LOUISIANA'S PROHIBITION ON THE POLITICAL ACTIVITY OF STATE AND LOCAL CIVIL SERVANTS: GOOD GOVERNANCE OR A VIOLATION OF PROTECTED EXPRESSION?

INTRODUCTION

Imagine working for most of your career with a single employer and with the same coworkers. You work very well together, and your years of experience collectively allow each of you to do your jobs correctly and efficiently. There is only one catch. You work for the State of Louisiana, and every four to eight years, you get a new boss, appointed by the newly elected governor. Sometimes that boss has experience in your field and is an asset to the workplace. Other times, that boss may be appointed to this unclassified position for a reason other than merit, such as because the new governor owes them a political favor. Whatever the reason, the boss's lack of knowledge and experience impedes workplace morale and efficiency. But the real harm begins when the new administration drastically cuts the workforce,[1] freezes employees' pay,[2] and eviscerates their benefits.[3] With no possibility of pay raises on the horizon to benefit their retirement incomes, the most senior employees see no reason to continue working. When they retire, the administration chooses to not replace them.[4] As the workforce

1. *See* LA. ST. CIV. SERV., REP. ON TURNOVER RATES FOR NON-TEMP. CLASSIFIED STATE EMP. at 4 (2012-13), https://www.civilservice.louisiana.gov/files/publications/annual_reports/2012-2013%20Act%20879%20Turnover%20Rate%20Report.pdf (the Louisiana State Civil Service voluntary and involuntary turnover rate was 31.8% in the 2012-13 fiscal year alone); *see also Civil Service reports 8,400 state employee layoffs under Governor Bobby Jindal*, THE ADVOCATE (July 5, 2016, 9:55 AM), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_66c503bb-1a68-5cd8-b564-4280c6d3c303.html.

2. *Civil Service Agrees to Pay Freeze for State Workers*, WWLTV (Apr. 6, 2011, 8:21 AM), https://www.wwltv.com/article/news/civil-service-agrees-to-pay-freeze-for-state-workers/289-346894252.

3. *See* John Kennedy, Opinion, *Guest commentary: Changes mean problems for state employees*, THE ADVOCATE, (Aug. 24, 2014, 1:54 AM), https://www.theadvocate.com/baton_rouge/opinion/article_674b5c32-362c-5435-8c62-af3127bce846.html; *see also* LA. LEGIS. FISCAL OFF., OGB UPDATE (July 18, 2014), https://tomaswell.files.wordpress.com/2014/08/ogb-report_july-2014-for-jlcb.pdf (legislative report prepared to explain the need for increases in state employee health insurance premiums after depletion of $500 million health care trust fund); *What happened to $500 million?*, AMERICAN PRESS, (May 29, 2014, 8:15 AM), https://www.americanpress.com/2014/05/29/what-happened-to-500-million/ (explaining the effects of the Jindal Administration's privatization of the OGB trust fund).

4. *See* Jeff Adelson, *Gov. Bobby Jindal implements year-long state hiring freeze*, THE TIMES-PICAYUNE, (July 12, 2012, 7:15 AM), https://www.nola.com/news/

dwindles and the workload increases, the most experienced of those workers who remain begin to experience burnout and many decide to retire early.

The remaining employees are primarily those mid-career individuals who cannot retire yet but have too many years invested into their retirement to simply abandon it. However, because they have worked for the State of Louisiana and paid into the retirement system, any Social Security retirement income they may be eligible for will be statutorily reduced or eliminated.[5] Thus, most of these employees feel that they have no other viable option except to remain and hope that the next administration will be better. These employees struggle as they work sixty-hour workweeks to complete the growing stacks of past-due assignments but are only paid for the forty hours for which they are scheduled.

Eventually, the work falls so far behind and the accuracy rates of the work fall so low that the administration realizes they must begin hiring. But by this time, the once enjoyable workplace has turned into an unhappy, punitive environment. The once prevalent sense of pride and enjoyment that previously made this a satisfying place to work is gone. It does not take long for the new employees to see what is in store for them, and they quickly depart to find better employment, creating a revolving door of inexperienced employees. So, those left behind continue on, splitting their effort between wasting time training new employees, most of whom will simply leave once their training ends, and completing a workload that they only have the ability to finish timely or correctly—but not both. If, like me, you worked for the State of Louisiana during the Bobby Jindal administration, then you do not have to imagine this scenario. It is likely that you personally experienced it.

