



Volume 87 | Issue 1

Article 12

September 1984

Restrictions on Political Activities of Government Employees

Elizabeth L. Crittenden
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Labor and Employment Law Commons](#), [Law and Politics Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Elizabeth L. Crittenden, *Restrictions on Political Activities of Government Employees*, 87 W. Va. L. Rev. (1984).
Available at: <https://researchrepository.wvu.edu/wvlr/vol87/iss1/12>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

RESTRICTIONS ON POLITICAL ACTIVITIES OF GOVERNMENT EMPLOYEES

I. INTRODUCTION

The constitutionally protected freedoms of speech, association, and assembly are recognized as fundamental to citizens in our society. Yet there are numerous statutory abridgments of these fundamental freedoms which apply when a person accepts employment financed primarily from government funds.

This Note will review the basic rationale for regulating employee political activity, the nature of these restrictions, and their judicial enforcement. The Note will also discuss the divergent trends of the last decade. Legislative bodies have generally loosened restrictions on political activity. Nevertheless, stringent limitations have been upheld through judicial decisions. The continued viability of political restrictions is questioned as being inconsistent with evolving concepts of first amendment freedoms.

II. HISTORY OF STATUTORY RESTRICTIONS

A. *Historical Background*

Although political parties played only a minimal role in the very early years of our republic, by the early nineteenth century political patronage had caused many federal employees to be chosen through the spoils system.¹ President Thomas Jefferson issued an executive order which expressed dissatisfaction with political activities by government officials and asserted the expectation that such officials would refrain from electioneering.² Needless to say, Jefferson's order of 1801 did not put an end to the spoils system in the federal government. Similar, and equally ineffective, orders were issued under the administrations of Harrison (1841), Grant (1873), and Hayes (1877).³

A more significant blow to the spoils system was struck by the passage of the Civil Service Act (also known as the Pendleton Act) in 1883.⁴ The Civil Service Act primarily addressed the process by which government positions were filled, but it also restricted certain activities such as solicitations and political assessments.⁵ Three years later, in 1886, President Cleveland's executive order again warned federal officials of the evils of political activities.⁶ It was former Civil Service Commissioner Theodore Roosevelt who issued an executive order in 1907 that later became

¹ Vaughn, *Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond*, 44 GEO. WASH. L. REV. 516, 517 (1976).

² *Id.*

³ Friedman & Klinger, *The Hatch Act: Regulation by Administrative Action of Political Activities of Governmental Employees (pt. 2)*, 7 FED. B.J. 5, 7 (1945).

⁴ Civil Service Act of 1883, ch. 27, 22 Stat. 403.

⁵ *Id.* at 406.

⁶ Friedman & Klinger, *supra* note 3, at 7.

Civil Service Rule I and remained in effect until the passage of the Hatch Act⁷ in 1939:

No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competition [sic] classified service, while retaining the right to vote as they please and to express *privately* their opinions on political subjects shall take no active part in political management or in political campaigns.⁸

Thus, from the earliest days of regulation all executive branch employees were forbidden to use their official influence for political purposes, while employees covered by the civil service system (classified employees) had additional restrictions placed upon them. It was difficult to enforce any restrictions on those persons employed in positions not classified under the Civil Service Act, however, because the Civil Service Commission had no direct authority over those officials.⁹ Nevertheless, employees in the classified service had some job security and the restraints on political activity were seen as safeguards to that security.¹⁰ Employees in the classified service could not be dismissed for refusing to engage in political activity when such activity was prohibited by law.

In 1882, in *Ex Parte Curtis*, the Supreme Court recognized the power of Congress to restrict political activities of federal employees "to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service."¹¹ The statute under scrutiny in *Ex Parte Curtis* prohibited federal employees from requesting, giving, or receiving political contributions from other employees. The Court found that such a statute was necessary and proper to promote an efficient public service, because the "dread of dismissal" would take away the "feeling of independence" needed for "faithful public service."¹² The statute was seen as having as its objective the protection of federal employees.¹³ In a dissenting opinion, Justice Bradley decried the statutory prohibitions because they made the relinquishment of certain political freedoms a condition of government employment.¹⁴ He noted that the constitutionally protected freedoms of speech, assembly, and to petition for redress of grievances should not be "trammelled by inconvenient restrictions."¹⁵ Although Congress could take necessary actions to prevent corruption and exertion of undue influence among federal employees, the means

⁷ Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147, as amended, and Act of July 19, 1940, ch. 640, 54 Stat. 767, as amended.

⁸ Irwin, *Public Employees and the Hatch Act*, 9 VAND. L. REV. 527, 533 (1956) (emphasis added).

⁹ Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510, 511 (1962).

¹⁰ Friedman & Klinger, *supra* note 3, at 7.

¹¹ *Ex parte Curtis*, 106 U.S. 371, 373 (1882).

¹² *Id.* at 373-74.

¹³ *Id.* at 374.

¹⁴ *Id.* at 376.

¹⁵ *Id.* at 377.

used to accomplish these ends must not interfere with constitutionally protected freedoms.¹⁶

Consequently, even before the passage of the Hatch Act, the lines of debate were drawn between those who viewed the restriction of political activities as a protection yielding job security and those who saw the restrictions as an infringement on the most fundamental rights of citizenship.

B. *The Hatch Act*

When Jefferson issued the first executive order restricting political activities the federal government employed approximately 2,100 persons.¹⁷ By the time the Pendleton Act was passed, there were about 140,000 federal employees but only ten percent were covered by the new civil service system.¹⁸ President Theodore Roosevelt greatly extended the coverage of the classified civil service by including all executive branch employees who were not laborers, presidential appointees, or otherwise exempted by Congress or the President.¹⁹ By the time the Hatch Act was passed in 1939, the number of federal employees had grown to 953,891 and sixty-nine percent of those employees were covered by the Civil Service Act.²⁰

The New Deal legislation promoted by Franklin Delano Roosevelt sent an infusion of emergency relief dollars into the economy, much of it in the form of funds for employment programs such as the Works Progress Administration (W.P.A.). As early as 1935, strong criticism was aimed at the W.P.A. for the high degree of political influence involved in the program's implementation.²¹ In response to such criticism the W.P.A. Administrator issued a ruling, applicable to all nonrelief personnel, that no W.P.A. employee could be a candidate for or hold elective office.²²

Congress, however, was not satisfied solely with an administrative response and included a similar provision in the 1936 appropriations bill.²³ In addition, an amendment prohibiting discrimination on the basis of political affiliation was included.²⁴ Roosevelt's political adversaries were not satisfied with these measures, however, and after conducting an investigation of relief programs, offered an amend-

¹⁶ *Id.* at 378.

¹⁷ H. E. KAPLAN, *THE LAW OF CIVIL SERVICE* 2 (1958).

¹⁸ *Id.* at 10.

¹⁹ *Id.* at 11.

²⁰ Rose, *supra* note 9, at 511.

²¹ *Proposed Amendments to the Hatch Political Activities Act: Hearing on H. R. 696 Before the Subcomm. on Elections of the House Comm. on House Administration, 86th Cong., 1st and 2d Sess. 30 (1960) (Appendix, Legislative History of the Hatch Act) [hereinafter cited as Legislative History of the Hatch Act].*

²² General Letter No. 2, published in 80 Cong. Rec. 7566 (1936).

²³ Act of June 22, 1936, ch. 689, 49 Stat. 1597, 1610.

