner, Hatch Act Enforcer, Seeks Reforms*, POLITICO (Oct. 6, 2011, 7:04 PM), <http://www.politico.com/news/stories/1011/65374.html>.

177. *Id.*

178. See Anthony T. Kovalchick, *Ending the Suppression: Why the Hatch Act Cannot Withstand Meaningful Constitutional Scrutiny*, 30 W. NEW. ENG. L. REV. 419,

offices are staffed through partisan elections.<sup>179</sup> One of the most frequently cited examples of this issue is the election of a local sheriff, where the most obvious and qualified candidates for office include members of the police force, who frequently receive federal grants, subjecting them to Hatch Act coverage.<sup>180</sup> Jason C. Miller put forth another criticism, which was echoed by Carolyn N. Lerner, the head of the OSC. Miller and Lerner argue that the provisions claim that the broad prohibition against “Hatch Act-covered” state and local employees running for partisan political office creates a disparate impact and unfavorable consequences.<sup>181</sup>

Another major criticism of HARA is that the penalty provisions were unworkable as written. Kathleen Clark, an expert in legal ethics and a law professor at Washington University in St. Louis, criticized the lack of options for the penalty provisions when a federal employee violates the Act.<sup>182</sup> The old penalty provisions were so “draconian” that they discouraged reporting.<sup>183</sup> The choice between

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421 (2008) (“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.”).

179. *See, e.g.*, Miller, *supra* note 18, at 329.

180. *Id.* at 321–22. The unique position of law enforcement is discussed further in Part II.D. As a position in law enforcement frequently requires the officer to constantly be in uniform, certain provisions disparately affect them. For example, if an officer used a police dog received through a federal grant, that officer would be prevented from running for a partisan sheriff election. *See id.; infra*, Part II.D.

181. Carolyn N. Lerner, *A Law Misused for Political Ends*, N.Y. TIMES, Oct. 31, 2011, <http://www.nytimes.com/2011/10/31/opinion/the-hatch-act-a-law-misused.html>; *see also* Miller, *supra* note 18, at 329. In his article, Miller states that “[t]he Hatch Act’s vagueness and the confusion it causes may have a chilling effect even on employees who are not covered because they do not understand the exceptions. These exceptions demonstrate how absurd the Hatch Act is.” Miller, *supra* note 18, at 329. He further explains how certain positions, such as Mayor of Detroit, are non-partisan, while other positions, such as township trustee of a small town in Michigan, are partisan. *Id.* Similarly, “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.” *Id.* These are only a few examples of the disparity in applicability to covered employees. In addition, Miller attempts to leverage federalism arguments in support of additional reforms. “Even if the Hatch Act does not violate the Tenth Amendment, the state and local government provisions inherently raise problems. ‘The regulation of the political activity of state and local government by the federal government was never a good idea.’” *Id.* at 328. This Note will not discuss federalism at length.

182. Eileen Ambrose, *Campaign Rules for Federal Employees Get an Update*, BALT. SUN, Jan. 27, 2013, [http://articles.baltimoresun.com/2013-01-27/news/bs-md-federal-hatch-20130127\\_1\\_hatch-act-federal-employees-government-employees/2](http://articles.baltimoresun.com/2013-01-27/news/bs-md-federal-hatch-20130127_1_hatch-act-federal-employees-government-employees/2).

183. *Id.*

suspension of no less than thirty days or termination does not leave much room for minor, first-time offenses the way a fine or reduction in grade might.<sup>184</sup>

### G. The Hatch Act Modernization Act of 2012

In an editorial, Lerner discussed the reasons for proposing the changes that would eventually become HAMA:

[A]t its worst, the law prevents would-be candidates in state and local races from running because they are in some way, no matter how trivially, tied to a source of federal funds in their professional lives. Our caseload in these matters quintupled to 526 complaints in the 2010 fiscal year, from 98 in 2000. We advised individuals on this law 4,320 times in 2010.<sup>185</sup>

Lerner's statement resonated soundly with Miller and Clark's dismay at the effects of the Hatch Act on state and local elections.<sup>186</sup> Co-sponsors Senator Joseph Lieberman, Senator Carl Levin, and Senator Mike Lee introduced HAMA in the Senate on March 7, 2012.<sup>187</sup> The bill passed in the Senate on November 30, 2012, and it passed in the House of Representatives on December 19, 2012.<sup>188</sup> President Barack Obama signed it into law on December 28, 2012.<sup>189</sup> HAMA further limited the Hatch Act's historically broad application to state and local employees by lifting restrictions on running for office and expanding the penalty provisions for federal employees.<sup>190</sup> These changes went into effect on January 28, 2013.<sup>191</sup> Support for

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184. 5 U.S.C. §§ 1505, 1506, 1508 (2012); 5 U.S.C. § 7326 (2012).

185. Lerner, *supra* note 181.

186. Miller, *supra* note 18, at 329.

187. *S.2170—Hatch Act Modernization Act of 2012: Cosponsors*, CONGRESS.GOV, <https://beta.congress.gov/bill/112th-congress/senate-bill/2170/cosponsors> (last visited Feb. 16, 2015).

188. *S.2170—Hatch Act Modernization Act of 2012: Actions*, CONGRESS.GOV, <https://beta.congress.gov/bill/112th-congress/senate-bill/2170/actions> (last visited Feb. 16, 2015).

189. *Id.*

190. 5 U.S.C. §§ 1501–08 (Supp. 2013); 5 U.S.C. §§ 7321–26 (Supp. 2013). Additionally, HAMA provided exceptions to D.C. employees who were previously covered under the federal Hatch Act and permitted federal employees more latitude in becoming involved in D.C. city politics. See Tim Craig, *City, Federal Employees in D.C. Face Revised Hatch Act*, WASH. POST, Jan. 9, 2013, [http://www.washingtonpost.com/blogs/dc-wire/post/city-federal-employees-in-dc-face-revised-hatch-act/2013/01/09/1a10a3d8-5a98-11e2-9fa9-5fbdc9530eb9\\_blog.html](http://www.washingtonpost.com/blogs/dc-wire/post/city-federal-employees-in-dc-face-revised-hatch-act/2013/01/09/1a10a3d8-5a98-11e2-9fa9-5fbdc9530eb9_blog.html).

191. See Craig, *supra* note 190.

HAMA's passage stemmed from criticisms by lawmakers, academics, and officials within the OSC alike.<sup>192</sup>

### 1. *Effects of HAMA on Federal Employees*

The primary reform provision applicable to federal employees under HAMA was a change in the penalty provisions, which allowed for suspension of no less than thirty days or termination.<sup>193</sup> The definition of a covered federal employee did not change.<sup>194</sup> Under HAMA, a final order from the MSPB for an employee may now impose:

- (i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand; (ii) an assessment of a civil penalty not to exceed \$1,000; or (iii) any combination of disciplinary actions described under clause (i) and an assessment described under clause (ii).<sup>195</sup>

Some experts, like Clark, have praised the new penalties, arguing that the previous penalties were the “death penalty to your federal career” and that now the “standards are more likely to be enforced because the penalty is not absurd.”<sup>196</sup> The new penalty provisions provide a range of penalties that now may be assessed against the severity and frequency of the violation.<sup>197</sup>

### 2. *Effects of HAMA on State Employees*

Under HAMA, the prohibitions against running for partisan office for state and local employees apply only to employees whose salaries are funded in their entirety by the federal government.<sup>198</sup> This change

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192. See, e.g., Ambrose, *supra* note 182; Lerner, *supra* note 181.

193. Ambrose, *supra* note 182.

194. *Hatch Act Frequently Asked Questions: Federal Employees*, U.S. OFFICE SPECIAL COUNSEL, <https://osc.gov/pages/hatchact-affectsme.aspx> (select “I am a Federal Employee”; then follow “IV.” hyperlink) (last visited Feb. 16, 2015) [hereinafter *Federal Employees FAQs*] (“For purposes of the Hatch Act, the term federal ‘employee’ means any individual, other than the President and the Vice President, employed or holding office in one of the following: 1) an Executive agency other than the General Accounting Office; or 2) a position within the competitive service which is not an executive agency; Additionally, under the Hatch Act the term federal employee does not include a member of the uniformed services or an individual employed or holding office in the government of the District of Columbia.”).

195. 5 U.S.C. § 1215 (Supp. 2013).

196. Ambrose, *supra* note 182.

197. *Id.*

198. 5 U.S.C. § 1502(a)(3) (Supp. 2013).

means that “Hatch Act-covered” state and local employees may now run for partisan office so long as their salaries are only partially funded by the federal government.<sup>199</sup> To illustrate the number of state and local employees affected by this change, nearly 10,000 of New York State’s over 200,000 employees<sup>200</sup> have salaries that are funded in whole or in part by federal funds.<sup>201</sup> As most funds are allocated to agencies as a whole, it is unlikely that any one employee would be fully federally funded, with the exception of a select few specialized law enforcement personnel whose positions are created or fully funded by a federal grant.<sup>202</sup> Therefore, for nearly every state and local employee, the prohibition against running for partisan political office is now lifted.

HAMA’s passage addressed many of the criticisms of HARA because it removed what had been referred to as an “incumbent protection device.”<sup>203</sup> The reforms also made the provisions relating to state and local employees applicable to employees of the District of

199. See § 1502; *Covered State and Local Employees*, *supra* note 9.

200. As of 2011, New York State had 226,662 full-time employees. *2011 Public Employment and Payroll Data*, CENSUS.GOV, <http://www2.census.gov/govs/apex/11stny.txt>.

201. Tom Precious, *N.Y. State Employees Funded by U.S. Avoid Immediate Furlough*, BUFFALO NEWS, Oct. 1, 2013, <http://www.buffalonews.com/city-region/albany-politics/ny-state-employees-funded-by-us-avoid-immediate-furlough-20131001>; see also Michael Cooper, *States Fear Local Effects if Shutdown Cuts Off Cash*, N.Y. TIMES, Apr. 5, 2011, <http://www.nytimes.com/2011/04/06/us/06states.html> (stating that, “in 1995, Maryland spent \$1.4 million a day to keep its federally paid employees at work,” and that “Massachusetts estimates that it has roughly 4500 full-time workers who are paid from various federal sources”).