But there is a glimmer of hope. Because you work under the appointees of an elected official, you recognize that elections are near, and it simply does not have to continue this way. You could explain to others how the administration's positive spin on their spending cuts is not the whole story, and there are real consequences that are impacting real people. You could help them understand that the next time they go to the ballot box,

---

politics/article_ab136806-d3bc-5c0c-a6bb-bf885cce2d92.html.

5. LA. ST. EMP. RET. SYS., *Social Security Offsets: WEP & GPO*, https://lasersonline.org/social-security-offsets/ (last visited Feb. 7, 2022).

they have the power to change this poorly performing government. Unfortunately, however, if you did that, you may lose your job. In Louisiana, if a state employee provides their insight and information to others in a way that can be construed as supporting or opposing any politician or political party, they are subject to disciplinary action.[6] "But wait," you think: "surely the First Amendment protects this kind of speech."

The First Amendment,[7] of course, is the foundation of our free democracy. The free speech protections afforded by the First Amendment do not exist merely to satisfy our individual desires for self-expression. Instead, since the founding of this nation, we have understood that a democracy can only function properly when an educated populace can discuss and debate public policy.[8] The free communication of ideas among the voting public, exploring the pros and cons of each policy choice, allows the propagation and improvement of good ideas and exposes the flaws of inferior ones.

Additionally, the Framers believed that government was a necessary evil, and they designed our Constitution with many safeguards, including the First Amendment, to ensure that tyranny did not overcome democracy.[9] We continue to see this concern expressed today in the proliferation of private government watchdog organizations[10] and congressional measures, such as the Freedom of Information Act, which allows the public to obtain information on our government's activities.[11] Without sources of inside information on the workings of

---

6. *See, e.g.*, *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

7. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."); Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'").

8. *See* Letter from Thomas Jefferson to Charles Yancey (Jan. 6, 1816), https://www.loc.gov/resource/mtj1.048_0731_0734/?sp=4&st=text ("If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be.").

9. *See* THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

10. *See generally* FULTON LIB., *Gov't Oversight and Watchdog Orgs.*, https://uvu.libguides.com/government-information/oversight (last visited Feb. 7, 2022).

11. U.S. DEP'T OF JUST., https://www.foia.gov/ (last visited Feb. 7, 2022) ("The basic function of the Freedom of Information Act is to ensure informed citizens, vital to the functioning of a democratic society.").

government, we may never learn of government mismanagement and corruption by public officials. There are countless examples of such conduct: Watergate,[12] the IRS Targeting Controversy,[13] Ukrainegate,[14] and numerous allegations of sexual misconduct by government officials,[15] to name but a few. But such high-profile public scandals are not the only concerns that inside information can expose. The opinions and personal knowledge of government employees can also reveal instances of inefficiency, ineptitude, and bias that would otherwise go unnoticed. Once these issues are exposed to the public and their governmental representatives, they can devise and implement resolutions to improve government efficiency and accountability.

However, despite the benefits enjoyed by the public when those with personal knowledge of government activities can freely express their opinions and concerns, the State of Louisiana has promulgated rules that effectively silence its public employees.[16] These restrictions on the free speech of government employees take the form of prohibitions on political activities, preventing public employees from making comments in support of, or in opposition to, those elected officials who operate our government.[17] However, by preventing those who best understand the inner workings of government from expressing support of or opposition to political parties and officials, the state effectively deprives the voting public of valuable information about how the government operates and whether those who run it do so competently.

The Louisiana State Civil Service agency (SCS) issues circulars on prohibitions of political activities for government

12. *See Select Committee on Presidential Campaign Activities*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/investigations/watergate.htm (last visited Feb. 7, 2022).

13. *See* Peter Overby, *IRS Apologizes For Aggressive Scrutiny Of Conservative Groups*, NPR (Oct. 27, 2017, 3:08 PM), https://www.npr.org/2017/10/27/560308997/irs-apologizes-for-aggressive-scrutiny-of-conservative-groups.