²⁴ *Id.*

ment to the next W.P.A. appropriations bill applying the same restrictions to W.P.A. administrative staff as then applied to civil service personnel.²⁵ After that amendment failed, the Sheppard Committee on Campaign Expenditures and Use of Governmental Funds conducted an investigation of the use of relief funds for political purposes.²⁶ That committee's recommendations formed the basis for the bill which became the Hatch Act.²⁷

President Roosevelt responded to the legislative initiative by attempting to bring all the relief programs' administrative staff under civil service.²⁸ Congress, however, rejected that proposal and passed the Hatch Act. When he signed the Act on August 2, 1939, Roosevelt recommended changes to the Act which would have included some state and local governments and allowed residents of the District of Columbia and nearby areas to run for local office.²⁹ Roosevelt also interpreted the Act to be designed to follow prior civil service regulations and rulings.³⁰

In the 1940s, Congress acted to extend coverage to employees of the District of Columbia and state and local government employees working in federally financed projects, but also permitted nonpartisan political activity by all covered employees.³¹ Another major statutory change took place in 1942 when employees of educational and religious organizations supported by federal funds were exempted from the political activity provisions of the Act.³² Legislation to restrict the political activities of federal employees was considered extensively during the late 1930s and early 1940s, but legislative activity on this subject was not solely an initiative of the federal government. States were also acting during this period to regulate employees' political activities.

C. State Regulation³³

Of the six states examined for this Note, three had some statutory restrictions on political activities by public employees prior to the 1939 passage of the Hatch Act.³⁴ These early statutes were aimed primarily at prohibiting political assessments, solicitations and improper use of influence among employees covered by the state civil service system.

²⁵ Legislative History of the Hatch Act, *supra* note 21, at 30.

²⁶ *Id.*

²⁷ Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147.

²⁸ Legislative History of the Hatch Act, *supra* note 21, at 32.

²⁹ 84 Cong. Rec. 10,747 (1939).

³⁰ *Id.* at 10,746.

³¹ Act of July 19, 1940, ch. 640, 54 Stat. 767.

³² Act of Oct. 24, 1942, ch. 620, 56 Stat. 986. The concern here was based on state attorney general rulings that teachers at land grant colleges and all other schools receiving federal funds would be subject to the Act.

³³ Statutes from the following states were examined for this Note: California, Florida, Michigan, New York, Wisconsin, and West Virginia. They are discussed in detail in a later section of the text.

³⁴ California (1913), New York (1909), and Wisconsin (1929).

The other three states passed their statutes after the enactment of the federal law.³⁵ Although these statutes are also aimed primarily at civil service employees, the provisions of these later state laws reflect a greater influence by the Hatch Act than do those statutes which were originally enacted prior to the Act. The latter states generally place more restrictions on covered personnel and include limitations on partisan political activity.

III. NATURE OF STATUTORY RESTRICTIONS

A. Hatch Act

The Hatch Act, officially titled "an act to prevent pernicious political activities," makes it unlawful for any person, whether or not a government employee, to interfere with any other person's right to vote for high federal officers, to make improper promises (or threats) regarding government employment in exchange for political activity, to solicit or receive political assessments or subscriptions from federal employees or to furnish or receive employee lists to or from anyone for political purposes.³⁶

1. Federal Employees

Under the Hatch Act, virtually all federal employees of an executive branch agency or in the competitive service³⁷ are prohibited from using their "official authority or influence for the purpose of interfering with" an election.³⁸ Additionally, the statute provides for presidential rules which protect these same employees from any obligation to make a political contribution and prohibit the use of official authority or influence in a coercive fashion.³⁹ Most executive agency employees⁴⁰ are also prohibited from requesting or receiving political contributions from other federal employees.⁴¹ Employees on leave of absence remain covered by any otherwise applicable restrictions.⁴²

Most of the restrictions which are commonly thought of as "Hatch Act pro-

³⁵ Florida (1949), Michigan (1976), and West Virginia (1961).

³⁶ Restrictions on political activity do not apply to individuals "employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization." 5 U.S.C. § 7324(c) (1982).

³⁷ 5 U.S.C. §§ 7321-7322 (1982).

³⁸ 5 U.S.C. § 7324(a)(1) (1982).

³⁹ Except direct presidential appointees.

⁴⁰ 5 U.S.C. § 7323 (1982).

⁴¹ Act of Aug. 2, 1939, ch. 410, §§ 1-6, 53 Stat. 1147 (codified as amended at 18 U.S.C. §§ 594-595, 598-601, 604-605 (1976 & Cum. Supp. 1983)).

⁴² See, e.g., Commission rulings in Folsom, 1 POL. ACTIVITIES REP. 104 (1945) and Lewis, 3 POL. ACTIVITIES REP. 93a (Dec. 22, 1971).

hibitions" are detailed in 5 U.S.C. § 7324(a)(2), which prohibits employees of executive agencies and the District of Columbia from taking an active part in political management or in political campaigns. Some employees are exempted from these prohibitions.⁴³ Exempted employees include those paid by the office of the President, federal department heads and assistant heads, policy making direct presidential appointees, the Commissioners and the Recorder of Deeds of the District of Columbia,⁴⁴ and employees residing in specific municipalities or other political subdivisions where many voters are federal employees.⁴⁵

Interestingly, the Hatch Act does not attempt to develop a detailed definition of what activities fall within the prohibitions against political management or political campaigning. Instead, the Act incorporates by reference "determinations of the Civil Service Commission under the rules prescribed by the President."⁴⁶ The original 1939 Act had not made any provision for defining what activities would be prohibited.⁴⁷ During the debate over the 1940 amendments, significant resistance arose to proposed language which would have given the Civil Service Commission (Commission) broad powers to promulgate rules and regulations defining the prohibited activities.⁴⁸ Senator Carl Hatch then proposed a substitute which apparently incorporated the thousands of decisions made under the Civil Service Rules I and IV before the passage of the Hatch Act and extended those rulings to all of the additional employees covered by the Act.⁴⁹ These many decisions of the Commission were not at first readily available to the public. After the passage of the Freedom of Information Act,⁵⁰ the Commission published the four-volume Political Activities Reporter (P.A.R.) which contains a summary of the pre-1940 rulings and the actual decisions made under the Hatch Act since that time.

It is beyond the scope of this Note to give a detailed breakdown of Commission decisions under Section 7324(a)(2) of the Hatch Act. The Code of Federal Regulations, however, does list permissible and prohibited activities.⁵¹ Off-duty federal employees are free to do the following:

- | | |
|------------------------------|---|
| —register and vote | —participate in nonpartisan civic organizations |
| —express their opinions | —join a political organization |
| —display political materials | |

⁴³ 5 U.S.C. § 7324(d) (1982).

⁴⁴ *Id.*

⁴⁵ 5 U.S.C. § 7327 (1982). Employees exempted under this section include employees of the Alaska Railroad and residents of Maryland or Virginia in the immediate D.C. vicinity, as well as any other political subdivision designated by the Civil Service Commission "because of special or unusual circumstances." See 5 C.F.R. § 733.124 (1983).

⁴⁶ 5 U.S.C. § 7324(a) (1982).

⁴⁷ Act of Aug. 2, 1939, ch. 410, § 9(a), 53 Stat. 1147, 1148.

⁴⁸ Rose, *supra* note 9, at 513.

⁴⁹ *Id.* at 513-514.

