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## Restricting Public Employees' Political Activities: Good Government or Partisan Politics?

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# ARTICLE

## RESTRICTING PUBLIC EMPLOYEES' POLITICAL ACTIVITIES: GOOD GOVERNMENT OR PARTISAN POLITICS?

*Rafael Gely\* and Timothy D. Chandler\*\**

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## I. INTRODUCTION

Even in the brass-knuckle world of Illinois politics, the fittest need to abide by just a few simple rules to thrive.

Rule No. 1: Never pick up the phone to squeeze campaign money from a company that has public contracts.

Rule No. 2: Always delegate the money-collecting dirty work to a flunky.

Rule No. 3: Glare, seethe, or stare daggers if you must, but never utter a syllable that could be construed as a threat and captured by a hidden recording device.<sup>1</sup>

The creation of an apolitical public service has been a goal of government in the United States almost since the nation's inception.<sup>2</sup> As the above quote illustrates, however, achieving this

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1. Bob Sexter & Rick Pearson, *Santos Bungled Art of Fundraising*, *Experts Say*, CHI. TRIB., May 5, 1999, § 2, at 1.

2. In 1801, for example, Thomas Jefferson issued an executive order advocating the political neutrality of public employees. Senator Rives stated:

The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions active parts in elections of the public functionaries, whether of the General or of the State Governments . . . The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.

W.C. RIVES, A SPEECH TO THE UNITED STATES SENATE ON A BILL TO PREVENT THE INTERFERENCE OF CERTAIN FEDERAL OFFICERS IN ELECTIONS, CONG. GLOBE, 25th Cong., 3d Sess. 407 (1839), reprinted in 8 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 98 (1898) [hereinafter RICHARDSON]. See also Henry Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510, 510 (1962) (describing the early development of federal restrictions on the political activities of public employees and noting that legislation

ideal might be difficult given the practical realities of politics. On the one hand, the dangers associated with allowing politics to interfere in the delivery of public services have been clearly recognized.<sup>3</sup> On the other hand, there exists an “untold” realization that participation in party politics, and even in public service, must sometimes be rewarded, and that the dispensation of political favors is one way of doing so.<sup>4</sup>

Generally, government has taken two approaches to regulate the political involvement of public employees. One approach has been to enact laws restricting the ability of public employees to engage in various political activities (e.g., campaign, solicit contributions, or run for political office).<sup>5</sup> This is exemplified at the federal level by the Hatch Act,<sup>6</sup> though similar regulations exist at the state level.<sup>7</sup> The second approach involves regulating political involvement via the power of public employers to hire and fire based on an employee’s political preferences, i.e., patronage.<sup>8</sup>

Over the years, both methods of political control have been challenged in the courts as infringing upon the constitutional rights of public employees.<sup>9</sup> In evaluating their constitutionality, the courts have adopted contrasting positions. Generally, courts have

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began as early as 1907 with the passage of Civil Service Rule D).

3. See John B. Webster & Jeffrey W. Kastle, *The Hatch Act: Should It Be Repealed or Reformed?*, GOV'T UNION REV., Winter 1998, at 25, 27-28 (restrictions on the political activities of public employees have been advanced as necessary to eliminate the “spoils” system, to end political coercion, to promote efficiency and fairness, and to eliminate the appearance of impropriety).

4. George Plunkitt remarked:

“I ain’t up on sillygisms, but I can give you some arguments that nobody can answer. First, this great and glorious country was built up by political parties; second, parties can’t hold together if their workers don’t get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there’ll be h[ell] to pay.”

WILLIAM L. RIORDON, PLUNKITT OF TAMMANY HALL 13 (1963); see also Cynthia Grant Bowman, *The Law of Patronage at a Crossroads*, 12 J.L. & POL. 341, 343 (1996) (relating the Supreme Court’s decision in *Elrod v. Burns*, 427 U.S. 347 (1976), in which the Court recognized that elected governments have an interest in ensuring the political loyalty of employees).

5. Refer to Part II.A.1 *infra* (describing the development of legislation aimed at restricting the political involvement of public employees).

6. 5 U.S.C. §§ 7321-7326 (1994 & Supp. IV 1999).

7. Refer to Part II.B *infra* (detailing the differences and similarities between the Hatch Act and similar legislation at the state level).

8. Refer to Part III.A-B *infra* (discussing the practice of patronage and the treatment that courts have given to its practice).

9. Refer to Part II.A.2 *infra* (discussing cases pertaining to the regulation of political activities by public employees) and Part III.B *infra* (discussing cases dealing with the practice of patronage).

been unsympathetic to government's defense of patronage.<sup>10</sup> The Supreme Court has essentially prohibited adverse employment decisions based on political affiliation, subject to a narrow set of exceptions.<sup>11</sup> In taking this markedly pro-employee view, the courts rejected the argument raised by public employers that patronage serves some valuable objective and that it is necessary for the effective and efficient operation of American government.<sup>12</sup> Instead, they have adopted what might best be described as a "partisan politics" model, which views patronage as a mechanism for political control that has both costs and benefits.<sup>13</sup> Using this model, courts have concluded that, except for a limited set of circumstances, the negative social consequences of patronage outweigh its benefits and, thus, justify limitations on its use.<sup>14</sup>

In contrast, courts have taken a much more pro-employer approach with regard to the regulation of public employees' political activities, often upholding government restrictions on public employees' political activities.<sup>15</sup> Courts have justified these restrictions on the basis of efficiency, impartiality, and the protection of public employees' interests.<sup>16</sup> We refer to this set of justifications as the "good government" model.

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10. See *Elrod v. Burns*, 427 U.S. 347, 368-69 (1976) (holding that the preservation of a democratic process does not justify the dismissal of employees who choose to exercise their freedom of expression).

11. See *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 720-21 (1996) (holding that decisions prohibiting patronage discharges extend to prohibit the discharge of independent contractors); *Rutan v. Republican Party*, 497 U.S. 62, 79 (1990) (pointing out that the prohibition against discharge based on patronage also extends to promotion, transfer, recall, and hiring decisions); *Branti v. Finkel*, 445 U.S. 507, 518 (1980) (noting that patronage may be exercised only if party affiliation is required for the effective performance of the office involved); *Elrod*, 427 U.S. at 367 (holding that employees may be discharged under patronage practices only if the employees held policy making positions).

12. Refer to notes 149-57 *infra* and accompanying text (discussing the justifications offered by the government to defend its patronage practices and explaining why courts rejected the justifications).

13. Refer to notes 185-95 *infra* and accompanying text (pointing out that while courts have recognized that an efficient operation of government is a legitimate governmental interest, they have nevertheless placed significant restrictions on the practice of patronage).

14. Refer to notes 145-64 *infra* and accompanying text (detailing the treatment of patronage cases and the restrictions that have been imposed on the practice).

15. See, e.g., *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973) (holding that restricting the political activities of public employees is constitutionally permitted if it is justified by the need to provide efficient government); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 99 (1947) (holding that Congress can constitutionally restrict active partisan political activity of federal employees).

16. Refer to notes 55-57 *infra* and accompanying text (listing the justifications supporting the prohibitions on the political participation of public employees).

In this Article, we argue that the courts' differential treatment of patronage and restrictions on public employees' political activities is unwarranted because both are mechanisms of political control and, thus, should be treated similarly. When governments implement restrictive Hatch Act-type legislation, they are controlling the ability of public employees to be politically involved to a similar degree as would occur if they were conditioning public employment on prospective employees' political affiliations.<sup>17</sup> Further, we posit that laws regulating the political activities of public employees are motivated by the desire of legislators to achieve re-election and, thus, manipulate the political process as much as occurs under a patronage system.<sup>18</sup> In fact, despite rhetoric to the contrary, a review of the politics surrounding passage of legislation restricting government employees' political activities reveals that politics, not good government, are driving policymaking in this important area of public employment law.<sup>19</sup>

The Article starts by reviewing, in Part II, the history of the regulation of political activities by public employees, and in Part III, the regulation of patronage. Part IV develops the argument that both sets of regulations, although justified on different grounds, are better understood as political control mechanisms. Part V provides some empirical evidence for this argument by examining voting patterns on federal legislation restricting public employees' political activities. Part VI discusses the relationship of these laws to public sector unionization. Part VII concludes the Article.

## II. REGULATING THE POLITICAL ACTIVITIES OF PUBLIC EMPLOYEES: THE HATCH ACT AND BEYOND

### A. *Federal Regulation: The Hatch Act*

1. *Early Regulatory Efforts.* Regulation of federal employees' political activities dates to the early days of the Republic.<sup>20</sup> The Jefferson Administration, for example, was

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17. Refer to notes 29-37 *infra* and accompanying text (discussing the enactment of the Hatch Act and the prohibitions it proscribed on the ability of public employees to participate in partisan politics).

18. Refer to Part V.B.1 *infra* (discussing the motives behind Hatch Act-type legislation).

19. Refer to Part V.B.1 *infra*.

20. For example, in 1791, Congress attempted to pass legislation "to prevent Inspectors [of distilled spirits], or any officers under them, from interfering, either directly or indirectly, in elections, further than giving their own votes." 2 ANNALS OF

steadfast in its belief that the aims of efficiency and neutrality in government service could best be achieved by restricting public servants' involvement in the political affairs of the nation.<sup>21</sup> By means of executive order, Jefferson declared that officers of the government could not attempt "to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it."<sup>22</sup> Efforts to foster political neutrality continued through a series of similar Executive Orders issued during the 1800s.<sup>23</sup> These early regulatory efforts are noteworthy because they were designed to eliminate abuses associated with political patronage.<sup>24</sup>

The restrictions contained in the various Executive Orders were later compiled in Civil Service Rule I,<sup>25</sup> which prohibited merit system employees from using their official authority or influence either to coerce the political action of any person or body or to interfere with any election.<sup>26</sup> In 1907, President Roosevelt amended Rule I to include a provision explicitly stating that individuals under the scope of the Rule could take no active part in political management or in political campaigns.<sup>27</sup> During

CONG. 1876 (1791). Ten years later, in 1801, Thomas Jefferson called for the political neutrality of government employees stating that federal employees should not "attempt to influence the votes of others nor take any part in the business of electioneering." RICHARDSON, *supra* note 2, at 99.

21. See RICHARDSON, *supra* note 2, at 98-99 (noting the issuance of an order restricting the participation of federal officers in elections promulgated by President Jefferson in 1801).

22. *Id.* at 99.

23. For example, in 1886, President Grover Cleveland warned federal employees by means of executive order "against the use of their official positions in attempts to control political movements in their localities." *Id.* at 494 (discussing several executive orders issued during the 1870s).

24. See Thomas H. Roback, *Patronage, Merit, and the Bill of Rights: Evolution and Current Trends in Public Employment*, 16 PUB. ADMIN. Q. 326, 330 (1992) (pointing out that the first efforts to regulate the individual political activity of public employees and the regulation of patronage occurred around the same time). The connection between the prohibition of political activities and patronage is exemplified by the Civil Service Act of 1883, Pendleton Act, ch. 27, 22 Stat. 403 (1883). The Pendleton Act created a civil service system that intended to promote greater efficiency in government service via the merit selection of qualified candidates. See *id.* § 2. The Act's primary goal was to curtail the patronage system by placing specific prohibitions on the political activities of covered public servants. See *id.* The Act stated that no individual by reason of his public position was under an obligation to make a political contribution, see *id.*, nor could he use his position to coerce anyone to act or refrain from acting in a partisan manner. See *id.* The Act also prohibited covered employees from soliciting or receiving political contributions from fellow employees. See *id.* § 14.

25. 5 C.F.R. § 1.1 (1939), *reprinted in* 2 P.A.R. 3 (1975).

26. See *id.*

27. Exec. Order No. 642, *reprinted in* 1 PRESIDENTIAL EXECUTIVE ORDERS 61

this period, the Civil Service Commission, the agency in charge of enforcing Civil Rule I, applied the rule to over 3000 cases, creating a large body of case law in this area.<sup>28</sup>

Ongoing concerns about the politicization of public service led Congress to enact the Hatch Act in 1939.<sup>29</sup> Section 9(a) of the Hatch Act was basically a restatement of Civil Service Rule I and provided:

It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any other agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects.<sup>30</sup>

The penalty for violating the Hatch Act was removal from office unless the enforcing agency determined by unanimous vote that a violation did not warrant removal, in which case a minimum penalty of suspension without pay for thirty days was imposed.<sup>31</sup> In addition to covering federal employees, the Act applied to state and local employees whose principal employment was connected to an activity financed by federal loans or grants.<sup>32</sup>

After the passage of the Hatch Act, numerous problems arose with its application.<sup>33</sup> Perhaps the most contentious aspect of the law was a provision in Section 9(a) prohibiting active participation in political management or in political campaigns.<sup>34</sup> The problem was largely definitional, because the language “any

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(1944).

28. See Rose, *supra* note 2, at 510-11. Among the activities found to violate Rule I were running for partisan political office as a member of a political party, soliciting funds for political campaigns, and writing a single letter to the newspaper in opposition to a particular candidate for office. See Michael Bridges, Comment, *Release the Gags: The Hatch Act and Current Legislative Reform—Another Voice for Reform*, 22 CAP. U. L. REV. 237, 244 (1993).

