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ANTHONY T. KOVALCHICK*

On March 30, 1981, President Ronald Reagan was wounded in an assassination attempt.1 Upon hearing this news, a nineteen-year-old clerical worker in the Office of the Constable of Harris County, Texas, allegedly exclaimed to a co-worker, "If they go for him again, I hope they get him."2 After a brief conversation with a superior, she was discharged for making this statement.3 In Rankin v. McPherson, the U.S. Supreme Court held that this form of retaliatory termination by the Office of the Constable in response to political speech violated the Free Speech Clause of the First Amendment, which is applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment.4 Under these circumstances, the Court determined that a clerical government employee had a First Amendment right to say, inside of the workplace, that she hoped that a future attempt to assassinate the President of the United States would be successful.5 Nevertheless, the Court has also concluded that, outside of the workplace, such a clerical government employee has no First Amendment right to campaign for

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3. Id. at 382.
4. Id. at 390-92.
5. Id. at 390 (noting that she was fired precisely because of the content of her speech).
or against the President, or any other partisan political candidate.\(^6\) Because of fundamentally misguided legislation and an unprincipled line of judicial decisions, the federal Hatch Act\(^7\) has systematically chilled government employees' participation in partisan political activity for over seven decades. Despite some important revisions, several provisions of the Hatch Act are clearly contrary to basic First Amendment principles. It is incumbent upon legislators, executives, and jurists alike to end this unconstitutional suppression of partisan political activity. Those who devote their careers to public service deserve better than a jurisprudence that protects their right to participate in the democratic process as responsible citizens outside of the workplace to a lesser degree than it protects their rights to verbally wish death to the nation's Chief Executive inside of the workplace.

The Hatch Act, which was named after Senator Carl Hatch of New Mexico, was originally enacted in 1939.\(^8\) Its purpose was to prohibit federal executive employees from voluntarily taking an "active part in political management or in political campaigns."\(^9\) In 1940, a similar prohibition was imposed on state and local government employees whose duties were connected to federally funded programs and activities.\(^10\) Despite the severity of the restrictions imposed on the expressive activities of government employees by the Hatch Act, the Supreme Court upheld the applicable statutory prohibitions.\(^11\) The Court's decisions upholding the Hatch Act have been totally devoid of constitutional analysis. Notwithstanding the First Amendment's mandate that "Congress shall make no law ... abridging the freedom of speech," the Court has generally deferred to Congress's judgment concerning the alleged need for the Hatch Act.\(^12\) The Court has done so without making a determi-

\(^{6}\) 5 U.S.C. § 7322 (2000) (defining "partisan political office" as "any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, but shall exclude any office or position within a political party or affiliated organization"). See generally U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).


\(^{9}\) Bloch, supra note 8, at 230-31.

\(^{10}\) Id. at 233-34; see also Hatch Act of 1940, Pub. L. No. 76-753, 54 Stat. 767 (amending the Hatch Act of 1939).


\(^{12}\) Letter Carriers, 413 U.S. at 564.
nation as to whether restrictions on the voluntary participation of government employees in partisan political activity are necessary to secure the interests asserted by Hatch Act supporters.\footnote{Rutan v. Republican Party of Ill., 497 U.S. 62, 98-99 (1990) (Scalia, J., dissenting).} Despite the clear implication of First Amendment rights by the Hatch Act, the Court has essentially applied a rational basis test in cases involving constitutional challenges to the Act's validity.\footnote{United Pub. Workers, 330 U.S. at 101 ("For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service.").} The Supreme Court's jurisprudence has resulted in a legacy of suppression.

History has proven that the interests asserted by Hatch Act supporters to justify its prohibitions are not weighty enough to justify coercing the vast majority of government employees into political silence. In 1974, Congress amended the Hatch Act to permit covered state and local government employees to participate in partisan political activity.\footnote{Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; Bauers v. Cornett, 865 F.2d 1517, 1523 (8th Cir. 1989).} Almost two decades later, in 1993, Congress again amended the Hatch Act to permit most federal executive employees to "take an active part in political management or in political campaigns."\footnote{5 U.S.C. § 7323(a) (2000).} Nevertheless, in both instances, Congress left provisions in place prohibiting covered employees from becoming candidates in partisan elections.\footnote{Id. §§ 1502(a)(3), 7323(a)(3).} Consequently, covered employees risk losing their jobs if they run for partisan political office, even though incumbents in Congress do not have to resign in order to run for another position. This attempt by incumbents to insulate themselves from electoral challenges from government employees has gone virtually unnoticed by many Americans. Nevertheless, the time has come for the Hatch Act to be exposed for the incumbent-protectionist sham that it is.

As the Supreme Court has recognized, the government has broader authority to impose restrictions on the speech of its employees than it does to impose restrictions on the speech of members of the general public.\footnote{Waters v. Churchill, 511 U.S. 661, 671-74 (1994).} This basic principle, however, does not mean that prohibitions on the partisan political activities of government employees are constitutionally permissible. Political campaign speech lies at the very core of the First Amendment, not at its
An individual's right to engage in the expressive activities associated with a political campaign is highly protected. As the U.S. Court of Appeals for the Eighth Circuit recently explained in Republican Party v. White, our constitutional system of government was "borne of the great struggle to secure such freedoms as political speech" and the protection of such freedoms helps to "assure the continuance of that constitutional government."

Even if one accepts the general proposition that the government may restrain the speech of its employees to a greater degree than it may restrain the speech of the general public, it does not follow that the government may constitutionally prohibit its employees from engaging in partisan political activity. While "Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large," the Supreme Court has recognized that public employees do not relinquish all of their First Amendment rights merely because they enter into an employment relationship with the government.

Although the Supreme Court has upheld the Hatch Act's prohibitions on the partisan political activities of government employees, it has implicitly acknowledged that such prohibitions do not serve any weighty governmental interests. Instead of giving effect to the constitutional mandate of the First Amendment, the Court has permitted Congress to silence the political speech of government employees without subjecting the Hatch Act to any meaningful degree of constitutional scrutiny. In so doing, the Court has abdicated its responsibility to give effect to the Constitution. The Hatch Act violates the First Amendment, demeans the dignity of the political process, and denigrates the importance of political participation. It is fundamentally at odds with basic constitutional principles and it cannot withstand the meaningful constitutional

20. Id.
21. Id. at 748.
24. Waters v. Churchill, 511 U.S. 661, 673 (1994) ("One could make a respectable argument that political activity by government employees is generally not harmful . . . .").
scrutiny that the Supreme Court has inexplicably neglected to apply in cases that have challenged its validity.

I. **The Supreme Court’s Jurisprudence Concerning the Hatch Act**

The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”26 Although Congress undoubtedly has legislative jurisdiction to regulate the terms of federal employment, that authority is subject to the substantive limits imposed by the First Amendment.

The constitutionality of restrictions on the political activities of federal employees has been addressed by the U.S. Supreme Court on several occasions. As early as 1882, in *Ex parte Curtis*, the Court upheld a federal statute that made it unlawful for federal executive officers and employees, other than those appointed by the President, “to request [from], give to, or receive from any other officer or employé of the government any money or property or other thing of value for political purposes.”27 Violators were not only subject to discharge, but were also guilty of a misdemeanor, punishable by a five hundred dollar fine.28 In a brief opinion authored by Chief Justice Waite, the Court explained that the statutory provision was a valid attempt by Congress “to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service.”29 The Court observed:

If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty, growing out of the political relations of the parties.30

Moreover, it was noted that if it was constitutional for Congress to prohibit the underlying activity, “the kind or degree of punishment

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27. *Ex parte Curtis*, 106 U.S. 371, 376 (1882) (Bradley, J., dissenting); *id.* at 375 (majority opinion) (holding the statute constitutional).
28. *Id.* at 375.
29. *Id.* at 373.
30. *Id.* at 374.
to be inflicted for disregarding the prohibition [was] clearly within the discretion of Congress, provided [that it was] not cruel or unusual.\textsuperscript{31} Since the Constitution gave Congress the authority to create the positions held by the employees covered by the statute, the prohibition was deemed to be a valid exercise of Congress's authority under the Necessary and Proper Clause.\textsuperscript{32}

Justice Bradley authored a dissenting opinion in which he expressed the view that the statutory prohibition violated the First Amendment.\textsuperscript{33} He explained:

To take an interest in public affairs, and to further and promote those principles which are believed to be vital or important to the general welfare, is every citizen's duty. It is a just complaint that so many good men abstain from taking such an interest. Amongst the necessary and proper means for promoting political views, or any other views, are association and contribution of money for that purpose, both to aid discussion and to disseminate information and sound doctrine. To deny to a man the privilege of associating and making joint contributions with such other citizens as he may choose, is an unjust restraint of his right to propagate and promote his views on public affairs. The freedom of speech and of the press, and that of assembling together to consult upon and discuss matters of public interest, and to join in petitioning for a redress of grievances, are expressly secured by the Constitution.\textsuperscript{34}

It is clear from the language of Justice Bradley's dissent that he viewed the First Amendment as the embodiment of popular sovereignty.

The Supreme Court was called upon to decide the constitutionality of the Hatch Act in \textit{United Public Workers v. Mitchell}.\textsuperscript{35} In 1947, when \textit{United Public Workers} was decided, the relevant provision was codified at 18 U.S.C. § 61h and provided, in pertinent part:

No officer or employee in the executive branch or the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement

\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.} at 372.
\textsuperscript{33} \textit{Id.} at 376-79 (Bradley, J., dissenting).
\textsuperscript{34} \textit{Id.} at 376-77.
or manufacture of war material shall take any active part in political management or in political campaigns.\(^{36}\)

Those who violated the Act were subject to dismissal from their jobs.\(^{37}\) The Court found the Act to be constitutionally permissible.\(^{38}\) Speaking through Justice Reed, the Court declared that "[t]he essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery."\(^{39}\)

The Court's primary basis for upholding the Hatch Act was Congress's recognition of a "danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections."\(^{40}\) The statutory prohibition was not viewed as a severe restraint on the First Amendment rights of federal employees because it "[left] untouched full participation by employees in political decisions at the ballot box and [prohibited] only the partisan activity of federal personnel deemed offensive to efficiency."\(^{41}\) The Court explained:

It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success.\(^{42}\)

The Act's indiscriminate application to employees in various job categories was of no concern to the Court. Noting that "Congress may have thought that government employees are handy elements for leaders in political policy to use in building a political machine," the Court declared that "[f]or regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."\(^{43}\) Rejecting the idea that the political activities of industrial workers could not be limited even if the political activities of administrative workers could be limited, the Court explained

\(^{36}\) Id. at 78 n.2.
\(^{37}\) Id. at 79.
\(^{38}\) Id. at 103.
\(^{39}\) Id. at 95.
\(^{40}\) Id. at 98.
\(^{41}\) Id. at 99.
\(^{42}\) Id. at 100.
\(^{43}\) Id. at 101.
that "'[t]he determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress.'"44 Although it may not have been apparent at the time, the Court applied a standard that was no more rigorous than a "rational basis" review.