⁵⁰ 5 U.S.C. § 552 (1982).

⁵¹ 5 C.F.R. §§ 733.101-301 (1983).

- attend a political gathering
- sign a political petition
- make a financial contribution
- be an independent candidate or take an active part in a local partisan election in one of the political subdivisions designated⁵²
- fully participate in nonpartisan elections
- perform election duties required by state law

Similarly, federal employees are prohibited from improper use of official authority or influence and from the following:

- holding political party office
- organizing a political club
- soliciting or receiving partisan political funds
- organizing a partisan fundraiser
- helping to manage a partisan political campaign
- becoming a partisan candidate
- soliciting votes for or against a partisan candidate
- acting as a pollworker in a partisan capacity
- driving voters to the polls in a partisan capacity
- endorsing or opposing a partisan candidate through any public medium
- serving as a delegate, etc. at a political party convention
- addressing a political party convention, rally, etc. in a partisan nominating petition

2. Certain State and Local Employees

Employees of state and local executive branch agencies “whose principal employment is in connection with”⁵³ an activity receiving any federal funds are covered by 5 U.S.C. ch. 15. A large group of state and local government employees is, however, exempted from the Hatch Act. Not covered are employees of any “educational or research institution, establishment, agency or system” supported by state or local governments or a recognized religious, charitable, or cultural organization.⁵⁴

The language of section 1501 defining covered employees has been construed by the Commission and the courts to include a large proportion of state and local government employees. Even though an employee works only part-time for the government, that employment may be found to be his or her “principal employment.”⁵⁵ It has been ruled that, if the employee has policy making administrative responsibilities, it does not matter if only one percent of his or her time is spent on federally aided projects.⁵⁶ Generally speaking, all employees of the follow-

⁵² These are the political subdivisions specified in 5 C.F.R. § 733.124 (1983). See *supra* note 45.

⁵³ 5 U.S.C. § 1501(4) (1982).

⁵⁴ *Id.* § 1501(4)(B).

⁵⁵ See, e.g., *In re Higginbotham*, 340 F.2d 165 (3d Cir.), cert. denied, 382 U.S. 853 (1965); *Smyth & Sheboygan County v. United States Civil Serv. Comm'n*, 291 F. Supp. 568 (E.D. Wis. 1968).

⁵⁶ *Palmer v. United States Civil Serv. Comm'n*, 297 F.2d 450 (7th Cir.), cert. denied, 369 U.S. 849 (1962).

ing types of state and local departments or agencies are included: health, highway, welfare, unemployment, housing and urban development authorities, veterans affairs, agriculture, and civil defense.⁵⁷ As with federal employees, an employee on leave of absence remains covered by the Hatch Act.⁵⁸

Covered state and local government employees initially were subject to the same restrictions as federal employees.⁵⁹ The regulations covering these employees were almost identical to those described in the previous section which covered federal employees. Beginning in 1941, however, numerous bills were offered in Congress to repeal section 12 of the Hatch Act, which provided for regulation of the political activities of officers and employees of state and local agencies receiving federal loans or grants. Extensive investigation and study led to committee proposals to repeal these provisions.⁶⁰ Section 12 was termed "probably the most unpopular Federal legislation ever imposed on our State and local governments," based on a committee survey.⁶¹

Finally, in 1974, Congress was successful in amending the Hatch Act to loosen restrictions on covered state and local employees. The restriction on active participation in political management and campaigns was repealed and, in its place, language was inserted which prohibited only being "a candidate for elective office."⁶² Additionally, another section allows all covered employees to be candidates in completely nonpartisan elections.⁶³

These changes in statutory language substantially loosened the limitations imposed on state and local government employees. The provisions of the amendment are implemented in 5 C.F.R. part 151, which simply repeats the statutory prohibitions on improper use of official authority, coercion of contributions, and being a candidate in a partisan election. The restrictions in section 1502(a)(3) regarding candidacy do not apply to the governor or lieutenant governor, the mayor of a city, a nonclassified elected head of an executive department, or an individual brought under the Hatch Act by virtue of holding an elective office, as far as running again for that same office.⁶⁴ Additionally, any covered state or local employee may

⁵⁷ Annot., 8 A.L.R. FED. 343, 355-56 n.4 (1971).

⁵⁸ Act of July 19, 1940, ch. 640, 54 Stat. 767, 767-68 (adding § 12 to the Hatch Act).

⁵⁹ See, e.g., Montgomery, 3 POL. ACTIVITY REP. 45 (Feb. 18, 1970).

⁶⁰ H.R. REP. NO. 13, 85th Cong., 2d Sess. (1959).

⁶¹ *Id.* at 32. Comments illicited by the Committee from state officials were interesting in their broad range of opinions and perceptions. Some examples are given below. California: Restrictions are no longer justified after demise of W.P.A., and problems could be more properly dealt with by state legislatures. *Id.* at 46-47. Florida: Federal laws are amply justified. *Id.* at 48. Michigan: Officials felt restrictions would not apply to local employees. *Id.* at 51. New York: No comments were given; officials simply sent a listing of numbers of covered employees. *Id.* at 91. West Virginia: The Hatch Act is never considered by state employees, since most "think it unconstitutional." *Id.* at 106. Wisconsin: The response indicated that employees would welcome repeal. *Id.* at 56.

⁶² 5 U.S.C. § 1502(a)(3) (1982).

⁶³ *Id.* § 1503.

⁶⁴ *Id.* § 1502(c).

run for political office or be a candidate to serve as a delegate to a political party convention.⁶⁵

Other than the restrictions on partisan candidacy, a covered state or local employee is free—at least in so far as federal law is concerned—to participate freely in political activities, including political management and campaigning.

B. *State Laws Restricting Political Activity*

A 1968 study by a federal commission indicated that eight states had laws more restrictive than the Hatch Act.⁶⁶ Nine state statutes were classified as similar to the Hatch Act.⁶⁷ Thirty-three states had laws less restrictive than the Hatch Act, with ten of those in the class imposing little or no restriction on political activities.⁶⁸

As noted earlier, the statutes of six states were examined in order to obtain a sampling of the current nature of state control over the political activities of public employees. Each of these state statutes will be discussed in this section, examining both the employees who are covered and the types of activities that are restricted. Several statutes apply not only to state employees, but also to employees of local governments. Additionally, some provisions could be viewed as more restrictive than those imposed on state and local employees by the Hatch Act. This is compatible with congressional intent in passing the 1974 amendment to the Hatch Act, which was not meant to preempt or supersede state laws regulating the activities of state and local government employees.⁶⁹

California's statute⁷⁰ is generally nonrestrictive, but applies to employees of all state agencies, including the universities and the state legislature, and to employees of local governments except school districts and municipal corporations.⁷¹ The only activities specifically restricted by the statute are improper use of influence,⁷² solicitation of contributions from employees of the same agency,⁷³ and participating in political activities while in uniform.⁷⁴ Although local governments may restrict political activities on the premises or during working hours,⁷⁵ no other limitations

⁶⁵ 5 C.F.R. § 151.122(f) (1983).

⁶⁶ 2 *Commission on Political Activity of Government Personnel, A Commission Report* 92 (1968) [hereinafter cited as *Comm'n on Pol. Activity*].

⁶⁷ *Id.*

⁶⁸ *Id.* at 98.

⁶⁹ Act of Oct. 10, 1974, Pub. L. No. 93-443, 1974 U.S. CODE CONG. & AD. NEWS 5587, 5669 (codified at 5 U.S.C. § 1502).