29. Act of Aug. 2, 1939, Pub. L. No. 76-252, 53 Stat. 1147 (1939) (current version at 5 U.S.C. § 7321 (1994)).

30. *Id.* § 9(a).

31. See 5 U.S.C. § 7326 (1994).

32. See *id.* § 1501(4).

33. See Bridges, *supra* note 28, at 246 (noting that part of the language in the statute was too vague).

34. In particular, the distinction between the right to express an opinion about a political candidate and the prohibition against “any active part in political management or in political campaigns” was unclear in the 1939 legislation. See *id.*



active part in political management or in political campaigns” was not defined within the statute.<sup>35</sup> Congress attempted to remedy this problem in the 1940 amendments to the Hatch Act, which defined the term “active part in political management or in political campaigns” by referencing the Civil Service Commission rulings prior to June 19, 1940 under Civil Service Rule I.<sup>36</sup> By doing so, the 1940 Amendments incorporated the approximately 3000 rulings of the Civil Service Commission into the definition of the terms “active part in political management or in political campaigns.”<sup>37</sup>

2. *Judicial Reaction.* The constitutionality of the Hatch Act has been challenged in several important cases. The first case to reach the Supreme Court was *United Public Workers of America v. Mitchell*.<sup>38</sup> *Mitchell* involved the termination of a public employee because of his participation in election day activity as a poll watcher and paymaster for other party workers.<sup>39</sup> The Court phrased the issue to be decided as whether

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35. *See id.*

36. *See* Act of July 19, 1940, ch. 640, 54 Stat. 767 (1940). In particular, Section 15 provided that:

[T]he provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

*Id.*

37. *See* Rose, *supra* note 2, at 513-14 (explaining that by amending the Hatch Act, Congress incorporated by reference all the administrative determinations under Rule I). The amendments incorporating the prior rulings of the Commission into the Hatch Act did not solve the definitional problem. In particular, Section 9(a) continued to provide a blurred distinction between prohibited and permissive behavior. For example, accepted political activities under the Act included registering and voting, privately expressing political opinions about candidates and issues, and belonging to political organizations without taking an active part. *See Project: Collective Bargaining and Politics in Public Employment*, 19 UCLA L. REV. 887, 968 (1972). Proscribed behaviors included soliciting contributions for or endorsing candidates in partisan elections, being candidates in partisan elections, or distributing campaign materials in partisan elections. *See id.* Thus, under these regulations, federal employees were allowed to speak publicly on political subjects, but not at a political gathering; attend a political convention, but not serve as a delegate; allowed to sign a nominating petition, but not circulate it; allowed to place a bumper sticker on their car, but could not give a bumper sticker to a friend. *Cf. id.* (noting that public employees were allowed to privately express opinions about issues and candidates and issues and to take a passive role in political organization membership).

38. 330 U.S. 75 (1947).

39. *See id.* at 94.

“a breach of the Hatch Act and Rule I of the [U.S. Civil Service] Commission can, without violating the Constitution, be made the basis for disciplinary action.”<sup>40</sup>

In answering this question, the Supreme Court first found that the Constitution granted Congress the authority to enact such legislation.<sup>41</sup> In particular, the Court noted that Congress had the power to enact, within reasonable limits, regulations defining the scope of permissible political activities engaged in by employees.<sup>42</sup> The Court held that it would defer to legislative discretion, unless such legislation “passe[d] beyond the generally existing conception of governmental power.”<sup>43</sup> According to the Court, these powers must be determined from “practice, history, and changing educational, social, and economic conditions.”<sup>44</sup>

In determining whether Congress had the power to enact such legislation, the Court discussed the objectives underlying the Hatch Act’s regulation of political activities.<sup>45</sup> The Court found that the Hatch Act was intended to eliminate the corrupting influence that political patronage was having on the political process and public service.<sup>46</sup> According to the Court, the corrupting influence of patronage was manifested in the loss of efficiency, neutrality, and the possibility of coercing an employee into political activity he or she did not wish to pursue.<sup>47</sup> In conclusion, the Court reasoned that, once legitimate ends were established, Congress needed only to achieve those ends through reasonable means, which the Court found Congress had done.<sup>48</sup>

In *United States Civil Service Commission v. National Ass’n of Letter Carriers*,<sup>49</sup> the Court again confronted a challenge to the Hatch Act.<sup>50</sup> The case involved a complaint by various employee groups seeking injunctive relief because they alleged that the Hatch Act’s prohibitions found in 5 U.S.C. § 7324(a)(2) were unconstitutional on its face.<sup>51</sup> In particular, the Act was

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40. *Id.*

41. “If, in [the judgment of Congress and the President], efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.” *Id.* at 99.

42. *See id.* at 102.

43. *Id.*

44. *Id.*

45. *See id.* at 98-99, 103 (pointing out that the Hatch Act was passed in part to maintain the integrity and efficiency of public service).

46. *See id.* at 99, 101.

47. *See id.* at 101.

48. *See id.* at 101-02.

49. 413 U.S. 548 (1973).

50. *See id.* at 550.

51. *See id.* at 551.

challenged as impermissibly vague and overbroad.<sup>52</sup> It was argued that in defining “active part in political management or in political campaigns” by incorporating the 3000 plus decisions previously decided by the Commission, Congress had made it constitutionally unreasonable for a reasonable person to know from reading the statute which actions were prohibited and which were permitted.<sup>53</sup>

Following *Mitchell*, the Court held that the appropriate standard by which the regulation should be judged is a balancing test, where the scales to be balanced involve the individual's interest in pursuing partisan political activity versus the interests of the government as an employer in promoting efficiency and neutrality.<sup>54</sup> Having re-affirmed the standard established in *Mitchell*, the Supreme Court proceeded to enunciate five governmental interests supporting the restrictions imposed under the Hatch Act.<sup>55</sup> As it had done before, the Court recognized the validity of government's interests in efficiency and neutrality, as well as the protection of the employee from being coerced into voting or taking part in political activities against his will.<sup>56</sup> The Court also accepted the government's interest in maintaining the appearance of impartial administration of the law, and in avoiding the possibility that public service would be turned into a powerful political machine.<sup>57</sup>

The efficiency argument is not without limits. In *Pickering v. Board of Education*,<sup>58</sup> the Supreme Court addressed the government's ability to restrict public employees' freedom of speech.<sup>59</sup> As in *Letter Carriers*, the Court had to decide what kind of restrictions the government can impose on the free speech rights of public employees.<sup>60</sup> *Pickering* involved a high school

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52. *See id.* at 568.

53. *See id.* at 570-71.

54. “The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.” *Id.* at 564 (alterations in original) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).

55. *See id.* at 564-67.

56. *See id.* at 566-67 (agreeing with the holding in *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), and pointing out the importance of maintaining neutrality in government and protecting public employees from coercion).

57. *See id.* at 565.

58. 391 U.S. 563 (1968).

59. *See id.* at 563.

60. *See id.* at 565 (addressing whether a school teacher's dismissal for writing a letter to a newspaper criticizing the Board of Education and district superintendent's actions violated the teacher's First Amendment rights).

teacher who had been fired for his comments in a local newspaper criticizing the Board of Education and district superintendent's handling of certain financial matters.<sup>61</sup> The School Board defended the teacher's termination on efficiency grounds.<sup>62</sup> According to the defendants, the teacher's statements were not only false, but allowing them would "tend to foment 'controversy, conflict and dissension' among teachers, administrators, the Board of Education, and the residents of the district."<sup>63</sup> Recognizing the tension between the individual's right to free speech and the government's interest in maintaining orderly and effective public service, the Court adopted a balancing test to determine when government may restrict a public employee's freedom of speech.<sup>64</sup>

The *Pickering* Court considered four factors in deciding whether the government may restrict a public employee's speech.<sup>65</sup> first, whether the speech affects the government's ability to maintain discipline by superiors or harmony among coworkers;<sup>66</sup> second, whether the employment relationship between a speaker and her employer involves "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning";<sup>67</sup> third, whether the speech hinders an employee's ability to perform his job;<sup>68</sup> and finally, whether the speech affects an employer's ability to provide government services in an effective manner.<sup>69</sup> The Court answered all four questions of the inquiry in the negative, concluding that the dismissed teacher's right to speak on an issue of public concern outweighed the school board's interest in maintaining the efficient operation of its school system.<sup>70</sup>

The *Pickering* case and its progeny stand as a nice contrast to the *Mitchell* and *Letter Carriers* decisions. Taken together,

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61. *See id.* at 564, 566.

62. *See id.* at 564-65.

63. *Id.* at 566-67.

64. *See id.* at 568-69 (adopting a balancing test to use when analyzing whether a public employee's free speech rights have been violated).

65. *See id.* at 569-73.

66. *See id.* at 569-70.

67. *Id.* at 570.

68. *See id.* at 572-73.

69. *See id.* at 571-73.

70. *See id.* at 565, 574-75. The Court has continued to adhere to *Pickering* in similar types of cases. *See Connick v. Myers*, 461 U.S. 138, 140, 150-53 (1983) (following the *Pickering* balancing test and clarifying the scope of permissible restrictions on public employees' speech by considering additional factors); *Rankin v. McPherson*, 483 U.S. 378, 388, 390 (1987) (following *Pickering*, but adding an additional criterion to be weighed in the balancing test—the level of responsibility accorded the employee).

these cases demonstrate that public employees' speech can be restricted based on government's interest in efficiently providing public services.<sup>71</sup> Free speech outweighed efficiency in *Pickering*, but not in *Mitchell* and *Letter Carriers*.<sup>72</sup> Government's interest in efficiency is at the center of the debate regarding restrictions on public employee's political activities, and as these two lines of cases illustrate, its validity is somewhat unclear.<sup>73</sup>

3. *Recent Legislative Developments.* The basic principles embedded in the Hatch Act remained unaltered for fifty-odd years after its enactment,<sup>74</sup> despite several attempts to amend it.<sup>75</sup> In 1993, however, Congress passed, and President Clinton

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71. See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 555-56 (1973) (reaffirming that if Congress decides that providing efficient government services requires prohibiting federal employees from engaging in active partisan politics, then such prohibitions are constitutional); *Pickering*, 391 U.S. at 568 (developing a balancing test that allows a government to set restrictions on an employee's speech only if the government's efficiency losses are greater than the encroachment on the individual's freedom of speech); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 99 (1947) (concluding that Congress can constitutionally restrict active partisan political activity by federal employees if providing an efficient public service requires such restrictions).

72. Compare *Pickering*, 391 U.S. at 572-73 (finding that a schoolteacher's speech rights had been violated because the teacher's right to free speech on a matter of public concern was greater than the Board of Education's loss in efficiency), with *Letter Carriers*, 413 U.S. at 564 (applying the *Pickering* balancing test and concluding that the limits Congress placed on the partisan political activities by federal employees under the Hatch Act are within constitutional boundaries given a congressional determination that the limits are necessary in order to provide efficient government services), and *Mitchell*, 330 U.S. at 99 (finding a federal employee's constitutional rights were not violated because a determination had been made by Congress that efficiency needs required that restrictions be placed on the partisan political activities engaged in by federal employees).

73. See *Letter Carriers*, 413 U.S. at 564, 567 (finding that government's efficiency needs justified the limitations placed on the rights of federal employees to participate in partisan political activities); *Pickering*, 391 U.S. at 572-73 (finding that the government's efficiency needs were not greater than the free speech rights of employee); *Mitchell*, 330 U.S. at 94, 99 (noting that the issue is whether the right to free speech through partisan political activity is greater than the need for an efficient government, and concluding that congressional determination that government efficiency needs are greater is constitutionally valid).

74. Various minor amendments have been enacted over the years, however. For example, in 1950 the sanction for violating the Hatch Act was reduced from automatic termination to the possibility of suspension without pay. See Act of Aug. 25, 1950, ch. 784, 64 Stat. 475, 475 (1950) (codified as amended at 5 U.S.C. § 7326 (1994)) (amending the Hatch Act). In 1974, Congress again amended the Hatch Act by lessening its application to state and local employees. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 401, 88 Stat. 1263, 1290 (codified as amended at 5 U.S.C. § 1503 (1994)) (amending the Hatch Act to allow state and local employees to be candidates in nonpartisan elections).

75. Legislation to reform the Hatch Act was proposed several times between 1940 and 1992. See 46 CONG. Q. ALMANAC: 101ST CONGRESS 2ND SESSION 1990, at 408 (1991) [hereinafter 1990 CONG. Q. ALMANAC] (discussing failed efforts by

signed into law, the Hatch Act Reform Amendments.<sup>76</sup> In general, the Hatch Act Reform Amendments of 1993 lifted the restrictions on active participation in political management or political campaigns by federal employees.<sup>77</sup> The two major portions of the amended Act are 5 U.S.C. §§ 7323 and 7324.<sup>78</sup> Under § 7323, covered employees are explicitly permitted to actively participate in political management and political campaigns.<sup>79</sup> Section 7323, however, still prohibits employees from using their official authority to interfere with or affect the results of an election and from running as a candidate for election to a partisan political office.<sup>80</sup> Employees who are subject to the Hatch Act are also prohibited from knowingly soliciting, accepting, or receiving a political contribution from any person, unless such person meets the following criteria: (1) a member of the same federal labor organization; (2) not a subordinate employee; and (3) the contribution is for the multi-candidate political committee of such federal labor organization.<sup>81</sup>

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Congress in 1990 and previous years to amend the Hatch Act). On two occasions, such legislation passed both houses of Congress but was subjected to a presidential veto. *See id.* President Ford vetoed the Federal Employees' Political Activities Act of 1976 arguing that "pressures 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." *See* Statement by President Gerald R. Ford Upon Vetoing the Hatch Act Amendments Bill, 2 PUB. PAPERS 1114, 1115 (Apr. 12, 1976). Similar arguments were raised by President Bush in vetoing the Hatch Act Reform Amendments of 1990. *See* Statement by President George Bush to the House of Representatives Upon Returning Without Approval the Hatch Act Reform Amendments of 1990, 1 PUB. PAPERS 830, 831 (June 15, 1990) (commenting that enactment of the Hatch Act Reform Amendments would result in "unstated but enormous pressure to participate in partisan political activity").