Justice Black dissented on the ground that the Hatch Act violated the First Amendment.45 He explained that "[p]opular government, to be effective, must permit and encourage much wider political activity by all the people."46 He declared:

Our political system, different from many others, rests on the foundation of a belief in rule by the people—not some, but all the people. Education has been fostered better to fit people for self-expression and good citizenship. In a country whose people elect their leaders and decide great public issues, the voice of none should be suppressed—at least such is the assumption of the First Amendment. That Amendment, unless I misunderstand its meaning, includes a command that the Government must, in order to promote its own interest, leave the people at liberty to speak their own thoughts about government, advocate their own favored governmental causes, and work for their own political candidates and parties.47

In the opinion of Justice Black, the First Amendment did not allow Congress to "make[ ] honest participation in essential political activities an offense punishable by proscription from public employment."48

Justice Douglas also filed a dissenting opinion. He expressed the view that if the First Amendment rights of federal employees needed to be curtailed for the sake of "the larger requirements of modern democratic government," the restrictions imposed by Congress needed to be "narrowly and selectively drawn to define and punish the specific conduct which constituted a clear and present danger to the operations of government."49 According to Justice Douglas, the Hatch Act's sweeping prohibitions could not be constitutionally applied to industrial workers.50 He expressed no opin-

44. Id. at 102.
45. Id. at 109 (Black, J., dissenting).
46. Id. at 110.
47. Id. at 114.
48. Id. at 115.
49. Id. at 126 (Douglas, J., dissenting).
50. Id.
ion as to whether prohibitions of this kind could be constitutionally applied to employees in other job categories.\textsuperscript{51}

Subsequent to \textit{United Public Workers}, the Supreme Court began to delineate the First Amendment rights of public employees with respect to the terms and conditions of their employment. In \textit{Pickering v. Board of Education}, the Court explained that "[t]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."\textsuperscript{52} In \textit{Pickering}, a high school teacher was dismissed for writing a letter to a newspaper that criticized how the Board of Education had allocated financial resources between certain academic and athletic programs.\textsuperscript{53} The Court concluded that the teacher's dismissal violated the First and Fourteenth Amendments. It was acknowledged that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."\textsuperscript{54} The Court declared that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."\textsuperscript{55} This balancing is frequently referred to as the \textit{Pickering} balancing test.

Applying this balancing test, the Court explained that since teachers were "the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent," it was "essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."\textsuperscript{56} Although some of the specific financial figures included in the teacher's letter were inaccurate, the Court reasoned that the school board could have easily rebutted the teacher's errors by publishing the actual financial figures in a letter to the same newspaper.\textsuperscript{57} The precise statements involved, though critical of the teacher's employer, were not shown to have impeded the

\begin{itemize}
\item \textsuperscript{51} Id. at 126 n.14.
\item \textsuperscript{53} Id. at 566.
\item \textsuperscript{54} Id. at 568.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id. at 572.
\item \textsuperscript{57} Id.
\end{itemize}
teacher’s proper performance of his duties or to have interfered with the general operation of the schools within the district.\textsuperscript{58} Since the fact of the teacher’s employment was only “tangentially and in-substantially involved in the subject matter of the public communication” contained in the letter, the Court concluded that it was “necessary to regard the teacher as the member of the general public.”\textsuperscript{59} The Court determined that, absent proof that the teacher’s statements were made with knowledge that they were false or with reckless disregard as to whether they were false, they could not constitutionally furnish the basis for his dismissal.\textsuperscript{60} Commenting on the importance of the First Amendment issues at stake in the case, the Court declared that “[w]hile criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech [than] dismissal from employment,” the threat of dismissal was nevertheless “a potent means of inhibiting speech.”\textsuperscript{61}

In 1973, five years after \textit{Pickering}, the Supreme Court revisited the issue of the Hatch Act’s constitutionality. The applicable provision of the Hatch Act was 5 U.S.C. § 7324(a)(2), which prohibited federal executive employees and employees of the government of the District of Columbia from taking “an active part in political management or in political campaigns.”\textsuperscript{62} In \textit{United States Civil Service Commission v. National Ass’n of Letter Carriers}, the Court “unhesitatingly” reaffirmed its prior decision in \textit{United Public Workers}.\textsuperscript{63} In the Court’s view, “neither the First Amendment nor any other provision of the Constitution” invalidated a statute barring federal employees from engaging in partisan political activity.\textsuperscript{64} In so holding, the Court referred to “the judgment of history” that it was in the best interest of the country “that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited.”\textsuperscript{65}

The opinion of the Court in \textit{Letter Carriers} was delivered by Justice White, who explained that it was the judgment of Congress

\textsuperscript{58} \textit{Id.} at 572-73.
\textsuperscript{59} \textit{Id.} at 574.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.}
\textsuperscript{63} \textit{Id.} at 556.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.} at 557.
that partisan political activities of federal employees needed to be limited if "the Government [was] to operate effectively and fairly, elections [were] to play their proper part in representative government, and employees themselves [were] to be sufficiently free from improper influences." He noted that the Hatch Act's prohibitions did not target particular parties or viewpoints, and that they sought to control neither the political opinions of federal employees nor the votes cast by those employees. Relying on the Court's prior decision in *Pickering*, Justice White declared:

"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." Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act.

The Court identified four governmental interests to justify upholding the Hatch Act. The first was a generalized interest in ensuring that federal employees administer the law "in accordance with the will of Congress" rather than in accordance with the "will of a particular political party." The Court thought that forbidding partisan political activities on the part of federal employees would "reduce the hazards to fair and effective government." Second, the Court believed that it was not only important that federal employees avoid "practicing political justice," but that "they appear to the public to be avoiding it." In the Court's view, the Hatch Act prevented confidence in the system of representative government from being "eroded to a disastrous extent." Third, the Court noted that Congress had an interest in preventing a political party from "using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its political structure and political campaigns." Fourth, the Court highlighted the gov-

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66. *Id.* at 564.
67. *Id.*
69. *Id.* at 564-65.
70. *Id.* at 565.
71. *Id.*
72. *Id.*
73. *Id.* at 565-66.
ernment's interest in ensuring that federal employees did not feel pressured or coerced "to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." The Court deferred to the legislative determination that prohibiting federal employees from engaging in partisan political activity provided the "most significant safeguard against coercion." The Court concluded that "[n]either the right to associate nor the right to participate in political activities is absolute in any event."

In a dissenting opinion joined by Justices Brennan and Marshall, Justice Douglas decried the Court's conclusory decision to reaffirm its prior decision in United Public Workers. He insisted that if the case had involved "social or economic matters," it would have been sufficient for the Court to apply the rational basis standard that had been the touchstone of the United Public Workers precedent. Relying on Pickering, Justice Douglas explained that United Public Workers had been "of a different vintage" from Letter Carriers. He declared that laws trenching on the freedom to discuss governmental affairs needed to be "narrowly and precisely drawn to deal with precise ends." Conceding that the government could constitutionally prevent its employees from engaging in partisan political activity on office time, Justice Douglas insisted that "it [was] of no concern of the government what [the] employee said in private to his wife or to the public in Constitution Hall."

Even a cursory reading of the Supreme Court's opinion in Letter Carriers reveals its unprincipled nature. As the Court would later observe in United States v. National Treasury Employees Union, the balancing test that had been applied in Pickering was never truly applied in Letter Carriers. Instead, the Court simply "restated in balancing terms" its prior approval of the Hatch Act in United Public Workers. In other words, instead of applying Pickering in order to determine whether the Hatch Act was constitu-

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74. Id. at 566.
75. Id. at 566-67.
76. Id. at 567.
77. Id. at 596-97 (Douglas, J., dissenting).
78. Id.
79. Id. at 598.
80. Id.
81. Id. at 597.
83. Id.
tional, the Court simply cited Pickering as a basis for adhering to its prior decision in United Public Workers. United Public Workers was decided in accordance with a rational basis analysis. Such a deferential standard was a far cry from the balancing test that would later be applied in Pickering.

With respect to the first three interests identified by the Court to justify its decision to uphold the Hatch Act in Letter Carriers, it is clear that the Court blurred the distinction between a federal employee’s job performance and his or her individual speech as a citizen. In Pickering, the Court found it necessary to regard the teacher “as the member of the general public” when he spoke out against the actions of his employer. In Letter Carriers, the Court ignored the distinction between an employee’s job duties and his or her independent speech. Instead of recognizing this distinction and applying the Pickering balancing test, the Letter Carriers majority simply assumed that federal employees would be unable to perform their duties at work in a nonpartisan manner if they were engaging in partisan political activities away from the workplace.

Under the Supreme Court’s recent decision in Garcetti v. Ceballos, the First Amendment does not protect a public employee from employer discipline for speech made pursuant to that employee’s official duties. This is a sensible rule since an employee who speaks pursuant to his or her official duties does not speak on his or her own behalf as a citizen. Nevertheless, the converse of this rule was ignored in Letter Carriers. The Letter Carriers majority spoke as if all partisan political activity on the part of a federal employee was undertaken pursuant to the employee’s official duties rather than in his or her capacity as a private citizen. Where a public employee engages in independent speech as a citizen, an inquiry must be conducted as to whether this speech is about a matter of public concern. If the employee’s speech does not involve a matter of public concern, the public employer’s reaction to that speech does not violate the First Amendment. However, if the

84. After all, it was in United Public Workers that the Court declared that “[f]or regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service.” United Pub. Workers v. Mitchell, 330 U.S. 75, 101 (1947).
86. Letter Carriers, 413 U.S. at 564-65.
88. Letter Carriers, 413 U.S. at 564-65.
89. Garcetti, 547 U.S. at 418 (citing Pickering, 391 U.S. at 568).
employee's speech does involve a matter of public concern, "the possibility of a First Amendment claim arises."91 At that point, "The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."92 As the Supreme Court noted in Garcetti, "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."93

The Supreme Court's language in Garcetti defines the constitutional limit on the government's ability to suppress the speech of its employees. This standard does not allow a public employer to have the final say as to whether a given restriction on speech is necessary. In Letter Carriers, however, the Court simply deferred to Congress's judgment as to the necessity of the Hatch Act.94 The rationale that was applied in Letter Carriers acted as a rubber stamp for a political judgment that had already been made.95 For this reason, Letter Carriers is at odds with the Court's subsequent decisions concerning the First Amendment rights of public employees.

The fourth interest identified by the Court in Letter Carriers as a basis for upholding the Hatch Act was the government's interest in protecting its employees from political coercion.96 By relying on this interest, however, the Court ignored the fact that the Hatch Act was itself coercive. Federal employees were compelled to refrain from political activity. Suppressing the political speech of federal employees for the sake of protecting the First Amendment rights of those employees is like banning women from the workplace in order to prevent sexual harassment. The object of the prohibition is subsumed by the prohibition itself. In Wooley v. Maynard, the Court declared that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."97 The First Amendment protects an affirmative right to

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91. Garcetti, 547 U.S. at 418.
92. Id.
93. Id. at 419.
speak to the same extent that it protects a right to refrain from speaking.

In Board of Directors of Rotary International v. Rotary Club of Duarte, the Supreme Court explained that "the right to engage in activities protected by the First Amendment implies 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'"98 This right of expressive association "has its fullest and most urgent application precisely to the conduct of campaigns for political office."99 As the Court stated in Buckley v. Valeo, "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."100 Moreover, a citizen's speech for or against the election of a political candidate is obviously speech regarding a matter of public concern. Consequently, within the context of the Pickering balancing test, it would take a very weighty governmental interest to outweigh a public employee's interest in participating in a political campaign.

Had the Court actually applied the Pickering test in Letter Carriers, it is highly unlikely that the Hatch Act could have been upheld on the basis of a generalized interest in "efficiency." For this reason, the Court observed, in hindsight, that the "employee-protective rationale" discussed in Letter Carriers provided a much stronger justification for upholding the Hatch Act's prohibition on partisan political activity than did the government's interest in "workplace efficiency."101 This rationale, however, accounts only for the "protection" of those federal employees who would feel coerced or pressured to participate in partisan political campaigns. It ignores the First Amendment rights of those employees who would choose to participate in partisan political activity rather than be coerced into political silence by the Hatch Act. This reality highlights the fundamental flaw in the Court's reasoning in United Public Workers and Letter Carriers.