⁷⁰ CAL. GOV'T CODE §§ 3201-09 (Deering 1982 & Supp. 1984).

⁷¹ *Id.* § 3202.

⁷² *Id.* § 3204.

⁷³ *Id.* § 3205.

⁷⁴ *Id.* § 3206.

⁷⁵ *Id.* § 3207.

are allowed.⁷⁶ It can be seen from the limited nature of these restrictions that public employees in California enjoy a great deal of freedom of political activity. Of course, Hatch Act prohibitions still apply to covered employees.⁷⁷

Michigan's statute⁷⁸ is similarly nonrestrictive, and covers state civil service employees and nonelected employees of any political subdivision.⁷⁹ Classified state employees may participate in most political activities and may run for local office without a leave of absence or for state office while on leave of absence.⁸⁰ Employees who are candidates for local office may be required to take leave only if they are running for office in the unit of government in which they are employed.⁸¹ Permitted activities, however, cannot be engaged in during work time.⁸² Coercing political contributions from other public employees is also prohibited.⁸³ Additionally, covered employees are required to comply with Hatch Act provisions.⁸⁴

New York law closely parallels some of the criminal provisions of the federal law concerning coercion and corruption, but provides for few limitations on an employee's rights to engage in political activity. The election law statute regarding pernicious political activities establishes misdemeanor penalties for any person who engages in coercion or interference with another's voting rights, who makes improper promises or threats regarding government employment, who solicits or receives political assessments, or who furnishes employee lists for political purposes.⁸⁵ Subsequent sections provide for additional misdemeanor offenses if these "pernicious activities" are engaged in by public employees.⁸⁶

New York's civil service law proscribes certain other activities, such as basing employment recommendations on the basis of political affiliation, improperly using authority to coerce political actions or contributions, improperly inquiring as to political affiliation, political assessments, and improperly promising or threatening to use official influence regarding public employment.⁸⁷ The limitations under the civil service law apply to classified state employees and to classified employees of any civil division of the state.⁸⁸ Other than those restrictions listed, the New York civil servant is free to engage in political activities.

⁷⁶ *Id.* § 3208.

⁷⁷ *Id.* § 3203.

⁷⁸ MICH. STAT. ANN. § 4.1702 (Callaghan 1977 & Supp. 1984).

⁷⁹ *Id.* § 4.1702(1).

⁸⁰ *Id.* § 4.1702(2)(c).

⁸¹ *Id.* § 4.1702(3)(1)(c). If an employee is elected, however, he or she must take a leave of absence or resign.

⁸² *Id.* § 4.1702(4).

⁸³ *Id.* § 4.1702(5).

⁸⁴ *Id.* § 4.1702(7).

⁸⁵ N.Y. ELEC. LAW § 17-154 (McKinney 1978).

⁸⁶ *Id.* §§ 17-156, 17-158.

⁸⁷ N.Y. CIV. SERV. LAW § 107 (McKinney 1983).

⁸⁸ *Id.* § 2.

Florida's law more substantially curtails the political activities of its state civil service employees. In addition to restrictions against political discrimination, improper use of authority, and giving or accepting payment for civil service employment, the statute prohibits a state employee from being a candidate for or holding public office unless approval is received from the Department of Administration to run for and serve in a local office found not to conflict with the state employment.⁸⁹ State employees may not take an active part in any political campaign while on duty.⁹⁰ County and municipal employees, while prohibited from improper use of authority and coercion of contributions, are allowed to run for and hold public office and to participate in political campaigns during off-duty hours.⁹¹

Wisconsin's political activities law applies to employees of the state classified service, including institutions of higher learning,⁹² but does not mention county or municipal employees. Besides the familiar prohibitions against solicitation of contributions and political activities while on duty, an employee must take a leave of absence to run for office and must resign his or her classified employment if elected.⁹³ Leaves also may be granted for partisan campaigning which would otherwise interfere with an employee's duties.⁹⁴

Of all the states sampled, West Virginia's law is the most restrictive.⁹⁵ The West Virginia statute contains the usual prohibitions against political discrimination, improper use of authority, and political assessments.⁹⁶ The statute, however, lists a number of restrictions on otherwise legitimate political activities, including holding party office, being a candidate for national or state paid public office, or holding paid public office.⁹⁷

The West Virginia statute was amended in 1983 and the administrative rule called for by the statute has not yet been promulgated, but some forms of political

⁸⁹ FLA. STAT. ANN. § 110.233 (West 1982).

⁹⁰ *Id.*

⁹¹ *Id.* § 104.31.

⁹² WIS. STAT. ANN. §§ 230.01-.03 (West Supp. 1982).

⁹³ *Id.* § 16.35.

⁹⁴ *Id.*

⁹⁵ W. VA. CODE § 29-6-20(e) (Supp. 1984). This is true in spite of the fact that the West Virginia statute was amended in 1983 to allow broader political participation by covered employees. The earlier version of W. VA. CODE § 29-6-20(e) had prohibited an employee from taking "any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen *privately* to express his opinion and to cast his vote." W. VA. CODE § 29-6-20(e) (1980) (emphasis added). The relaxing of the earlier statutory prohibitions may well have been in response to a West Virginia Supreme Court of Appeals decision which gave an "appropriate narrow interpretation" to an even more stringent statute. *Weaver v. Shaffer*, 290 S.E.2d 244, 251 (W.Va. 1980). In *Weaver*, the West Virginia court construed the state statute to prohibit only those activities proscribed by the United States Supreme Court in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

⁹⁶ W. VA. CODE § 29-6-20 (Supp. 1984).

⁹⁷ *Id.*

activity previously barred apparently are now allowed. Political campaigning and management are permitted.⁹⁸ A covered employee must take a leave of absence in order to be a candidate for a local paid public office, and an employee may hold any unpaid public office.⁹⁹ The full ramifications of the 1983 statutory language will only become certain after opportunity for administrative and judicial interpretation.

In contrast to its broadly worded restrictive provisions, the coverage of the West Virginia statute is limited. Employees of the Board of Regents are considered neither exempt nor classified.¹⁰⁰ While the Governor is empowered to add to the list of classified positions, the statute requires that numerous employees remain exempt. Included among those exemptions are all policymakers, laborers, and county road maintenance supervisors.¹⁰¹

C. *Miscellaneous Federal Statutes and Regulations of Nongovernmental Employees*

Not all political limitations on federally funded employees are contained within the Hatch Act. Some enabling statutes which fund services on the local level also provide for restrictions on the political activities of the persons paid by these programs. An important distinction between employees covered under these statutes and those covered under the Hatch Act is that these employees are not classified under civil service and, generally, are not public employees at all.

One of the most striking examples of the regulation of persons employed by nongovernmental organizations involves Community Action Agencies (CAAs).¹⁰² CAAs must be either governmental units or nonprofit agencies.¹⁰³ Services provided by CAAs vary from community to community, but include such projects as Head Start centers, Meals on Wheels programs, and weatherization assistance to the economically needy. In practice, many CAAs are private, nonprofit agencies. Yet, 42 U.S.C. § 2943 (repealed in 1981) provided that *every* CAA would be treated as a state or local agency for the purposes of the Hatch Act. No distinction was made between governmental and nonprofit organizations. Thus, employees of private nonprofit agencies which received funds from this program were subject to the same constraints on their political activities as were state and local govern-

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 29-6-4.