76. *See* 49 CONG. Q. ALMANAC: 103RD CONGRESS 1ST SESSION 1993, at 201 (1994) [hereinafter 1993 CONG. Q. ALMANAC]. House Bill H.R. 20, introduced by Reps. William L. Clay and John Myers, was passed on March 3, 1993 and as amended by the Senate on September 21, 1993. *See id.*; 139 CONG. REC. H82 (daily ed. Jan. 5, 1993). The Senate version, S. 185, which was basically the one enacted into law, was introduced by Sen. John Glenn and passed the Senate on July 20, 1993. *See* 1993 CONG. Q. ALMANAC, *supra*, at 201.

77. *See* Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, § 2, 107 Stat. 1001, 1001-04 (1993) (codified as amended at 5 U.S.C. §§ 7321-7326 (1994)).

78. *See* 5 U.S.C. §§ 7323-7324 (1994 & Supp. IV 1999) (authorizing federal employees to engage in most political activities, but also prohibiting the participation in these activities while on duty or under other specified conditions).

79. *See id.* § 7323(a).

80. *See id.* § 7323(a)(1), (3).

81. *See id.* § 7323(a)(2)(A)-(C). Interestingly, the House version of the bill was more permissive than the Senate version that was ultimately enacted into law. *See* 1993 CONG. Q. ALMANAC, *supra* note 76, at 201, 203. For example, the House-passed bill would have permitted federal employees to solicit contributions on behalf of partisan candidates, whereas the proposed Senate Hatch Act amendments permitted solicitation only on behalf of the multi-candidate political action committees for

Section 7324 of the 1993 Amendments attempts to clarify the line between prohibited and permissible activities by banning political activities while an employee is on duty in any room or building occupied in the discharge of official duties and while wearing a uniform or official insignia or using any government vehicle.<sup>82</sup>

Proponents of the 1993 reforms defended lifting the restrictions on political activities on three grounds. First, they argued that by making a clear distinction between on-the-job and off-the-job conduct, the 1993 amendments would make the Hatch Act tougher than before because the amendments would prohibit all political activity while on duty.<sup>83</sup> Second, supporters argued that the reforms would either eliminate or clarify rules that were confusing, nonsensical, and often contradictory.<sup>84</sup> Finally, they argued that all of this would be accomplished without compromising the impartial and nonpolitical administration of the government and the protection for federal employees against political abuses because the reforms would continue to specifically prohibit political coercion and manipulation.<sup>85</sup>

In contrast, opponents of the reforms saw a significant danger in lifting the restrictions, namely the unleashing of "irresistable [sic] pressures to become a captive soldier in political armies inside and outside the government."<sup>86</sup> They argued that the legislation "would undercut the neutral, nonpartisan administration of programs by civil servants [and that] [i]t would nourish a working environment where politics replaces merit."<sup>87</sup> Opponents pointed out that the Hatch Act, rather than oppressing federal employees, protected them against inside and outside coercion.<sup>88</sup>

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federal employees' organizations. *See* 139 CONG. REC. S8604-05 (daily ed. July 13, 1993) (statement of Sen. Glenn). Similarly, while the House-passed bill retained the Hatch Act restrictions only on the political activities of employees of the Federal Election Commission, the Senate bill retained those restrictions for a much larger group of employees. *See* 139 CONG. REC. H6817 (daily ed. Sept. 21, 1993) (statement of Rep. Clay) (including within its restrictions Senior Executive Services members, law enforcement, and intelligence agency employees, among others).

82. *See* 5 U.S.C. § 7324(a)(1)-(4).

83. *See* 139 CONG. REC. H6817 (daily ed. Sept. 21, 1993) (statement of Rep. Clay); 139 CONG. REC. S8941 (daily ed. July 20, 1993) (statement of Sen. Glenn).

84. *See* 139 CONG. REC. S8941 (daily ed. July 20, 1993) (statement of Sen. Glenn).

85. *See* 139 CONG. REC. H6819 (daily ed. Sept. 21, 1993) (statement of Rep. Gilman); *id.* at 6817 (statement of Rep. Clay).

86. S. REP. NO. 103-57, at 24 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1825, 1825 (minority views of Sens. Roth, Cohen and Cochran).

87. *Id.*

88. *See id.* at 25, *reprinted in* 1993 U.S.C.C.A.N. 1825, 1826 (arguing that the

An analysis of Hatch Act complaints brought before and after the 1993 amendments suggests that the experience under the amendments has been generally positive. Table 1 shows the number of Hatch Act complaints filed between 1986 and 1998 and the number of those complaints that resulted in disciplinary action being brought by the Office of the Special Counsel (OSC) before the U.S. Merit Systems Protection Board (MSPB).<sup>89</sup>

**Table 1**  
**Hatch Act Complaints and Charges**  
**1986-1998<sup>a</sup>**

Fiscal Year	Number of Complaints	Number of Cases Brought By the OSC Before the MSPB (Percentage of the Total Number of Complaints)
1986	83	2 (2.4%)
1987	78	6 (7.7%)
1988	80	11 (13.8%)
1989	102	5 (4.9%)
1990	149	1 (0.7%)
1991	92	3 (3.3 %)
1992	137	13 (9.5%)
1993	134	24 (17.9%)
1994	130	9 (6.9%)
1995	104	3 (2.9%)
1996	108	3 (2.8%)
1997	75	3 (4.0%)
1998	83	0 (0%)

<sup>a</sup> See United States Office of Special Counsel, A Report to Congress from the U.S. Office of Special Counsel, for Fiscal Year 1998, at 18 tbl.5 (1998); United States Office of Special Counsel, A Report to Congress from the U.S. Office of Special Counsel, for Fiscal Year 1995, at 13 (1995); United States Office of Special Counsel, A Report to Congress from the U.S. Office of Special Counsel, for Fiscal Year 1992, at 15 (1992); United States Office of Special Counsel, A Report to Congress from the U.S. Office of Special Counsel, for Fiscal Year 1991, at 15 (1991); United States

Hatch Act functions as a civil rights act for federal employees by ensuring, for example, that they are not pressured by their supervisors to participate in political activities).

89. The OSC is the federal investigative and prosecutorial agency with jurisdiction under the Hatch Act to enforce restrictions on political activity by government employees. See 5 U.S.C. §§ 1211(a), 1216(a)(1)-(2), (c) (1994).



Office of Special Counsel, A Report to Congress from the U.S. Office of Special Counsel, for Fiscal Year 1990, at 14 (1990); United States Office of Special Counsel, A Report to Congress from the U.S. Office of Special Counsel, for Fiscal Year 1989, at 14 (1989); United States Office of Special Counsel, A Report to Congress from the U.S. Office of Special Counsel, for Fiscal Year 1988, at 2, 10 (1988); United States Office of Special Counsel, A Report to Congress from the U.S. Office of Special for Fiscal Year 1987, at 2 (1987); United States Office of Special Counsel, A Report to Congress from the U.S. Office of Special Counsel, for Fiscal Year 1986, at 12 (1986).

As shown in Table 1, there has been a steady decline in the filing of Hatch Act complaints since the effective date of the amendments in February, 1994.<sup>90</sup> From a high of 134 complaints in 1993, the number of complaints has declined almost every fiscal year to a low of 75 complaints in 1997, followed by a slight rise in 1998 to 83 complaints.<sup>91</sup> Similarly, the OSC has sought disciplinary action in a decreasing percentage of cases since the effective date of the 1993 amendments.<sup>92</sup> Since the OSC has had jurisdiction over all Hatch Act violations involving employees engaged in illegal political activity, as well as those involving employees who are pressured to engage in political activity, the downward trends in complaints and violations suggest that the amendments have successfully liberalized political participation without compromising the rights of public employees.

Further evidence of the effects of the 1993 amendments is found in the results of various surveys conducted by the United States MSPB. The Board has found that since the 1993 Hatch Act revisions, 6.5% of federal employees have reported being more active in partisan political activities, while 12.5% of federal supervisors have exercised the additional freedom to participate in politics.<sup>93</sup> Likewise, fewer than 1% of respondents reported

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90. See Table 1 (listing the number of Hatch Act complaints filed each year since fiscal year 1986 and showing a decrease in complaints from 134 in 1993 to only 75 in 1997 and 83 in 1998).

91. See *id.* (listing the number of Hatch Act complaints filed each year since fiscal year 1986 and showing a decrease from 134 in 1993 to only 75 in 1997 and 83 in 1998).

92. See *id.*

93. See UNITED STATES MERIT SYS. PROTECTION BD., OFFICE OF POLICY AND EVALUATION, ISSUES OF MERIT 5 (1998) [hereinafter ISSUES OF MERIT]. Prior to the enactment of the 1993 Hatch Act amendments, various studies predicted that repeal of the Act's restrictions on political activity would result in a significant increase in political involvement by public employees. See, e.g., William M. Pearson & David S. Castle, *Political Activity Among State Executives: The Effect of Hatch Act Repeal*, 19

having been pressured to engage in political partisan activity since the 1993 amendments and fewer than 2% reported having been pressured to retaliate against or take an action in favor of another federal employee or applicant for political reasons.<sup>94</sup>

### *B. State Level Regulation: The "Little Hatch" Acts*

Regulation of state and local employees' political participation through so-called "Little Hatch" Acts is both widespread and diverse. A review of state laws reveals that thirty-five states have enacted some form of explicit restriction concerning the ability of state employees to actively engage in politics.<sup>95</sup> In this Part, we review the main characteristics of "Little Hatch" Acts and compare them to federal law.

States' "Little Hatch" Acts prohibit a wide range of political activities. In Table 2, we identify five types of prohibitions and categorize states based on whether or not they adopted the prohibition.<sup>96</sup> For comparison purposes, the five categories are phrased in terms of the type of activities that are specifically mentioned in the Hatch Act.<sup>97</sup> As amended in 1993, the Hatch Act allows employees to participate in political campaigns, but prohibits the following four activities: (1) using official authority or influence to interfere or affect the results of an election;<sup>98</sup> (2) soliciting financial or manpower contributions from any political organization or candidate;<sup>99</sup> (3) campaigning for partisan positions in government;<sup>100</sup> and (4) engaging in political activities while on duty, in uniform, or on government property.<sup>101</sup>

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PUB. PERSONNEL MGMT. 399, 400-04 (1990) (surveying state supervisory personnel in eight states and finding there would be an increase in political activities by state executives in those states if Hatch Act restrictions were repealed).

94. See ISSUES OF MERIT, *supra* note 93, at 5.

95. See Table 2 (summarizing and listing citations for "Little Hatch" Act provisions found in thirty-five state statutes). We focus on state employees other than police and firefighters. These states are: Alabama, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin.

96. See *id.* (identifying and categorizing states that have provisions restricting political activities by public employees).

97. See *id.* (specifying five different categories of "Little Hatch" Act provisions contained in state statutes); 5 U.S.C. § 7323(a) (1994) (listing the same prohibitions under federal law).

98. See 5 U.S.C. § 7323(a)(1).

99. See *id.* § 7323 (a)(2).

100. See *id.* § 7323 (a)(3).

101. See *id.* § 7324(a)(1)-(4).

**Table 2**  
**Summary of State Laws Regulating**  
**State Employees' Political Activities**

Prohibited Political Activities	States
Taking Active Part in a Political Campaign <sup>a</sup>	Louisiana, New Mexico, Ohio, West Virginia
Using Official Authority or Influence to Interfere or Affect the Results of an Election <sup>b</sup>	Connecticut, Delaware, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, New York, North Carolina, Oregon, Tennessee, Texas, West Virginia
Providing or Soliciting Financial or Manpower Contributions to any Political Organization or Candidate <sup>c</sup>	Alabama, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, North Carolina, Ohio, Rhode Island Tennessee, Texas, Washington, West Virginia
Holding Political Positions in Government <sup>d</sup>	Alabama, Indiana, Kansas, Louisiana, Maine, Minnesota, Missouri, New Hampshire, New Mexico, Utah, Washington, West Virginia, Wisconsin
Engaging in Political Activities While on Duty, in Uniform, or on Government Property <sup>e</sup>	Alabama, California, Connecticut, Delaware, Georgia, Illinois, Iowa, Maine Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Rhode Island, South Carolina, Tennessee, Texas, Utah, Wisconsin

<sup>a</sup> See LA. CONST. art. X, § 9(A); N.M. STAT. ANN. § 10-9-21(B) (Michie 1995); OHIO REV. CODE ANN. § 124.57(A) (Anderson Supp. 1999); W. VA. CODE ANN. § 29-6-20(e)(3) (Michie 1999).