In the aftermath of Letter Carriers, the Supreme Court has consistently held that the First Amendment protects government

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100. Id. at 14-15.
employees from job-related discrimination on the basis of political affiliation. In *Elrod v. Burns*, the Court held that the First Amendment prohibited public employers from dismissing nonpolicymaking employees because of their political affiliation. The basis for this holding was the severe restrictions on political belief and association that resulted from patronage dismissals. This rule was refined in *Branti v. Finkel*, in which the Court explained that a public employer could constitutionally dismiss an employee because of his or her political affiliation only upon a showing that party affiliation was "an appropriate requirement for the effective performance of the public office involved." In *Rutan v. Republican Party of Illinois*, the Court extended *Elrod* and *Branti* by holding that "promotion, transfer, recall, and hiring decisions involving low-level government employees may [not] constitutionally be based on party affiliation." Constitutional protection was later extended to independent contractors in *Board of County Commissioners v. Umbehr* and *O'Hare Truck Service, Inc. v. City of Northlake*. In *Umbehr*, the Court determined that the First Amendment protected independent contractors from government entities' retaliatory termination of their contracts because of the contractors' speech, and that the extent of this protection was to be determined in accordance with the *Pickering* balancing test. In *O'Hare*, the Court concluded that it was unconstitutional for a governmental entity to cancel the contract of an independent contractor, or to remove that contractor from an official list of contractors authorized to perform public services, because of his or her political allegiance.

The underlying purpose behind the Supreme Court's decisions in *Elrod*, *Branti*, *Rutan*, *Umbehr*, and *O'Hare* was the protection of political freedom. As the Court explained in *Rutan*, "The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *United Public Workers* and *Letter Carriers* are clearly

103. *Id.*
110. *Rutan*, 497 U.S. at 76.
at odds with this fundamental principle. Participation in a political campaign is the quintessential example of the exercise of the "freedom to believe and associate" described in Rutan.\textsuperscript{111} The Hatch Act's prohibition on partisan political activity, particularly when viewed in the context of the Court's rationale for striking down employment-related patronage policies, is incompatible with the Free Speech Clause.

There is, of course, a distinction between the Hatch Act upheld in United Public Workers and Letter Carriers and the patronage practices found to be unconstitutional in Elrod, Branti, Rutan, Umbehr, and O'Hare. The Hatch Act's prohibitions were viewpoint neutral, while the patronage practices were viewpoint based. The Hatch Act prohibited federal employees from taking "an active part in political management or political campaigns" for the benefit of any political party, while the patronage practices rewarded or punished employees or contractors for supporting or opposing the candidates of a particular party.\textsuperscript{112} In certain instances, the government can impose content-based restrictions on speech that would be constitutionally impermissible if they restricted speech on the basis of viewpoint. As the Court noted in Davenport v. Washington Education Ass'n, "when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum."\textsuperscript{113} The most rigorous form of First Amendment scrutiny is applicable when public officials attempt to suppress expression merely because they disagree with the speaker's views.\textsuperscript{114}

In any event, the tension between the decisions upholding the Hatch Act and the decisions invalidating patronage policies is not eliminated merely because the Hatch Act was only content-based while the patronage policies were viewpoint based. The Court invalidated the patronage policies for the purpose of safeguarding the political freedom of public employees and contractors.\textsuperscript{115} Nevertheless, a First Amendment right to be free from viewpoint-based retaliation for engaging in political activity is of little constitutional value if the government can prohibit that same activity by enacting a content-based prohibition like the Hatch Act. Content-based

\textsuperscript{111} Id.
\textsuperscript{115} O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 725-26 (1996).
prohibitions on collective political expression prohibit the same activities that are chilled by unconstitutional patronage practices. To the extent that the Hatch Act was designed to protect the First Amendment rights of federal employees, it was inherently self-defeating. The Free Speech Clause protects both the "freedom to believe and associate" and the freedom "to not believe and not associate." 116 Prohibitions on political activity sacrifice the former for the sake of the latter. Moreover, when political activity is prohibited, employees are not freely exercising their right to refrain from political activity. Instead, they are coerced into refraining from political activity. Given this reality, the underlying rationale for the Court's decisions in United Public Workers and Letter Carriers was nonsensical.

In Branti, the Supreme Court explained that the government demonstrates a compelling interest in making personnel decisions on the basis of political affiliation only when it can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved." 117 The line between positions for which party affiliation is an appropriate requirement and positions for which it is not can be difficult to draw. This difficulty, however, is not obviated by content-based prohibitions on public employees' participation in partisan political activity. When political affiliation is an appropriate requirement for a given position, the government is free to engage in viewpoint-based discrimination when it fills that position. 118 This is true even if the employee who accepts the position is thereafter prohibited from engaging in political activity. 119 For this reason, the fact that the First Amendment permits the government to make viewpoint-based personnel decisions in limited circumstances provides no constitutional justification for content-based prohibitions like the Hatch Act.

The Hatch Act cannot be justified on the basis of Congress's clear legislative jurisdiction to regulate the terms of federal employment. Although the Constitution undoubtedly bestows on Congress the authority to set the terms and conditions of federal employment, 120 the First Amendment imposes a substantive limit

118. See id.
119. Id.
120. U.S. Const. art. 1, § 8, cl. 3.
If legislation could be sustained in the face of a First Amendment challenge solely on the basis of Congress's legislative jurisdiction, the First Amendment would itself be wholly superfluous. If Congress has no express or implied constitutional authority to enact a law in the first place, the law is unconstitutional regardless of whether it abridges the freedom of speech. Even when Congress acts within its constitutional sphere of authority, legislation that does not comport with the First Amendment is void.

In certain instances, the Supreme Court has recognized that particular Article I powers are inherently suited to accommodate First Amendment concerns. For example, the Copyright and Patent Clause gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In *Eldred v. Ashcroft*, the Court explained that the "limited monopolies" created by copyright law are "compatible with free speech principles." "By establishing a marketable right to the use of one's expression, copyright [law] supplies the economic incentive to create and disseminate ideas." As the Court noted in *Eldred*, copyright law "distinguishes between ideas and expression and makes only the latter eligible for copyright protection." When a constitutional or statutory provision is precisely tailored to accommodate First Amendment concerns, the need for strict judicial scrutiny is less apparent. In contrast, when statutory provisions specifically target expressive activities for suppression, the need for exacting judicial scrutiny is more obvious. The collective action that occurs when citizens band together to elect a political candidate is, of course, at the very heart of the First Amendment.

122. U.S. CONST. amend. 1.
It is clear that the Hatch Act contains no "built-in First Amendment accommodations."130

In addition to statutes that contain built-in accommodations for First Amendment freedoms, there are statutory provisions that burden or prohibit only those forms of speech that are categorically unprotected by the Free Speech Clause. A classic example of this type of legislation is the Trademark Act of 1946, which is commonly referred to as the Lanham Act.131 The Lanham Act contains both provisions prohibiting trademark infringement and provisions prohibiting false or misleading advertising.132 The Lanham Act's trademark infringement provisions prohibit the commercial use of registered marks when "such use is likely to cause confusion, or to cause mistake, or to deceive."133 The statute's unfair competition provisions prohibit the commercial use of "false designation[s] of origin, false or misleading description[s] of fact, or false or misleading representation[s] of fact."134 Civil liability is imposed on those who violate the Lanham Act.135 This statute, however, does not raise First Amendment concerns because it deals with false or misleading commercial speech, which is categorically unprotected by the First Amendment.136 For this reason, Congress can use its authority under the Commerce Clause to enact legislation such as the Lanham Act. Unlike false or misleading commercial speech, political campaign speech is highly protected.137 Consequently, statutory prohibitions on partisan political activity do not fall within the constitutional authority of Congress even when Congress acts pursuant to an express or implied constitutional power.

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130. Eldred, 537 U.S. at 219 (noting that since copyright law contains built-in First Amendment protections, the Copyright Term Extension Act did not violate the First Amendment).
133. Id. § 1114(1)(a)-(b).
134. Id. § 1125(a).
135. Id. §§ 1114, 1125.
137. Republican Party v. White, 416 F.3d 738, 748-49 (8th Cir. 2005).
II. THE HATCH ACT'S CURRENT APPLICATION TO FEDERAL EXECUTIVE EMPLOYEES

In 1993, Congress amended the Hatch Act to permit most executive branch employees to participate in partisan political activity.\(^{138}\) The amended statute declares it to be "the policy of the Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation."\(^{139}\) For purposes of the Act, the term "employee" includes:

any individual, other than the President and the Vice President, employed or holding office in ... an Executive agency other than the Government Accountability Office ... a position within the competitive service which is not an Executive agency, ... or ... the government of the District of Columbia, other than the Mayor or a member of the City Council or the Recorder of Deeds; but does not include a member of the uniformed services.\(^{140}\)

The Act's substantive provisions are codified at 5 U.S.C. §§ 7323 and 7324. Section 7323(a)(1) prohibits an employee from "us[ing] his [or her] official authority or influence for the purpose of interfering with or affecting the result of an election."\(^{141}\) Section 7323(a)(2) limits the category of persons from whom an employee may "solicit, accept or receive a political contribution."\(^{142}\) Most notably, § 7323(a)(2)(B) prohibits employees from seeking political contributions from their subordinates.\(^{143}\) Under § 7323(a)(3), an employee may not "run for the nomination or as a candidate for election to a partisan political office."\(^{144}\) The term "partisan political office" is defined as "any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, [excluding] any office or position within a political party or affiliated organization."\(^{145}\) Section 7323(a)(4) provides that an employee may not "knowingly so-

\(^{140}\) Id. § 7322(1)(A)-(C).
\(^{141}\) Id. § 7323(a)(1).
\(^{142}\) Id. § 7323(a)(2).
\(^{143}\) Id. § 7323(a)(2)(B).
\(^{144}\) Id. § 7323(a)(3).
\(^{145}\) Id. § 7322(2).
licit or discourage the participation in any political activity of any person who . . . has an application for any compensation, grant, contract, ruling, license, permit, or certificate pending before the employing office of such employee,” or who “is the subject of or a participant in an ongoing audit, investigation, or enforcement action being carried out by the employing office of such employee.” Section 7324(a) generally prohibits employees, who are on duty, from engaging in political activity while

in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof, . . . while wearing a uniform or official insignia identifying the office or position of the employee, . . . or while using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.

Some employees are subject to more restrictive provisions. Section 7323(b)(1) provides that “[a]n employee of the Federal Election Commission (except one appointed by the President, by and with the advice and consent of the Senate), may not request or receive from, or give to, an employee, a Member of Congress, or an officer of a uniformed service a political contribution.” Employees of agencies and offices enumerated in § 7323(b)(2)(B), except those employees “appointed by the President, by and with the advice and consent of the Senate,” are prohibited from taking an “active part in political management or political campaigns.” The agencies and offices covered under this prohibition include the Federal Election Commission or Election Assistance Commission; Federal Bureau of Investigation; Secret Service; Central Intelligence Agency; National Security Council; National Security Agency; Defense Intelligence Agency; Merit Systems Protection Board; Office of Special Counsel; Office of Criminal Investigation of the Internal Revenue Service; Office of Investigative Programs of the U.S. Customs Service; Office of Law Enforcement of the Bureau of Alcohol,

146. Id. § 7323(a)(4)(A)-(B).
147. Id. § 7324(a)(1)-(4). These prohibitions are qualified by § 7324(b).
148. Id. § 7323(b)(1).
149. Id. § 7323(b)(2)(A). Section 7323(b)(4) provides:

For purposes of this subsection, the term “active part in political management or in a political campaign” means those acts of political management or political campaigning which were prohibited for employees of the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

Id.
Tobacco, and Firearms; National Imagery and Mapping Agency (National Geospatial-Intelligence Agency); and Office of the Director of National Intelligence.\textsuperscript{150} The prohibition also applies to administrative law judges and administrative appeals judges who are employed in positions described in 5 U.S.C. §§ 5372, 5372a, and 5372b, as well as "career appointees"\textsuperscript{151} described in 5 U.S.C. § 3132(a)(4).\textsuperscript{152} Section 7323(b)(3) provides that "[n]o employee of the Criminal Division or National Security Division of the Department of Justice (except one appointed by the President, by and with the advice and consent of the Senate), may take an active part in political management or political campaigns."\textsuperscript{153} The Act makes it clear, however, that "[a]n employee retains the right to vote as he [or she] chooses and to express his [or her] opinion on political subjects and candidates."\textsuperscript{154}

The penalties for violating the Act are described in § 7326, which provides:

An employee or individual who violates section 7323 or 7324 of this title [5 U.S.C.] shall be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual. However, if the Merit System Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board.\textsuperscript{155}

Given the language of the statute, covered employees who engage in prohibited political activities risk losing their jobs.