14. *See* Viola Gienger & Ryan Goodman, *Timeline: Trump, Giuliani, Biden, and Ukrainegate,* JUST SECURITY (Jan. 31, 2020), https://www.justsecurity.org/66271/timeline-trump-giuliani-bidens-and-ukrainegate/.

15. *See, e.g.*, *Legislator Misconduct Database*, GOVTRACK, https://www.govtrack.us/misconduct (last visited Feb. 7, 2022).

16. *See generally Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

17. *See, e.g.*, *id.* at 2.

employees each year.[18] In these circulars, the agency advises employees that they will be subject to disciplinary action if they participate in any of a long list of enumerated activities.[19] One may easily understand the rationale behind some of these prohibited activities, such as actively campaigning for a politician while on duty, while wearing a public uniform, or while driving in a public vehicle.[20] Government employees should project an appearance of impartiality on the job, and members of the public should never feel as though official government decisions that personally affect them are made based on political affiliation or bias. However, there are other prohibited activities that have less apparent policy rationales.

Examples of such prohibitions include the wearing of any political clothing, buttons, or pins while off duty, on the employee's own personal time; the allowing of a political sign to be placed in the employee's yard; or the placing of a bumper sticker on the family car.[21] Many of these prohibitions make perfect sense while one is at work, representing the government as a public employee. However, Louisiana's prohibitions implicitly prohibit public employees from participating in these activities even when they are acting in their capacities as private citizens.[22] For example, employees are not allowed to wear something as simple as a T-shirt supporting their preferred presidential candidate while attending their child's baseball game.[23] They are not allowed to drive to the grocery store in the family car fitted with a bumper sticker supporting their local council member.[24] They cannot even place a sign in their yard to support their parent, sibling, or child who is running for a position on the local school board.[25] Louisiana's prohibitions are

18. *See, e.g.*, *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2019-028 (St. Civ. Serv., Baton Rouge, La.), July 15, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/GC2019-028.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

19. *See, e.g.*, *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

20. *See, e.g.*, *id.*

21. *See id.* at 2.

22. *See id.*

23. *See id.*

24. *See id.* at 2-3.

25. *See id.* at 3. Note, however, that an employee's spouse may still place a

so strict that they do not even allow public employees to "follow" a political party or politician or "like" their posts on social media.[26] These rules arguably create a complete bar to the expression of these employees' views and concerns about politicians and candidates for political office. The result is a failure by the State of Louisiana to strike the delicate balance, better achieved by most other states and the federal government,[27] between satisfying the government's need to curb political impropriety, and its employees' rights to free speech.

There are currently over 245,000 state and local government employees in Louisiana.[28] Therefore, more than one in every twenty Louisiana residents[29] are directly subject to the chilling effects of the rules promulgated by the Louisiana State Civil Service agency. This suppresses the free speech rights of a significant portion of Louisiana's population and chills their participation in our democratic political process. More significantly, it silences the specific segment of the population who are best positioned to observe the inner workings of the very government by which they are being silenced. In turn, this creates a potential barrier to good governance in Louisiana and could be one of several reasons why the state's government has a reputation for corruption[30] and a track record for poor performance compared to other states.[31]

---

political sign in the yard of their shared home as long as the sign reflects the "true expression of the spouse" and not that of the employee. *Id.*

26. *See id.* at 5.

27. *See 50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffand politicalactivitystatutes.aspx (detailing the applicable law dealing with prohibitions on political activity in each state); *Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx# tabGroup11|tabGroup31 (last visited Feb. 7, 2022).

28. *State and Local Government: Employment and Payroll Data*, U.S. CENSUS BUREAU (May 10, 2021, 8:01 AM), https://www2.census.gov/programs-surveys/apes/datasets/2020/2020_state_local.xls (Mar. 2020 data, released May 2021).

29. *Louisiana Population 2022,* WORLD POPULATION REV., https://world populationreview.com/states/louisiana-population (last visited Feb. 7, 2022).