<sup>b</sup> CONN. GEN. STAT. ANN. § 5-266a(a)(1) (West 1998); DEL. CODE ANN. tit. 29, § 5954(a) (1997); FLA. STAT. ANN. § 104.31(1)(a) (West Supp. 2000); HAW. REV. STAT. ANN. § 76-91(1)

(Michie 1996); IOWA CODE ANN. § 19A.18 (West Supp. 2000); KAN. STAT. ANN. § 75-2953(a) (1997); ME. REV. STAT. ANN. tit. 5, § 7056-A(1)(A) (West Supp. 1999); MASS. GEN. LAWS ANN. ch. 56, § 36 (West 1991); N.Y. CIV. SERV. LAW § 107(1) (McKinney 1999); N.C. GEN. STAT. § 126-13(a)(2) (1995); OR. REV. STAT. ANN. § 260.432(1) (Butterworth Supp. 1998); TENN. CODE ANN. § 2-19-202(a) (1994); TEX. GOV'T CODE ANN. § 556.004(c) (Vernon Supp. 2000); W. VA. CODE ANN. § 29-6-20(e)(1) (Michie 1999).

<sup>c</sup> ALA. CODE § 36-26-38(a) (1991); CAL. GOV'T CODE § 3205(a) (West Supp. 2000); CONN. GEN. STAT. ANN. § 5-266a(a)(2) (West 1998); DEL. CODE ANN. tit. 29, § 5954(c) (1997); FLA. STAT. ANN. § 104.31(1)(b) (West Supp. 2000); GA. CODE ANN. § 21-5-30.2(b) (1998); HAW. REV. STAT. ANN. § 76-91(3)-(4) (Michie 1996); KAN. STAT. ANN. § 75-2974(a) (1997); LA. CONST. art. X, § 9(A)-(B); ME. REV. STAT. ANN. tit. 5, § 7056-A(2) (West Supp. 1999); MD. CODE ANN. STATE PERS. & PENS. § 2-304(d)(2) (Supp. 1998); MASS. GEN. LAWS ANN. ch. 55, §§ 13-16 (West 1991 & Supp. 2000); MICH. COMP. LAWS ANN. § 15.405 (West 1994); MINN. STAT. ANN. § 43A.32(1) (West Supp. 1999); MO. ANN. STAT. § 36.150(4) (West Supp. 2000); N.Y. CIV. SERV. LAW § 107(3) (McKinney 1999); N.C. GEN. STAT. § 126-14(a) (1995); OHIO REV. CODE ANN. § 124.57(A); R.I. GEN. LAWS § 36-4-53 (Michie 1997); TENN. CODE ANN. § 2-19-203(a) (1994); TEX. GOV'T CODE ANN. § 556.004(d) (Vernon Supp. 2000); WASH. REV. CODE ANN. § 41.06.250(1) (West 2000); W. VA. CODE ANN. § 29-6-20(d) (Michie 1999).

<sup>d</sup> ALA. CODE § 36-26-38(a); IND. CODE ANN. § 4-15-2-40(c) (Michie 1996); KAN. STAT. ANN. § 75-2953(b) (1997); LA. CONST. art. X, § 9(A); ME. REV. STAT. ANN. tit. 5, § 7056-A(4) (West Supp. 1999); MINN. STAT. ANN. § 43A.32(2) (West 1999); MO. ANN. STAT. § 36.150(5)-(6) (West Supp. 2000); N.H. REV. STAT. ANN. § 21-I:52I (Supp. 1999); N.M. STAT. ANN. § 10-9-21(B); UTAH CODE ANN. § 67-19-19(1)(a) (Michie 1996); WASH. REV. CODE ANN. § 41.06.250(3) (West 2000); W. VA. CODE ANN. § 29-6-20(e)(3); WIS. STAT. ANN. § 230.40(2) (West Supp. 1999).

<sup>e</sup> ALA. CODE § 36-26-38(a); CAL. GOV'T CODE § 3206 (West 1995); CONN. GEN. STAT. ANN. § 5-266a(b) (West 1998); DEL. CODE ANN. tit. 29, § 5954(b) (1997); GA. CODE ANN. § 45-10-70 (1990); 5 ILL. COMP. STAT. ANN. 320/2 (West 1993); IOWA CODE ANN. § 19A.18; ME. REV. STAT. ANN. tit. 5, § 7056-A(3) (West Supp. 1999); MD. CODE ANN. STATE PERS. & PENS. § 2-304(c)(1) (Supp. 1998); MASS. GEN. LAWS ANN. ch. 55, § 14 (West 1991); MICH. COMP. LAWS ANN. § 15.404 (West 1994); NEB. REV. STAT. § 20-160 (1997); N.J. STAT. ANN. § 11A:2-23 (West 1993); N.M. STAT. ANN. § 10-9-21(F) (Michie 1995); N.C. GEN. STAT. § 126-13(a)(1) (Michie 1995); N.D. CENT. CODE § 44-08-19(1) (1993);

R.I. GEN. LAWS § 36-4-52 (Michie 1997); S.C. CODE ANN. § 8-13-765(A) (Law. Co-op. Supp. 1999); TENN. CODE ANN. §§ 2-19-206(a), 2-19-207(a) (1994); TEX. GOV'T CODE ANN. § 556.004(b); UTAH CODE ANN. § 67-19-19(1)(b) (Michie 1996); WIS. STAT. ANN. § 230.40(1) (West Supp. 1999).

An initial way of analyzing information in Table 2 is to compare the states' approaches to the federal government's approach. Of the thirty-five states that have enacted "Little Hatch" Acts, four are more restrictive than the Hatch Act because they limit the ability of public employees to take an active part in political campaigning.<sup>102</sup> Two of these four states have taken fairly sweeping approaches by, for example, prohibiting covered employees from taking part "in the management of the affairs of a political party . . . or any political campaign."<sup>103</sup> Two other states, New Mexico and West Virginia, have adopted a somewhat less restrictive approach by allowing political participation in general,<sup>104</sup> but prohibiting covered employees from becoming members or officers of political parties.<sup>105</sup> Notice that the prohibitions imposed by these four states are similar to those imposed at the federal level before the 1993 amendments to the Hatch Act.<sup>106</sup>

Although we can clearly compare these four states to the amended Hatch Act, it is harder to make definitive comparisons between the rest of the states' laws and the federal legislation. The other four activities identified in Table 2 (rows two to five) are prohibitions currently included in the Hatch Act.<sup>107</sup> As seen in

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102. These states are: Louisiana, New Mexico, Ohio, and West Virginia. See Table 2 (categorizing the different types of "Little Hatch" Act provisions contained in state statutes). Refer to notes 102-06 *infra* and accompanying text (discussing the four states that have enacted legislation more restrictive than the Hatch Act).

103. LA. CONST. art. X, § 9(A). A similar approach is taken in Ohio, where public employees are prohibited from taking "part in politics other than to vote as the . . . employee pleases." OHIO REV. CODE ANN. § 124.57(A) (Anderson Supp. 1999).

104. For example, West Virginia's statute allows participation in "[o]ther types of partisan or nonpartisan political campaigning and management not inconsistent with the provisions of this subdivision." W. VA. CODE § 29-6-20(e)(3) (Michie 1999).

105. West Virginia's statute provides 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." *Id.* The New Mexico statute prohibits covered public employees from becoming officers of a political organization during their employment. See N.M. STAT. ANN. § 10-9-21(B) (Michie 1995).

106. Refer to notes 29-32 *supra* and accompanying text (discussing the broad political activity prohibitions imposed on public employees under the Hatch Act enacted in 1939).

107. See Table 2 (listing the different type of activities prohibited under state "Little Hatch" Acts); 5 U.S.C. § 7323(a) (1994) (listing the same type of prohibitions

Table 2, states vary considerably in terms of the scope of their political participation restrictions. Fourteen states prohibit using an employee's official authority to interfere with, or affect, political processes or outcomes.<sup>108</sup> Twenty-three states prohibit providing or soliciting financial or manpower contributions to any political organization or candidate.<sup>109</sup> In addition, thirteen states prohibit holding political (i.e., elected) positions in government and twenty-two states specifically prohibit public employees from engaging in political activities while on duty, in uniform, or on state property.<sup>110</sup>

To summarize, four states have statutes more restrictive than the Hatch Act.<sup>111</sup> Thirty-one states have adopted legislation less restrictive than the Hatch Act.<sup>112</sup> Among these thirty-one states, nine have adopted restrictions in at least three of the areas prohibited under federal law,<sup>113</sup> fourteen have adopted at least two of the prohibitions currently found at the federal level,<sup>114</sup> and eight have adopted approaches prohibiting just one of the activities that are prohibited by the Hatch Act.<sup>115</sup>

Of the states that restrict three of the activities prohibited at the federal level, all of them prohibit the providing or soliciting of financial or manpower contributions to political organizations or political candidates.<sup>116</sup> Of the fourteen states that regulate at least two of the activities prohibited at the federal level, ten regulate the solicitation of campaign contributions.<sup>117</sup> This

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under federal law).

108. See Table 2 (categorizing the different "Little Hatch" Act provisions contained in state statutes).

109. See *id.*

110. See *id.*

111. Refer to notes 102-06 *supra* and accompanying text (identifying and discussing the four states that have statutes imposing greater restrictions on the political activities of public employees than the Hatch Act).

112. Refer to note 102 *supra* and accompanying text (observing that thirty-five states have enacted "Little Hatch" Act provisions of which four have provisions more restrictive than the Hatch Act).

113. These states are: Alabama, Connecticut, Delaware, Kansas, Maine, Massachusetts, North Carolina, Tennessee, and Texas. See Table 2 (categorizing the different "Little Hatch" Act provisions contained in state statutes).

114. These states are: California, Florida, Georgia, Hawaii, Iowa, Maryland, Michigan, Minnesota, Missouri, New York, Rhode Island, Utah, Washington, and Wisconsin. See *id.*

115. These states are: Illinois, Indiana, Nebraska, New Hampshire, New Jersey, North Dakota, Oregon, and South Carolina. See *id.*

116. Refer to note 113 *supra* (listing the nine states). See Table 2 (categorizing the different "Little Hatch" Act provisions contained in state statutes).

117. These states are: California, Delaware, Florida, Georgia, Hawaii, Michigan, Minnesota, New York, Rhode Island, and Washington. Refer to note 114 *supra* (listing the fourteen states that regulate at least two of the activities prohibited at

suggests some consensus that restrictions on partisan campaign contributions are an important part of what "Hatch Act"-type laws seek to accomplish. As we will discuss later, this finding supports our main argument that these restrictions are primarily a form of political control.<sup>118</sup>

### III. PATRONAGE

Paradoxically, the extensive efforts of both federal and state governments to maintain a politically free environment at the workplace have been coupled with an equally extensive use of political patronage.<sup>119</sup> In its broadest sense, patronage refers to "the allocation of the discretionary favors of government in exchange for political support."<sup>120</sup> More narrowly, the practice involves the reward of government jobs in exchange for providing support to a candidate during an election.<sup>121</sup> Patronage developed and flourished at the same time the federal government and various state governments attempted to limit the political activities of public employees.<sup>122</sup> Interestingly, while one of the justifications advanced for Hatch Act-type laws was to curtail the effects of patronage, the practice of patronage itself was not challenged until fairly recently in our constitutional history.<sup>123</sup> In

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the federal level). See Table 2 (categorizing the different types of "Little Hatch" Act provisions contained in state statutes).

118. Refer to Part V.B *infra* (developing and testing an empirical model to explain congressional voting outcomes on Hatch Act amendments, and concluding that regression analysis results support the hypothesis that Hatch Act restrictions against political activities are motivated by partisan politics).

119. Refer to notes 20-24 *supra* and accompanying text (discussing how early actions regulating the political activities of public employees were designed to curtail patronage abuses). Refer to note 122 *infra* and accompanying text (noting that patronage and Hatch Act-type legislation flourished at the same time).

120. MARTIN TOLCHIN & SUSAN TOLCHIN, *TO THE VICTOR . . . POLITICAL PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE* 5 (1971). A more humorous definition is provided by James Q. Wilson, a political scientist, who defines patronage jobs as "all those posts, distributed at the discretion of political leaders, the pay for which is greater than the value of the public services performed." James Q. Wilson, *The Economy of Patronage*, 69 J. POL. ECON. 369, 370 n.4 (1961).

121. See Richard L. Hasen, *An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence*, 14 CARDOZO L. REV. 1311, 1311 n.1 (1993). Patronage also includes the award "of government contracts to members of the ruling party or to major campaign contributors." Kathryn E. Eisenhart, *The First Amendment and the Public Sector Employee: The Effect of Recent Patronage Cases on Public Sector Personnel Decisions*, REV. OF PUB. PERSONNEL ADMIN., Summer 1998, at 58, 59.

122. See Roback, *supra* note 24, at 330 (pointing out that the first efforts to regulate the individual political activity of public employees and the regulation of patronage occurred around the same time).

123. "Suffice it to say that patronage was, without any thought that it could be

this Part, we describe the legal framework that has been used to analyze patronage.