202. For an example of an instance where such positions might exist, see Peter Goonan, *Springfield Police to Use \$1 Million Justice Department Grant to Combat Crime in South End*, MASSLIVE (Oct. 29, 2013), [http://www.masslive.com/news/index.ssf/2013/10/springfield\\_police\\_will\\_use\\_1.html](http://www.masslive.com/news/index.ssf/2013/10/springfield_police_will_use_1.html). For example, if they create new units or positions pursuant to the grant, these positions may be covered. See *Congress Repeals Restriction on Fire Fighters Running for Political Office*, IAF (Dec. 20, 2012), <http://www.iaff.org/12News/122012Congress.htm> (“While [HAMA] is an important step in expanding the ability of fire fighters to participate in the political process, there are still other barriers in the way of IAFF members who want to serve their communities as elected officials. The Hatch Act Modernization Act applies only to state and municipal employees. Federal fire fighters remain covered by other sections of the Hatch Act, and are still barred from many types of political activity. Also, the prohibition on municipal employees running for office remains in effect for those employees whose salary is paid entirely by federal funds. Therefore, any fire fighter whose salary comes solely from a Staffing for Adequate Fire and Emergency Response (SAFER) grant would not be eligible to run until the grant expires.”).

203. By preventing many state and local employees from running for public office, thereby decreasing the pool of potential opponents, the Act can be seen as protecting incumbents. See Ambrose, *supra* note 182.

Columbia as well.<sup>204</sup> However, unlike the changes to the penalty provisions for federal employees under HAMA, the penalty for state employees remains the same.<sup>205</sup> These penalty provisions still only provide the options of termination and non-termination.<sup>206</sup> While significant changes were made to the partisan office provision, all other prohibitions under the Hatch Act remain in force for all state and local employees who work in connection with programs that receive federal funds.<sup>207</sup> Therefore, state and local employees who were “Hatch Act-covered” employees before HAMA are still covered by the provisions prohibiting the use of official authority or influence to interfere with an election or nomination and the coercion or direction of employees to make contributions to any group for political purposes.<sup>208</sup>

#### H. “Little Hatch Acts”

While the federal government has relinquished much of its control over whether certain state and local employees may run in partisan political elections, the states still maintain their own interest in regulating the political activities of their employees.<sup>209</sup> The OSC asserts that “Little Hatch Acts,” still apply to employees exempt from the Hatch Act’s prohibitions, and that such employees must look to state prohibitions to determine whether they are in violation (noting that states may impose more rigid standards if they so choose).<sup>210</sup> However, not all states have the same policy regarding what is proscribed as far as political activities and speech of public employees, and which public employees are included under the statute.<sup>211</sup> The OSC has already faced questions about the applicability of HAMA to pending cases; however, the constitutionality of the new law has yet to face a legal challenge.<sup>212</sup>

A major question remains as to whether these agencies can and should retain their current policies if they were closer to the original

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204. 5 U.S.C. §§ 1501(2), 1501(4), 1502(c)(3), 1506(a)(2) (Supp. 2013).

205. See § 1506; 5 U.S.C § 1215 (2014).

206. § 1506.

207. See *Covered State and Local Employees*, *supra* note 9.

208. *Id.*

209. *HAMA Guidance*, *supra* note 115.

210. *Id.*

211. See, e.g., Rafael Gely & Timothy D. Chandler, *Restricting Public Employees’ Political Activities: Good Government or Partisan Politics?*, 37 HOUS. L. REV. 775, 791–96 (2000); *infra* Part II.A.

212. *Special Counsel v. Greiner* held that the HAMA would not be applied retroactively. 119 M.S.P.R. 492, 495 (2013).

Hatch Act requirements, where state political activities law is less stringent than the Hatch Act.<sup>213</sup> The OSC reports that new complaints received decreased from 503 in 2012 to 277 in 2013, and advisory opinions decreased from 3448 to 1767.<sup>214</sup> While the effects on the number of complaints post-HAMA have dropped significantly, it is too early to discern whether the precipitous drop will be permanent, especially considering that the number of new complaints was as low as 282 in 2007.<sup>215</sup> It is still unclear which of the HAMA reforms—the federal penalty provisions or the loosening of the restrictions on state and local employees—had more of an impact on the number of complaints.<sup>216</sup>

### 1. *Comparing Different “Little Hatch Acts”*

Individual states have adopted a wide variety of regulations modeled after provisions of the Hatch Act, which apply to state and local employees.<sup>217</sup> In 2000, Professor Rafael Gely of University of Cincinnati College of Law and Professor Thomas D. Chandler of Louisiana State University organized a study of all the states that have enacted “Little Hatch Acts.”<sup>218</sup> They found that thirty-one states have adopted less restrictive statutes.<sup>219</sup> Of the less restrictive states, nine<sup>220</sup> have adopted restrictions in at least three of the areas prohibited under the Hatch Act, fourteen<sup>221</sup> have adopted at least two of the prohibitions, and eight<sup>222</sup> have adopted only one of the prohibitions.<sup>223</sup> In total, twenty-three states bar employees from solicitation of contributions or support for a campaign, thirteen states

213. *See infra* Part III (suggesting how states might proceed).

214. U.S. OFFICE OF SPECIAL COUNSEL, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2013 30 (2013), *available at* <https://osc.gov/Resources/6%2027%2014%20ANNUAL%20REPORT.pdf>.

215. *Id.*

216. *See id.* The report does not detail the nature of the complaints.

217. *See generally* Gely & Chandler, *supra* note 211.

218. *Id.*

219. *See id.* at 795.

220. The nine states are Alabama, Connecticut, Delaware, Kansas, Maine, Massachusetts, North Carolina, Tennessee, and Texas. *See id.* at 792. All of these states “prohibit the providing or soliciting of financial or manpower contributions to political organizations or political candidates.” *Id.* at 795.

221. The fourteen states are California, Florida, Georgia, Hawaii, Iowa, Maryland, Michigan, Minnesota, Missouri, New York, Rhode Island, Utah, Washington, and Wisconsin. *Id.* at 792. Ten of these states regulate the solicitation of campaign contributions. *Id.* at 795.

222. The eight states are Illinois, Indiana, Nebraska, New Hampshire, New Jersey, North Dakota, Oregon, and South Carolina. *Id.* at 792.

223. *Id.* at 795.



bar holding elected positions, and twenty-two states bar participation in political activities at work, in uniform, or on government property.<sup>224</sup>

However, four states<sup>225</sup> go beyond the Hatch Act's<sup>226</sup> provisions for state and local employees, barring employees from taking an active part in political campaigning as well as direct participation in partisan elections.<sup>227</sup> Two states bar covered employees from taking part "in the management of the affairs of a political party . . . or any political campaign,"<sup>228</sup> and two bar covered employees from "becoming members or officers of political parties."<sup>229</sup> This survey reveals that when states consider which activities to restrict, campaign contributions and political activity while on duty are the most important, followed by holding elected positions.<sup>230</sup>

Adding to the confusion caused by the states' varying implementation of "Little Hatch Act" provisions is the trend of judicial review to loosen such provisions. For example in *Pinto v. State Civil Service Commission*, the Supreme Court of Pennsylvania examined whether a corrections officer taking a leave of absence to serve as the Vice President of the Pennsylvania State Corrections Officers Association was subject to the Civil Service Act.<sup>231</sup> The Civil Service Act prohibited:

[T]aking an active part in political management or in a political campaign. Activities prohibited by this subsection include, but are not limited to, the following activities: . . . Soliciting votes in support of or in opposition to a candidate for public office in a partisan

224. *Id.* at 792.

225. Gely and Chandler studied thirty-five states' "Little Hatch Acts." *Id.* at 791.

226. It is important to note that this study was performed before HAMA and examined the Hatch Act as amended in 1993. For information on the 1993 amendments, which loosened restrictions on political management, see *supra* Part I.F.

227. Gely & Chandler, *supra* note 211, at 794.

228. *Id.* (citing LA. CONST. art. X, § 9(A); OHIO REV. CODE ANN. § 124.57(A) (Anderson Supp. 1999) (barring Ohio employees from taking "part in politics other than to vote as the . . . employee pleases.")).

229. *Id.* (citing W. VA. CODE § 29-6-20(e)(3) (Michie 1999) (allowing West Virginia employees to participate in "[o]ther types of partisan or nonpartisan political campaigning and management not inconsistent with the provisions of this subdivision" and stating that "no employee in the classified service shall . . . be a candidate or delegate to any state or national political party convention, [or] a member of any national, state or local committee of a political party."); N.M. STAT. ANN. § 10-9-21(B) (Michie 1995) (prohibiting New Mexico's covered public employees from becoming officers of a political organization)).

230. *See id.* at 795.

231. 912 A.2d 787 (Pa. 2006).

election or a candidate for political party office . . . . Endorsing or opposing a candidate for public office in a partisan election or a candidate for political party office in a political advertisement, a broadcast, campaign, literature, or similar material.<sup>232</sup>

The court's analysis relied upon the State Employee Retirement Code, which provided for statewide employee organizations to reimburse employers for "[a]n active member on paid leave granted by an employer for purposes of serving as an elected full-time officer for a Statewide employee organization which is a collective bargaining representative under the [Public Employee Relations] Act."<sup>233</sup> Moreover, Commission Rule 103.11(b), which made an exception from the Civil Service Act for those who "who [are] on a regular leave of absence, or leave of absence to take a non[-]civil service position."<sup>234</sup> Relying on the language of these regulations, the court held that the officer was exempt from the state Civil Service Act because the leave of absence was to take a non-civil service position, thus loosening the interpretation of the political activities provision.<sup>235</sup>

The Supreme Judicial Court of Maine, meanwhile, held in *Callaghan v. City of South Portland* that a particular prohibition on City of South Portland employees violated the First Amendment rights of two part-time employees who had previously served on the school board before the statute's passage.<sup>236</sup> The provision in question prohibited any City employee from: "(1) seeking election to or serving on the South Portland School Board; and (2) engaging in certain political activities on their own time, specifically circulating petitions or campaign literature in connection with School Board elections, and soliciting or receiving contributions or political service for or against candidates in School Board elections."<sup>237</sup> The court held that the City failed to demonstrate a "necessary impact on the actual operation of the Government," school sufficient to outweigh the employees' First Amendment interests in running in the School Board election.<sup>238</sup> The court also rejected claims that the case should be evaluated like other Hatch Act cases because the City's candidacy restriction in the nonpartisan School Board elections was more

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232. 71 PA. CONS. STAT. § 741.905b (2012).