In many ways, the importance of the alleged interests relied upon by the Supreme Court to uphold the Hatch Act in \textit{United Public Workers} and \textit{Letter Carriers} is belied by Congress's subsequent decision to permit most federal employees to actively participate in partisan political activities. Although § 7323(b) still prohibits some employees from taking "an active part in political management or political campaigns," the overwhelming majority of

\textsuperscript{150} Id. § 7323(b)(2)(B)(i).
\textsuperscript{151} Id. § 3132(a)(4) (defining a "career appointee" as "an individual in a Senior Executive Service position whose appointment to the position or previous appointment to another Senior Executive Service position was based on approval by the Office of Personnel Management of the executive qualifications of such individual").
\textsuperscript{152} Id. § 7323(b)(2)(B)(ii).
\textsuperscript{153} Id. § 7323(b)(3).
\textsuperscript{154} Id. § 7323(c).
\textsuperscript{155} Id. § 7326.
federal employees are now free to engage in political activities away from the workplace.156 The fact that § 7323(a) has permitted active political participation by most federal employees since 1993 without wreaking the havoc predicted by Hatch Act supporters serves to illustrate the speculative exaggerations behind the rationale adopted by the Court in United Public Workers and Letter Carriers.

Shortly after Congress relaxed the Hatch Act’s restrictions on most federal employees, the Supreme Court commented on the government’s authority to restrain the speech of its employees in Waters v. Churchill.157 In a plurality opinion joined by Chief Justice Rehnquist, Justice Souter, and Justice Ginsburg, Justice O’Connor declared that “[t]he government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.”158 In dictum, Justice O’Connor explained that while “[o]ne could make a respectable argument that political activity by government employees is generally not harmful,” the Court had “given substantial weight to government employers’ reasonable predictions of disruption.”159 The problem with this reasoning is that it ignores the nature of the constitutional inquiry. The constitutionality of a prohibition on political activity depends precisely on whether it is necessary.160 If that were not the case, there would be no meaning to the Court’s admonition in Garcetti that “[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employer to operate efficiently and effectively.”161 As Justice Scalia noted in his Rutan dissent, the Court did not conclude that the Hatch Act was necessary in United Public Workers or Letter Carriers.162 Instead, the Court simply deferred to Congress’s judgment without subjecting the Hatch Act to any measure of meaningful judicial scrutiny.163

A little over a year after the 1993 amendments to the Hatch Act, the Supreme Court decided United States v. National Treasury

156. 5 U.S.C. § 7323(a).
158. Id. at 675.
159. Id. at 673.
160. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (stating that “[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.” (emphasis added)).
161. Id. (emphasis added).
163. Id.
Employees Union (NTEU).164 In NTEU, the Court addressed the constitutionality of 5 U.S.C. § 501(b), the Ethics in Government Act, "which broadly prohibited federal employees from accepting compensation for making speeches or writing articles."165 Speaking through Justice Stevens, the Court explained that the federal employees who challenged § 501(b) sought "compensation for their expressive activities in their capacity as citizens, not as government employees."166 "Unlike Pickering and its progeny," Justice Stevens noted, NTEU "did not involve a post hoc analysis of one employee's speech and its impact on that employee's public responsibilities."167 Instead, the government asked the Court "to apply Pickering to Congress' wholesale deterrent to a broad category of expression by a massive number of potential speakers."168

The Court stated that while it "normally accord[ed] a stronger presumption of validity to a congressional judgment than to an individual executive's disciplinary action," the far-reaching impact of § 501(b)'s honoraria ban "gave rise to far more serious concerns than could any single supervisory decision."169 Moreover, it was noted that "unlike an adverse action taken in response to actual speech," § 501(b) chilled speech before it happened.170 The Court went on to state:

[T]he Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary decision. The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by the expression's "necessary impact on the actual operation" of the Government.171

Even though § 501(b) neither prohibited speech nor discriminated among speakers "based on the content or viewpoint of their messages," the Court recognized that § 501(b) "unquestionably impose[d] a significant burden on expressive activity" by denying federal employees a significant incentive to engage in such activity.172

165. Id. at 457.
166. Id. at 465.
167. Id. at 466-67.
168. Id. at 467.
169. Id. at 468.
170. Id.
171. Id. (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968)).
172. Id. at 468-69.
This "large-scale disincentive to Government employees' expression also impose[d] a significant burden on the public's right to read and hear what the employees would otherwise have written and said."173 Ultimately, the Court concluded that § 501(b) violated the First Amendment.174 The Court reasoned that:

Because the vast majority of the speech at issue . . . [did] not involve the subject matter of Government employment and [took] place outside of the workplace, the Government [was] unable to justify § 501(b) on the grounds of immediate workplace disruption asserted in Pickering and the cases that followed it.175

Although the government relied on United Public Workers and Letter Carriers for the proposition that the compensation prohibited by § 501(b) could be proscribed merely because it was "‘reasonably deemed by Congress to interfere with the efficiency of the public service,’"176 the Court distinguished the Hatch Act on the ground that it had "aimed to protect employees' rights, notably their right to free expression, rather than to restrict those rights."177 In a footnote, the Court stated that the Hatch Act's "employee-protective rationale provided much stronger justification for a proscription rule than the Government's general interest in workplace efficiency."178 Notably, this observation was made after Congress had already repealed the Hatch Act's ban on partisan political activity with respect to the overwhelming majority of federal employees.179 In addition, the Court acknowledged that Letter Carriers had merely "restated in balancing terms" the Court's prior approval of the Hatch Act in United Public Workers, and that the majority opinion in Letter Carriers "did not determine how the components of the Pickering balance should be analyzed in the context of a sweeping statutory impediment to speech."180

The rationale employed by the Court in NTEU illustrates two important points. First, despite the reference to Pickering in Letter Carriers, the Court never actually applied the Pickering balancing test to the Hatch Act.181 Second, NTEU acknowledges that the

173. Id. at 470.
174. Id. at 470, 477.
175. Id. at 470.
177. Id. at 471.
178. Id. at 475-76 n.21.
180. NTEU, 513 U.S. at 467.
181. See id.
government’s burden is greater when it imposes a sweeping statutory restriction on expression than it is when the government merely defends a particular disciplinary decision. Like § 501(b), the Hatch Act cannot be sustained under Pickering unless the government can “show that the interests of both potential audiences and a vast group of present and future employees” in hearing or that expressing political messages “are outweighed by that expression’s ‘necessary impact on the actual operation of the Government.’” This is a much higher standard than the rational basis standard applied in United Public Workers. The Court’s past analysis of the Hatch Act under a rational basis standard cannot be reconciled with its present-day First Amendment jurisprudence.

Pickering is an imprecise standard, and its exact contours remain uncertain. The Court recently extended the Pickering balancing test, which had previously been applied only in the context of speech by public employees and independent contractors, to a situation in which a high school athletic association promulgated a rule prohibiting high school coaches from recruiting middle school athletes. In Tennessee Secondary School Athletic Ass’n v. Brentwood Academy, the Court explained that “[j]ust as the government’s interest in running an effective workplace can in some circumstances outweigh employee speech rights, so too can an athletic league’s interest in enforcing its rules sometimes warrant curtailing the speech of its voluntary participants.” The Court determined that the association’s interest in preventing “hard-sell tactics directed at middle school students” outweighed the expressive interests of coaches who wanted to engage in prohibited recruiting practices.

While Brentwood Academy emphasized the government’s interest in suppressing a category of speech directed at a narrow group of individuals, it is clear that political campaign speech is closer to the core of the Free Speech Clause than is speech designed to recruit high school athletes. In various instances, the expressive activities commonly associated with political campaign speech have

182. Id. at 468.
183. Id. (emphasis added) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968)).
185. Id. at 2495 (citation omitted).
186. Id. at 2495-96.
been characterized as “highly-protected” speech. The Court’s failure to engage in a meaningful analysis of the Hatch Act’s constitutionality in United Public Workers and Letter Carriers was demeaning to the importance of political association in the United States. Of course, it is true that a public employee is not always entitled to Pickering balancing when he or she is disciplined for retaliation for speech. For instance, in City of San Diego v. Roe, the Court held that there was no need for Pickering balancing where a police officer was terminated for making sexually explicit videotapes of himself in his police uniform. Since the officer’s “speech” did not touch on a matter of public concern, his termination was deemed to be constitutionally permissible without the need for the Pickering balancing test. Political campaign speech, however, is the most obvious example of speech addressing a matter of public concern. By applying a rational basis test rather than a balancing test in United Public Workers and Letter Carriers, the Court treated political campaign speech as if it were akin to the sexually explicit videotapes at issue in Roe. The rationale adopted in NTEU makes it clear that the Hatch Act is unconstitutional under the Pickering balancing test. United Public Workers and Letter Carriers stand in stark contrast to the Court’s subsequent decisions applying Pickering, and cannot be reaffirmed if the Court is serious when it says that “[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.”

III. THE HATCH ACT’S PROHIBITION ON PARTISAN POLITICAL CANDIDACIES

In the wake of the 1993 amendments to the Hatch Act, most federal employees are now free to actively engage in partisan political activity. Nevertheless, § 7323(a)(3) still prohibits covered employees from “run[ning] for the nomination or as a candidate for

189. Id. at 80-85.
election to a partisan political office.”193 In NTEU, the Supreme Court opined that the Hatch Act’s “employee-protective rationale” had provided a “much stronger justification for a proscriptive rule” than had the government’s generalized interest in “workplace efficiency.”194 While prohibiting federal employees from participating in another candidate’s campaign may at least be rationally related to a governmental interest in preventing coercion, a prohibition on candidacy is not even remotely related to this purported interest. It would certainly be ludicrous for one to contend that a federal employee running for public office might feel pressured or coerced to participate in his or her own campaign. Despite this reality, federal employees covered by the Hatch Act risk losing their jobs if they choose to run for a partisan political office. This is due, in large part, to the fact that the Hatch Act has been completely divorced from the original purpose of its enactment.

It is clear that federal employees cannot be disqualified from eligibility to serve in Congress. The Qualifications Clause of Article I, Section 2, of the U.S. Constitution provides: “No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”195 Similarly, the Qualifications Clause of Article I, Section 3, provides: “No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.”196 The qualifications contained in these two provisions are exclusive, and Congress has no authority to add to them.197 In Powell v. McCormack, the Supreme Court held that Article I, Section 5 does not give the House of Representatives or the Senate the “authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.”198 The Constitution does, of course, give each house the authority to “punish its Members for disorderly

193. Id. § 7323(a)(3).
194. NTEU, 513 U.S. at 475-76 n.21.
196. Id. art. I, § 3.
197. See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783 (1995) (holding that an amendment to the Arkansas State Constitution that imposed term limits on otherwise eligible congressional candidates to be unconstitutional).
Behavior, and, with the Concurrence of two thirds, [to] expel a Member." Nevertheless, an individual elected to a seat in the House of Representatives or the Senate cannot be excluded unless the respective chamber determines that he or she does not meet the exclusive qualifications enumerated in Article I. Consequently, Congress has no power to keep a federal employee off of the ballot in a congressional election.