### A. *Early Views*

American political patronage dates back to the administration of George Washington.<sup>124</sup> While politically motivated dismissals have always been controversial, a number of justifications for such practices have been successfully advanced over the years.<sup>125</sup> First is the frequently asserted proposition that elected officials need loyal supporters who can effectuate their policies.<sup>126</sup> In this sense, patronage could result in a more efficient offering of public services by a government that is increasingly accountable and responsive to the public.<sup>127</sup> Second, patronage has been justified as helping to preserve the democratic process by strengthening the party system.<sup>128</sup> Finally, patronage has been defended based on its quasi-welfare functions, and as an instrument of social acceptance for minorities.<sup>129</sup>

Despite these justifications and patronage's common occurrence during the early years of the Republic,<sup>130</sup> the public has never been comfortable with the use of patronage. Indeed, "legislative attacks on patronage began as early as 1883, when corruption in the Grant administration and Garfield's assassination by an unsuccessful office-seeker prompted the passage of the Pendleton Act."<sup>131</sup> The Pendleton Act, which has

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unconstitutional, a basis for government employment from the earliest days of the Republic until *Elrod*—and has continued unabated since *Elrod*, to the extent still permitted by that unfortunate decision." *Rutan v. Republican Party*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting) (arguing that the Supreme Court has no basis for holding patronage practices unconstitutional because such practices have a long, unchallenged tradition).

124. See Jaimie Johnson, Note, *O'Hare Truck Serv., Inc. v. City of Northlake: Further Limiting the Spoils of the Victor*, 14 GA. ST. U. L. REV. 489, 491 (1998) (tracing political patronage back to the Washington administration).

125. See *id.*; see also Kathleen M. Dugan, Note, *An Objective and Practical Test for Adjudicating Political Patronage Dismissals*, 35 CLEV. ST. L. REV. 277, 279 (1987) (detailing historical justifications for patronage).

126. See Dugan, *supra* note 125, at 279 (acknowledging that political leaders can use patronage to ensure they have loyal supporters).

127. See *id.* (detailing traditional justifications for political patronage and noting that amongst them is the notion that patronage will create more accountability and responsiveness to the public).

128. See Johnson, *supra* note 124, at 491 (identifying the strengthening of political parties as a traditional justification of patronage).

129. See Dugan, *supra* note 125, at 279.

130. See Roback, *supra* note 24, at 328-30 (detailing the history of patronage and noting that its practice predates the Constitution and has been found in colonial charters and state constitutions).

131. Johnson, *supra* note 124, at 492 (footnote omitted).



been described as marking the birth of the federal merit civil service system,<sup>132</sup> provided a nonpartisan basis for the dismissal and hiring of government employees by requiring competitive examinations.<sup>133</sup> Similar legislation was subsequently passed at the state and local government levels.<sup>134</sup> However, although political patronage has been largely eliminated at the federal level, similar success has not been achieved at the state and local levels.<sup>135</sup>

Prior to the 1970s, constitutional challenges to patronage met with little success.<sup>136</sup> Nonetheless, municipal, county, and state employees who were dismissed solely for political reasons continued to challenge the constitutionality of patronage employment decisions.<sup>137</sup> Courts, however, “considered government employment a privilege, not a right, and allowed the government to condition the receipt of that privilege on waiver of First Amendment rights.”<sup>138</sup> Under the “privilege doctrine,” “courts allowed the government broader discretion in denying privileges that it bestows than in denying constitutional rights that it must recognize.”<sup>139</sup>

### B. Current View of Patronage

In the mid-1970s, the Supreme Court rejected the “privilege doctrine,” thus paving the way for a direct attack on the practice of patronage.<sup>140</sup> In *Perry v. Sindermann*,<sup>141</sup> for example, the Court

132. See Roback, *supra* note 24, at 330-31 (documenting the expansion of the merit system from its beginning, with the Pendleton Act in 1883, through 1932, when it covered 80% of federal employees).

133. See 5 U.S.C. § 3304(a)-(b) (1994).

134. See Dugan, *supra* note 125, at 280-81 (noting that federal efforts to curtail patronage abuses were paralleled at the state and local level).

135. See, e.g., Bowman, *supra* note 4, at 356-57 (concluding that in Illinois, for example, party affiliation still provides an advantage for applicants of state jobs).

136. See, e.g., Bailey v. Richardson, 182 F.2d 46, 51 (D.C. Cir. 1950) (explaining that, unless protected by civil service regulations, public employees had no right to employment and could be dismissed for political reasons).

137. See Dugan, *supra* note 125, at 281-82 (noting that for the last twenty years, there has been a great deal of litigation dealing with patronage related dismissals).

138. Johnson, *supra* note 124, at 493; see also, e.g., Bailey, 182 F.2d at 51 (refusing to order the government to disclose the names of informants who alleged that plaintiff was disloyal to the government); American Fed'n of State, County & Mun. Employees v. Sharp, 280 A.2d 375, 378 (Pa. 1971) (holding that there is no right to government employment under either the Federal or Pennsylvania constitution).

139. Johnson, *supra* note 124, at 493.

140. See *Graham v. Richardson*, 403 U.S. 365, 374 (1971) (rejecting the concept that constitutional rights turn upon whether a governmental benefit is characterized as a “right” or as a “privilege”).

141. 408 U.S. 593 (1972).

held that a government employee could not be denied a benefit for exercising his First Amendment rights.<sup>142</sup> The Court stated that:

For at least a quarter-century, this Court has made clear that even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.<sup>143</sup>

With the “privilege doctrine” out of the picture, “the stage was set for the Supreme Court to take a decided stance against patronage.”<sup>144</sup> The Supreme Court’s first direct encounter with a challenge to the use of patronage came in the case of *Elrod v. Burns*.<sup>145</sup> In *Elrod*, a group of non-civil service employees brought suit against a newly elected Democratic sheriff, alleging that their termination amounted to a violation of their First and Fourteenth Amendment rights.<sup>146</sup> The employees’ dismissals resulted from their lack of affiliation with the Democratic party.<sup>147</sup> Addressing the constitutionality of patronage dismissals, a divided Court held that patronage violates the First Amendment because it restrains a public employee’s freedom of political belief and association.<sup>148</sup>

The Government offered three defenses for its use of patronage. First, the Government cited the need for effective governance of the workplace and efficient employees.<sup>149</sup> The Court rejected that justification, arguing instead that the “wholesale replacement of large numbers of public employees every time

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142. See *id.* at 596-98 (reaffirming earlier rulings that a government does not have the right to terminate employment due to exercise of First Amendment rights).

143. *Id.* at 597.

144. Johnson, *supra* note 124, at 494.

145. 427 U.S. 347 (1976).

146. See *id.* at 349-50 (seeking declaratory, injunctive, and other relief).

147. See *id.* at 351 (noting the Cook County tradition of allowing the Sheriff, upon election, to replace non-civil service employees with members of the Sheriff’s party).

148. See *id.* at 372-73 (dismissing the notion that benefits of patronage outweigh the infringement on First Amendment rights in a plurality opinion written by Justice Brennan in which Justice Powell and Chief Justice Burger dissented).

149. See *id.* at 364.

political office changes hands” created inefficiencies equal to or greater than those caused by retention of employees who do not share political affiliation with the governing party.<sup>150</sup> Second, the government argued that patronage was vital to the democratic process because it ensured the vitality of political parties and, hence, the two-party system.<sup>151</sup> The Court summarily dismissed this argument, commenting that the elimination of patronage would not bring about the demise of party politics.<sup>152</sup> Finally, the Government raised a loyalty argument by arguing that patronage was necessary to ensure that employees would not undermine the implementation of new policies sanctioned by the electorate.<sup>153</sup> While somewhat sympathetic to this argument, the Court found that it did not validate the need for patronage in all cases.<sup>154</sup> Instead, the Court argued that limiting patronage to policymaking positions was sufficient to achieve governmental ends.<sup>155</sup>

Based upon this last response, the Court adopted a categorical approach to patronage cases to separate those positions of public employment that can be subject to patronage from those that cannot.<sup>156</sup> Recognizing that when there is a change in political administrations, newly elected officials need to bring in their own people to help implement political policies, the Court held that policymaking positions are the only positions subject to patronage dismissals.<sup>157</sup>

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150. *See id.* at 364. The Court also noted that the possibility of dismissal after an election in which the incumbent party had lost could amount to a major disincentive to good work, and thus be more inefficient than the retention of employees of different political persuasions. *See id.*

151. *See id.* at 368 (suggesting that support for the political parties stems from the patronage system).

152. *See id.* at 368-69.

153. *See id.* at 367 (identifying government's position as protecting government efficiency through political loyalty).

154. *See id.* (acknowledging that although the government's argument had some force, it was not enough to justify the practice of patronage).

155. *See id.* (pointing out that nonpolicymaking employees cannot thwart party goals).

156. *See id.* at 367-68 (noting that in determining whether a position is a policy position, consideration needs to be given to the responsibilities attached to the position and whether such responsibilities include advising and formulating plans for implementation).

157. *See id.* at 367. The Court reasoned that “[n]onpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party.” *Id.* The Court was not completely clear on how to distinguish policymaking from nonpolicymaking positions. *See id.* Justice Brennan acknowledged that while “no clear line can be drawn between policymaking and nonpolicymaking positions,” courts should consider the nature of an employee's responsibilities and whether the same include acting as an adviser or formulating plans for the implementation of broad goals. *See id.* at 367-68.

The Court has followed this categorical approach in later decisions while expanding the scope of the *Elrod* decision. For example, in *Branti v. Finkel*,<sup>158</sup> the Court adhered to the categorical approach, but rejected strict adherence to the policymaking label as the means of applying the *Elrod* test.<sup>159</sup> Instead, the Court pointed out that the ultimate question is “whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”<sup>160</sup> In more recent cases, the Court has expanded First Amendment protection to include not only politically motivated dismissals, as in *Elrod*, but also promotions, transfers, and recalls,<sup>161</sup> and to cover not only public employees, but also independent contractors.<sup>162</sup>

Thus—unlike the approach taken in cases reviewing the constitutionality of the Hatch Act—in patronage cases, the Court has been more willing to reject the rationales advanced by the government in favor of permitting the use of patronage.<sup>163</sup> The different treatment between patronage and Hatch Act cases is evident not only in the outcome of the cases (e.g., invalidating patronage, while upholding restrictions on political activities), but also in the different tests the Court has applied for each (e.g., the balancing test vis-à-vis the categorical approach).<sup>164</sup>

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158. 445 U.S. 507 (1980).

159. *See id.* at 518 (indicating that the inquiry is not whether a position involves policymaking or has confidential implications, but whether the position requires a particular party affiliation for the effective performance of the public office in question).

160. *Id.*

161. *See* *Rutan v. Republican Party*, 497 U.S. 62, 72 (1990) (rejecting the argument that contractual employment status should be considered when considering First Amendment claims in patronage cases).

162. *See* *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 720-21, 726 (1996) (declining to exclude independent contractors from First Amendment protections).

163. *See id.* (rejecting the government's attempt to exclude independent contractors from patronage rules); *see also* *Rutan*, 497 U.S. at 72 (refusing to accept government's rationale that promotions, transfers, and recalls are not a right and thus not subject to review by the Court).

164. *Compare, e.g.,* *Elrod v. Burns*, 427 U.S. 347, 367-68 (1976) (applying a categorical approach to patronage cases by distinguishing between policy and nonpolicymaking decisions), *with* *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973) (applying a balancing test as the appropriate standard).

## IV. DISTINCTION WITHOUT A DIFFERENCE

## A. Overview

As noted in Parts II and III above, court decisions have been generally sympathetic to the constitutionality of laws regulating the political activities of public employees, but have restricted the use of patronage by local and state governments.<sup>165</sup> The different treatment afforded these two practices is perplexing, considering that government has defended both practices based on the need to achieve efficiency in the delivery of public services and to hold public employees to the highest possible ethical standards.

The varying approaches the courts have taken represent two very different models of the dynamics of public employment. The treatment of challenges to Hatch Act-type laws conceptualizes the public employer as “guardian” of the public interest, whose main concern is assuring an efficient, impartial, and fair delivery of public services.<sup>166</sup> We call this the “good government” model. Cases like *Mitchell*<sup>167</sup> and *Letter Carriers*<sup>168</sup> are examples of this model.<sup>169</sup> In contrast, when responding to legal challenges to patronage, courts have seemingly viewed the public employer (i.e., government officials) as a party that cannot be trusted and who will, if permitted, take advantage of his or her position of authority in order to perpetuate his or her political life.<sup>170</sup> We refer to this as the “partisan politics” model. Cases like *Elrod*, *Branti*, and *Rutan* are examples of this approach.<sup>171</sup> In this Part, we discuss these two models more extensively.

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165. Compare, e.g., *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 102-03 (1947) (acknowledging the constitutionality of Hatch Act legislation restricting First Amendment freedoms), with *Rutan*, 497 U.S. at 72-75 (rejecting the state's attempts to retain patronage privileges).

166. See, e.g., *Elrod*, 427 U.S. at 367 (recounting the government's argument that patronage helps guarantee efficient government).

167. 330 U.S. 75 (1947).

168. 413 U.S. 548 (1973).

169. See *Letter Carriers*, 413 U.S. at 564 (sustaining Congress's legislation on the restriction of public employees' political participation); *Mitchell*, 330 U.S. at 102 (ceding the power to determine whether government employees can be political party workers to Congress).