¹⁰¹ *Id.*

¹⁰² Community Action Agencies were originally funded by the now dismantled Office of Economic Opportunity (O.E.O.). The Economic Opportunity Act of 1964 was repealed, except for the VISTA and Legal Services Programs, by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 519 (1982).

¹⁰³ 42 U.S.C. § 2790 (repealed 1981).

ment employees covered by the Hatch Act. The current Code of Federal Regulations still contains the regulations¹⁰⁴ implementing these restrictions, despite the repeal of the statutory authority for such constraints. Generally, these programs are still operated in a manner which complies with these limitations.¹⁰⁵

Staff attorneys for programs funded by the Legal Services Corporation are also subject to the restrictions of chapter 15 of title 5 of the U.S. Code¹⁰⁶ even though many are not employed by state or local governments.¹⁰⁷ An earlier statutory provision which applied to legal services employees contained restrictions even more extensive than those in the Hatch Act. That provision was upheld in federal courts.¹⁰⁸ The statute has since been amended to conform with the Hatch Act.

Volunteers under the Domestic Volunteer Service Act¹⁰⁹ (VISTA workers) are subject to the same limitations as federal employees.¹¹⁰ In addition, they are prohibited from engaging in any voter registration activities, helping with any effort to provide transportation to the polls, or attempting to influence any legislation.¹¹¹

IV. EMPLOYEE PERCEPTIONS OF RESTRICTIONS

As in so many other areas of the law, many employees only vaguely understand their rights and responsibilities under the Hatch Act or under similar state statutes. While almost all government employees know whether they are employed as part of the classified civil service, they are less likely to be certain of the extent to which their continued employment is conditioned on compliance with rules regulating their political activities. Many employees, when asked to speak out concerning a legislative issue, will respond that they cannot because they are covered by the Hatch Act. Often, employees of noncovered private nonprofit corporations are told by superiors that they too are subject to the Hatch Act because the organization receives federal grant dollars.

Scholars have devoted little study to the issue of employee perceptions of statutory restrictions on political rights. It matters little if the actual language of a statute allows a given activity if the public perception is that it does not. The chilling effect is just as real whether the prohibition is based on an accurate or inaccurate perception of the law involved.

¹⁰⁴ 45 C.F.R. § 1069.8 (1983).

¹⁰⁵ Telephone interview with Ken Dean, Executive Director, North Central Community Action Association (March 16, 1984).

¹⁰⁶ 42 U.S.C. § 2996e(e) (1982).

¹⁰⁷ *Id.* § 2996e(a)(1)(A). Interestingly, under this provision, contracts to provide legal services may be given (and restrictions applied) to individuals, partnerships, and firms as well as nonprofit organizations.

¹⁰⁸ *Smith v. Ehrlich*, 430 F. Supp. 818 (D.D.C. 1976).

¹⁰⁹ Pub. L. No. 93-113, 87 Stat. 394 (1973).

¹¹⁰ *See* 45 C.F.R. § 1226.6 (1983).

¹¹¹ *Id.* § 1226.8.

In 1967, the U.S. Commission on Political Activity of Government Personnel issued a report which included results of surveys of government personnel. While nine-tenths of the federal employees questioned knew that there were restrictions on their political activities, thirty-eight percent either had not heard of the Hatch Act or did not know the general purpose of the Act.¹¹² Similarly, only one-half of the state employees questioned understood the general purpose of the Hatch Act.¹¹³

The Commission's research showed that, while a large majority of government employees were aware that they were free to write to their Congressman and were prohibited from running for partisan office, there was substantial confusion regarding the propriety of many other political activities.¹¹⁴ Nearly fifty percent of those questioned thought they were allowed to drive people to the polls on election day, but Civil Service Commission rulings have held this to be a prohibited activity.¹¹⁵ Somewhere between a quarter to a third of those sampled were not aware that they were permitted to become involved in nonpartisan issues and campaigns.¹¹⁶ One-fourth of both federal and state employees felt they could not put a political bumper sticker on their cars (with another thirteen percent of the federal employees indicating that they were not sure if this was permitted). Thus, it is apparent that even among those employees who were aware of the federal restrictions, many did not have a clear picture of just what these restrictions were.¹¹⁷ The Chairman of the Commission, Arthur S. Flemming, recommended a vigorous effort to educate government employees regarding their rights and responsibilities.¹¹⁸

Two recent surveys conducted among social service workers in West Virginia indicated that confusion regarding permissible and prohibited political activities still exists. In 1982, a policy analysis by the West Virginia University School of Social Work found that "employees for the most part are uninformed about state and federal regulations on participation in political activities."¹¹⁹ Only twenty-seven percent of the employees surveyed felt that state and federal regulations were clear enough for them to know what activities were allowed.¹²⁰

An informal survey conducted for this Note among members of two county-level councils of social agencies produced similar results.¹²¹ All of the persons

¹¹² *Comm'n on Pol. Activity*, *supra* note 66, at 9-10.

¹¹³ *Id.* at 75.

¹¹⁴ *Id.* at 10-11, 75-76.

¹¹⁵ *Id.* at 11, 75. At the time of this survey, the restrictions on state employees were identical to those on federal employees.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 23. Of the 980 federal employees surveyed, *none* got more than 8 of 10 correct answers to questions designed to test knowledge of specific restrictions on political activities.

¹¹⁸ *Id.* at 1.

¹¹⁹ L. Schultz, *THE HATCH ACT: A POLICY ANALYSIS OF ITS APPLICATION TO SOCIAL SERVICE AGENCIES IN WEST VIRGINIA* (1982) (available from the School of Social Work, Morgantown, WV).

¹²⁰ *Id.*

¹²¹ A survey was conducted in March of 1984. Respondents included employees of governmental units and nonprofit organizations, who were tested on their knowledge of specific restrictions.

surveyed knew if they were covered by the civil service system. Of those working for agencies receiving federal or state funds, all reported either that they were covered by the Hatch Act or that they did not know. Actually, only one-half of the agencies involved are so covered. Employees of state agencies seemed to know about applicable restrictions at a level roughly comparable to employees in the earlier cited studies. The most disturbing finding of this informal survey was that many persons not covered by federal or state restrictions thought they were covered and reported a number of legitimate political activities in which they felt constrained from participation.

V. COURT ENFORCEMENT OF STATUTORY RESTRICTIONS

The constitutionality of the Hatch Act and its limitations on the political freedoms of federal employees was first upheld in *United Public Workers v. Mitchell*.¹²² A roller employed by the U.S. Mint faced discharge for serving as a ward committeeman and for election day work at the polls.¹²³ The Court recognized that the Hatch Act interfered with freedoms guaranteed citizens under the first, ninth, and tenth amendments.¹²⁴ Nevertheless, the Court pointed out, "these fundamental human rights are not absolutes."¹²⁵ First amendment rights must sometimes yield "to the elemental need for order without which the guarantees of civil rights to others would be a mockery."¹²⁶ If the exercise of federal authority is based on powers granted by the Constitution, then the rights infringed upon are not reserved to the states or the people under the ninth and tenth amendments.¹²⁷

In *Mitchell*, the Court did not seriously address the first amendment question raised, but concentrated on the arguments that Congress did not have the power to enact legislation such as the Hatch Act. Congressional prohibitions of employee political activities were first upheld in 1882,¹²⁸ and, in *Mitchell*, the Court reaffirmed its position that it is within the power of Congress to reasonably regulate active political participation of government employees in order to promote the efficiency of public service.¹²⁹

A decision handed down on the same day as *Mitchell* confirmed the propriety of the extension of Hatch Act prohibitions to covered state and local government employees.¹³⁰ In *Oklahoma v. United States Civil Service Commission*, the Court stated *Mitchell* applied to state and local employees, and the Act's interference

¹²² *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

¹²³ *Id.* at 92.