233. 71 PA. CONS. STAT. § 5302(b)(2) (2012).

234. 4 PA. CODE § 103.11(b) (2014).

235. *Pinto*, 912 A.2d at 794.

236. 76 A.3d 348, 349–50 (Me. 2013).

237. *Id.*

238. *Id.* at 357 (citing *United States v. Nat'l Treasury Emp. Union*, 513 U.S. 454, 468 (1995)).

restrictive than Maine's "Little Hatch Act."<sup>239</sup> Maine's "Little Hatch Act" not only allows state employees to run as "a candidate for public office in a nonpartisan election,"<sup>240</sup> but also allows candidacy in a partisan election for a local office.<sup>241</sup>

Additionally, the Eighth Circuit held in *Republican Party of Minnesota v. White* that a Minnesota statute's partisan activities limitation violated judges' freedom of association rights, and the statute's solicitation clause violated judges' First Amendment rights.<sup>242</sup> The court held that the political-activities clause did not survive strict scrutiny, reasoning that, because the law restricted activities related to political parties and not other interest groups, the law was under-inclusive as to its stated interest and therefore it was not narrowly tailored to serve a compelling state interest.<sup>243</sup> While several jurisdictions have addressed the validity of particular regulations, it is as of yet unclear what the true limitations are on state and local political-activities laws.

The jurisprudence surrounding state and local political activities laws informs an analysis of the constitutionality of "Little Hatch Acts" and illustrates the potential boundaries of state and local regulations. The aforementioned cases may be interpreted to further the position that states should interpret political activities policies narrowly, as seen in *Pinto*, or, alternatively, that they violate the First Amendment, as seen in *Callaghan* and *White*.<sup>244</sup> Interestingly, the Eighth Circuit draws a line in *Callaghan* where a local regulation is more restrictive than the state and federal regulations.<sup>245</sup> With no uniform rule regarding the extent to which state and local political activities laws may regulate public employees, there is the potential

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239. *Id.* at 355.

240. 5 ME. REV. STAT. ANN. tit. 4, § 7056-A(6)(D) (West 2014).

241. *Id.* § 7056-A(4).

242. 416 F.3d 738 (8th Cir. 2005). This case was heard on remand en banc after the Supreme Court held that "the Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment." *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002). The Supreme Court did not reach the issues of the political activities clause in MINN. CODE JUD. CONDUCT, Canon 5(A)(1)(a), (d), 5(B)(1)(a) (2000), or the solicitation clause in MINN. CODE JUD. CONDUCT, Canon 5(B)(2) (2000).

243. *White*, 416 F.3d at 751-56.

244. See *White*, 416 F.3d 738; *Callaghan*, 76 A.3d at 349-50; *Pinto v. State Civil Serv. Comm'n*, 912 A.2d 787 (Pa. 2006).

245. See *Callaghan*, 76 A.3d at 355.

for conflicting case law on the validity of over-inclusive regulations.<sup>246</sup> Such uncertainty poses an issue for both those drafting state and local political activities regulations and those interpreting them.

Furthermore, the judicial interpretations of “Little Hatch Acts” differ from judicial interpretations of the federal Hatch Act.<sup>247</sup> The interpretations that political activities policies interfere with employees’ First Amendment rights in *Callaghan* and *White* conflict with the Supreme Court’s interpretation of the federal Hatch Act as seen in *Letter Carriers* and *Mitchell*.<sup>248</sup> Federal case law has thus far found no conflict between provisions barring partisan political activities and largely has deferred to the government’s interest in regulating its own employees.<sup>249</sup> While there is no direct conflict in the interpretation of state and federal provisions, as they remain distinct laws, the disparate interpretation of the political activities provisions heightens the potential for confusion.<sup>250</sup>

## 2. *The Constitutionality of “Little Hatch Acts”*

Just as it upheld the original Hatch Act in 1939, the Supreme Court has upheld the constitutionality of “Little Hatch Acts” and their application to classified service employees.<sup>251</sup> In *Broadrick v.*

246. *Bauer v. Shepard* declined to follow *White* and held that an Indiana judicial conduct rule limiting the political activities of Indiana’s judges did not violate the First Amendment. 620 F.3d 704 (7th Cir. 2010). In *Mancuso v. Taft*, the First Circuit likewise affirmed the District Court’s holding that a city charter that barred nonpartisan candidacy violated the First Amendment and held that it violated the equal protection clause. 476 F.2d 187, 200 (1st Cir. 1973). However, in *Magill v. Lynch* the First Circuit weakened its *Mancuso v. Taft* position on regulations barring nonpartisan candidacy, stating “the government may constitutionally restrict its employees’ participation in nominally nonpartisan elections if political parties play a large role in the campaigns.” 560 F.2d 22, 29 (1st Cir. 1977). The First Circuit vacated an order granting a permanent injunction against the enforcement of a city provision barring a broad range of political activities, including running for nonpartisan office, and remanded to the District Court to perform an over breadth analysis. *Id.* at 22. In addition, the Arizona Court of Appeals held that a statute barring state employees from holding any paid, elected public office, even a nonpartisan position, did not violate state employees’ First and Fourteenth Amendment rights. *Fernandez v. State Pers. Bd.*, 852 P.2d 1223 (Ariz. Ct. App. 1992).

247. Compare *Callaghan*, 76 A.3d at 349–50, and *White*, 416 F.3d 738, with U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 556 (1973).

248. See generally *Callaghan*, 76 A.3d 348; *White*, 416 F.3d 738.

249. See *Letter Carriers*, 413 U.S. at 556.

250. This is because state and federal policies do not preempt each other.

251. *Broadrick v. Oklahoma*, 413 U.S. 601, 601 (1973).

*Oklahoma*,<sup>252</sup> the Supreme Court held that a state statute forbidding political activities of state employees does not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>253</sup> Petitioners argued that the Equal Protection Clause was violated because the political activities law applied to classified service employees and not unclassified service employees. They also argued that the statute was unconstitutionally vague.<sup>254</sup> The Court disagreed, holding that the statute was not impermissibly vague in forbidding state employees from soliciting contributions “for any political organization, candidacy or other political purpose,” from being a member of “any national, state or local committee of a political party,” or from being “an officer or member of a committee or a partisan political club.”<sup>255</sup> The provision forbidding state employees from being “a candidate for nomination or election to any paid public office,” or from “tak[ing] part in the management or affairs of any political party or in any political campaign” was likewise upheld.<sup>256</sup> Under this decision, the Court opined that the only truly protected political activity was the right to privately express one’s opinion and vote.<sup>257</sup>

Acknowledging the potential for the political activities law to chill protected speech,<sup>258</sup> the Court ultimately rejected the argument that the statute should be discarded because some “arguably protected conduct may or may not be caught or chilled by the statute.”<sup>259</sup> While a broadly-worded political activity law may chill protected speech to a degree, the Court asserted, it cannot be said with confidence that such a chilling effect would be sufficient to justify striking the statute and barring the State from enforcing the statute against “conduct that is admittedly within its power to proscribe.”<sup>260</sup> The Court’s holding that “Little Hatch Acts” are constitutional despite their potential to chill protected speech remains the controlling rule of law; however, it must be noted that some states’ highest courts and Circuit Courts have

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252. *Broadrick* is the principal case addressing the constitutionality of “Little Hatch Acts”; however, see *supra* Part I.H.1 for a discussion of state and circuit court opinions on the “Little Hatch Acts” and the First Amendment.

253. *Broadrick*, 413 U.S. at 601.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 618 (stating that some restrictions may be susceptible to improper applications by restricting protected activities such as “the wearing of political buttons or the use of bumper stickers”).

259. *Id.*

260. *Id.* at 615.

found provisions of “Little Hatch Acts” to violate the First Amendment.<sup>261</sup>

## II. POST-HAMA, RIGID, INFLEXIBLE RESULTS REMAIN DUE TO THE HATCH ACT’S DISPARATE APPLICATION AND LACK OF GUIDANCE

HAMA made a number of changes to the Hatch Act that benefit proponents of free speech and open political discourse. However, HAMA removed prohibitions that had already been incorporated into agency employee policies and state regulations.<sup>262</sup> Even after HAMA, the differences between state, federal, and local agency approaches to prohibitions on certain political discourse are sufficient to maintain confusion over whether or not certain employees may or may not participate in political activities and when they may do so.<sup>263</sup> Furthermore, HAMA does not provide guidance for bi- and multi-state government agencies.<sup>264</sup> Additionally, HAMA still has not addressed the rigid penalty provisions that result in inconsistent enforcement of the Hatch Act at the state level.

### A. Confusion Over Applicable Regulations Deters Political Participation

While the changes enacted by HAMA addressed the concerns raised by critics of the Hatch Act and proponents of the bill,<sup>265</sup> further action is needed to effectuate the purposes of HAMA. The passage of HAMA indicates that Congress recognized the decreased need for government regulation of the political speech of government employees. However, HAMA lacks a mechanism for decreasing the confusion caused by overlapping prohibitions and disparate state regulations. When confronted with uncertainty regarding the Hatch Act’s application, employees may choose to pull out or question their

261. *See, e.g.*, *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005); *Callaghan v. City of S. Portland*, 76 A.3d 348, 349–50 (Me. 2013).