170. See, e.g., *Rutan*, 497 U.S. at 72-75 (contending that patronage restricts First Amendment freedoms of public employees fearing retribution); *Branti v. Finkel*, 445 U.S. 507, 519 (1980) (asserting that an assistant public defender's employment should not be dependent on political affiliation); *Elrod*, 427 U.S. at 355-56 (recognizing the dangers of coercion on public employees that are found in the practice of patronage).

171. See *Rutan*, 497 U.S. at 72-75; *Branti*, 445 U.S. at 519; *Elrod*, 427 U.S. at 355-56.

*B. The "Good Government" Model*

Several arguments have been advanced in favor of government's attempt to restrict the political involvement of public employees via Hatch Act-type laws.<sup>172</sup> In particular, such laws have been justified as necessary to ensure an efficient and impartial administration of public services.<sup>173</sup> Prohibitions on political activity were expected to provide an equitable administration of the law and distribution of resources, thus leading to a more efficient and fair bureaucracy.<sup>174</sup> With regard to efficiency, the main concern is having public employees perform partisan political work while at the same time performing official public duties.<sup>175</sup> As for impartiality, the underlying concern is with the fair administration of the law.<sup>176</sup>

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172. Refer to notes 55-57 *supra* and accompanying text (summarizing government's arguments in favor of restricting the political participation of public employees).

173. Refer to notes 55-57 *supra* and accompanying text (detailing five governmental interests advanced for the support of the Hatch Act). Two other arguments favor restricting political activities by public employees. First, supporters of restrictions on partisan activities by federal employees contend that elected politicians could use the government bureaucracy to establish a powerful political machine. Refer to note 57 *supra* and accompanying text (citing government's fear of public service being turned into a powerful political machine as a justification for restricting the political activity of government employees). Without restrictions on their political activities, it is possible that a large contingency of government employees will provide in-kind assistance to political campaigns and, thus, distort the political process. Refer to note 54 *supra* and accompanying text (acknowledging the Court's desire to maintain neutrality in government). While this argument might have had some merit in an era in which grassroots and in-kind political contributions were at the core of the political process, concerns about the political machine are less pressing in an era of mass-media campaigning. *See* Hasen, *supra* note 121, at 1318-19 (suggesting patronage is waning as technology makes it less politically profitable). Second, restrictions on the political activities of public employees have also been justified on the grounds that they are necessary to protect public employees. *See* Webster & Kasle, *supra* note 3, at 29 (ascribing a desire to avoid subjecting public employees to coercion as a motive of the Hatch Act). By limiting the possibility of a politicized public service, government employees gain protection from pressure to vote, or otherwise participate in politics in order to curry favor with superiors. *See id.* The rationale that prohibitions against political activity will prevent coercion assumes that an employee, who is asked by a supervisor to engage in political activities, will be able to decline to avoid violating the law. *See id.* This has been referred to as the "I'm Hatched" defense. *See id.* In light of the protections provided under "civil service" statutes both at the federal and state levels, it is unclear what additional protection employees actually receive from Hatch Act-type laws.

174. *See* Webster & Kasle, *supra* note 3, at 30 (noting that prohibitions on political activity were predicated to bring about an equitable administration of the law).

175. *See id.*

176. *See id.* at 31.

For example, the rationale behind the “merit” system in the federal civil service (i.e., that federal employees should be hired according to ability and protected from political abuse), together with restrictions imposed on public employees’ political activities, are believed to ensure impartial administration of the law.<sup>177</sup> Political administration of the law is discouraged by reassuring government employees that as long as they perform their duties in accordance with legislative and agency guidelines, their tenure in employment is not subject to political manipulation by superiors.<sup>178</sup> The prohibition against active political participation is necessary because loyalty to the impartial administration of the law is likely to succumb to the political interests of politically active public employees.<sup>179</sup> Thus, to prevent this conflict of interest, public employees should be isolated from political pressures.<sup>180</sup>

Imbedded in the “good government” model is the assumption that public employees, if given the opportunity, will abuse their positions by placing partisan politics ahead of the public’s interests.<sup>181</sup> The *Mitchell* decision, for example, contains multiple references to the “evils” created by public employees’ involvement in politics<sup>182</sup> and the menacing aspects of their behavior.<sup>183</sup> In

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177. See *id.* (asserting that fair application of the law is one of the underlying goals of Hatch Act-type legislation).

178. See *United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers*, 413 U.S. 548, 566 (1973) (pointing out that one of the goals of enacting Hatch Act-type legislation is to make sure that employees feel free from pressure and can express their political inclinations without fear of losing their jobs).

179. See *Webster & Kasle*, *supra* note 3, at 30-31 (noting that one of the concerns that prompted the enactment of Hatch Act-type legislation was the belief that without such legislation, government would be run along party lines).

180. The notion that restricting public employees’ political activities contributes to public confidence in government is seen most clearly in *Letter Carriers*. In *Letter Carriers*, the Court noted that “it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.” *Letter Carriers*, 413 U.S. at 565. Although the Supreme Court in *Letter Carriers* did not explain how prohibiting public employees’ political activities would help strengthen public confidence in government, the Court expressed concern with the effects that certain political activities could have on the public, even when the public is not hurt directly by the actions of the public employee. See *id.* (recognizing that it is important that the public perceive an impartial administration if “confidence in the system of representative government is not to be eroded”). For example, public confidence in government may be reduced when public officials use their offices for personal gain.

181. See, e.g., *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 96 (1947) (recognizing the evils associated with political partisanship).

182. “The influence of political activity by government employees, if evil in its effects on the service, the employees or people dealing with them, is hardly less so because that activity takes place after hours.” *Id.* at 95. “To declare that the present supposed evils of political activity are beyond the power of Congress to redress would

order to control the problem created by this predisposition attributed to public employees, the “good government” model turns to the public employer as the solution. The public employer, represented by the legislature, is expected to control public employees by enacting laws that limit the ability of public employees to corrupt the delivery of public services.<sup>184</sup> Hence, the enactment of Hatch Act-type laws. Underlying this model, of course, is the assumption that politically-oriented public employees are controlled by an “apolitical” public employer. Consequently, the “good government” model entirely fails to consider the possibility that the public employer—the legislature—is itself subject to political pressure and, thus, will only enact legislation that responds to those pressures.

### C. *The “Partisan Politics” Model*

While government has successfully raised the efficiency argument as a rationale for regulating the political activities of public employees, it has failed to convince the courts to accept the same argument when reviewing legal challenges to patronage.<sup>185</sup> The courts’ response to such arguments represents what we refer to as the “partisan politics” model.

As discussed earlier, defenders of patronage have argued that it is necessary to insure effective government and the efficiency of public employees.<sup>186</sup> Presumably, employees of political persuasions different from those of the party controlling public office will lack the incentive to work efficiently and “may even be motivated to subvert the incumbent administration’s efforts to govern effectively.”<sup>187</sup> An implication of this argument is that the public employer, who is in charge of implementing patronage, can be trusted to use it in a way that fosters efficiency and, thus, is not abusive. The Supreme Court has rejected this view.<sup>188</sup>

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leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system.” *Id.* at 99.

183. “When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required.” *Id.* at 103.

184. *See id.* (requiring Congress to enact legislation to forestall threats to the integrity of public service).

185. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 364 (1976) (rejecting the Government’s efficiency argument as a justification for patronage).

186. Refer to notes 124-29 *supra* and accompanying text (identifying historical justifications for patronage).

187. *Elrod*, 427 U.S. at 364.

188. *See id.* (finding unpersuasive government’s fears of internal subversion).



Instead, the Court has focused on costs associated with patronage.<sup>189</sup> The Court's concern with the potential effects of patronage on the freedoms of belief and association,<sup>190</sup> as well as on the electoral process, weighed more heavily in the majority's reasoning than the possible benefits derived from the practice.<sup>191</sup> This "partisan politics" model recognizes that the public employer might abuse patronage and, thus, is evidence of a distrusting view of the public employer. Yet the decisions in *Elrod* and its progeny do not impose an absolute ban on patronage, but allow that certain government positions can be subject to patronage. In short, the Court acknowledges that the freedoms of belief and association are not absolute, and that patronage only presents constitutional problems if it infringes too far on those liberties.<sup>192</sup>

Interestingly, the "partisan politics" model of the public employer is consistent with public choice theory. Public choice research conceptualizes bureaucrats as self-interested utility maximizers who seek to advance their power, income, and prestige by expanding the size of bureaucracy.<sup>193</sup> According to this view, top-level bureaucrats, left to their own devices, might pressure public employees to support policies that encourage the expansion of government.<sup>194</sup> Public employees are expected to be especially vulnerable to such pressures because of their strong loyalty to the organization controlling their job security.<sup>195</sup> Therefore, there needs to be some outside control, in this case the judiciary, to monitor the possible abuses likely to result if politicians are left unattended.

#### D. Different Models—Same Practice

Identifying the differences between the models used to evaluate patronage and the regulation of public employees'

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189. See *id.* at 355-56 (noting that the proper inquiry in patronage is identifying whether the practice of patronage places limitations on constitutional protections).

190. See *id.* at 355-56 (addressing the limitations that patronage places on an employee's ability to exercise his First Amendment freedoms).

191. See *id.* at 355-57, 373 (holding that patronage places too many restrictions upon public employees' First Amendment freedoms and is thus unconstitutional).

192. See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973) (listing at length restrictions Congress could constitutionally levy).

193. See, e.g., William Niskanen, Comment, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617, 618 (1975) (formalizing the model of bureaucratic empire building).

194. See, e.g., RONALD WINTROBE, *Modern Bureaucratic Theory*, in PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 451 (Dennis C. Mueller ed., 1997).

195. See *id.* (analyzing the reasons an employer has power over his employees in context of the cost of disobedience, i.e., unemployment).

political activities raises one very important question: Are the practices of patronage and the regulation of political activities as different as the two models suggest? That is, do the “good government” and “partisan politics” models provide a theory for distinguishing between the two practices or are the two models a post hoc justification for what is simply a political choice? A review of the politics surrounding the passage of Hatch Act legislation suggests that the latter best explains how these practices are treated in the law and that both patronage and the regulation of political activities lead to political manipulation.

## V. “UNMASKING” HATCH ACT-TYPE REGULATIONS

### A. Overview

The various justifications for prohibiting political activities by public employees suggest that the motives behind the regulations are benign, perhaps even noble. That is, regulation of public employees’ political activities combines a paternalistic concern for the welfare of government employees with the defense of good government.

So far we have argued that, similar to patronage, government’s efforts to regulate the political activities of public employees represent a form of political manipulation. Moreover, we posited that the manner in which the courts have responded to these forms of regulation, that is, adhering to the “good government” model, is based on the premise that the regulation intends to achieve an ideal standard of public service.<sup>196</sup> These two approaches provide us with a competing set of hypotheses. If the good government approach correctly explains the existence of Hatch Act-type laws, we should observe no particular trends in the voting behavior of legislators on proposed Hatch Act legislation. On the other hand, if political control is the motivating force behind Hatch Act-type laws, a number of other hypotheses might explain legislative voting behavior.

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196. See William H. Magness, Comment, “*Un-Hatching*” *Federal Employee Political Endorsements*, 134 U. PA. L. REV. 1497, 1522-23 (1986) (advancing the view that restrictions on public employees’ participation in political activities stemming from the Hatch Act not only fail to prevent such activities, but provide a means for public and private officials to distort the democratic process).

## B. *Revealed Motives*

1. *Theoretical Framework.* In this Part, we develop a theoretical framework to explain legislators' voting behavior. We then empirically test this model. The results are consistent with the argument developed earlier: Laws restricting political activities of public employees are not substantively different than patronage because they basically involve an attempt to control and manipulate the political process.<sup>197</sup>

At first glance, voting behavior in Congress might be attributed to party membership. Examination of congressional voting patterns on federal Hatch Act legislation clearly shows that Hatch Act legislation is partisan. For example, the legislative history surrounding the Hatch Act of 1939 suggests that the Act was passed largely because Republicans were concerned with the existence of patronage in federal agencies created during the New Deal.<sup>198</sup> Republicans feared that President Roosevelt would use the support of federal employees owing allegiance to him to gain support for his policies.<sup>199</sup> These partisan concerns are reflected in Table 3, which shows that 100% of voting Republicans in the House voted for the Hatch Act compared to 38.5% of Democrats.<sup>200</sup>

Similarly, partisan politics were strongly evident during congressional votes on proposed amendments to weaken Hatch Act restrictions in 1976, 1990, and 1993.<sup>201</sup> The voting records for these amendments, also presented in Table 3, show that a substantial majority of Republicans in the House of Representatives and Senate rejected amendments to weaken existing Hatch Act prohibitions.<sup>202</sup> In contrast, the amendments received overwhelming support of House and Senate Democrats.<sup>203</sup> Totaling all votes for the various amendments indicates that only about 40% of Republicans in the House of

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197. *See id.* (propounding the view that laws regulating public employees' political activities are themselves a form of political manipulation). Refer to notes 198-200 *infra* and accompanying text (justifying the argument that legislators' voting patterns are indicative of partisan voting).

198. *See* Magness, *supra* note 196, at 1501-02 (tracing how the Hatch Act of 1939 was largely a product of Republican fears about the effects of patronage on the new federal agencies created by the New Deal).