¹²⁴ *Id.* at 95.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 96.

¹²⁸ *Ex parte Curtis*, 106 U.S. 371 (1882).

¹²⁹ *Mitchell*, 330 U.S. at 99.

¹³⁰ *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947).

with freedom of expression was not unconstitutional.¹³¹ The distinction that those covered are not federal employees was disposed of with a one-sentence observation: "While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed."¹³²

The *Mitchell* and *Oklahoma* decisions reflect a high degree of deference to the determinations of Congress. The Court held that

Congress may regulate the political conduct of government employees "within reasonable limits," even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power.¹³³

The Court, however, did say that the conception of the proper extent of governmental power is an evolving one, based not only on history and practice, but on changing societal conditions.¹³⁴

Prior to the decisions in *Mitchell* and *Oklahoma*, the Court had applied a rather strict standard of review for any statute which restricted first amendment freedoms. Statutes had been required to be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State."¹³⁵ The marketplace of opinion had to be freely open to allow debate of matters of public interest, and discussion of issues could not be restricted by broadly written statutes.¹³⁶

In spite of these precedents which stringently tested statutory language abridging first amendment freedoms, the *Mitchell* court applied a rational nexus test in its scrutiny of the Hatch Act. "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."¹³⁷

Little in the *Mitchell* decision explains the Court's departure from its previously adopted strict scrutiny standard for restrictions of fundamental freedoms. Clearly, the Court recognizes a greater governmental interest in regulating the speech of government employees than it does in regulating the speech of the general public.¹³⁸ While not expressly stated in the *Mitchell* decision, it is also possible that, given

¹³¹ *Id.* at 142.

¹³² *Id.* at 143.

¹³³ *Mitchell*, 330 U.S. at 102.

¹³⁴ *Id.*

¹³⁵ *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940).

¹³⁶ *Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940).

¹³⁷ *Mitchell*, 330 U.S. at 101 (emphasis added).

¹³⁸ *Id.* at 95.

the then-accepted view of public employment as a privilege rather than a right, the Court felt that government is free to impose any conditions it wishes in offering employment.¹³⁹

While the *Mitchell* opinion addressed the issue of the constitutionality of restricting the individual political rights of a federal employee, the *Oklahoma* decision dealt with matters such as state sovereignty and statutory implementation. The Court pointed to the holding in *United States v. Darby*¹⁴⁰ which stated that if the Constitution grants a power to the federal government then all means “which are appropriate and plainly adapted to the permitted end”¹⁴² may be utilized. The Court found that fixing the terms for allocating federal dollars so that state and local employees were compelled to comply with the Hatch Act was appropriate to the end of “better public service.”¹⁴² In response to a claim by the State of Oklahoma that the penalty provisions of the Hatch Act amounted to federal coercion, the Court simply observed that “[t]he offer of benefits to a state by the United States dependent upon cooperation by the State with federal plans, assumedly for the general welfare, is not unusual.”¹⁴³

Oklahoma argued that the Hatch Act was void for vagueness, but the Court rejected this contention by pointing to section 15 of the Act and its incorporation of previous civil service determinations.¹⁴⁴ While Oklahoma asserted that the federal courts should review every detail of an appealed Commission order, the Court chose to adopt the standard that it would remand a decision only if it could be determined that the Commission abused its discretion in making its determination.¹⁴⁵

Thus, with the *Mitchell* and *Oklahoma* decisions, it became clear that the Court would enforce the Hatch Act in its totality. While it would be twenty-six years before a similar state statute, patterned after the Hatch Act, was examined by the Court, limitations imposed by the states were also found to be constitutional.¹⁴⁶

Nevertheless, it should not be assumed that, because the Court enforced the Act, the controversies surrounding the curtailing of individual political freedoms were completely extinguished. The Court decisions were far from unanimous.¹⁴⁷

¹³⁹ Minge, *Federal Restrictions on the Political Activities of State and Local Employees*, 57 MINN. L. REV. 493, 531 n.206 (1973).

¹⁴⁰ *United States v. Darby*, 312 U.S. 100 (1941).

¹⁴¹ *Id.* at 124.

¹⁴² *Oklahoma*, 330 U.S. at 143.

¹⁴³ *Id.* at 144.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 145-46.

¹⁴⁶ *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). It is ironic that the first of the “little Hatch Acts” to be challenged would be Oklahoma’s and that the statute would be assailed on the grounds of vagueness.

¹⁴⁷ Justices Murphy and Jackson took no part in either decision. Justice Frankfurter concurred in both, but raised procedural questions. Justices Black and Rutledge dissented in both cases and Justice Douglas dissented in *Mitchell*.

Justice Douglas, in his dissent in *Mitchell*, pointed out that the Court had previously insisted that statutes be narrowly drawn when individual constitutional rights were balanced with a perceived community interest.¹⁴⁸ Douglas could see no adequate justifications for depriving all government workers of political rights and would have upheld the Act only if it had limited the political restrictions to appropriate classes of government employees, such as policymakers or administrative personnel.¹⁴⁹ Justice Black dissented because “[l]egislation which muzzles several million citizens threatens popular government, not only because it injures the individuals muzzled, but also because of its harmful effect on the body politic in depriving it of the political participation and interest of such a large segment of our citizens.”¹⁵⁰ In addition, Black was concerned that the arguments which supported the majority’s decision would similarly support legislation in which the political rights of groups other than governmental employees were suppressed.¹⁵¹

The arguments in these dissenting opinions have formed the basis for numerous subsequent attacks on Hatch Act-type provisions and will be addressed in more detail in the concluding sections of this Note.

State courts have generally found that reasonable restrictions on political activity by public employees are permissible.¹⁵² Earlier cases upheld severe limitations on the exercise of first amendment freedoms, especially as applied to uniformed employees, apparently on the theory that public employment is a matter of privilege.¹⁵³

A local ordinance prohibiting county employees from seeking elective public office or engaging in certain other political activities was upheld by the Supreme Court of Florida in a 1973 case.¹⁵⁴ The Florida court relied on language in the *Mitchell* and *Oklahoma* decisions to find that the local ordinance was neither unconstitutional nor overbroad.¹⁵⁵

As will be discussed later, however, many of the more recent state court decisions have questioned or overturned broadly drawn prohibitions as unconstitutional infringements on the freedom of speech.

VI. LEGISLATIVE CONSIDERATION OF EASING RESTRICTIONS

Congress, from time to time, has studied the implementation of the Hatch Act,

¹⁴⁸ *Mitchell*, 330 U.S. at 124.

¹⁴⁹ *Id.* at 122-23.

¹⁵⁰ *Id.* at 111.

¹⁵¹ Annot., 28 A.L.R.3d 717, 720 (1969).

¹⁵² See, e.g., *People ex rel. Clifford v. Scannell*, 74 A.D. 406, 77 N.Y.S. 704 (1902), *aff’d mem.*, 173 N.Y. 606, 66 N.E. 1114 (1903); *State ex rel. McKittrick v. Kirby*, 349 Mo. 988, 163 S.W.2d 990 (1942).