262. THE PORT AUTH. OF N.Y. & N.J., *SERVING IN THE PUBLIC INTEREST: THE GUIDE TO PORT AUTHORITY ETHICAL STANDARDS* (2000), *available at* <http://www.panynj.gov/corporate-information/foi/13255-O.pdf>. An example of this can be found in my discussion of the Port Authority of New York and New Jersey’s political activities rules. *See infra* Part II.B; *see also* Gely & Chandler, *supra* note 211, at 795 (discussing “Little Hatch Acts” that bar holding elected positions).

263. *See* Michael O’Connell, *Are You Violating the Hatch Act and You Don’t Even Know It?*, FED. NEWS RADIO (May 20, 2014, 4:23 PM), <http://www.federalnewsradio.com/?nid=521&sid=3623987&pid=0&page=2>.

264. *See infra* Part II.B.

265. *See supra* Part I.G.1–2.

candidacy, thereby reducing the number of potential candidates for political office as well as political participation by a wide variety of government employees.<sup>266</sup>

1. *Disparate State Regulations.*

Differences in the regulations enacted by multiple states contribute to overall confusion and a reduction of valuable political discourse. A 2007 survey of state “Little Hatch Acts” revealed that most workers in senior management and officials in state government believed that employees knew that the state laws existed but did not necessarily understand their application.<sup>267</sup> While some states<sup>268</sup> train their employees about the Hatch Act, others do not.<sup>269</sup> Additionally, as “enforcement authority, which itself varies from state to state, is often fragmented among several agencies, commissions, and offices,”<sup>270</sup> there is a great degree of variation in the awareness and understanding of employees regarding their ability to run for office. The survey found that sixty-two percent doubt that “confusion over the provisions of the [Little] Hatch Act has a ‘chilling’ effect that reduces participation in democracy.”<sup>271</sup> However, the authors of the study caution that it would be unwise to disregard the significance of those who disagree, and argue that “there is room for concern if a substantial minority of the workforce does not know the law.”<sup>272</sup>

There was also significant disagreement as to whether “the original purpose of the law—to protect civil servants from partisan coercion and to protect the public from political administration of the law—has been fulfilled.”<sup>273</sup> It is undeniable that public understanding of “Little Hatch Acts” and the actual effectiveness of the acts at fulfilling their intended purpose are less than ideal.<sup>274</sup> Additionally, individual state agencies may interpret perceived Hatch Act violations differently and

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266. See, e.g., Scot Andrew Pitzer & Jarrad Hedes, *Hatch Act Questions Plague DJ Race*, GETTYSBURG TIMES, Aug. 1, 2011, [http://www.gettysburgtimes.com/news/article\\_71131f0c-7b70-11e0-a987-001cc4c03286.html?Mode=jqm](http://www.gettysburgtimes.com/news/article_71131f0c-7b70-11e0-a987-001cc4c03286.html?Mode=jqm).

267. See Bowman & West, *supra* note 4, at 28–30.

268. Such states include Massachusetts, Nebraska, North Carolina, and Oregon. *Id.* at 28.

269. Such states include Maine, Minnesota, Georgia, and Michigan. *Id.* at 28.

270. *Id.* at 28.

271. *Id.* at 29.

272. *Id.* at 28.

273. *Id.* at 31. Bowman and West note that “most managers are either uncertain (19%) or disagree (38%)” as to whether the original purpose is fulfilled.

274. See *id.*

consider such acts in personnel decisions.<sup>275</sup> The Utah Supreme Court held that the “Hatch Act did not preempt state law, and thus the Department could voluntarily comply with the Act by making independent personnel decisions based on employee’s violation of the Act.”<sup>276</sup> Such responses have the potential to chill and confuse employees.

## 2. *Overlapping Prohibitions: The Uniform Code of Military Justice*

Confusion regarding the Act’s current application to military personnel provides an analogous context in which free speech may be stifled. Military personnel are often confused as to which statutory prohibitions against political participation apply to them.<sup>277</sup> They might be covered by the Hatch Act, their respective state’s “Little Hatch Act,” the Uniform Code of Military Justice (UCMJ), and/or Department of Defense Directives (DODD). Compounding the confusion are exceptions to the Hatch Act’s typical scope. For example, the Hatch Act does not apply to military personnel on active duty; the UCMJ applies to active military members; and the DODD applies various restrictions to specific employees.<sup>278</sup> However, while the Hatch Act does not cover military personnel on active duty,<sup>279</sup> there is rampant misinformation in media reporting regarding which military personnel are covered by the Hatch Act and the UCMJ/DODD, and what these regulations actually prohibit.

For instance, RedFlagNews.com reported a story with the headline: “TERRIFYING! Soldiers Donating to Tea Party Now Face Punishment Under the Uniform Code of Military Justice.”<sup>280</sup> The website continued to broadcast that two anonymous soldiers had been told during a pre-deployment briefing at Fort Hood that soldiers donating to evangelical Christian groups and members of the Tea Party would be subject to punishment because members of those groups were a threat to the nation.<sup>281</sup> The story was reported to a

275. See Utah Dep’t of Human Servs. v. Hughes, 156 P.3d 820 (Utah 2007).

276. *Id.*

277. See *Federal Employees FAQs*, *supra* note 194.

278. “Members of the uniformed services are not covered by the Hatch Act. However, if you are a reservist and a federal civilian employee, you are covered by the Hatch Act.” *Federal Employees FAQ*, *supra* note 194.

279. *Id.*

280. C. Eugene Emery Jr., *Rhode Island Tea Party Says Soldiers Who Donate to the Tea Party Face Military Discipline*, POLITIFACT R.I. (Oct. 30, 2013, 12:01 AM), <http://www.politifact.com/rhode-island/statements/2013/oct/30/rhode-island-tea-party/rhode-island-tea-party-says-soldiers-who-donate-te/>.

281. *Id.*



larger audience on FoxNews.com, yet the claims could not be substantiated after a preliminary investigation.<sup>282</sup> However, just as confusion over the Hatch Act's proper scope still exists, continued belief in the possibility of coverage for active military personnel may still exist without widespread clarifications.

In response to the RedFlagNews.com article, Department of Defense spokesman Lt. Col. J. Todd Breasseale stated "it's also a kind of un American potentially dangerous fear mongering . . . . Service members may donate to any legal cause they choose . . . as long as they do so within the boundaries of the Hatch Act . . . ." <sup>283</sup> Breasseale added that members of the military are permitted to participate in the political process as long as they do so out of uniform, off duty, and without any implication of government endorsement.<sup>284</sup> Members of the military do face limits on political activities; these regulations are in line with the Hatch Act in preventing the appearance of Department of Defense endorsement of candidates.<sup>285</sup> Under the Hatch Act, there are no restrictions to donating to political organizations.<sup>286</sup> Such incidents of misinformation surrounding the potential application of multiple regulations to one employee exemplify the unresolved issues with the public's understanding of the Hatch Act and other political activities laws.<sup>287</sup> The public understanding of the intended purpose of the Hatch Act not only affects the activities of government employees, but it likewise has an impact on the public perception and scrutiny applied to government employees.<sup>288</sup>

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282. *Id.*

283. *Id.* Note that here even the spokesman was not clear about which service members the Hatch Act applies to.

284. *Id.*

285. Department of Defense Directives 1325.6 and 1344.10 regulate the kinds of political speech servicemen may participate in and which activities are forbidden. Meanwhile, Articles 88 and 133 of the Uniform Code of Military Justice cover contemptuous language to the President or other officers and conduct unbecoming of an officer, respectively. John Loran Kiel, Jr., *When Soldiers Speak Out: A Survey of Provisions Limiting Freedom of Speech in the Military*, PARAMETERS Autumn 2007, at 69, 71–76, <http://cape.army.mil/repository/materials/WhenSoldiersSpeakOut.pdf>.

286. Emery Jr., *supra* note 280.

287. *See id.*

288. *See, e.g.*, Dave Helling, *Furlough Adds to the Anguish for Federal Workers*, KANSAS CITY STAR, Oct. 05, 2013, <http://www.kansascity.com/2013/10/05/4531641/furlough-adds-to-the-anguish-for.html#storylink=cpy>. According to a poll conducted by researchers at George Washington University, thirty-five percent had "very little confidence" in civilian federal workers, an increase of fourteen percentage points from just four years ago. *Id.* The researchers note that:

### B. Lack of Guidance for Bi- and Multi-State Agencies Results in Broad Prohibitions

Bi- and multi-state agencies are uniquely affected by the changes that come along with HAMA. Since HAMA, the Hatch Act does not apply to the employees of bi- or multi-state agencies unless the employees' salaries are fully funded by federal grants or loans.<sup>289</sup> However, state regulations frequently do not apply to bi-state or multi-state agencies either.<sup>290</sup> Therefore, many agencies must maintain their own internal policies.<sup>291</sup> Moreover, bi- and multi-state agencies fall outside the purview of both state and federal regulation unless the states included in the compact forming the agency have passed identical legislation.<sup>292</sup>

Two notable cases illustrate the principle that concurrent, identical legislation is necessary to bind a bi- or multi-state agency. First, the New Jersey Supreme Court in *Eastern Paralyzed Veterans Association v. City of Camden* illustrated this principle.<sup>293</sup> In *Eastern Paralyzed Veterans*, the court held that “only when the compact itself recognizes the jurisdiction of the compact states may it be subject to single state jurisdiction.”<sup>294</sup> Secondly, *King v. Port Authority of New York and New Jersey* illustrated that it is difficult to pass legislation with the cooperation of two state legislatures, even in instances where the laws of two states are very similar.<sup>295</sup> In that case, the District of New Jersey held that “when the compact states have similar, but not

Scandals involving employees at the Internal Revenue Service, the Justice Department, even the Secret Service reinforce the poor public perception of federal workers. But federal employees say the images severely distort the work most of them do. There are bad apples in the private sector, they say, yet they aren't routinely offered up for public ridicule.