199. *See id.* at 1501.

200. *See* Table 3 (depicting legislators' partisan voting patterns on the Hatch Act and all of its amendments from 1939-1990).

201. *See id.* (illustrating how most Republicans opposed weakening the Hatch Act).

202. *See id.*

203. *See id.*

Representatives supported Hatch Act reform compared to about 92% of Democrats.<sup>204</sup> Even more lopsided results appear in the Senate, where about 25% of Republicans supported the reform amendments compared to nearly 96% of Democrats.<sup>205</sup>

**Table 3:  
Congressional Votes 1939 – 1990 Hatch Act and  
Amendments<sup>a</sup>**

	1939		1976		1976 Veto Override		1990		1990 Veto Override		1993	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
House												
Rep.	156	0	25	112	22	113	90	84	84	90	90	84
Dem.	85	133	216	52	221	47	244	3	243	3	248	1
Senate												
Rep.	—	—	5	28	—	—	13	30	10	35	13	30
Dem.	—	—	49	8	—	—	54	0	55	0	55	1

<sup>a</sup> See 1993 CONG. Q. ALMANAC, *supra* note 76, at 201-03; 1990 CONG. Q. ALMANAC, *supra* note 75, at 408, 410; 32 CONG. Q. ALMANAC: 94TH CONG. 2ND SESSION 1976, at 490, 493 (1976) [hereinafter 1976 CONG. Q. ALMANAC].

At a basic level, the data in Table 3 support our main argument. Namely, when enacting laws restricting the political activities of public employees, legislators respond to some underlying political motivation as represented by the individual legislator's party alliance, rather than some abstract concept of "good government."<sup>206</sup>

This does not mean, however, that party membership is deterministic of voting behavior. As shown in Table 3, while votes clearly occurred along party lines on the Hatch Act and its amendments, in every single vote, a non-trivial number of

204. *See id.*

205. *See id.*

206. *See* Magness, *supra* note 196, at 1501 (canvassing the underlying political motivations for the enactment of the Hatch Act in 1939); *see also* Table 3.

legislators crossed party lines.<sup>207</sup> Table 4 presents the total number of legislators that crossed party lines in each of the recorded votes. An interesting trend appears. After the initial vote enacting the Hatch Act, in which no Republican legislator crossed party lines,<sup>208</sup> there has been, both in absolute and relative terms, a steady increase in the number of Republicans voting in favor of liberalizing restrictions on the political activities of public employees.<sup>209</sup> At the same time, the number of Democrats crossing party lines has decreased in both houses of Congress.<sup>210</sup> The data in Table 4 suggest that the voting behavior of legislators might be related to specific interests that transcend any abstract ideas of good government and even party membership characteristics. So then, what explains these voting patterns?

**Table 4:  
Number of Votes Crossing Party Line<sup>a</sup>**

Year	House		Senate	
	Republican	Democrat	Republican	Democrat
1939	0	84	-	-
1976	25	52	5	8
1976	22	47	-	-
1990	84	3	13	0
1990	90	3	10	0
1993	84	1	13	1

<sup>a</sup> See Table 3.

In order to explain voting patterns surrounding Hatch Act legislation, one must consider the nature of the legislation and the vote-maximizing concerns of elected government officials.

207. See Table 3.

208. See Table 4 (demonstrating that no Republican legislator crossed party lines in the vote on the original Hatch Act).

209. See *id.* (illustrating the general increase in the number of Republican legislators voting in favor of decreasing Hatch Act-type restrictions on the political activities of public employees).

210. See *id.*

The Hatch Act and similar types of laws target a very specific group—public employees.<sup>211</sup> Thus, the costs associated with such laws are borne almost exclusively by public employees, while whatever benefits derived from “good government” are diffused to a public that remains rationally ignorant of the laws’ effects.<sup>212</sup> Because vote-maximizing politicians recognize the concentrated costs and dispersed benefits associated with Hatch Act-type laws, they should be responsive to the presence of public employees in order to maximize their chances for re-election. In short, votes regarding the Hatch Act and its amendments must relate in some non-trivial way to characteristics of public employees.

Because public employees are more likely to vote and to otherwise be more politically active than other citizens, public employees can represent an important voting block.<sup>213</sup> If public employees represent a significant portion of a legislator’s constituency, that legislator should be more likely to support policies favored by public employees, especially those that facilitate their participation in the political process. Accordingly, there should be a positive relationship between the size of the public labor force and the legislator’s tendency to support liberalization of Hatch Act-type restrictions independent of party membership.

2. *Analysis of Voting Patterns.* As is traditionally done in research applying economic principles to the analysis of political processes, we assume that the primary objective of legislators is re-election.<sup>214</sup> In order to maximize their probability of re-election, politicians act in a manner consistent with the re-election goal. Accordingly, legislators’

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211. See 5 U.S.C. § 7322 (1994); Refer to notes 30-32 *supra* and accompanying text (identifying how the Hatch Act and its various amendments limit the political activities of public employees).

212. See ROBERT D. TOLLISON, *Rent Seeking*, in PERSPECTIVES, *supra* note 194, at 506, 521-22 (propounding the notion of legislation as a market mechanism by analyzing how members of the more diffuse and disorganized segments of society are taxed to fund legislation, and by contending that the better organized interest groups are much more active players in the market of legislation because the benefits are significantly higher for them).

213. See, e.g., James T. Bennett & William P. Orzechowski, *The Voting Behavior of Bureaucrats: Some Empirical Evidence*, 41 PUB. CHOICE 271, 282 (1983) (evidencing the notion that public employees tend to engage in political activities more than other citizens).

214. See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13 (1975) (illustrating that the assumption that the primary objective of legislators is re-election is a central one to economic analysis of politics); cf. Hasen, *supra* note 121, at 1316 (critiquing as simplistic the assumption that a legislator’s sole objective is re-election, but adopting it because it is efficient and ubiquitous).

voting behavior can be explained by looking at the preferences of their constituencies.<sup>215</sup>

In addition to party membership and the presence of federal employees in a legislator's district, other characteristics related to the economic and ideological preferences of constituents must be included in a model of legislators' voting behavior.<sup>216</sup> These variables should empirically capture the effects of other factors that are likely to affect the policy preferences of constituents and, thus, the voting behavior of the individual legislator.

Consistent with arguments presented above and with prior research on congressional voting behavior, we examine the influence of the following variables on legislators' votes on Hatch Act reform legislation: PARTY (0=Democrat, 1=Republican); PERCENT PUBLIC (percentage of the state/district's labor force that works in government); INCOME (median family income); PERCENT URBAN (percentage of the state/district's population living in urban areas); PERCENT UNION (percentage of the state's labor force that is unionized); PERCENT BLACK (percentage of the state/district's population that is black).<sup>217</sup> This leads to the estimation of the following equation:

$$\text{VOTE} = f(\text{PARTY, PERCENT UNION, PERCENT URBAN, INCOME, PERCENT PUBLIC, PERCENT BLACK}),$$

where VOTE equals 1 if the legislator supported liberalizing the Hatch Act and 0 otherwise. Because VOTE is a dichotomous dependent variable, logistic regression was used in the analyses.<sup>218</sup>

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215. See Sam Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181, 183-84 (1984) (justifying the argument that legislators' voting patterns can be explained by looking at the preferences of their constituencies).

216. See *id.* (explaining that factors such as race and ideology must be included as variables in any economic model of legislators' voting patterns for such a model to be accurate).

217. Data for each variable were collected for years 1976, 1990, and 1993, all years when Hatch Act reform legislation was voted on by both houses of Congress. The data sources are the following: VOTE—Congressional Quarterly Almanac, various years; PERCENT UNION—Statistical Abstract of the United States, various years; PERCENT URBAN, PERCENT BLACK and INCOME—Statistical Abstract of the United States and Almanac of American Politics, various years.

218. See ERIC A. HANUSHEK & JOHN E. JACKSON, *STATISTICAL METHODS FOR SOCIAL SCIENTISTS* 187, 190-91 (1977) (noting that logistic regressions must be used to tabulate dichotomous dependent variables).

Although this represents a rather simplistic empirical model of complex political decision making, it enables us to more rigorously test whether or not the voting behavior of legislators on Hatch Act reform legislation was motivated primarily by partisan politics or whether other factors were at work. Table 5 shows the regression results of the various votes on amendments to the Hatch Act.<sup>219</sup>

**Table 5**  
**Logistic Regression Analysis of Congressional Voting**  
**(House and Senate) on "Hatch" Act Reform Legislation**  
**(includes votes in 1976, 1990, 1993)**

Variable	Coefficient (S.E.)
Intercept	2.154 (.667)
Party	-3.488** (.200)
Pct. Union	.028** (.008)
Pct. Urban	.022** (.004)
Income	.00002 (.93E-5)
Pct. Black	.005 (.006)
Pct. Public	-.085** (.027)
-2 LLR	580.540**
N	1349

\*\* (\*) p<.01 (05)

All tests are two-tail.

These results demonstrate that even after controlling for other factors that might affect votes on Hatch Act legislation, party membership continues to be a major determinant of

219. See Table 5.



voting behavior.<sup>220</sup> Republicans were significantly less likely than Democrats to support Hatch Act reform legislation.<sup>221</sup> Thus, as originally suspected, party membership is a significant determinant of voting behavior regarding amendments to the Hatch Act, which supports our hypothesis that regulations concerning the political activities of public employees are a form of political control.<sup>222</sup>

Other significant results are consistent with the prevailing ideology of the groups the variables tend to represent. For example, a higher percentage of union members (who tend to support more liberal legislation) and a higher percentage of residents in urban areas (where high concentrations of minorities are found) significantly increased support for Hatch Act reform legislation.<sup>223</sup>

Interestingly, the percentage of a state's labor force employed in government is significantly and negatively associated with support for Hatch Act reform legislation.<sup>224</sup> Although consistent with our general hypothesis that constituents' characteristics matter in explaining voting behavior, this result is inconsistent with our hypothesis that the percentage of a state's labor force employed in government would be positively associated with a liberal vote.<sup>225</sup> The negative PERCENT PUBLIC coefficient in Table 5 suggests that the larger the percentage of the state's labor force employed in government, the less likely it is that a legislator will vote in favor of liberalizing the Hatch Act.<sup>226</sup> To further examine this relationship, we ran a separate analysis for Democrat and Republican members of Congress. Table 6 presents these results.

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220. *See id.*

221. *See id.*

222. Refer to note 197 *supra* and accompanying text (justifying the argument that laws regulating the political activities of public employees are themselves political machinations).

223. *See* Table 5.

224. *See id.*

225. Refer to text accompanying notes 213-14 *supra* (reflecting the hypothesis that the higher the percentage of a state's labor force that is publicly employed, the more likely it is that the state's legislators will vote to liberalize Hatch Act-type restrictions).

226. *See* Table 5 (illustrating that the percentage of a state's labor force employed in government is inversely proportional to the likelihood of a legislator's voting in favor of liberalizing Hatch Act restrictions).

**Table 6**  
**Logistic Regression Analysis of Congressional Voting**  
**(House and Senate) on "Hatch" Act Reform Legislation**  
**(includes votes in 1976, 1990, 1993)**

## (A) Republicans Only

Variable	Coefficient (S.E.)
Intercept	-.857 (.745)
Pct. Union	.030** (.009)
Pct. Urban	.016** (.006)
Income	.40E-5 (.00001)
Pct. Black	.008 (.008)
Pct. Public	-.078* (.031)
-2LLR	43.018**
N	525

\*\* (\*) p<.01 (05)

All tests are two-tail.

## (B) Democrats Only

Variable	Coefficient (S.E.)
Intercept	.232 (1.338)
Pct. Union	.022 (.018)
Pct. Urban	.022** (.007)
Income	.00014** (.00004)
Pct. Black	.002 (.010)
Pct. Public	-.060 (.054)
-2LLR	75.089**
N	824

\*\* (\*) p<.01 (05)

All tests are two tail.

The results in Table 6 suggest that the negative PERCENT PUBLIC coefficient is primarily driven by the effect it has on the voting behavior of Republicans. Compare the negative and significant PERCENT PUBLIC coefficient in panel (a) with the positive and statistically insignificant coefficient in panel (b). That is, Republicans are less likely to vote in favor of liberalizing the Hatch Act when they face a larger public sector in their states.<sup>227</sup> A plausible explanation for this result could be related to the public employment policies that the two political parties have traditionally supported.

Republicans have generally favored policies calling for a smaller government bureaucracy.<sup>228</sup> In contrast, the Democratic Party has traditionally been associated with "expansionist" government policies.<sup>229</sup> As bureaucrats, public employees tend to favor policies that expand the government bureaucracy.<sup>230</sup> By increasing the size of government budgets, public employees maximize their own job security. Accordingly, public employees should be more likely to support Democrats than Republicans. Recognizing this, a Republican legislator might reasonably calculate that there is little chance of gaining political support from public employees and, thus, vote to create obstacles to their participation in the political process.

In sum, these findings make it difficult to conclude that partisan politics are not a driving force behind debates regarding the appropriateness of government regulation of public employees' political activities. Of course, these sorts of political debates are not new. The same partisan self-interests are reflected in battles over whether or not government should adopt policies that increase voter turnout, such as voter-friendly registration, voting on the weekend, and easy access to absentee ballots, among others.<sup>231</sup> At the core of these debates is the simple

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227. See Table 6 (detailing how the size of the public sector in a state is inversely proportional to the likelihood of Republicans' voting in favor of liberalizing the Hatch Act).