¹⁵³ *Swinney v. Untreiner*, 272 So.2d 805 (Fla. 1973), *cert. denied*, 413 U.S. 921 (1973).

¹⁵⁴ *Id.* at 809-10.

¹⁵⁵ *Id.*

and various proposals have been advanced to loosen the restrictions on government employees. As noted earlier, beginning in 1941, there were bills introduced to repeal or amend the Act.¹⁵⁶ In 1959, a major report was issued by the House, recommending more flexibility in the punishments than provided for by the Act, urging the removal of state and local employees from coverage, and allowing federal employees to participate in partisan activity on a local level.¹⁵⁷

The Commission on Political Activity of Governmental Personnel made a number of recommendations in 1968. The Commission noted the tension between encouraging citizen participation in the political process and assuring governmental integrity and an impartial civil service.¹⁵⁸ The Commission recommended expanding permitted political activities while strengthening sanctions and enforcement provisions aimed at coercion and improper use of authority or official position.¹⁵⁹ It was the unanimous opinion of the Commission that, rather than incorporating by reference the many rulings of the Civil Service Commission, the limitations on the political activities of covered employees should be "clearly and specifically expressed, and that beyond those limits political participation should be permitted."¹⁶⁰

In 1974, the recommendations of several commissions were adopted when Hatch Act restrictions on state and local employees were significantly loosened.¹⁶¹ The only comment included in the formal legislative history of this amendment indicated that more restrictive state laws were still permitted.¹⁶² Nevertheless, it can be assumed that the congressional action in relaxing the relevant provisions of the Hatch Act was facilitated by the cumulative weight of the many recommendations and studies urging such action.

The following year, proposals were introduced in both houses of Congress to restore to federal employees their "rights to participate, as private citizens, in the political life of the Nation."¹⁶³ Another bill, known as the Federal Employees' Political Activities Act of 1976, eventually passed both the Senate and the House.¹⁶⁴ Basically, this bill was aimed at opening up the political process to federal employees while strengthening the protections of the merit system.¹⁶⁵ It prohibited improper use of authority, solicitation, and all political activities while on duty, while in a federal building or while in uniform.¹⁶⁶ The bill also provided for leaves to be granted to employee/candidates, a separate board to decide on violations, and a

¹⁵⁶ H. R. REP. NO. 13, *supra* note 60, at 35-41.

¹⁵⁷ *Id.* at 4.

¹⁵⁸ 1 *Commission on Political Activity of Government Personnel, A Commission Report* 3 (1968).

¹⁵⁹ *Id.* at 3-4.

¹⁶⁰ *Id.* at 3.

¹⁶¹ 5 U.S.C. § 1502(a)(3) (1982).

¹⁶² 1974 U.S. CODE CONG. & AD. NEWS 5587, 5669.

¹⁶³ S. 372, 94th Cong., 1st Sess. (1975). See H.R. 3000, 94th Cong., 1st Sess. (1975).

¹⁶⁴ H.R. 8617, 94th Cong., 1st Sess. (1975).

¹⁶⁵ 122 CONG. REC. 11,867 (1976).

¹⁶⁶ H.R. 8617, *supra* note 164.

program to educate employees regarding their rights and responsibilities under the Act.¹⁶⁷

President Ford vetoed the 1976 Act, stating that the amendments "would deny the lessons of history."¹⁶⁸ Ford felt that subtle pressures could be brought to bear on government employees which would not be deterred by the sanctions in the bill. The Hatch Act, he said, had been successful in balancing the first amendment rights of employees against the need for a fair and effective government.¹⁶⁹ Neither the House nor the Senate overrode the Presidential veto.

The Civil Service Reform Act of 1978¹⁷⁰ provided for the creation of a Merit System Protection Board and for safeguarding the operation of merit principles in practice. While government employees were not extended any greater degree of political freedom, the Act may be viewed as buttressing the protective functions of the Hatch Act by protecting whistleblowers and strengthening disciplinary actions under the merit system.¹⁷¹

VII. STATUTORY RESTRICTIONS IN LIGHT OF DEVELOPING CONSTITUTIONAL CONCEPTS

Legislative chambers are not the only forums in which the viability of limitations on the political freedoms of public employees has been questioned. The constitutionality of these limitations continues to be scrutinized by the courts, even in the face of the *Mitchell* decision and its subsequent reaffirmations by the Supreme Court. The courts' scrutiny has grown more exacting as the concept of first amendment freedoms has evolved.

Several state courts have recognized that curtailment of first amendment rights must survive exacting scrutiny. In *Fort v. Civil Service Commission*,¹⁷² the Supreme Court of California held that a statute restricting the exercise of first amendment rights must be based on a compelling state interest and drawn as narrowly as possible to satisfy the state's purpose.¹⁷³ Similarly, the Supreme Court of Michigan has found that before an administrative agency may regulate off-duty participation in political activity it must show that such activity has actually interfered with job performance.¹⁷⁴

In the *Mitchell* decision, the United States Supreme Court had applied a rational nexus test in upholding the Hatch Act.¹⁷⁵ This standard was a departure from that

¹⁶⁷ *Id.*

¹⁶⁸ H.R. Doc. No. 449, 94th Cong., 2d Sess., 122 CONG. REC. 10,561 (1976).

¹⁶⁹ *Id.*

¹⁷⁰ Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

¹⁷¹ 1978 U.S. CODE CONG. & AD. NEWS 2723, 2728-30.

¹⁷² *Fort v. Civil Serv. Comm'n*, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964).

¹⁷³ *Id.* at 337, 392 P.2d at 388-89, 38 Cal. Rptr. at 628-29.

¹⁷⁴ *Council No. 11, AFSCME v. Civil Serv. Comm'n*, 408 Mich. 385, 292 N.W.2d 442 (1980).

previously applied in first amendment situations.¹⁷⁶ Soon thereafter, however, in a similar case the Court returned to a more stringent standard, observing: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice, in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." ¹⁷⁷ Indeed, the Court reasserted the principle that "only a compelling state interest . . . can justify limiting First Amendment freedoms."¹⁷⁸ In addition to the "compelling state interest" test, the Court also required a showing that no less restrictive form of regulation was available before limitations on first amendment rights would be upheld.¹⁷⁹

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.¹⁸⁰

Decisions like these led many commentators of the late sixties and early seventies to speculate that the Supreme Court would reassess the constitutionality of Hatch Act restrictions at the next opportunity.¹⁸¹

Despite possible abridgements of first amendment freedoms, two 1973 decisions, *Letter Carriers* and *Broadrick*,¹⁸² held the Hatch Act and a similar state statute to be valid and "unhesitatingly" reaffirmed *Mitchell*.¹⁸³ The Court stated "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees."¹⁸⁴

In both *Letter Carriers* and *Broadrick* the restrictive statutes involved were attacked on grounds of vagueness and overbreadth. In *Letter Carriers*, the Court observed, however, that "our task is not to destroy the Act if we can, but to con-

¹⁷⁶ See *supra* text accompanying notes 133-34.

¹⁷⁷ *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

¹⁷⁸ *NAACP v. Button*, 371 U.S. 415, 438 (1963).

¹⁷⁹ *Sherbert*, 374 U.S. at 407.