*Id.*

289. Such agencies fall under the category of state and local agencies. See *Covered State and Local Employees*, *supra* note 9. Therefore, the changes made by HAMA apply to them.

290. See *King v. Port Authority*, 909 F. Supp. 938, 944–45 (D.N.J. 1995); *E. Paralyzed Veterans Ass'n v. City of Camden*, 545 A.2d 127 (N.J. 1988).

291. The Port Authority provides an interesting case study because it has a highly developed political activities policy that mirrors that of the original Hatch Act. See *infra* Part II.B.

292. See *King*, 909 F. Supp. at 944–45; *E. Paralyzed Veterans Ass'n*, 545 A.2d 127.

293. 545 A.2d at 132.

294. *Id.*

295. *Id.*; see also N.J. STAT. ANN. § 32:1-19 (West 2015); N.Y. UNCONSOL. LAW § 6419 (McKinney 2015). Concurrent legislation requires both state legislatures to consult before passage and to agree on the entirety of the bill or regulation. For practical reasons, it is unlikely that both states will pass concurrent legislation without overwhelming support and necessity.

identical laws, the laws only apply to the bi-state agency upon an explicit showing of agreement by both states that the laws are intended to apply to the agency.”<sup>296</sup> The court explained that to allow a single state’s law to apply to the agency would mean allowing one state to affect the operation of a bi-state agency, thereby “forcing upon it additional duties or responsibilities.”<sup>297</sup> Regardless of the reasoning, the end result is a large degree of unpredictability regarding the applicable law.

Even where states enact identical legislation, bi-state and multi-state agencies might still fall outside the provisions of their “Little Hatch Acts.” For instance, New York’s<sup>298</sup> Public Officers Law, which sets out the ethics laws for state employees, defines “state officer[s] or employee[s]” as “members or directors of public authorities, other than multi-state authorities, public benefit corporations and commissions at least one of whose members is appointed by the governor, who receive compensation other than on a per diem basis, and employees of such authorities, corporations and commissions.”<sup>299</sup> The New York State Joint Commission on Public Ethics is tasked with the investigation of potential violations of New York’s “Little Hatch Act.”<sup>300</sup> Executive Law Section 94, which established the Joint Commission, sets forth the duties of the commission as carrying out the duties set forth in the section (including carrying out the Civil Service Law) with respect to elected officials, state employees and officials as defined by Public Officers Law Sections 73 and 73-a, and various other individuals.<sup>301</sup> This definition, in conjunction with

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296. *King*, 909 F. Supp. at 944–45 (citing *E. Paralyzed Veterans Ass’n*, 545 A.2d 127).

297. *Id.*

298. With many employees from federal, state, local, and bi-/multi-state agencies, New York and New York City are prime examples of areas with large numbers of government employees. New York, California, and Texas are the three states with the largest numbers of state and local government employees (all exceeding one million). In March 2012, New York had 1,326,990 state and local employees, 79.2% of which were local employees. Lisa Jessie & Mary Tarleton, *2012 Census of Governments: Employment Summary Report*, U.S. CENSUS BUREAU (Mar. 6, 2014), [http://www2.census.gov/govs/apes/2012\\_summary\\_report.pdf](http://www2.census.gov/govs/apes/2012_summary_report.pdf).

299. N.Y. PUB. OFF. LAW § 73(1)(i)(iv) (McKinney 2012).

300. *Tips and Complaints*, N.Y. ST. JOINT COMMISSION ON PUB. ETHICS, <http://www.jcope.ny.gov/complaint/tipsandcomplaints.html> (last visited Feb. 16, 2015). New York’s “Little Hatch Act” is codified in Civil Service Law § 107. N.Y. CIV. SERV. LAW § 107 (McKinney 2007). The commission is also tasked with investigating potential violations of the Lobbying Act (codified in N.Y. LEGIS. LAW art. 1-A (McKinney 2007)) and New York’s ethics laws (codified in N.Y. PUB. OFF. LAW §§ 73, 73-a, 74 (McKinney 2012)).

301. N.Y. EXEC. LAW § 94 (McKinney 2013).

Section 94 and New York's "Little Hatch Act," explicitly excludes multi-state agencies such as the Port Authority from the ethical and political activities regulations set forth by the state.<sup>302</sup> Even without such explicit language excluding multi-state agencies, such regulations would not be applied to bi-state or multi-state employees due to the lack of concurrent legislation.<sup>303</sup>

Consequently, while state and local employees must look to their respective state and municipal laws after HAMA, agencies like the Port Authority may implement their own rules.<sup>304</sup> Agencies may also need to comply with some state regulations.<sup>305</sup> For example, several states prohibit all employers from taking adverse action against employees for engaging in limited protected political activities.<sup>306</sup> However, absent concurrent state regulations, individual agencies are left to their own devices, which may be to maintain the status quo with strict policies or to enact minimal restrictions and inform covered employees of their Hatch Act status.<sup>307</sup>

Bi-state and multi-state agencies may have strong incentives to avoid public scrutiny, as such scrutiny can influence the agencies' dealings with other organizations or encourage legislation by the governing state(s).<sup>308</sup> For agencies such as the Port Authority that attempt to avoid partisanship, the appearance of impropriety or connection to one party or state's politics could be particularly damaging.<sup>309</sup> The appearance of partisanship can be particularly damaging for agencies operating under a compact requiring agreement between member-states because such compacts depend upon consensus.<sup>310</sup>

302. *Id.*

303. *See* King v. Port Authority, 909 F. Supp. 938, 944–45 (D.N.J. 1995); E. Paralyzed Veterans Ass'n v. City of Camden, 545 A.2d 127 (N.J. 1988).

304. *See generally* King, 909 F. Supp. 938.

305. *See HAMA Guidance*, *supra* note 115.

306. Eugene Volokh, *Private Employees' Speech And Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012).

307. For a comparison of different agency policies, see *infra* notes 317–19 and accompanying text.

308. *See, e.g.*, Glenn Blain, *State Sen. Brad Hoylman to Introduce Bill to Make Port Authority More Transparent*, N.Y. DAILY NEWS, Feb. 10, 2014, <http://www.nydailynews.com/news/politics/legislator-port-authority-transparent-article-1.1609001>.

309. Scott A. Coffina, *The Perilous Legal Landscape of 'Bridgegate'*, LEGAL INTELLIGENCER, January 15, 2014, <http://www.thelegalintelligencer.com/id=1389793430678/The-Perilous-Legal-Landscape-of-Bridgegate%3Fmcode=0&curindex=0&curpage=1>.

310. *See id.* In light of probes involving the "Bridgegate" scandal, it is particularly pertinent to stress such a policy internally and maintain a workforce that functions

To compensate for the uncertainty of disparate state regulations, some agencies have chosen to implement strict prohibitions on political participation by their employees. The Port Authority is one such agency, and its policy is more stringent than those of New York, New Jersey, and the Hatch Act.<sup>311</sup> Its political activities policy states:

Given the unique bi-state character of the Port Authority, independent of state and local elections, the agency since its inception has carried out its responsibilities in a non-partisan manner for the public good. Accordingly, partisan political involvement is inappropriate. Employees must not use their official authority or influence to interfere with elections or nominations for any federal, state, county, or municipal office or actively work to affect their results. *Employees may, however, pursue non-partisan candidacies for membership on the board of a public agency or institution, such as a Board of Education, provided that their department or office head and the Director of Human Resources decide that the holding of such local office will not conflict or interfere with the discharge of their Port Authority duties.*

In addition, employees may not directly or indirectly induce or counsel other employees to make any political contribution and *may not actively participate personally or in support of partisan political campaigns.* There is no intent to interfere with employee rights as citizens to vote and express personal views on political subjects and

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“above the fray.” With heightened internal review and scrutiny from both New York and New Jersey, the Port Authority has sufficient reasons to maintain a strict political activities policy.

311. New York Civil Service Law prohibits state employees from making recommendations based on political opinions or affiliations. N.Y. CIV. SERV. LAW § 107 (McKinney 2007). It makes prohibitions against compelling those in civil service to make political contributions or render political service and protects such employees from being removed or prejudiced against for refusing to do so. *Id.* Prohibitions are also made against inquiring about an employee’s affiliations as a test of fitness for holding office (making exceptions for inquiry about subversive affiliations); using authority or official influence to compel or induce another officer or employee to pay a political assessment, subscription or contribution; and using or promising to use official authority or influence to influence votes, political action, employment, or salary. *Id.* New Jersey law prohibits employees in the career or senior executive service from, directly or indirectly, using their position to control or affect political action of another person or engage in political activity during working hours. N.J. ADMIN. CODE § 4A:10-1.2(a) (2014). It goes on to prohibit employees in the career, senior executive, or unclassified service whose principal employment is in connection with a program financed in whole or in part by federal funds from candidacy in partisan elections from using authority to influence votes, and coercing the political contribution of a subordinate under the Hatch Act. *Id.* § 4A:10-1.2(b). Presumably, New Jersey’s prohibitions that incorporate the pre-HAMA Hatch Act’s wording are ineffective in light of HAMA; however, the failure to update the statute post-HAMA further emphasizes the need for states to reexamine their own “Little Hatch Acts.”

candidates. Employees may make reasonable voluntary campaign contributions to any regularly constituted political or campaign organization for its general expenditures. By “reasonable” is meant an amount not so much as to make the employee a prominent contributor, identified with either the candidate or the party.<sup>312</sup>

The clauses regarding candidacy and active participation in partisan political campaigns are particularly notable.<sup>313</sup> While the allowance of “Hatch Act-covered” state and local government employees to run for partisan office is new, the prohibitions against state and local employees’ active participation in politics or in support of partisan political campaigns were lifted in 1974.<sup>314</sup> As state laws do not apply to these employees, the agency is free to operate under its own, possibly more stringent policy and apply it to all employees regardless of their respective Hatch Act coverage.<sup>315</sup> Indeed, the Port Authority justifies its prohibitions in the first few lines by emphasizing the unique “bi-state character” of the Port Authority and its operation outside local politics to carry out “its responsibilities in a non-partisan manner for the public good.”<sup>316</sup>

Not all bi-state and multi-state agencies have opted to enact more stringent political activities laws, and many have limits solely on political contributions and conflicts of interest. For instance, the Delaware River Port Authority (between New Jersey and Pennsylvania) forbids the solicitation or receipt of contributions from any other employee on behalf of any candidate and the solicitation or acceptance of contributions while on premises.<sup>317</sup> The Bi-State Development Agency (between Missouri and Illinois) bans the use of agency property or money in connection with personal political activities and requires that any personal political activity not be done in connection to the agency.<sup>318</sup> Meanwhile, the Washington Metropolitan Area Transit Authority (between Virginia, Maryland,

312. THE PORT AUTH. OF N.Y. & N.J., *supra* note 262, at 15–16 (emphasis added).

313. *Id.*

314. For a discussion of the 1974 changes, see *supra* Part I.D.

315. See *King v. Port Authority*, 909 F. Supp. 938, 944–45 (D.N.J. 1995); *E. Paralyzed Veterans v. City of Camden*, 545 A.2d 127 (N.J. 1988).