The Supreme Court elaborated on this principle further in United States Term Limits, Inc. v. Thornton. In United States Term Limits, the Court invalidated an amendment to the Arkansas Constitution, which prohibited the name of a congressional candidate from appearing on the general election ballot if he or she had already served three terms in the House of Representatives or two terms in the Senate. The amendment, which was known as Amendment 73, was found to violate the U.S. Constitution.

The Court's analysis in United States Term Limits relied significantly on Powell. Justice Stevens, who authored the United States Term Limits opinion, explained that Powell had established two important principles of constitutional law. The first principle was that the Framers intended the qualifications enumerated in Article I to be exclusive. The second principle was "that the people should choose whom they please to govern them." The right of the people to elect members of the House of Representatives existed from the inception of the Constitution. Members of the Senate were originally chosen by their respective state legislatures, but the Seventeenth Amendment provided for the popular election of Senators. Given the language contained in Article I and the Seventeenth Amendment, it is the prerogative of the people to elect any candidate who meets the exclusive qualifications for a seat in Congress.

The Court found Amendment 73 to be unconstitutional because it prevented candidates who met the qualifications enumerated in Article I from appearing on a congressional election

199. U.S. Const. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.").
201. Id. at 783.
202. Id.
203. Id. at 795.
204. Id.
205. Id. (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969)).
206. U.S. Const. art. I, § 2, amend XVII.
207. Id. art. I, § 3, amend. XVII.
ballot. The Court rejected the argument that Amendment 73 was a valid exercise of Arkansas's powers under the Elections Clause. The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Arkansas argued that Amendment 73 was a valid exercise of its Elections Clause authority, since candidates who could not obtain access to the ballot could nevertheless run as write-in candidates. The Court rejected this argument on the ground that the Elections Clause was intended "to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office." Amendment 73 was invalidated as "an indirect attempt to accomplish what the Constitution prohibit[ed] Arkansas from accomplishing directly."

The Supreme Court discussed this point further in *Cook v. Gralike*. *Cook* involved a challenge to an amendment to article VIII of the Missouri Constitution that was designed to encourage members of Missouri's congressional delegation to support a federal constitutional amendment to limit service in Congress to three terms in the House of Representatives and two terms in the Senate. The Court explained how article VIII, as amended, purported to achieve its objective:

Three provisions in Article VIII combine to advance its purpose. Section 17 prescribes that the statement "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed on all primary and general [election] ballots adjacent to the name of a Senator or Representative who fails to take any one of eight legislative acts in support of the proposed amendment. Section 18 provides that the statement "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed on all primary and general election ballots next to the name of every nonincumbent congressional candidate who refuses to take a "Term Limit" pledge that commits the candidate, if elected, to performing the

209. *Id.*
212. *Id.* at 832-33.
213. *Id.* at 829.
215. *Id.* at 514.
legislative acts enumerated in § 17. And § 19 directs the Missouri Secretary of State to determine and declare, pursuant to §§ 17 and 18, whether either statement should be printed alongside the name of each candidate for Congress.\(^\text{216}\)

Don Gralike, a nonincumbent congressional candidate, challenged the constitutionality of article VIII, sections 17 to 19.\(^\text{217}\) The Missouri Secretary of State contended that article VIII, as amended, was a valid exercise of Missouri’s powers under the Elections Clause and the Tenth Amendment.\(^\text{218}\) The Court determined that neither the Elections Clause nor the Tenth Amendment provided Missouri with the constitutional authority to enact sections 17 to 19 of article VIII.\(^\text{219}\)

Justice Stevens, who wrote the opinion of the Court in \textit{U.S. Term Limits}, also delivered the opinion of the Court in \textit{Cook}. Rejecting the argument that the amendment to article VIII constituted an exercise of Tenth Amendment power, he explained that the federal offices at stake arose from the Constitution itself.\(^\text{220}\) Justice Stevens declared that “[b]ecause any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power ‘had to be delegated to, rather than reserved by, the States.’”\(^\text{221}\) Noting that the Elections Clause “delegated to the States the power to regulate the ‘Times, Places and Manner of holding Elections for Senators and Representatives,’ subject to a grant of authority to Congress to ‘make or alter such Regulations,’” he stated that “[n]o other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment.”\(^\text{222}\) Consequently, “the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.”\(^\text{223}\) Since the amended version of article VIII was not a procedural regulation, but rather an attempt “to

\(^{216}\) \textit{Id.} 514-15 (citations omitted).
\(^{217}\) \textit{Id.} at 516.
\(^{218}\) \textit{Id.} at 518.
\(^{219}\) \textit{Id.} at 522-23.
\(^{220}\) \textit{Id.} at 522 (citing \textit{U.S. Term Limits, Inc. v. Thornton}, 514 U.S. 779, 805 (1995)).
\(^{221}\) \textit{Id.} (quoting \textit{U.S. Term Limits}, 514 U.S. at 804).
\(^{222}\) \textit{Id.} at 522-23 (citations omitted).
\(^{223}\) \textit{Id.} at 523.
favor or disfavor a class of candidates,'"\(^{224}\) it was not deemed to be a valid exercise of Missouri's Elections Clause authority.\(^{225}\)

_Powell, U.S. Term Limits_, and _Cook_ all stand for the proposition that the right to choose elected representatives in Congress lies not with Congress or the states, but with the people. Section 7323(a)(3) does not prevent a federal employee from securing a place on a primary or general election ballot.\(^{226}\) Instead, it ensures that a covered employee who exercises his or her right to run for a partisan political office will face dismissal from federal employment.\(^{227}\) Since the Hatch Act neither denies federal employees access to the ballot nor imposes an additional qualification on those employees who seek election to Congress, it does not violate the Qualifications Clauses. Nevertheless, it virtually ensures that a covered employee will be terminated in retaliation for becoming a congressional candidate. Such termination is based not on workplace disruptions or adverse effects on the government's operations, but _solely_ because a federal employee chooses to run for a partisan political office. Moreover, since most federal employees are now free to participate in partisan political activity under § 7323(a), the "employee-protective rationale" referenced in _NTEU_ can no longer serve as a "justification for a proscriptive rule."\(^{228}\) The inevitable conclusion is that § 7323(a)(3) violates the First Amendment.

The First Amendment protects not only the right to participate in political campaigns, but also the right to pursue political office as a candidate. The rights of candidates are inextricably linked with the rights of voters.\(^{229}\) The Court's "ballot access cases" under the First Amendment "have rarely distinguished between the rights of candidates and the rights of voters."\(^{230}\) As the Court noted in _Anderson v. Celebreeze_, "voters can assert their preferences only through candidates or parties."\(^{231}\) "[L]aws that affect candidates always have at least some theoretical, correlative effect on voters."\(^{232}\) Restrictions designed to prevent candidacies have generally been

\(^{224}\) _Id._ (quoting _U.S. Term Limits_, 514 U.S. at 833-34).

\(^{225}\) _Id._ at 524-25.


\(^{227}\) _Id._ § 7326.


\(^{230}\) _Cook_, 531 U.S. at 531 (Rehnquist, C.J., concurring).


\(^{232}\) _Bullock_, 405 U.S. at 143.
found to be unconstitutional.\textsuperscript{233} The government cannot constitutionally manipulate the electoral process in such a way as to defeat the aspirations of particular candidates or political parties.\textsuperscript{234}

Even if one's candidacy is viewed outside of the perspective of a party wishing to support that candidate, First Amendment rights are \textit{individual} rights as much as they are collective rights.\textsuperscript{235} As the Court noted in \textit{Wooley v. Maynard}, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of \textit{individual} freedom of mind."\textsuperscript{236} Each individual has the right to seek election to a public office for which he or she is qualified. The availability of other candidates for parties and citizens to support is no justification for infringing the First Amendment rights of a particular person. Since the constitutional structure presumes that "the people should choose whom they please to govern them," the voters have the right to hear from all who wish to govern.\textsuperscript{237} Deciding who their leaders should be is the voters' right, not the government's prerogative. If the Supreme Court is serious when it says that the Free Speech Clause "has its fullest and most urgent application \textit{precisely} to the conduct of campaigns for political office," it cannot continue to adhere to an unprincipled line of decisions permitting the government to retaliate against its own employees \textit{precisely} because they opt to "‘campaign[ ] for political office.'"\textsuperscript{238}

The issue is admittedly more complicated where a particular jurisdiction defines eligibility for a given political office with refer-

\begin{itemize}
\item \textsuperscript{233} Norman v. Reed, 502 U.S. 279 (1992).
\item \textsuperscript{234} Williams v. Rhodes, 393 U.S. 23, 25 (1968).
\item \textsuperscript{235} The government may enact reasonable regulations to prevent election-related disorder, and "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." \textit{Timmons v. Twin Cities Area New Party}, 520 U.S. 351, 359 (1997). Although the Supreme Court noted in \textit{Timmons} that a political party's associational rights are not severely burdened merely because a particular candidate may not appear on the ballot as that party's nominee, the Court made that observation in the context of a case involving an antifusion statute. \textit{Id.} In \textit{Timmons}, the Court upheld a Minnesota law that prohibited the same "candidate from appearing on the ballot as the candidate of more than one party." \textit{Id.} at 354. The Court reasoned that the law did not prevent other parties from endorsing the nominee of a particular party. \textit{Id.} at 360. For this reason, the law did not violate the First and Fourteenth Amendments. \textit{Id.} at 363. The law prevented no one from seeking public office, and did not suppress any party's preferences.
\item \textsuperscript{236} \textit{Wooley v. Maynard}, 430 U.S. 705, 714 (1977) (emphasis added) (quoting \textit{Bd. of Educ. v. Barnette}, 319 U.S. 624, 637 (1943)).
\item \textsuperscript{238} \textit{Buckley v. Valeo}, 424 U.S. 1, 15 (1969) (emphasis added) (quoting \textit{Monitor Patriot Co. v. Roy}, 401 U.S. 265, 272 (1971)).
\end{itemize}
ence to one’s employment status. For instance, in *Clements v. Fashing*, the Supreme Court upheld article III, section 19, of the Texas Constitution, which provides:

[No] judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.\(^{239}\)

The Court has observed that it has not always “attached such fundamental status to candidacy as to invoke a rigorous standard of review” every time regulatory restrictions place a burden on someone’s ability to run for public office.\(^{240}\) Nevertheless, there are recognized reasons for not treating the right to be a candidate for political office as fundamental for all purposes. For instance, most elective offices must be filled with an occupant who meets a minimum age requirement. Such age requirements do not raise serious constitutional concerns, since the “States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.”\(^{241}\) A determination that the right to run for public office is fundamental in all contexts would require that age qualifications for various political offices be evaluated under the strict scrutiny standard, which applies to challenges brought under the Equal Protection Clause for discrimination based on suspect classifications or under the Due Process Clause for actions that burden the exercise of fundamental rights.\(^{242}\) The reality that the states have a reasonable degree of latitude to define the qualifications for their own public offices does not provide a constitutional justification for the kind of retaliatory termination mandated by §§ 7323(a)(3) and 7326. Where an individual meets the qualifications for a particular office, governmental action against him or her for choosing to run for that office violates fundamental constitutional principles that are simply not implicated by more generalized provisions setting forth age qualifications for political officeholders.

Even when federal employees accept public employment, they remain eligible to serve in Congress if they satisfy the qualifications enumerated in Article I. Yet, §§ 7323(a)(3) and 7326 provide for

\(^{239}\) *Tex. Const.* art. III, § 19; *see* *Clements v. Fashing*, 457 U.S. 957, 960 (1982).


the same kind of dismissal that was found to be unconstitutional in *Pickering*, since candidates run for political office in their capacities as private citizens rather than in their capacities as government employees. While government employees have no constitutional right to public employment, the First Amendment prohibits the government from terminating an employee in retaliation for engaging in expressive activities protected by the First Amendment. In *Perry v. Sindermann*, the Court explained:

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government 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. 243

The Hatch Act clearly violates this fundamental principle.