30. *See* Adam B. Kushner, *Is Louisiana the Most Corrupt State?,* NEWSWEEK (Mar. 10, 2010, 7:00 PM), https://www.newsweek.com/louisiana-most-corrupt-state-69541.

31. *See* Elliott Davis Jr., *U.S. News Ranks Best States for 2021,* U.S. NEWS, (Mar. 9, 2021, 12:00 AM) https://www.usnews.com/news/best-states/articles/us-news-releases-best-states-rankings (in U.S. News' annual Best States rankings, after considering 71 metrics across 8 categories, Louisiana placed 50th out of all 50 states).

This Comment will address Louisiana's unusually strict prohibitions on political activity for public employees and propose solutions that would not only help to achieve a better balance between the needs of the government and the rights of its employees, but also improve government transparency and efficiency. Part I will explore the background of prohibitions on political expression. It will detail why the government implemented these prohibitions and how they have been relaxed over time in other jurisdictions. Part II will examine both state and federal laws on the prohibition of political activities as they exist today. Part III will provide the policy rationale for loosening Louisiana's restrictions and an examination of the constitutionally shaky ground on which Louisiana's current policies rest. Part IV will then propose solutions modeled after the practices of the federal government and other states. Ultimately, this Comment will attempt to demonstrate the need for a more balanced approach to Louisiana's prohibitions on political activities for government employees, suggesting the use of narrowly tailored prohibitions to accomplish Louisiana's objectives without needlessly infringing on its employees' constitutionally protected rights.

I. BACKGROUND

The federal and state governments of the United States have not always prohibited the political activity of civil servants.[32] In fact, for nearly a century, such activity was arguably encouraged.[33] From the earliest administrations, presidents leveraged the power of attractive government employment positions to reward those who helped them into office.[34] Worse yet, government employees began using public works and federal funds as tools for political coercion.[35] Ultimately, Congress realized the gravity of the issue and began passing legislation to curb these practices.[36]

---

32. *See* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA 332 (2007); Sean M. Theriault, *Patronage, The Pendleton Act, and the Power of the People*, 65 J. POLS. 50, 54 (2003).

33. *See* Howe, *supra* note 32, at 332.

34. *See id.*

35. *See* Raymond Michael Myers IV, *"To prevent pernicious political activities:" the 1938 Kentucky Democratic primary and the Hatch Act of 1939*, 36 (2018) (B.A. honor thesis, University of Louisville) (ThinkIR).

36. *See, e.g.*, Civil Service (Pendleton) Act, 47 Cong. ch. 26, 22 Stat. 403 (1883); Steven J. Eberhard, *The Need for the Hatch Act*, 1 HARV. J.L. & PUB. POL'Y 153, 157

A. GOVERNMENT EMPLOYMENT BEFORE POLITICAL PROHIBITIONS

Beginning with the presidency of George Washington, political appointments were given to supporters of the president.[37] In these early days, however, it was customary for the incoming president to retain all political appointees made by the previous administration, except those in the very highest positions.[38] Those who were not replaced would typically remain employed with the government and be replaced only through attrition.[39] This practice retained experienced staff,[40] promoting continuity in government services. However, this custom changed sharply in 1829, upon the election of Andrew Jackson. President Jackson replaced a significant portion—ten percent by some estimates—of the total federal workforce with his supporters, resulting in more federal employees being removed from their jobs than under all six presidents before him.[41] A disproportionate number of these removals occurred in the United States Postal Service,[42] leading to a massive loss of experience, which significantly impacted the competency and performance of the agency.[43] After this practice was normalized by the Jackson administration, the resulting patronage system, or the spoils system, as it came to be known,[44] became the usual practice until the assassination of President Garfield[45] by a rejected job seeker in 1881.[46] This was the proverbial straw that broke the camel's back, prompting Congress to pass legislation to reign in the spoils system.[47]

(1978).

37. Howe, *supra* note 32, at 332.

38. *Id.* at 332-33.

39. *Id.*

40. *See id.* at 334.

41. *See id.* at 333.

42. *See id.*

43. *Id.* at 334.