316. See THE PORT AUTH. OF N.Y. & N.J., *supra* note 262, at 15.

317. DEL. RIVER PORT AUTH., BYLAWS OF THE DELAWARE RIVER PORT AUTHORITY 19–20 (2014), available at <http://www.drpa.org/pdfs/DRPA%20By%20Laws.pdf>.

318. BI-STATE DEV. AGENCY D/B/A METRO, METRO CODE OF CONDUCT 5 (2013), available at [http://www.corporatecompliance.org/Portals/1/PDF/Resources/past\\_handouts/CEI/2013/W10\\_Handout1CodeofConduct.pdf](http://www.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/CEI/2013/W10_Handout1CodeofConduct.pdf).

and the District of Columbia) only forbids conflicts of interest.<sup>319</sup> The disparity in the extent to which employees at various bi-state and multi-state agencies are regulated creates the potential for confusion.

For agencies not covered by a state “Little Hatch Act,” creating an internal political activity policy often means “over-covering” employees who do not work in connection with federally funded programs. Agencies, like other employers, have the latitude to adopt policies restricting the solicitation of funds or use of company computers, resources, or time for political activities.<sup>320</sup> For example, the Port Authority’s agency-wide policy goes above and beyond what is required under both the Hatch Act and the state political activities policy.<sup>321</sup> In the alternative, agencies may also choose to enact policies that are far more lenient, leaving the responsibility to individual employees to comply with Hatch Act requirements. The unpredictable enactment of divergent policies reifies confusion over the proper application of the Hatch Act, prompting the need for further discussion and reform.

The diversity of Hatch Act approaches raises several questions for future research. First, should bi- and multi-state agencies simply try to comply with one state’s rules? If so, then which states should they look to for guidance? If the agency tries to comply with, for example, both New York and New Jersey laws, they may fall into a situation where the policies they are implementing are stricter than either states’ prohibitions individually. Similar questions regarding the proper scope and application of the Hatch Act’s provisions are also raised in discussions over the differences in the Hatch Act’s penalty provisions. As evidenced by both the case law and diverse policies implemented by individual agencies, the tenuous relationship between bi- and multi-state agencies’ policies and their respective states’ “Little Hatch Acts” necessitate a conversation about the states’ roles in agency policy formation post-HAMA.

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319. WASHINGTON METRO. AREA TRANSIT AUTH., COMPACT 4 (2009), available at [http://wmata.com/about\\_metro/docs/Compact\\_Annotated\\_2009\\_final.pdf](http://wmata.com/about_metro/docs/Compact_Annotated_2009_final.pdf).

320. See D. Albert Brannen, *Political Speech in the Workplace: Employers Beware*, TLNT.COM (July 25, 2012), <http://www.tlnt.com/2012/07/25/political-speech-in-the-workplace-employers-beware/>.

321. Port Authority employees not covered by the Hatch Act are restricted by the agency-wide policy. See THE PORT AUTH. OF N.Y. & N.J., *supra* note 262, at 15–16.

### C. Rigid Employee Penalty Provisions Produce Undesirable Results

The disparity between remedies for state and federal employees under the Hatch Act also produces undesirable results, such as unduly strict punishment for minor offenses.<sup>322</sup> The penalties for federal employees provide more lenient punishment options for noncompliance.<sup>323</sup> Meanwhile, upon a ruling that they must be terminated, state employees must be fired or the agency risks losing funding if the employee remains in their employ for the following eighteen months.<sup>324</sup> If a state employee is found to have committed a violation, punishment is limited to termination, whereas federal employees may face a thirty-day suspension or \$1000 fine.<sup>325</sup> The federal government does not have the authority to directly impose punishments upon state and local employees for their violations;<sup>326</sup> therefore, as previously mentioned, such employees do not have the option of more lenient punishment.

Concurrent state and federal regulation of political activities complicates compliance and increases the likelihood of accidental Hatch Act violations. State and local employees who violate the Hatch Act may also run afoul of their own state regulations.<sup>327</sup> Since the Hatch Act does not preempt state or municipal laws that restrict the political activities of state and local employees, such employees may have to comply with numerous laws.<sup>328</sup> For example, in New York City, a city employee whose salary is fully federally funded may simultaneously be subject to the Hatch Act, New York City's Conflicts of Interest Law,<sup>329</sup> and New York State's "Little Hatch Act."<sup>330</sup> As such, the employee may be punished under multiple provisions and subject to multiple investigations. A provision

322. *See supra* Part I.G.1-2 (comparing the penalty provisions for state and local employees and federal employees).

323. *See supra* Part I.G.1 (discussing the new penalty provisions under HAMA).

324. 5 U.S.C. § 1506 (Supp. 2013).

325. *See* 5 U.S.C. § 1215 (Supp. 2013).

326. The federal government's authority to regulate state and local employees is limited to its spending power under the Commerce Clause. *See* U.S. CONST. art I, § 8, cl. 3.

327. *See HAMA Guidance, supra* note 115.

328. Sung Mo Kim, *Applicability of the Hatch Act to Municipal Officers and Employees*, N.Y. ST. B.A. MUN. LAW., Fall 2006, at 15, available at [http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal\\_ethics\\_laws\\_ny\\_state/Applicability\\_of\\_Hatch\\_Act\\_\(SKim\).pdf](http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/Applicability_of_Hatch_Act_(SKim).pdf).

329. N.Y.C. Charter, ch. 68, §§ 2600-2606, available at <http://www.nyc.gov/html/doi/downloads/pdf/chapter68.pdf>.

330; N.Y. CIV. SERV. LAW § 107 (McKinney 2007).



regarding statutory priority or a uniform penalty provision would perhaps alleviate some of the confusion connected to coverage by multiple provisions.

#### D. Criticisms that HAMA Remains Unduly Restrictive on Some Law Enforcement Officers

One of the major arguments for post-HAMA Hatch Act reform stems from the disparate impact on law enforcement and emergency workers, such as the over 3000 sheriffs<sup>331</sup> in the country. State and local law enforcement agencies receive numerous federal grants for equipment, new hires, and special programs.<sup>332</sup> Before HAMA, the receipt of these federal grants prevented many qualified deputies from running for sheriff because they fell under the Hatch Act's restriction on those who work in connection with federally funded programs.<sup>333</sup> While HAMA lifted the candidacy restriction for most law enforcement officers, other restrictions under the Hatch Act remain, including those prohibiting the public endorsement of candidates.<sup>334</sup>

The National Sheriffs' Association (NSA)<sup>335</sup> argues that two new provisions must be added to the post-HAMA Hatch Act in order for recent reforms to be effective.<sup>336</sup> First, the NSA argues that a specific provision exclusively covering sheriffs is necessary to remedy the disparate impact of Section 1502(a)(1) of the Hatch Act, which prohibits state or local employees from using "official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office."<sup>337</sup> The NSA proposes a provision that would clarify the applicability of the law to allow

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331. The National Sheriffs' Association estimates that there were 3083 sheriffs in the United States as of January 2012. *Frequently Asked Questions*, NAT'L SHERIFF'S ASS'N, <http://www.sheriffs.org/content/faq> (last visited Feb. 16, 2015).

332. See *Community Oriented Policing Services: Grants & Funding*, U.S. DEPARTMENT JUST., <http://www.cops.usdoj.gov/Default.asp?Item=46#CAMP> (last visited Feb. 16, 2015).

333. See *Congress Repeals Restriction on Fire Fighters Running for Political Office*, *supra* note 202.

334. See *Hatch Act Modernization Act of 2012 Fact Sheet*, NAT'L SHERIFF'S ASS'N, <http://www.sheriffs.org/sites/default/files/uploads/documents/GovAffairs/Hatch%20Act%20Legislation%20Fact%20Sheet%2001.09.13.pdf> [hereinafter *NSA Fact Sheet*] (last visited Feb. 16, 2015).

335. The National Sheriffs' Association's criticisms are essential to understanding that, despite recent reforms, there remains a disparate impact on many government employees.

336. *NSA Fact Sheet*, *supra* note 334.