The Qualifications Clauses prevent incumbents in Congress from fencing potential challengers out of the political process directly. However, §§ 7323(a)(3) and 7326 ensure that federal employees who run will be dismissed. This appears to be a manipulative attempt to deter a large class of individuals from running for partisan political office. Moreover, it represents hypocrisy of the worst kind, since members of Congress rarely resign when they decide to run for a different office. Given that § 7323(a) now permits most federal employees to participate in partisan political activity, the government’s reliance on an "employee-protective rationale" to justify a "proscriptive rule" 244 can no longer withstand constitutional scrutiny. It is difficult to fathom how an employee can feel pressured or coerced to participate in his or her own political campaign. Moreover, since federal employees are free to run for nonpartisan political offices, § 7323(a)(3) cannot be justified on the ground that political candidacies by such employees would undermine "workplace efficiency." 245 Section 7323(a)(3) acts only as an incumbent-protection provision.

245. *Id.*
As Justice Scalia recently noted in *Hein v. Freedom from Religion Foundation, Inc.*, the Supreme Court is charged with the duty "to decide cases by [the] rule of law rather than [by a] show of hands." The constitutionality of restrictions on the expressive activities of public employees depends on whether such restraints "are necessary for [government] employers to operate efficiently and effectively." In *United Public Workers* and *Letter Carriers*, the Court never determined that the Hatch Act was necessary for any purpose, choosing instead to defer to Congress's judgment. Such unqualified deference to Congress is particularly unwarranted when the very constitutional provision being construed provides that "Congress shall make no law . . . abridging the freedom of speech." Section 7323(a)(3) is wholly unrelated to any interest aside from incumbent protectionism, and it is unconstitutional.

IV. The Hatch Act's Application to State and Local Employees

The Hatch Act's prohibition on partisan political candidacies applies to certain state and local government employees as well as federal employees. The Act defines a

> [s]tate or local officer or employee [as] an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include—an individual who exercises no functions in connection with that activity[ ] or an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized, philanthropic, or cultural organization.

The substantive statutory provisions of 5 U.S.C. § 1502(a) provide:

(a) A State or local officer or employee may not—

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

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249. U.S. CONST. amend. I.
(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

(3) be a candidate for elective office.²⁵¹

Further, 5 U.S.C. § 1502(b) and (c) state that

(b) A State or local officer or employee retains the right to vote as he chooses and to express his opinions on political subjects and candidates.

(c) Subsection [1502](a)(3)'s candidacy prohibition] does not apply to—

(1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;

(2) the mayor of a city;

(3) a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil-service system; or

(4) an individual holding elective office.²⁵²

Moreover,

Section 1502(a)(3) . . . does not prohibit any State or local officer or employee from being a candidate in any election if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected.²⁵³

The statutory enforcement mechanisms are established by §§ 1504 to 1507. Section 1504 directs federal agencies to report violations of § 1502 to the Special Counsel, who is supposed to “investigate the report and such other information and present his findings and any charges based on such findings to the Merit Systems Protection Board.”²⁵⁴ After a hearing at which the state or local officer or employee is entitled to be present, the Merit Systems Protection Board is directed to determine whether a violation of § 1502 . . . has occurred; [to] determine whether the violation warrants the removal of the officer or employee from his office or employment; and [to] notify

²⁵¹. Id. § 1502(a)(1)-(3).
²⁵². Id. § 1502(b), (c)(1)-(4).
²⁵³. Id. § 1503.
²⁵⁴. Id. § 1504.
the officer or employee and the [employing state or local] agency of the determination by registered or certified mail.\textsuperscript{255}

The remedial provisions contained in § 1506 provide for the withholding of federal funds from a state or local agency which fails to remove an employee in accordance with a determination made by the Merit Systems Protection Board.\textsuperscript{256} Section 1508 provides for judicial review of determinations made by the Merit Systems Protection Board in a federal district court.\textsuperscript{257}

Sections 1502(a)(1) and 1502(a)(2) describe the forms of interference and coercion that can undermine the integrity of the electoral process.\textsuperscript{258} Section 1502(a)(3), however, simply prohibits covered employees from being candidates in partisan elections.\textsuperscript{259} The candidacy prohibition bears no rational relationship to any interest in preventing interference with the electoral process or

\textsuperscript{255} Id. § 1505(1)-(3).
\textsuperscript{256} Id. § 1506.
\textsuperscript{257} Id. § 1508.
\textsuperscript{258} Id. § 1502(a)(1)-(2).
\textsuperscript{259} Id. § 1502(a)(3).
shielding government employees from political coercion. Since § 1502(a)(3) prohibits covered employees from running for public office in partisan political elections, it implicates First Amendment concerns.

Prior to 1974, the Hatch Act prohibited covered state and local employees "from assuming any active role in political campaigns." The statute was amended in 1974 to permit state and local employees to participate in political campaigns, but § 1502(a)(3) continued to prohibit covered employees from being candidates in partisan elections. "Section 1503 was amended to specifically allow nonpartisan candidacies," since it had previously permitted nonpartisan political activities in a more general sense.

The Supreme Court addressed the constitutionality of the Hatch Act's application to state and local employees in *Oklahoma v. United States Civil Service Commission*, holding that the Act's application to Oklahoma's employees did not violate the Tenth Amendment. The Court stated that "[w]hile the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed." This case was decided on the same day as *United Public Workers*.

Noting its consideration in *United Public Workers* of whether the Hatch Act violated the First Amendment, the Court stated that the facts in *Oklahoma* did not "require any further discussion of that angle."

*Oklahoma* was brought by the state rather than by the state's employees. Consequently, the First Amendment implications of the Hatch Act's application to state and local employees were not squarely at issue. It is unclear whether the Court's reference to its holding in *United Public Workers* was meant to foreclose First Amendment claims against the Hatch Act's application to state and local employees. In any event, a federal statute prohibiting state and local government employees from engaging in partisan political activity implicates constitutional concerns beyond those discussed in *United Public Workers* and *Letter Carriers*.

261. Id.
262. Id.
264. Id. at 143.
266. *Oklahoma*, 330 U.S. at 142.
The Supreme Court's post hoc explanations for its decisions in *United Public Workers* and *Letter Carriers* have generally centered on the principle that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." Nevertheless, this principle cannot be relied upon to save prohibitions like § 1502(a)(3) from constitutional infirmity. Congress has no general constitutional authority to regulate the conduct of state and local government employees. When the federal government imposes restrictions on the political activities of state and local government employees, it acts as a sovereign rather than as an employer. Even if it is assumed that a state can restrict the political activities of its own employees without violating the First and Fourteenth Amendments, it does not follow that Congress can impose similar restrictions on the state's employees without violating the First Amendment.

Moreover, it is worth noting that Congress cannot use its Spending Clause authority to entice the states to violate the Fourteenth Amendment. Congress "may not 'induce' [a] recipient [of federal funds] 'to engage in activities that would themselves be unconstitutional.'" The First Amendment's prohibitions, of course, are incorporated within the Due Process Clause of the Fourteenth Amendment and are applicable against the states. For this reason, a determination that a state could not constitutionally impose a restriction such as § 1502(a)(3) on its own employees would obviously render Congress's attempt to do so unconstitutional. Section 1502(a)(3), however, violates the First Amendment even if the states could directly impose identical restrictions on their own employees.

268. *Printz v. United States*, 521 U.S. 898, 929-35 (1997). In *Printz*, the Court held that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* at 935.
In *Rust v. Sullivan*, the Supreme Court declared that "when the Government appropriates public funds to establish a program, it is entitled to define the limits of that program."273 When Congress exercises its authority under the Spending Clause, it can insist "that public funds be spent for the purposes for which they were authorized."274 Nevertheless, conditions placed by Congress on those who receive federal funds are not categorically immune from First Amendment scrutiny. The Court noted in *Legal Services Corp. v. Velazquez* that "[w]here private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest."275 Since the federal government does not employ the state and local government employees covered by § 1502(a)(3), the statutory prohibition must be analyzed as an exercise of Congress's Spending Clause authority.276

The Court's statement in *Rust* that Congress may demand that public funds be used only as authorized is inapplicable to the Hatch Act.277 The partisan candidacy prohibition imposed by § 1502(a)(3) bears no rational relationship to programs funded by Congress. The prohibition is not imposed on the recipients of federal funds. Instead, it is imposed on the employees of recipients. While the enforcement mechanism established by § 1506 provides for the withholding of federal funds if a state or local agency refuses to dismiss an employee who has violated § 1502, the substantive prohibitions are imposed on the employees in their private capacities.278 There is no nexus whatsoever between the prohibitions contained in § 1502(a)(3) and the federally funded activities. Section 1501(4) simply defines a state employee as "an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency," and § 1502(a)(3) prohibits such employees from being candidates in partisan elections.279 The prohibition itself is not defined with respect to any funded program or activity.

274. *Id.* at 196.
279. *Id.* §§ 1501(4), 1502(a)(3).
Congress often includes within a particular legislative scheme a jurisdictional element, which operates to limit the prohibition’s application to a discrete category of conduct falling within Congress’s legislative jurisdiction. Section 1501(4) incorporates state or local agencies’ receipt of federal funds as a jurisdictional element to provide a basis for federal legislative jurisdiction. In this respect, Congress’s use of its Spending Clause authority to impose § 1502(a)(3)’s candidacy prohibition on covered state and local government employees is indistinguishable from its use of its Commerce Clause authority in other contexts. In some instances, Congress uses its powers under both the Spending Clause and the Commerce Clause to enact substantive statutory provisions.

An example of this use of jurisdictional elements can be found in the Religious Land Use and Institutionalized Persons Act, which is codified at 42 U.S.C. § 2000cc. Section 2000cc includes prohibitions on certain land use regulations, and § 2000cc-1 imposes limits on the ability of government entities to impose incidental burdens on the religious freedom of institutionalized persons. Section 2000cc-1(b)(1) uses the covered governmental entities’ receipt of federal funds as a means to establish federal legislative jurisdiction, while § 2000cc-1(b)(2) uses Congress’s powers under the Foreign, Interstate, and Indian Commerce Clauses for the same purpose. Without such jurisdictional elements, Congress would...
have no constitutional authority to enact the substantive prohibitions contained within § 2000cc-1(a). This same principle applies to the jurisdictional element incorporated within § 1502(a)(3) by the definition contained in § 1501(4).

The mere existence of a jurisdictional element premised on the Spending Clause, however, does not insulate a statute from First Amendment scrutiny. Instead, it simply provides a jurisdictional basis for federal legislation. The First Amendment imposes substantive limits on Congress’s Spending Clause authority. Since § 1502(a)(3) limits the private activities of funding recipients’ employees rather than the activities of the funding recipients themselves, any perceived link between the federal funds and the prohibited activities is very attenuated. Because § 1502(a)(3)’s partisan candidacy proscription, at a minimum, implicates the First Amendment rights of covered employees, it cannot be sustained on such an attenuated basis.

If Congress could constitutionally impose § 1502(a)(3) on covered state and local government employees merely because their employers are recipients of federal funds, there is no logical reason why Congress could not also impose a similar prohibition on state and local government employees whose employers have some effect on interstate commerce. If a jurisdictional element is enough to justify the proscription, it is difficult to imagine why the particular constitutional power invoked by Congress would make a dispositive difference. Moreover, if the employees of state and local agencies could be prohibited from running for partisan political office simply because their employers receive federal money, there is no reason why Congress could not also impose a similar restriction on the employees of private entities that receive federal money. For instance, Congress could apply § 1502(a)(3)’s prohibition to the employees of private colleges and universities that receive federal funds. Since § 1502(a)(3) is not linked to an employment relationship between the federal government and covered state and local government employees, the federal government is acting as a sovereign rather than as an employer. If the First Amendment permitted the federal government to use its sovereign powers to prohibit partisan political candidacies, there would be no logical basis for distinguishing

between the employees of state and local governments that receive federal funds and the employees of private entities that also receive such funds. The logical conclusion, of course, is that Congress cannot use its sovereign powers to prohibit partisan political candidacies, and that § 1502(a)(3) is unconstitutional.