44. *Id.*

45. *See* Louis Lawrence Boyle, *Reforming Civil Service Reform: Should the Federal Government Continue to Regulate State and Local Government Employees?*, 7 J.L. & POL. 243, 248; *see generally* ALLAN PESKIN, GARFIELD: A BIOGRAPHY 596 (1978).

46. Boyle, *supra* note 45, at 248; *see also* Peskin, *supra* note 45, at 588-90.

47. Norm Ornstein, *How the Assassination of James A. Garfield Haunts VA Reform*, The Atlantic (July 10, 2014), https://www.theatlantic.com/politics/archive/2014/07/how-the-assassination-of-james-a-garfield-haunts-va-reform/374202/.

B. THE RISE OF PROHIBITIONS ON GOVERNMENT EMPLOYEES

After the assassination of President Garfield, Congress passed the Pendleton Civil Service Act of 1883.[48] This Act placed a significant number of federal employment positions into a classified service, administered by the newly created Civil Service Commission.[49] The Act also made two major changes to covered positions. First, employees in the classified service could no longer be mandated to make political campaign contributions.[50] This was significant because, at the time, these forced contributions made up nearly seventy-five percent of all political contributions.[51] Second, the spoils system was replaced by a merit-based system, in which competitive examinations were utilized for the selection of employees instead of the more traditional patronage system that depended on political loyalty.[52] This merit-based employment process prohibited the removal or demotion, for political reasons, of employees protected under the Act.[53] This prohibition, in turn, helped to retain experienced workers who could make government service a full-time career.[54] It also helped improve the reputation of employees in government service who, due to the spoils system, were generally held in disrepute in the public eye.[55]

Although the Pendleton Act brought badly needed reform to Washington, some thought it did not go far enough. In 1907, President Theodore Roosevelt signed Executive Order 642, prohibiting civil servants from using their official authority or influence to interfere with elections, beyond their own right to vote, or to "express privately their opinion on all political subjects[.]"[56] Then, during the 1938 election campaign, accusations of coercion involving Democratic primary candidates and employees of the Works Progress Administration (WPA)

48. *See* Civil Service (Pendleton) Act, 47 Cong. ch. 26, 22 Stat. 403 (1883).

49. *See* Ari Hoogenboom, *The Pendleton Act and the Civil Service*, 64 AM. HIST. REV. 301, 303 (1959).

50. Theriault, *supra* note 32, at 52.

51. *Id.*

52. *See id.*

53. *See* Civil Service (Pendleton) Act, 47 Cong. ch. 26, 22 Stat. 403 (1883).

54. *See* Hoogenboom, *supra* note 49, at 310.

55. *See id.* at 311-12.

56. Exec. Order No. 642 (June 3, 1907).

emerged.[57] WPA employees were accused of offering public benefits in exchange for political favors in swing states and denying benefits to those who would not vote for their preferred candidate.[58] In response to these allegations, Congress passed "An Act To Prevent Pernicious Political Activities,"[59] better known as the Hatch Act, which essentially codified President Roosevelt's executive order.[60]

The Hatch Act banned the use of "official authority for the purpose of interfering with, or affecting [an] election . . . ," soliciting campaign funds from anyone having business with the agency, and coercing votes such as by promising government employment or withholding government funds to compensate or punish political activity.[61] Penalties ranged from removal from office for civil violations to fines and imprisonment for criminal violations.[62]

Shortly thereafter, in 1940, the Act was amended to apply to federally funded state and local government employees.[63] Originally, Congress had exempted state and local government employees from the Act's prohibitions due to concerns of infringing states' rights.[64] However, Congress also wished to "prevent federal money from funding coercive activities at [the state and local levels]."[65] To balance these interests, the 1940 Amendments were passed to withhold federal funds from states that failed to remove employees who were found in violation of the Act.[66]

57. *See* Myers, *supra* note 35, at 36.

58. *See id.*

59. Act to Prevent Pernicious Political Activities, Pub. L. No. 76-252, 53 Stat. 1147, 1148 § 9(a) (1939).

60. *See* Eberhard, *supra* note 36, at 157; William Hibsher, *Assault on Hatch Act Signals Political Activity for Government Workers*, 47 ST. JOHN'S L. REV. 509, 511 n.13, 513 (1973).