337. 5 U.S.C. § 1502(a)(1) (Supp. 2013).

sheriffs to participate in political activities of other candidates in their official capacity and clarify what political activities sheriffs may participate in, such as publicly endorsing a candidate or speaking at political events and participating in fundraisers.<sup>338</sup> The NSA argues that Section 1502(a)(1) “is overreaching and ambiguous when applied to the Office of Sheriff.”<sup>339</sup> As the nature of the sheriff’s office requires them to always be on duty and uniformed, they argue, the Hatch Act has a disparate impact on this group.<sup>340</sup>

The NSA’s second proposal is to impose a statute of limitations to file a claim for an alleged violation of the Hatch Act.<sup>341</sup> The reasoning behind this suggestion is that “individuals have used potential violations that occurred in years past by filing a claim with the OSC as a political attack against an incumbent sheriff during an election cycle.”<sup>342</sup> While it is only one example of a group advocating for change in the wake of HAMA, the NSA is a representative example of the need for reforms. In fact, reforms have been proposed to implement many of the NSA’s proposals.<sup>343</sup>

On February 13, 2013, a bill entitled the State and Local Law Enforcement Hatch Act Reform Act of 2013 (2013 Reform Act) was introduced in the House of Representatives.<sup>344</sup> The bill mirrors the criticisms of the NSA by proposing that 5 U.S.C. § 1502 be amended to add:

(d) Subsection (a)(1) does not prohibit a sheriff from participating in political campaigns for, or endorsing, political candidates running for elective office by—

- (1) attending or speaking at political campaign rallies or events;
- (2) holding or sponsoring political fundraisers; or
- (3) appearing on political advertisements, including print, radio, television, or any other form of advertising.<sup>345</sup>

The bill further purports to add a statute of limitations for law enforcement officers by amending Section 1504 to include:

(b) Statute of Limitations for Law Enforcement Officers. With respect to paragraphs (1) and (3) of section 1502(a), the Special

338. *NSA Fact Sheet*, *supra* note 334.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *See, e.g.*, H.R. 659, 113th Cong. (2013).

344. *Id.*

345. *Id.*

Counsel may not present any charges against a law enforcement officer under subsection (a) after the end of the 6-month period beginning on the later of—

- (1) the date of the alleged violation of paragraph (1) or (3) of section 1502(a), as the case may be; or
- (2) the date of the enactment of the State and Local Law Enforcement Hatch Act Reform Act of 2013.<sup>346</sup>

The bill was referred to the House Committee on Oversight and Government Reform on February 13, 2013; however, no progress has been made since.<sup>347</sup>

By examining the disparate state regulations and their impact on bi- and multi-state agencies, the implications of HAMA's liberalization of its state and local provisions come to light. Without one overarching regulation, confusion over coverage can lead to a chilling effect. Another example of such confusion occurs with overlapping prohibitions, as seen in the discussion of the UCMJ and DODD. Additionally, certain undesirable relics from the pre-HAMA Hatch Act remain: the rigid penalty provisions for state and local employees and provisions disparately impacting law enforcement officers including a provision barring the public endorsement of candidates. This Part has discussed the criticisms and suggestions of law enforcement groups, including the NSA, to provide background for workable solutions.

### III. ELIMINATING CONFUSION AND UNIFYING DISPARATE PROHIBITIONS TO FOSTER HEALTHY POLITICAL DISCOURSE

Although there is no single simple solution to the problems created by the post-HAMA Hatch Act, a combination of minor statutory amendments could help alleviate some of the widespread confusion regarding the Hatch Act's updated scope and requirements. Policymakers drafting such statutory reforms must consider the Hatch Act within the context of the relatively recent and diverse state regulations that it brought about. Since most of the harms caused by the Hatch Act's current application stem from confusion over coverage, any successful proposal must successfully clarify the Hatch Act's scope. Possible options for such proposals include new state promulgated guidelines, a statutory exemption for lower level

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346. *Id.*

347. *H.R. 659 (113th): State and Local Law Enforcement Hatch Act Reform Act of 2013*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/hr659> (last visited Feb. 16, 2015).

government employees, discretionary penalty provisions, and the addition of a statute of limitation for claims brought pursuant to the Hatch Act's existing provisions. These changes would clarify the Hatch Act's scope and prevent abusive use of the Hatch Act's punitive provisions during contested campaigns.

**A. States Must Provide Guidance to Overcome Wide Disparities in Hatch Act Enforcement**

One potential way to overcome the confusion generated by the disparate enforcement of the Hatch Act and "Little Hatch Acts" would be on the state level. Individual states should provide independent, bi- and multi-state, and local agencies with guidelines for crafting their own political activities policies to compensate for disparities in the application of the Hatch Act and "Little Hatch Acts." Promulgation of guidelines by the state would be the most efficient way to assimilate state and federal Hatch Act interpretations for use by agencies in crafting their policies. As the state becomes the primary regulator of state and local employees, it assumes the responsibilities of informing its employees of which activities will put the employee at risk and which employees are further regulated.

The states should provide clarity for agencies by issuing guidelines that agencies could use when crafting their employment policies. The states have the best mechanism for facilitating predictable standards after HAMA. States should clarify who is covered, when they are covered, what kind of activity is covered, and what the penalties are. State governments are in a position of authority to which state agencies will look to regulate the political activities of their employees. Such action could also provide an opportunity for state legislatures to evaluate whether their current statutory prohibitions reflect the recent changes effectuated by HAMA. It is unlikely that they have reevaluated their "Little Hatch Acts" in the interim.

Individual agencies with their own political activities policies may also wish to use the state law as a baseline, if not the guidelines themselves. This is particularly true for bi- and multi-state agencies. In such cases, the participant states should convene with the agencies to craft policies to comply with both or all states' regulations. States could help by specifying whether all agencies must comply with their rule or whether agencies are free to have more stringent guidelines. Creating a uniform baseline avoids the vast disparities that may result from agencies crafting their own policies.

A baseline state policy for agencies would decrease confusion at the agency level. For employees of individual agencies, it would

decrease questions regarding coverage and limitations. For bi- and multi-state agencies, convening between the states may still result in discrepancies between the state and agency policies, as some individual states may be stricter than others.<sup>348</sup> However, without state guidelines, it is likely that agencies will craft the most conservatively worded political activities policy possible to avoid running afoul of state policy. As mentioned, concurrent legislation is needed for a law to apply to a bi- or multi-state agency.<sup>349</sup> If the states can agree on the provisions, concurrent legislation may be a simpler solution. Overall, the passage of HAMA should be the catalyst for states to examine their current policies and issue guidelines to the agencies under their purview.

### **B. Exempting all Lower-Level Employees from the Hatch Act's Prohibitions**

In addition to a state-level solution, another solution to the disparate impact of the current Hatch Act provisions would be to exempt lower-level employees at the federal, state, and local levels. Removing state and local employees completely from the Hatch Act's coverage would prevent any confusion between the federal Hatch Act and "Little Hatch Acts." However, a more effective provision for maintaining the original legislative intent of the Hatch Act would be a provision exempting all lower-level or ministerial employees at the state and federal levels. Exempting lower-level employees would also remove the unintended effects of chilling the speech and political participation of myriad employees. Therefore, it is necessary to implement a rule that changes the essence of the regulation to whether or not the employee is in a supervisory or policy-related position. Federal employees are already separated into more and less restricted categories; accordingly, it would not be unreasonable to further divide employees by civil service grade.

Exempting all lower-level employees from the Hatch Act's provisions would address employees categorically by their responsibilities and the likelihood that their political activity would evoke impropriety and coercion. This provision would have a broader effect than exempting all state and local employees by applying to both state and federal employees. Lower-level employees are less likely to raise the appearance of impropriety by running for

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348. See generally Gely & Chandler, *supra* note 211, at 791–96.

349. See *King v. Port Authority*, 909 F. Supp. 938, 944–45 (D.N.J. 1995); *E. Paralyzed Veterans v. City of Camden*, 545 A.2d 127 (N.J. 1988).

office, but more likely to be coerced by their policy-making superiors.<sup>350</sup> One potential solution would be to protect clerical workers from coercion through political activity rules that apply to their supervisors only, and prevent policy workers from running for public office. However, it must be noted that this change may only be nominal, as most of the remaining provisions of the Hatch Act overlap with state political activities laws.<sup>351</sup> Therefore, the solution to the current policy of over-regulating lower-level employees may ultimately lie with the states.

In order to most effectively exempt lower-level employees, mirror-image provisions to the proposed federal laws exempting lower-level employees should also be passed in the states. Many state regulations already take into account whether an employee is a clerical employee or a policy employee based on civil service grade.<sup>352</sup> While the Hatch Act further regulates particular agencies involved in law enforcement and other sensitive areas,<sup>353</sup> the interest of the Hatch Act can be furthered by altering prohibitions against political activity to apply to those with hiring and firing abilities or in supervisory positions. Preventing lower-level employees from campaigning or displaying support for a candidate does not further the interest of avoiding coercion. Additionally, policy-making employees are more likely to incite the patronage provisions of the Hatch Act, as they have inherent conflicts of interest,<sup>354</sup> which could affect the integrity of an election. Meanwhile, workers who do not work in policy-making positions but rather in clerical or law enforcement positions may wish to run for partisan local elections. For instance, in holding that the Oklahoma legislature had the latitude to restrict certain employees' partisan political activities and not others, the Court in *Broadrick* empowered state legislatures to make their own determinations when covering state employees under "Little Hatch Acts."<sup>355</sup> As such, state legislatures can and should regulate different types of state employees based on whether their work deals with policy or clerical work. It is

350. In fact, protecting federal employees from coercion was one of the primary motivations behind the 1939 Act. See Bloch, *supra* note 5, at 271–74.

351. For a discussion of state "Little Hatch Acts" and their provisions, see *supra* Part II.A.1.

352. See, e.g., N.J. ADMIN. CODE § 4A:10-1.2 (2014) (distinguishing provisions as applied to employees in the career, senior executive, and unclassified services).

353. See *Further Restricted Employees*, *supra* note 57.

354. For example, if they work in connection with a program whose funding would be allocated by the candidacy in question or if their solicitation of funds could be seen as coercion.

355. *Broadrick v. Oklahoma*, 413 U.S. 601, 606–08 (1973).

time to return to the model of protecting employees from coercion and to move away from excessive policing of otherwise unobtrusive activities.