The Supreme Court has not clearly explained when a funding condition imposed on a private entity ceases to be permissible and becomes unconstitutional. In *Grove City College v. Bell*, the Court declared that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." Voluntariness alone, however, does not insulate a funding condition from constitutional scrutiny. As the Court explained in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, while it is unclear where the line between "reasonable" conditions and unconstitutional conditions lies, "[i]t is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." It is safe to say that the federal government, acting in its sovereign capacity, could not constitutionally prohibit classes of individuals from running for partisan political office.

If § 1502's prohibitions applied directly to state and local agencies, they would arguably be immune from First Amendment scrutiny on the ground that governmental entities do not have First Amendment rights. Nevertheless, employees of governmental entities do have First Amendment rights. Since § 1502(a)(3) imposes a partisan candidacy prohibition on covered state and local government employees in their private capacities, the First Amendment is clearly implicated. Moreover, since covered employees have no control over whether their employers receive federal funds, they are not in a position to reject such funds in order to protect their constitutional rights. Spending Clause legislation "is much in the nature of a contract," and conditions on the receipt of federal funds must be accepted "voluntarily and knowingly." Such legislation must be construed from the perspective of a recipient engaged in the process of deciding whether to accept federal funds.

and "the obligations that go with those funds." It is difficult to fathom how this rule of construction should be applied when the obligations attached to federal funds are imposed on the employees of recipients rather than on the recipients themselves.

Given the reality that a Spending Clause nexus such as that contained in §§ 1501(4) and 1502(a)(3) could not justify the imposition of a partisan candidacy proscription on the employees of private institutions, it is axiomatic that § 1502(a)(3) violates the First Amendment. In Molina-Crespo v. United States Merit Systems Protection Board, however, the U.S. District Court for the Northern District of Ohio found an innovative way to uphold it. The interests identified by the district court as a justification for upholding § 1502(a)(3) included the federal government's interests in ensuring both "that state programs funded . . . with federal dollars [were] administered in a non-partisan manner" and that members of the public were not left with the impression "that those involved in administering [funded] programs" were "partisan politicians exerting inappropriate partisan influence." Based on these interests, the district court determined that § 1502(a)(3) passed the rational basis test.

In an alternative analysis, the district court explained why it believed that § 1502(a)(3) also satisfied the demands of strict scrutiny:

"The Court finds that under strict scrutiny review, the prohibition against running for partisan elected office is narrowly tailored to the perceived harm. Covered state and local employees remain free to engage in a wide range of political activities. Indeed, when Congress amended the Act in 1974 to loosen the constraints on political activity for state or local employees, only three narrowly focused restraints remained, one of which is the § 1502(a)(3) ban on being a candidate for elective office. Therefore, the restriction in § 1502(a)(3), of which Molina-Crespo had full knowledge before he chose to run for elective office, is narrowly tailored, and thus does not unduly burden the First Amendment rights of state and local employees."

295. Id. at 691.
296. Id.
297. Id. at 693 (citations omitted).
Given the meaningless review provided by the Supreme Court in *United Public Workers, Letter Carriers, and Oklahoma*, it is very easy to see why the district court had no idea as to what standard was applicable in *Molina-Crespo*. Nevertheless, the district court’s analysis clearly failed to comport with fundamental principles of constitutional law. The applicable test for evaluating the constitutionality of § 1502(a)(3) under the First Amendment cannot be rational basis, which is far more deferential than the balancing test established in *Pickering*. Since the federal government acts as a sovereign rather than as an employer with respect to § 1502(a)(3), there is no basis whatsoever for applying a standard that is less rigorous than the *Pickering* balancing test.

When the district court applied the strict scrutiny analysis, it applied it incorrectly. Where strict scrutiny is the test, the government must show that the challenged enactment is narrowly tailored to secure a compelling governmental interest. It is not sufficient for the government to show that the challenged enactment is narrowly tailored to address a perceived harm. Far from a principled application of the Constitution, the district court’s decision in *Molina-Crespo* is only the latest in the federal judiciary’s long line of pro-Hatch Act novelties.

It is clear that the prohibitions contained in §§ 1502(a)(1) and 1502(a)(2) are constitutionally permissible. No one has a First Amendment right to interfere with or affect the result of an election by using official authority, or to coerce someone else to make a political contribution. The federal government may use its sovereign authority under the Spending Clause to prohibit covered state and local government employees from engaging in such corrupt activities. Section 1502(a)(3), however, raises wholly different constitutional concerns. If the First Amendment provides even minimal protection to an individual’s right to run for a partisan political office, § 1502(a)(3) cannot stand. The prohibition is wholly unrelated to the federal funds involved, since it restricts the employees of recipients rather than the recipients themselves. There is no nexus between the partisan candidacy proscription and any funded program, since the proscription is not defined with respect to any particular program or activity.

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298. *Id.* at 691-92.
301. *Id.* §§ 1501(4), 1502(a)(3).
302. *Id.*
abridgment of speech, not the allocation of federal money. Section 1502(a)(3) is not an attempt to control federal spending. Instead, Congress invoked federal spending as a jurisdictional basis for enacting § 1502(a)(3). Federal funding is identified in § 1501(4) solely to enable incumbents in Congress to prohibit a broad class of individuals from doing what those same incumbents did to secure their positions.303

In Molina-Crespo, the district court was right about one thing: Section 1502(a)(3) is narrowly tailored.304 It is tailored so narrowly that it prohibits only the very thing that can unseat an incumbent in Congress. Under § 1503, covered employees can run for political office in nonpartisan elections.305 In their private capacities, they remain free to engage in a wide variety of political activities. As long as they refrain from running for partisan political office, they will not be harassed by the Merit Systems Protection Board. However, if they dare to challenge a partisan incumbent, retaliatory actions of the kind condemned in Elrod, Branti, Rutan, Umbehr, and O'Hare will be undertaken by the federal government in the name of the law.306 Section 1502(a)(3) is the quintessential example of a constitutionally suspect statutory provision. It is both too narrow and too broad.307 It narrowly prohibits only the very thing that threatens the ambitions of its drafters, and it broadly casts its net around all state and local government employees within § 1501(4)’s jurisdictional element.308 It leaves political speech untouched only if it has no meaningful purpose, and it muzzles speech with electoral significance. If § 1502(a)(3) can withstand constitutional scrutiny, the First Amendment is an empty promise.

V. THE IMPORTANCE OF POLITICAL PARTICIPATION

The provisions of the Hatch Act governing both federal and state employees make it clear that covered employees retain their right to vote.309 Many employees covered by the provisions of the Hatch Act, particularly those covered by § 7323(b), may consider their right to vote to be more important than any right to partici-

303. Id. § 1501(4).
306. Id. §§ 1504-1506.
308. 5 U.S.C. § 1501(4).
309. Id. §§ 1502(b), 7323(c).
partake in partisan political activity. While the electoral franchise is certainly important, the right to engage in political activity is, in many respects, even more fundamental than the right to cast a vote.

When the Constitution was first adopted, only members of the House of Representatives were chosen by popular vote. U.S. senators were chosen by their respective state legislatures. Senators were not elected by popular vote until the enactment of the Seventeenth Amendment in 1913. Consequently, when the First Amendment was adopted in 1791, the idea of holding popular elections for U.S. senators was wholly foreign to the Constitution. Nevertheless, the people had the right to engage in expressive activities for the purpose of influencing their state legislators, who were responsible for choosing U.S. senators.

Americans are accustomed to voting in presidential elections, but popular elections for presidential electors are certainly not required by the Constitution. Under Article II, Section 1, it is the responsibility of each state to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." Pursuant to the Twenty-third Amendment, the District of Columbia is entitled to appoint,

\[
\text{in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State.}
\]

The electors appointed by the states and the District of Columbia elect the President and the Vice President in accordance with the procedures established by the Twelfth Amendment.

Although Section 2 of the Fourteenth Amendment and Section 1 of the Twenty-fourth Amendment acknowledge the existence of popular elections for the purpose of appointing presidential electors, these provisions do not require any state, or the District of Columbia, to hold popular elections for that pur-

311. Id. art. I, § 3.
312. Id. amend. XVII.
313. Id. art. II, § 1.
314. Id. amend. XXIII.
315. Id. amend. XII.
316. Id. amend. XIV, § 2.
317. Id. amend. XXIV, § 1.
As the Supreme Court explained in Bush v. Gore, "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college." A state "may, if it so chooses, select the electors itself, which indeed was the manner used by state legislatures in several states for many years after the framing of our Constitution." Having granted the franchise to the people, a state remains free to "take back the power to appoint electors" pursuant to Article II, Section 1. Accordingly, Americans cast their votes in presidential elections not as a matter of constitutional right, but as a matter of legislative grace. The right to cast such a vote is wholly dependent on the continuing assent of the respective state legislature.

The freedom to speak for or against a particular presidential candidate, however, is not dependent on the consent of any governmental entity. Congress may, if it so chooses, use its authority under the Twenty-third Amendment to deprive the residents of the District of Columbia of their statutory right to vote for presidential electors. Nonetheless, Congress may not deprive those residents, or the residents of the several states, of their freedom of speech.

The Free Speech Clause, of course, is incorporated within the Due Process Clause of the Fourteenth Amendment. Consequently, the states "shall make no law ... abridging the freedom of speech." While the states remain free, under Article II, Section 1, to deprive their citizens of their statutory right to vote for presidential electors, the First and Fourteenth Amendments prohibit them from banning expressive activities designed to influence presidential elections. A plain reading of the Constitution reveals that, even more than the electoral franchise itself, "unabridged speech is the foundation of political freedom." As Justice Black noted in his United Public Workers dissent, "The right to vote and privately to express an opinion on political matters, important though they

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320. Id.
321. Id.
323. U.S. Const. amend. I.
be, are but parts of the broad freedoms which our Constitution has provided as the bulwark of our free political institutions.\textsuperscript{325}

Notwithstanding the Framers’ initial idea that state legislatures should choose their respective U.S. senators, the Seventeenth Amendment has now given that right to the people directly.\textsuperscript{326} Despite the constitutional prerogative of the states to dispense with popular elections for presidential electors, “[h]istory has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors.”\textsuperscript{327} As popular elections have become a central feature of the American political system, the importance of political campaigns has steadily increased over time. With popular elections for members of the Senate and the Electoral College, as well as for members of the House of Representatives, it is more important than ever that “the voice of none should be suppressed.”\textsuperscript{328}

In order to understand the importance of the constitutional values undermined by the Hatch Act, one need look no further than the Hatch Act itself. Section 7325 provides:

The Office of Personnel Management may prescribe regulations permitting employees, without regard to the prohibitions in paragraphs (2) and (3) of section 7323(a) and paragraph (2) of section 7323(b) of this title [5 U.S.C.], to take an active part in political management and political campaigns involving the municipality or other political subdivision in which they reside, to the extent the Office considers it to be in their domestic interest, when—

(1) the municipality or political subdivision is in Maryland or Virginia and in the immediate vicinity of the District of Columbia, or is a municipality in which the majority of voters are employed by the Government of the United States; and

(2) the Office determines that because of special or unusual circumstances which exist in the municipality or political subdivision it is in the domestic interest of the employees and individuals to permit that political participation.\textsuperscript{329}

This statutory language acknowledges that a democratic society cannot function without the political participation of its inhabitants.