61. *See* Myers, *supra* note 35, at 66-67.

62. *See id.* at 67.

63. Scott J. Bloch, *The Judgement of History: Faction, Political Machines, and the Hatch Act*, 7 J. BUS. L. 225, 233 (2005); Eberhard, *supra* note 36, at 153 n.3.

64. Bloch, *supra* note 63, at 233; *see* Myers, *supra* note 35, at 50.

65. Bloch, *supra* note 63, at 233.

66. *See id.*

C. THE EASING OF FEDERAL RESTRICTIONS OVER TIME

Over the years, the Act has been amended numerous times. With each amendment, the prohibitions have become less restrictive. For example, in 1950, the Act no longer required that federally funded state and local government entities permanently remove employees found in violation of the Act.[67] Instead, the modified statute imposed only a ninety-day suspension from service, which was further reduced to a thirty-day suspension by a subsequent amendment in 1962.[68] In 1974, the Act was amended so that covered civil servants could again "(1) serve as officers of political parties; (2) solicit votes and funds for partisan candidates; (3) and participate in and manage political campaigns . . . ," as long as they did so in their personal capacities, outside the scope of their "official authority or influence."[69]

Then, in 1993, Congress passed another round of amendments to the Act.[70] These amendments drew a distinction between a "further restricted" class of employees, to whom more strict prohibitions continue to apply, and "less restricted" employees, to whom a more liberalized standard would apply.[71] Further restricted positions are those that are so sensitive to the appearance of impartiality that employees who accept those positions must take extra precautions when speaking out in a partisan manner, even in their capacities as private citizens.[72] Examples of such positions include administrative law judges, employees of the FBI, and members of the Federal Election Commission.[73] The most notable difference between prohibitions on less and further restricted positions is that less restricted employees may actively campaign for or against partisan candidates.[74] This includes making public speeches and

67. *See id.* at 234.

68. *Id.*

69. *Id.*

70. Hatch Act Reform Amendments of 1993, H.R. 20, 103rd Cong. (1993).

71. *See Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last visited Feb. 7, 2022).

72. *See id.*

73. *See id.* (contains an exhaustive list of "Further Restricted Employees").

74. *See id*.

distributing campaign literature.[75] Further restricted employees, on the other hand, may only "participate in campaigns where none of the candidates represent a political party."[76]

II. THE LAW AS IT EXISTS TODAY

Within the last decade, Congress passed the Hatch Act Modernization Act of 2012.[77] This Act reduced penalties for Hatch Act violations, but most notably, it also reduced the scope of coverage applied to state and local governments.[78] Under the new amendments, the Hatch Act only prohibits state and local government employees from running for office as partisan candidates if 100% of their salary comes from federal funding.[79] Because there are numerous funding sources available to state and local governments, it is easy for states to partially fund virtually every employment position so that at least some of their funding comes from other sources, even if those positions are still mostly federally funded. Today, the Hatch Act is the standard by which prohibited political activities are measured, both on the federal level and in most states.[80]

A. CURRENT RESTRICTIONS ENACTED BY OTHER STATES

The Hatch Act prohibits certain political activities by federal employees while they are acting in their official capacities, on the clock, in uniform, or in public vehicles.[81] However, the political

75. *Id.*

76. *Id.*

77. Hatch Act Modernization Act of 2012, Pub. L. No. 112-230, Stat. 2170.

78. *See id.*; Zachary G. Parks, *Hatch Act Modernization Act Loosens Ethical Restrictions*, INSIDE POL. L. (Jan. 3, 2013), https://www.insidepoliticallaw.com/2013/01/03/hatch-act-modernization-act-loosens-ethical-restrictions.

79. *See* Hatch Act Modernization Act of 2012, Pub. L. No. 112-230, Stat. 2170 (amends 5 U.S.C. § 1502(a)(3) to prohibit public employees from being candidates for elective office only "if the salary of the employee is paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency, be a candidate for elective office.").

80. *See Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last visited Feb. 7, 2022); *see also 50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx (detailing the applicable law dealing with prohibitions on political activity in each State).