Since the Hatch Act's inclusion of state and local employees in 1940, Congress took steps through both the FECA Amendments and HAMA towards removing many of the prohibitions imposed on such employees.<sup>356</sup> While HAMA effectively eliminated the prohibition against running for partisan office for most state and local employees, the Hatch Act's other provisions, such as those covering the use of official authority or influence to affect the results of an election or solicitation of funds for political purposes, currently cover all state and local employees who work in connection with federal funds.<sup>357</sup> As many states already prohibit these activities, the next logical step is to eliminate state and local employees from the Hatch Act altogether and leave their regulation to the states.<sup>358</sup> Now that the prohibition against running for partisan office for most Hatch Act-covered state employees has been lifted, perhaps the position of the Hatch Act in the lives of state and local employees has reached a turning point. As the majority of the remaining prohibitions overlap with state political activities policies, HAMA may have been just one more step in a fifty-year history of phasing state and local employees out of federal regulation.

### C. Adding a Discretionary Penalty Provision

On the federal level, the Hatch Act should be amended to include a discretionary penalty provision for state and local employees and to encourage discourse between the state and federal governments regarding penalties. The penalty provisions under HAMA do not account for the possibility of various degrees of offenses for state and local employees, even though the Act does so for federal employees.<sup>359</sup> One solution could be to create a mirror image of the federal penalties for state employees.<sup>360</sup> Although the federal government cannot enforce penalties directly against state and local government employees for Hatch Act violations, it may suggest that a state adopt a modified penalty structure. Alternatively, the federal

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356. For a discussion of FECA and HAMA's impact on state and local employees, see *supra* Parts I.D, I.G.

357. See *Covered State and Local Employees*, *supra* note 9.

358. See *supra* Part I.H.1 (discussing the provisions included in "Little Hatch Acts").

359. For a discussion of state penalty provisions, see *supra* Part I.G.2.

360. See 5 U.S.C. § 7326 (Supp. 2013).

government may amend its own penalty provisions to account for more minor offenses by state and local employees.

The federal government and state legislatures should additionally engage in communication regarding enforcement of penalty provisions for violations of the Hatch Act and “Little Hatch Acts.” For example, when an employee violates both the Hatch Act and a “Little Hatch Act,” states should have a clear statute where only one of the potential penalties would be enforced. Further, the federal government should alter its current penalty provision for state and local employees by replacing the current policy with a modified fee structure proportional to the offense, with fines capped at two times the employee’s annual salary at the time of the violation.<sup>361</sup>

By addressing the issue of the disparate impact of the penalty provisions on state and local employees and agencies, these proposals would address one of the more problematic areas under the Hatch Act that remains untouched by HAMA. In altering the penalty provisions for federal employees, HAMA neglected to reconsider the penalty imposed on any other federally funded agency hiring the terminated employee within eighteen months of their violation.<sup>362</sup> This provision effectively blacklists public employees for any finding by the MSPB that a violation exists. This may be reduced by the implementation of a modified penalty structure, which would only impose the penalty on other agencies in the most serious of cases. Even if the current penalty provision is not modified, the provision deterring other agencies from hiring employees terminated for violations of the Hatch Act should nonetheless be modified. One way to implement this change would be to impose a lower penalty for the hiring agency’s more minor violations or abbreviating the eighteen-month bar on hiring to three to six months. These changes would address the serious disparity in the treatment of state and local

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361. See 5 U.S.C. § 1506 (Supp. 2013). Section 1506 currently requires that when the MSPB determines that a violation made by a state or local employee warrants removal,

[T]he Board shall make and certify to the appropriate federal agency an order requiring that agency to withhold from its loans or grants to the State or local agency to which notice was given an amount equal to 2 years’ pay at the rate the officer or employee was receiving at the time of the violation.

*Id.* However, this policy only accounts for two possibilities: a recommendation of removal or of non-removal. The provisions providing for penalties for federal employees, as amended by HAMA, provide a range of punishments which scale by the severity of the offense. 5 U.S.C. § 1215 (Supp. 2013).

362. § 1506.



employees and the gap in the revisions to the federal penalty provisions made by HAMA.

#### D. Adding a Statute of Limitations

Lastly, the federal Hatch Act must be amended to include a statute of limitations to encourage efficient and timely enforcement and prevent abuse. The passage of the 2013 Reform Act, which seeks to reduce the restrictions on political activity for law enforcement officers and impose a statute of limitations for reporting violations made by law enforcement officers, would improve on the current provisions.<sup>363</sup> While the 2013 Reform Act proposed a statute of limitations applicable to law enforcement officers, a global statute of limitations is necessary to prevent abuse of the Hatch Act and promote prompt reporting of violations.<sup>364</sup> However, the proposed statute of limitations is rather short (six months) and limited in scope.<sup>365</sup> A more practical solution would be to impose a one-year statute of limitations on the entire Hatch Act. This would discourage abuse of the provisions for political gain and allow sufficient time for incidents to come to light. Additionally, a global statute of limitations would decrease confusion and lend uniformity to the law because it would be applicable to all “Hatch Act-covered” employees.

Critics of the post-HAMA Hatch Act have proposed a statute of limitations.<sup>366</sup> In addition to the proposals raised by the NSA, Ward Morrow, Assistant General Counsel for the American Federation of Government Employees, argues that “[t]he biggest flaw of the Hatch Act [is that] there is no statute of limitations. The fact that there isn’t one means [the OSC] can go back to the [Andrew] Johnson administration . . . to look for violations. At some point, people need to move on and close the books.”<sup>367</sup> Without a statute of limitations, there is a risk of abuse of process; for instance, those seeking to discredit a candidate or retaliate against a fellow employee could dig up potential past violations, or fail to report known violations until an advantageous time.<sup>368</sup> Statutes of limitations also serve the valid purpose of promoting the prompt reporting of incidents.<sup>369</sup>

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363. H.R. 659, 113th Cong. (2013).

364. *Id.*

365. *Id.*

366. *See NSA Fact Sheet, supra* note 334.

367. Ambrose, *supra* note 182.

368. *See, e.g., NSA Fact Sheet, supra* note 334.

369. *See generally* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453 (1997).

A statute of limitations provision in the Hatch Act would reduce confusion and produce predictability in the enforcement of the law. Without a statute of limitations, one might be uncertain about whether an action is considered a violation if a substantial period of time has passed since the incident. A statute of limitations would also reduce the occurrence of claims filed for the purposes of political attacks for all employees and encourage prompt reporting of incidents to the OSC.<sup>370</sup> Prompt reporting would also help in substantiating claims, as the general purpose of a statute of limitations is to aid in gathering such evidentiary support.<sup>371</sup> Memories may fade, employees who witness a violation may leave or retire, and e-mails or materials may be lost if the violation is not brought up for a significant period of time.<sup>372</sup> With a statute of limitations in place, the Hatch Act would become a more effective mechanism to protect our civil service system from corruption.

#### **E. Taking Realistic Steps Toward the Realization of Greater Predictability and Enforcement of the Hatch Act**

While the aforementioned proposals would begin to effectively address the harms of the post-HAMA Hatch Act, they would not be easy to actually pass into law. Wholesale change may not pass as a single law so soon after HAMA; however, a law addressing the more pressing and practical issues of a statute of limitations, in conjunction with State actions clarifying “Little Hatch Acts” and rules for bi- and multi-state agencies would be both realistic and manageable. The aforementioned 2013 Reform Act could improve the current provisions of the Hatch Act.<sup>373</sup> This bill was introduced in the House and referred to the House Oversight and Government Reform Committee on February 13, 2013.<sup>374</sup> The bill has sat in committee and there has been no activity regarding the bill since.<sup>375</sup> While this bill

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370. Candidates are likely to drop out of a race where allegations regarding Hatch Act violations are made; therefore, having a statute of limitations in addition to clear standards for who is covered by the Hatch Act would help to prevent wasted time and effort on the part of candidates. *See, e.g.*, Pitzer & Hedes, *supra* note 266; *see also* Dan Chmielewski, *Joe Moreno Drops Out of AD-69; Blames Us for Asking about The Hatch Act*, LIBERAL OC (Sept. 27, 2012), <http://www.theliberoloc.com/2012/09/27/joe-moreno-out-ad-69-race/>.

371. *See generally* Ochoa & Wistrich, *supra* note 369.

372. *See id.*

373. H.R. 659, 113th Cong. (2013).

374. *Id.*

375. *H.R. 659 (113th): State and Local Law Enforcement Hatch Act Reform Act of 2013*, *supra* note 347.

only applies to law enforcement officers, it is a step in the right direction. The passage of laws with narrower scope may be the push needed to eventually implement change on a larger scale.<sup>376</sup> If the 2013 Reform Act were to pass, it would implement crucial provisions such as a statute of limitations and lifting the ban on campaigning for state and local law enforcement officers, who remain the most vulnerable to being covered under the Hatch Act's provisions after HAMA.

### CONCLUSION

HAMA is an important turning point in the regulation of government employees and their political participation. Exempting many state and local employees from the Hatch Act's prohibitions is an important recognition of the value of political discourse and the ability of the states to enact policies that best mitigate the coercion and deceptive political practices. While the federal government cannot force the states to adopt any particular regulation in the wake of HAMA, states should recognize the necessity to reevaluate their current policies. States should enforce policies that are either consistent and predictable, or at least flexible enough to avoid unnecessary confusion and agency costs.

Realistic changes to the Hatch Act and its progeny can be made on two levels: federal and state. The highest priority for amendments to the Hatch Act should be given to modifying the penalty provisions for state and local employees and a statute of limitations. Through the implementation of a statute of limitations and a discretionary penalty provision on the federal level, there would be greater predictability of enforcement and the proportionality of punishments given to federal employees through HAMA will benefit state and local employees as well. Then, states should consider the compatibility of their current "Little Hatch Acts" with the post-HAMA Hatch Act and individual agency policies. In doing so, they should consider the effects on bi- and multi-state agencies and consult with other states in multi-state compacts. The history of statutory amendments and pressure for reform of the Hatch Act illustrate a great appreciation for free speech. However, now is not the time to appreciate the effects of HAMA, but to bring the principles of HAMA to fruition without sacrificing the accountability of public employees who participate in politics. The manageable changes suggested in this Note would ameliorate the most pressing implementation and enforcement issues

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376. H.R. 659.

post-HAMA and lead to a more sustainable policy for the regulation of political activities for public employees.