228. See, e.g., Anita Krishnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget "Train Wreck,"* 34 HARV. J. ON LEGIS. 589, 602 (1997) (reviewing congressional Republicans' 1995 goal of consolidating the federal bureaucracy and downsizing the federal government).

229. See Charles D. Kelso & R. Randall Kelso, *Politics and the Constitution: A Review of Judge Malcolm Wilkey's Call for a Second Constitutional Convention*, 27 PAC. L.J. 1213, 1229-30 (1996) (book review) (highlighting the difference between social and political progressivism and conservatism as well as the Democratic Party's traditional allegiance to the progressive movement).

230. Refer to notes 193-94 *supra* and accompanying text (describing how the federal bureaucracy seeks to enlarge itself).

231. See Arend Lijphart, *Compulsory Voting is the Best Way to Keep Democracy Strong*, CHRON. HIGHER EDUC., Oct. 18, 1996, at B3.

fact that low voter turnout favors privileged voters, who tend to be conservative, and thus benefits the Republican Party.<sup>232</sup>

## VI. RELATIONSHIP TO UNIONIZATION

For much of the nation's history, unionization and collective bargaining by government employees were considered inappropriate by lawmakers and also by union officials.<sup>233</sup> In fact, public employees were excluded from labor legislation coverage under the Norris-LaGuardia Act<sup>234</sup> and the National Labor Relations Act<sup>235</sup> passed during the New Deal era.<sup>236</sup> Consequently, public employees lacked protection to unionize and engage in collective bargaining at a time when private sector unions flourished. In the early 1960s, this situation began to change when President Kennedy issued Executive Order 10988,<sup>237</sup> which granted limited unionization and collective bargaining rights for federal employees,<sup>238</sup> and various states began passing public sector labor legislation.<sup>239</sup>

Today, approximately eight million government employees are covered under collective bargaining agreements.<sup>240</sup> Public sector union members constitute approximately 38% of all union members in the United States.<sup>241</sup> Although extremely important to the growth of public sector unionization after 1960, the passage of legislation supporting unionization and collective bargaining was not the lone cause.<sup>242</sup> At the time these laws were passed, public employees' attitudes toward collective bargaining were changing, unions were intensifying their organizing efforts in the public sector, and, where

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232. See *id.* at B4.

233. See John F. Burton, Jr. & Terry Thomason, *The Extent of Collective Bargaining in the Public Sector*, in PUBLIC SECTOR BARGAINING 14-15 (Benjamin Aaron et al. eds., 2d ed. 1990) (canvassing the historical trend of union officials and legislators to discourage collective bargaining by public employees).

234. 29 U.S.C. § 101 (1994).

235. 29 U.S.C. § 151 (1994).

236. See *id.* § 102 (asserting the applicability of the statutory provisions to the rights of owners of property to unionize); *id.* § 152(2) (denying coverage under the statute to public employees).

237. 27 Fed. Reg. 551 (1962).

238. See *id.* § 1(a)-(b).

239. See Burton & Thomason, *supra* note 233, at 17.

240. See BUREAU OF THE CENSUS, ECON. AND STATISTICS ADMIN., STATISTICAL ABSTRACT OF THE UNITED STATES 1997, 440 tbl. 688 (117th ed. 1997).

241. See *id.*

242. See Burton & Thomason, *supra* note 233, at 27 (pointing out that part of the growth in public sector unionization was due, in part, to the changed attitude of workers toward bargaining).

organizing occurred, management resistance was minimal.<sup>243</sup> Considering the interrelationships among these various factors, it seems reasonable to conclude that the initiating factor was changes in public employees' attitudes. For example, unions would not likely have targeted public employees for organizing drives if public employees were not interested in unions and collective bargaining. Similarly, collective bargaining legislation, which some have argued has been the most important determinant of public sector union growth,<sup>244</sup> would not have existed without demand for such legislation by public employees.<sup>245</sup>

The development of public sector unionization provides an interesting contrast to the development of laws regulating the political activities of public sector employees. While the federal and state governments were limiting political involvement by public employees, those same employees were pursuing collective activities as a way of increasing their voice in the political sphere.<sup>246</sup> Given these two parallel developments, one wonders whether the increase in unionization among public employees might have been at least partially caused by restrictions placed on public employees by Hatch Act-type legislation.<sup>247</sup>

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243. See *id.* at 17, 27.

244. See RICHARD B. FREEMAN & CASEY ICHNIOWSKI, *Introduction: The Public Sector Look of American Unionism*, in WHEN PUBLIC SECTOR WORKERS UNIONIZE 1, 2-3 (Richard B. Freeman & Casey Ichniowski eds., 1988) (contending that collective bargaining legislation is the most important factor in causing public sector growth).

245. The idea that state bargaining laws are endogenously determined can be found in Melissa Waters & William J. Moore, *The Theory of Economic Regulation and Public Choice and the Determinants of Public Sector Bargaining Legislation*, PUB. CHOICE, Aug. 1990, at 161, 161 (suggesting that state bargaining laws ought to be regarded as endogenously determined).

246. See *Project: Collective Bargaining and Politics in Public Employment*, *supra* note 37, at 983-84 (discussing the relationship between collective bargaining legislation in the public sector and the regulation of political activities by individual employees); Dale Belman et al., *Public Sector Employment Relations in Transition*, in PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 1, 2 (Dale Belman et al. eds., 1996) (describing the 1960s through the 1980s as the era of establishment and maturation of collective bargaining in the public sector).

247. Arguably, if the primary intent of restricting the ability of public employees to engage in political activities is to manipulate the political process, passage of Hatch Act-type legislation may have been a direct response to the substantial political power and extensive political participation of public employee unions. While logically plausible, there are several reasons to reject this causal explanation. First is the issue of timing. Hatch Act legislation, which was first passed in 1939, significantly pre-dates the dramatic growth in public employee unionism that occurred after 1960. Refer to text accompanying notes 29-30 *supra* (discussing the enactment of the Hatch Act in 1939). Refer to notes 237-41 *supra* and accompanying text (stating that union activity flourished during the 1960s). Second, the political power of public employee unions makes it highly unlikely that vote-maximizing

Employees have two means of expressing discontent with the employment relationship: (1) they can exit the organization; or (2) they can voice their dissatisfaction to management.<sup>248</sup> Unfortunately, constraints (i.e., a strong profit motive) generally associated with public monopolies limit the importance of exit as a means of changing government. Specifically, because employee exit is thought to induce change by incurring costs on organizations, the lack of a profit motive diminishes the potential influence of exit on public sector organizations' practices and policies.<sup>249</sup> This should effectively increase the importance of voice to government employees.<sup>250</sup> Accordingly, public employees might attempt to exert political influence through their individual participation in various political activities. Yet, as seen from our review of Hatch Act legislation, such attempts are often severely constrained by federal and state Hatch Act legislation.<sup>251</sup> The resulting pent-up demand for political participation will cause public employees to seek alternative avenues of participation. If public employee unions are capable of providing political benefits to public employees, demand for unionization should increase. So, are public employee unions politically motivated? The answer is clearly "yes."<sup>252</sup>

Unlike private sector labor-management relations, in which unions negotiate with decisionmakers concerned with profit maximization, public sector unions negotiate with decisionmakers who are vote-maximizers, thus making collective bargaining inherently political.<sup>253</sup> Indeed, early students of public sector unionization feared that the political

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politicians would attempt to limit union power through the passage of Hatch Act legislation. Finally, though restrictive of political activities by individual public employees, Hatch Act legislation generally allows public employee political participation through public employee unions. See 5 U.S.C. § 7323 (1994). This exception would not be allowed if limiting public employee unions' political power was the goal of Hatch Act legislation. A more likely explanation for the relationship between Hatch Act legislation and public employee unionization is that such legislation was a cause, not an effect, of public employee union growth.

248. Under this view, exit is the classic market (i.e., economic) mechanism, whereas voice is political. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 15 (1970).

249. See *id.* at 34 (illustrating the limited utility of exit as a means of changing government).

250. See *id.* (noting that as the opportunities for exit decline, the role of voice increases).

251. Refer to Part II.A-B *supra* (detailing the prohibitions against political involvement imposed on public employees through Hatch Act-type legislation at the state and federal level).

252. See Rafael Gely & Timothy D. Chandler, *Protective Service Unions' Political Activities and Departmental Expenditures*, 16 J. LAB. RES. 171, 171 (1995) (pointing out that politics and public sector labor activities are intertwined).

253. See *id.*

nature of public sector labor-management relations would give public employee unions inordinate power and thereby distort the normal political process.<sup>254</sup>

Recent evidence suggests that public employee unions' political influence may be increasing and that such influence yields benefits to public sector union members. For instance, a recent assessment of union political capital found that public sector union PAC receipts were 320% higher in 1994 than in 1980 and that per-member PAC receipts were nearly 3.5 times greater in 1994 than in 1980.<sup>255</sup>

Obviously, PACs do not represent the full range of union political activities. This is especially true in the case of public sector unions in which political pressure tactics are employed to directly influence collective bargaining outcomes.<sup>256</sup> Recent empirical studies have examined the impact that various political activities at the local level have had on collective bargaining outcomes, including candidate endorsements, financial and manpower campaign contributions, mismanagement disclosure threats, and publicity campaigns, among others.<sup>257</sup> These studies find that union political activities increase wages and employment for public sector union members.<sup>258</sup> Moreover, public sector unions' political activities increase departmental expenditures.<sup>259</sup> Yet union political activities do not increase municipal expenditures, suggesting that public employee unions might, in fact, distort the normal political process (i.e., normal being that which would exist in the absence of unions) by redistributing resources away from nonunion employees and toward unionized employees.

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254. See HARRY H. WELLINGTON & RALPH K. WINTER, JR., *THE UNIONS AND THE CITIES* 25 (1971) (arguing that delegating the right to withhold labor and employ political pressure to public sector unions would grant them an inordinate share of political power). There are two principle reasons for this belief. First, monopoly conditions surrounding the provision of many public services ensure a lack of market forces, which constrain union power in the private sector. Second, combining the ability to strike with the usual methods of political influence could give unions "a disproportionate share of effective power in the process of decision[s]." *Id.*

255. See MARICK F. MASTERS, *UNIONS AT THE CROSSROADS: STRATEGIC MEMBERSHIP, FINANCIAL, AND POLITICAL PERSPECTIVES* 129 (1997).

256. See WELLINGTON & WINTER, *supra* note 254, at 24-25 (asserting that public sector unions' use of political pressure tactics could skew the political process).

257. See Timothy D. Chandler & Rafael Gely, *Protective Service Unions, Political Activities, and Bargaining Outcomes*, 5 J. PUB. ADMIN. RES. & THEORY 295, 295-96 (1995); see also Kevin M. O'Brien, *Compensation, Employment, and the Political Activity of Public Employee Unions*, 13 J. LAB. RES. 189, 190 (1992) (surveying the effects of public sector unions' political activities).

258. See O'Brien, *supra* note 257, at 199.

259. See Chandler & Gely, *supra* note 257, at 295-96.

In short, public employee unions are actively involved in political activities to affect collective bargaining outcomes and governmental resource allocation decisions.<sup>260</sup> Thus, they provide valuable political services to public employees who are constrained from participating in political processes on an individual basis.

## VII. CONCLUSION

It is not uncommon, and probably not surprising, that in a large democratic system such as ours, there exist some inconsistencies in the implementation of public policy. This Article points out one such inconsistency: The differing treatment that the United States Supreme Court has given to regulations concerning the political behavior of public employees, that is, Hatch Act-type laws and patronage.

The Court has been unsympathetic to government's defense of patronage.<sup>261</sup> The Supreme Court has essentially prohibited adverse employment decisions based on political affiliation, subject to a narrow set of exceptions.<sup>262</sup> In contrast, the Court has taken a much more pro-employer approach with regard to the regulation of public employees' political activities, often upholding government restrictions on public employees' political activities.<sup>263</sup> This Article posits that the Court's differential treatment of patronage compared to restrictions on public employees' political activities is unwarranted. When governments implement restrictive Hatch Act-type legislation, they are controlling the ability of public employees to be politically involved to a similar degree as would occur if they were conditioning public employment on prospective employees' political affiliations.

If our conclusion is correct, the regulation of political activities via Hatch Act legislation manipulates political processes as much as political patronage. Thus, the different treatment the Court has afforded these areas of public employment law appears to be unwarranted. The Court, we submit, should be more willing to question government efforts

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260. See Gely & Chandler, *supra* note 252, at 171 (advancing the notion that public sector unions affect collective bargaining outcomes).

261. Refer to Part III.B *supra* (chronicling the cases that evidence the Supreme Court's distaste for the system of patronage).

262. See *id.* (chronicling the cases that reflect the Supreme Court's proscription against employers' firing or demoting employees based solely on the employee's political predilections).

263. Refer to Part II.A.2 *supra* (reviewing the Supreme Court's more lenient stance towards regulations restricting purely political activities).



to limit political participation by public employees than has historically been the case, thereby diluting the legal importance of cases like *Mitchell* and *Letter Carriers*.