¹⁸⁰ *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

¹⁸¹ See, e.g., Minge, *supra* note 139, at 496, 534. Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389, 444 (1973).

¹⁸² *Letter Carriers*, 413 U.S. 548 (1973); *Broadrick*, 413 U.S. 601 (1973).

¹⁸³ *Letter Carriers*, 413 U.S. at 556.

¹⁸⁴ *Id.* After analyzing the historical and philosophical basis for the political prohibitions contained in the Hatch Act, the Court stated:

We agree with the basic holding of *Mitchell* that plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited. Until now this has been the judgment of the lower federal courts, and we do not understand the District Court in this case to have questioned the constitutionality of a law [that prohibits specific conduct].

strue it . . . so as to comport with constitutional limitations."¹⁸⁵ The Court then found that Congress did not improperly grant the Civil Service Commission the legislative function of determining the definition of prohibited activities, but intended the Commission to develop the law within the bounds of the 1940 Rules incorporated by reference into the Hatch Act.¹⁸⁶ The regulations issued by the Commission specifying conduct prohibited under the Act¹⁸⁷ were found not to be impermissibly vague,¹⁸⁸ since "the ordinary person exercising ordinary common sense can sufficiently understand and comply with" the prohibitions.¹⁸⁹

The Court was less adamant in its finding that the questioned statutes were not overbroad. In *Letter Carriers*, the Court found there was nothing "fatally overbroad about the statute when it is considered in connection with the Commission's construction of its terms" detailed in the regulations.¹⁹⁰ Thus, the Court depended on administrative regulations and interpretations to support its finding that the statute itself was constitutional. The appellants in *Broadrick* conceded the constitutionality of the application of the state statute to their conduct, and the Court did not directly address their vicariously asserted argument of overbreadth.¹⁹⁰ However, the Court said:

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.¹⁹²

While some challenges to statutes by those not directly impacted have been allowed subsequently because of possible chilling effects on the exercise of constitutionally protected rights,¹⁹³ no such attack was allowed in *Broadrick* because the statute involved limited not only the spoken word, but conduct as well.¹⁹⁴ Arguments based on facial overbreadth were found to be too attenuated where government was regulating conduct as well as speech.¹⁹⁵

Previous rulings had established that, although public employment could be withheld completely from an individual, it could not be subjected to unreasonable

¹⁸⁵ *Id.* at 571.

¹⁸⁶ *Id.* at 571-72.

¹⁸⁷ 5 C.F.R. § 733.122 (1983).

¹⁸⁸ *Letter Carriers*, 413 U.S. at 577.

¹⁸⁹ *Id.* at 579. This language was also adopted in *Broadrick*, 413 U.S. at 608.

¹⁹⁰ *Letter Carriers*, 413 U.S. at 580. In *Broadrick*, the Court also relied on an administrative ruling limiting the application of the challenged statute. *Broadrick*, 413 U.S. at 617.

¹⁹¹ *Broadrick*, 413 U.S. at 610.

¹⁹² *Id.* at 611-12.

¹⁹³ *Id.* at 612.

¹⁹⁴ *Id.* at 612-14.

¹⁹⁵ *Id.* at 615. In *Magill v. Lynch*, 560 F.2d 22 (1st Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978), the court ruled that a statute regulating conduct as well as pure speech must be found substantially overbroad to be found void on its face.

conditions.¹⁹⁶ This position represented a departure from the view, prevalent at the time of the *Mitchell* decision, that since public employment was a privilege, it could be subjected to any and all conditions imposed by statute. Under this requirement of reasonableness of employment restrictions, the Court found improper the dismissal of a teacher who had spoken out publicly regarding a bond issue. The Court found that there had to be “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 public services.¹⁹⁷ Although the Court conceded in *Pickering v. Board of Education* that the state’s interest in regulating the speech of its employees is greater than its comparable interest in the general citizenry,¹⁹⁸ such an interest must be analyzed in light of the specific issues of efficiency and interference with job performance.¹⁹⁹ When an employee’s public statements were found not to affect performance or have an impact on the operation of the agency generally, the employer’s interest in limiting the political speech of that employee was held “not significantly greater than its interest in limiting a similar contribution by any member of the general public.”²⁰⁰

The *Pickering* decision was not mentioned in the majority opinion in *Letter Carriers*. It is difficult to understand why the Court did not apply the tests so clearly articulated in *Pickering* in its reassessment of the propriety of the Hatch Act. In his dissent in *Letter Carriers*, Justice Douglas pointed out that in *Pickering* and in *Wood v. Georgia*²⁰¹ the Court had required a showing of interference with official duties in order to justify adverse actions as a result of political speech.²⁰² Douglas called for “substantial revision” of the Hatch Act by Congress in order to “meet the need for narrowly drawn language” which would not unduly hamper first amendment freedoms.²⁰³

In two later decisions, the Court ruled that public employees could not be discharged solely for their political affiliations or beliefs, at least so long as the employees were not policymakers or serving in confidential capacities.²⁰⁴ These rulings are based on the policy that a public employee cannot be discharged for exercising constitutionally guaranteed rights without a showing of a government interest which outweighs those rights.²⁰⁵ While the *Branti* and *Elrod* decisions are apparently limited to those cases where an employee has taken no overt action based upon his or her political associations or beliefs, both decisions are replete with language which emphasizes the primacy of first amendment rights. In *Elrod*, the

¹⁹⁶ *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

¹⁹⁷ *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 569-70.

²⁰⁰ *Id.* at 573.

²⁰¹ 370 U.S. 375 (1962).

²⁰² *Letter Carriers*, 413 U.S. at 598-99.

²⁰³ *Id.* at 599.

²⁰⁴ *Branti v. Finkel*, 445 U.S. 507 (1980). *Elrod v. Burns*, 427 U.S. 347 (1976).

²⁰⁵ *Perry v. Sinderman*, 408 U.S. 593 (1972).

Court observed that "a significant impairment of First Amendment rights must survive exacting scrutiny."²⁰⁶ The government must prove both that there is a paramount government interest and that the least drastic means of satisfying that interest has been chosen.²⁰⁷

VIII. CONCLUSION

It is difficult to explain why the Supreme Court continues to uphold the broad proscriptions of the Hatch Act and similar statutes. The "exacting scrutiny" supposedly utilized to examine infringements of first amendment rights seems to break down when applied to these statutes. The Court is unusually deferential to congressional findings of state interest and, indeed, sometimes supplies possible justifications for legislative action. The thousands of Civil Service Commission rulings which determine the actual prohibited or permitted activities are found not to be so confusing as to establish unconstitutional vagueness, despite significant evidence to the contrary. The statutes' coverage of millions of employees is not found to be prohibitively broad or in violation of the rule requiring utilization of the least restrictive alternative to meet the state's compelling interest, even though all types of employees are covered with the same suffocating blanket: administrative worker or laborer, policymaker or functionary, government employee or employee of a covered nonprofit organization.

Nevertheless, there is no indication that the Court will soon reexamine these restrictive statutes. Unless Congress is able to effectuate significant legislative reform, a substantial portion of the citizenry of this nation will remain at least partially disenfranchised for the foreseeable future. The enactment of legislation similar to that proposed in the Federal Employees' Political Activities Act of 1976 would be a major step toward correcting a long-standing injustice.

Elizabeth L. Crittenden

²⁰⁶ *Elrod*, 427 U.S. at 362.

²⁰⁷ *Id.* at 362-63.