81. *Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last

activity of civil servants acting outside the scope of their employment, in their capacities as private citizens, is minimally regulated.[82] Congress also extended the same provisions to state and local governments,[83] from which loan and grant monies may be withheld upon the finding of a violation.[84] To comply with the mandates set forth in the Act and ensure federal funding is not jeopardized, many states, including Louisiana, have enacted legislation to codify prohibitions on the political activity of state civil service employees.[85] In many states, this legislation is little more than a restatement of the prohibitions defined in the federal Hatch Act itself.[86] Some states, however, take a more liberal approach to ensure that the rights of their employees are protected. For example, Alabama passed legislation explicitly providing that "[n]o person . . . whether classified or unclassified, shall be denied the right to participate in . . . political activities to

visited Feb. 7, 2022).

82. *Id.* (most "off the clock" activities are unregulated, such as contributing money to political campaigns, attending political fundraising functions and political rallies, and campaigning for or against candidates in partisan elections. However, there are a few activities that are prohibited, even on the employee's personal time, such as running for partisan political office, and soliciting donations for a partisan political party or candidate).

83. 15 U.S.C. § 1502.

84. *Id.* § 1506.

85. *50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx

86. *See Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last visited Feb. 7, 2022); *see also 50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx; *see e.g.*, CONN. GEN. STAT. § 5-266a (2022) (A Connecticut state employee may not "use his official authority . . . for . . . interfering with . . . the result of an election . . . or directly or indirectly coerce . . . a state or local officer or employee to pay . . . anything of value . . . for political purposes." However, he is permitted to "express his opinions on political subjects and candidates and shall be free to participate actively in political management and campaigns. Such activity may include but shall not be limited to, membership and holding of office in a political party, . . . campaigning for a candidate in a partisan election by making speeches, writing on behalf of the candidate or soliciting votes in support of or in opposition to a candidate and making contributions of time and money to political parties, committees or other agencies engaged in political action, except that no such employee shall engage in such activity while on duty . . . ."); MO. REV. STAT. § 36.155 (2020) (A Missouri state employee may not use his "official authority or influence for the purpose of interfering with the results of an election," "solicit, accept or receive a political contribution from any person who is a subordinate employee," or "[r]un . . . as a candidate for election, to a partisan political office.").

the same extent as any other citizen . . . including endorsing candidates and contributing to campaigns . . . ."[87] Furthermore, civil servants in Alabama are permitted to run as partisan candidates for political office by merely taking a leave of absence from their employment duties.[88] This leave can take many forms, including unpaid leave, use of accrued overtime leave, or use of accrued vacation time.[89] Most states, such as Alabama, have found various ways of striking a harmonious balance between the requirements of the Act and the need to run the government efficiently, on the one hand, and the constitutionally protected free speech rights of their employees and the right of the populace to be well informed, on the other.[90] However, Louisiana takes a far more restrictive approach to these prohibitions.

B. THE LEGISLATIVE BASIS FOR RESTRICTIONS IN LOUISIANA

Since the passage of the Hatch Act, Louisiana has legislatively enacted several prohibitions on the political activity of state and local civil service employees. At the heart of Louisiana's administrative rules defining these prohibitions is Article X of Louisiana's constitution.[91] This Article broadly defines political activity as any "effort to support or oppose the election of a candidate for political office or to support a particular political party in an election," and prohibits such activities for employees in the classified service.[92] Curiously, State Civil Service hangs its hat on this provision of the constitution[93] even though the article specifically carves out an exception that allows an employee to "exercise his right as a citizen to express his opinion privately[.]"[94] In addition, the state

87. ALA. CODE § 17-1-4 (2006).

88. *Id.* § 17-1-4(b).

89. *Id.*

90. *See 50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetable staffandpoliticalactivitystatutes.aspx (detailing the applicable law dealing with prohibitions on political activity in each State).

91. *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, at 1, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf; LA. CONST. art. X, §§ 9, 47.