\textsuperscript{326} U.S. Const. amend. XVII.
\textsuperscript{328} United Pub. Workers, 330 U.S. at 114 (Black, J., dissenting).
In this respect, the Hatch Act impugns itself. If insufficient numbers of people participate in the political process, democracies decay, republics collapse, and free societies falter.

Even in jurisdictions in which participants are legion, the political process suffers when the voices of a few are silenced. In the words of Justice Black, "Our political system, different from many others, rests on the foundation of a belief in rule by the people—not some, but all the people." The protections of the First Amendment do not contain exceptions providing for the muzzling of those employees covered by § 7323(b). Congress's attempt to silence these devoted citizens is constitutionally impermissible.

Federal, state, and local government employees who answer the call to public service deserve better than to be badgered by the Merit Systems Protection Board. Sections 1502(a)(3) and 7323(a)(3), which serve no interests aside from incumbent protectionism, cannot withstand constitutional scrutiny if the First Amendment is to have its intended effect. The federal judiciary's complicity in Congress's attempts to deter potential candidates from taking on partisan incumbents is antithetical to the principle that the government "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." The application of constitutional principles compels the conclusion that the provisions of the Hatch Act restricting the private political activities of government employees cannot stand.

**Conclusion**

For too long, the provisions of the Hatch Act restricting the private political activities of government employees have had unqualified acceptance. The reality of the matter, however, is that these provisions patently violate the First Amendment rights of covered employees without serving any clear governmental interest. Partisan political candidates and campaign volunteers do not perform governmental functions when they participate in the electoral process. They are merely citizens seeking to choose leaders from among themselves. To say that one's employment status is incompatible with partisan political participation is to say that his or her employment status is incompatible with being American.

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Congress's decision in 1993 to permit most federal executive employees to participate in partisan political activity is perhaps the strongest indicator to date that the more stringent prohibitions of the Hatch Act were never really necessary to prevent political extortion or coercion. Since the federal employees covered by § 7323(b) remain under such prohibitions, however, it is worth noting that political extortion is not only proscribed by §§ 7323(a)(1), 7323(a)(2), and 7323(a)(4), but by several criminal statutes as well. It is a federal crime

for any person to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government . . . to engage in, or not to engage in, any political activity, including, but not limited to, voting or refusing to vote for any candidate or measure in any election, making or refusing to make any political contribution, or working or refusing to work on behalf of any candidate.332

It is also a crime for covered employees to use their official authority for the purpose of interfering with an election.333 Prohibiting government employees from voluntarily participating in partisan political activity for the purpose of preventing coercion is akin to banning sexual intercourse for the purpose of preventing rape. The First Amendment rights of government employees cannot be protected by a prohibition which prevents them from exercising those rights in the first place. The Hatch Act's "employee-protective rationale" literally "turns the First Amendment upside down."334 Freedom of thought cannot be secured by the suppression of speech. As the Supreme Court explained in Ashcroft v. Free Speech Coalition, "[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."335

The government's interest in maintaining a merit-based employment system can be adequately secured without the need to infringe upon the First Amendment rights of government employees. Candidates are prohibited from procuring support for their candidacies by promising to use their influence to secure the appointment of their political allies.336 It is also illegal to promise a

333. Id. § 595.
335. Id. at 253.
benefit to another in exchange for political favors or electoral support.\textsuperscript{337} Criminal activity is properly addressed by measures that punish offenders, not by measures that silence potential victims.

It is, of course, true that political affiliation may be used by the government as a basis for making personnel decisions in certain instances. As the Supreme Court recognized in \textit{Branti}, party affiliation is sometimes "an appropriate requirement for the effective performance of the public office involved."\textsuperscript{338} Such circumstances, however, are not foreign to federal employment law, and the legal framework for adjudicating such cases is firmly established. Although Title VII of the Civil Rights Act of 1964 generally prohibits covered employers from discriminating on the basis of race, color, religion, sex, or national origin, an employer may nevertheless make personnel decisions on the basis of religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."\textsuperscript{339} A similar provision is contained in the Age Discrimination in Employment Act.\textsuperscript{340} Where the particular position at issue is such that political affiliation is a bona fide occupational qualification, hiring and firing decisions can constitutionally be made on the basis of political affiliation. This reality does not necessitate the suppression of the political speech of large classes of government employees, many of whom perform ministerial functions which do not implicate partisan concerns.

The Hatch Act's prohibitions on partisan political candidacies are likewise unsupported by any palpable governmental interest.\textsuperscript{341} The Constitution certainly recognizes that federal employment may be incompatible with concurrent service in Congress. The relevant portion of Article I, Section 6, provides:

\begin{quote}
No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States,
\end{quote}

\begin{small}
\textsuperscript{337} \textit{Id.} § 600.
\textsuperscript{338} \textit{Branti} v. Finkel, 445 U.S. 507, 518 (1980).
\end{small}
shall be a Member of either House during his Continuance in Office.\textsuperscript{342}

The constitutional prohibition on concurrent congressional service and federal employment, however, has nothing to do with concurrent congressional candidacy and federal employment. Since political candidates run for office in their private capacities, there is no possibility of an employment-related conflict of interest until one actually holds a political office. Moreover, since it is the voters who ultimately determine the results of elections, no government employee could assume such an office without the consent of "We the People." Sections 1502(a)(3) and 7323(a)(3) do not protect our democracy. Instead, they subvert it.

While the Hatch Act is perhaps the most notable employment-based prohibition on partisan political activity, it is by no means the only one. The Supreme Court decided \textit{Broadrick v. Oklahoma}\textsuperscript{343} on the same day that it decided \textit{Letter Carriers}. In \textit{Broadrick}, the Court rejected the argument that an Oklahoma statute prohibiting certain state employees from engaging in partisan political activity was unconstitutionally vague and overbroad.\textsuperscript{344} The Oklahoma statute was similar to the Hatch Act in many respects,\textsuperscript{345} but it purported to impose criminal sanctions on those who violated its provisions in addition to termination from government employment.\textsuperscript{346} Since the employees in \textit{Broadrick} did not question "Oklahoma's right to place even-handed restrictions on the partisan political conduct of state employees," the validity of criminal sanctions for those who violated the statutory prohibition on political activity was never before the Court.\textsuperscript{347} Nevertheless, even if one is inclined to accept the erroneous assumption that a governmental entity may constitutionally condition public employment on an employee's willingness to refrain from political activity, it does not follow that the government may impose \textit{criminal sanctions} on an employee who engages in political activity. When the government merely \textit{terminates} an employee, it acts as an \textit{employer}. When the government \textit{prosecutes} an employee for engaging in political activity, it acts in its \textit{sovereign} capacity. The First and Fourteenth Amendments clearly prohibit Congress and the states from using their sovereign

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\item \textsuperscript{342} U.S. Const. art. I, § 6, cl. 2.
\item \textsuperscript{343} \textit{Broadrick v. Oklahoma}, 413 U.S. 601 (1973).
\item \textsuperscript{344} \textit{Id.} at 607-08.
\item \textsuperscript{345} \textit{Id.} at 604.
\item \textsuperscript{346} \textit{Id.} at 606.
\item \textsuperscript{347} \textit{Id.}
\end{itemize}
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authority to criminalize partisan political activity, and any attempt to impose punishment on an employee beyond mere termination is blatantly unconstitutional.\textsuperscript{348} It is true that the Supreme Court stated in \textit{Ex parte Curtis} that "[i]f it is constitutional to prohibit the act, the kind or degree of punishment to be inflicted for disregarding the prohibition is clearly within the discretion of Congress, provided it be not cruel or unusual."\textsuperscript{349} The statute at issue in that case, however, did not prohibit covered employees from engaging in political activity. Instead, it only prohibited federal executive employees "from requesting, giving to, or receiving from, any other officer or employ[ee] of the government, any money or property or other thing of value for political purposes."\textsuperscript{350} There is no constitutional basis for imposing criminal sanctions, or any other form of punishment beyond mere termination, on a government employee who engages in political activity. Attempts to criminalize political activity on the part of government employees are impermissible.

Justice Douglas filed a dissenting opinion in \textit{Broadrick}, decrying the majority’s willingness to allow the government to deprive its employees of their right to participate in partisan political activity.\textsuperscript{351} He declared that "once we fence off a group, and bar them from public dialogue, the public interest is the loser."\textsuperscript{352} He went on to state:

A bureaucracy that is alert, vigilant, and alive is more efficient than one that is quiet and submissive. It is the First Amendment that makes it alert, vigilant, and alive. It is suppression of First Amendment rights that creates faceless, nameless bureaucrats who are inert in their localities and submissive to some master’s voice. High values ride on today’s decision in this case and in \textit{Letter Carriers}. I would not allow the bureaucracy in the State or Federal Government to be deprived of First Amendment rights. Their exercise certainly is as important in the public sector as it is in the private sector. Those who work for government have no watered-down constitutional rights. So far as the

\textsuperscript{348} In \textit{Connick v. Myers}, the Supreme Court explained that "an employee’s false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street." \textit{Connick v. Myers}, 461 U.S. 138, 147 (1983).

\textsuperscript{349} \textit{Ex parte Curtis}, 106 U.S. 371, 374 (1882).

\textsuperscript{350} \textit{Id.} at 371.

\textsuperscript{351} \textit{Broadrick}, 413 U.S. at 618-21 (Douglas, J., dissenting).

\textsuperscript{352} \textit{Id.} at 620.
First Amendment goes, I would keep them on the same plane as all other people.\footnote{353} Justice Douglas was right in 1973, and he is right today.

In \textit{United Public Workers}, the Supreme Court acknowledged that Congress could not constitutionally prohibit federal employees from attending Mass or taking an active part in missionary work.\footnote{354} Given this limitation on Congress's authority, it is difficult to fathom how the Court determined that the Hatch Act was constitutional, since political speech is "as deeply embedded in the First Amendment as proselytizing a religious cause."\footnote{355} The idea that government employees should expect unique burdens on their political freedom is patently absurd. Since the First Amendment imposes no limits on the actions of purely private entities, government employers are the only employers that cannot constitutionally terminate their employees in retaliation for political speech. As Justice Stevens noted in his \textit{Waters} dissent, "[a]bsent some contractual or statutory provision limiting its prerogatives, a private-sector employer may discipline or fire employees for speaking their minds."\footnote{356} Government employees, however, have a First Amendment right to speak their minds, and to be free from retaliatory termination for doing so.\footnote{357}

The fact that so many government employees blindly acquiesce to unconstitutional restrictions on their political activities is the strongest evidence to date that the government has succeeded in creating "faceless, nameless bureaucrats who are inert in their localities and submissive to some master's voice."\footnote{358} It is incumbent upon all government employees to wake up, to speak out, and to demand an end to this subtle form of tyranny. Prohibitions on political activity are the hallmarks of tyrannical regimes and wicked rulers. They need not be the hallmarks of government employers in the United States. In recent years, the world has witnessed the courage of the brave citizens of Iraq and Afghanistan, who participated in historic elections despite the fact that terrorists were trying to kill them in retaliation for doing so. They understood that their young democracies would falter without their participation. Sec-

\footnote{353} \textit{Id.} at 621.
\footnote{356} \textit{Waters v. Churchill}, 511 U.S. 661, 694-95 (Stevens, J., dissenting).
\footnote{357} \textit{Id.} at 695.
\footnote{358} \textit{Broaddrick}, 413 U.S. at 621 (Douglas, J., dissenting).
tions 1502(a)(3), 7323(a)(3), and 7323(b) of the Hatch Act cannot stand if American democracy is to continue to flourish. Our democracy is fragile, and our Constitution is not a self-executing formula. As Americans, we cannot afford to let any institution erode the bulwarks of freedom enshrined in our Constitution—not even our own government.