92. LA. CONST. art. X, §§ 9, 47.

93. *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, at 1, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

94. LA. CONST. art. X, §§ 9, 47.

legislature has passed additional statutes that prohibit state civil servants from participating in political activity while acting in their "official capacity"[95]—clearly evincing an intent to distinguish civil servants' activities within the scope of their employment from those outside the workplace. Nonetheless, State Civil Service has chosen to look primarily to the broad, ambiguous language of Article X to define and regulate the political activities of public employees acting in their capacities as private persons—despite the exception for private political expression.[96] The only explanation can be that State Civil Service has defined "privately" to mean "in private" rather than "in one's capacity as a private individual." This is not how the federal government and other states have interpreted the very similar language that they have each adopted.[97]

C. LOUISIANA STATE CIVIL SERVICE INTERPRETATIONS

SCS has interpreted the state constitution and promulgated Rules 14.1(e), (f), and (g) governing the political activities of classified state employees. These rules strictly prohibit a very broad range of political activities.[98] A general circular is posted annually, describing the activities in which state employees are prohibited from participating and the punishments for violations of those prohibitions.[99] SCS publications warn employees of the

95. *See* LA. STAT. ANN. § 24:56(F); *see, e.g.*, *id.* § 18:1465.

96. *See, e.g.*, *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2019-028 (St. Civ. Serv., Baton Rouge, La.), July 15, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/GC2019-028.pdf; LA. CONST. art. X, §§ 9, 47.

97. *See Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last visited Feb. 7, 2022); *see also 50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx (detailing the applicable law dealing with prohibitions on political activity in each State).

98. *Chapter 14: Prohibited Activities*, LA. ST. CIV. SERV., https://www.civilservice.louisiana.gov/CSRules/Chapter14.aspx (last visited Feb. 7, 2022).

99. *See, e.g.*, *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2019-028 (St. Civ. Serv., Baton Rouge, La.), July 15, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/

corrective actions to which these violations subject them, which range from the issuance of a letter of admonishment to hailing them before the Commission for a public hearing.[100] The result of these hearings can include significant penalties and disciplinary action up to and including termination of employment.[101]

Especially during election years, the agency issues additional guidance to ensure employees understand the restrictions placed upon them.[102] Some of these prohibitions are what one may expect from a state that wishes to take no chances with the possibility of losing federal funding. These include prohibitions on becoming a candidate for any elected office and prohibitions on campaigning for candidates within the civil servant's scope of employment.[103] Other prohibitions, however, are so restrictive and present such a broad reading of the state constitution that their legality is highly questionable.[104] These include prohibitions, effective outside the scope of employment, on displaying any message supporting a political candidate, such as a campaign sign in the employee's yard, a bumper sticker on the employee's car, or even wearing a T-shirt or campaign pin.[105] These prohibitions are so strict that employees may not even "like" or "follow" a party or a candidate for political office on their

GC2019-028.pdf.

100. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2019-028 (St. Civ. Serv., Baton Rouge, La.), July 15, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/GC2019-028.pdf.

101. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2019-028 (St. Civ. Serv., Baton Rouge, La.), July 15, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/GC2019-028.pdf.

102. *See, e.g.*, *Prohibited Political Activity Infographic*, GENERAL CIRCULAR NUMBER 2019-035 (St. Civ. Serv., Baton Rouge, La.), Sept. 25, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/GC2019-035.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2015-037 (St. Civ. Serv., Baton Rouge, La.), July 15, 2015, at 1, https://www.civilservice.louisiana.gov/files/general_circulars/2015/GC2015-027.pdf.

103. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

104. *See infra* Part III.B.

105. *See, e.g.*, *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

personal Facebook or Twitter accounts, much less "share" any posts with political themes.[106] Most objective observers would likely consider much of this to be a gross overreach by the state.

III. THE NEED FOR CHANGE

There are several reasons why Louisiana should loosen its prohibitions on the political activity of public employees. The most obvious reasons are those of public policy. It should be apparent to the casual observer that these prohibitions not only infringe on public employees' freedom of expression, but also deny the public the opportunity to hear the valuable insights of those inside the political machine. Perhaps more compelling, however, is that there are several legal challenges that have been brought against other governmental entities that enacted restrictions that similarly exceeded those set forth under the Hatch Act, and courts have generally found those restrictions to be unconstitutional.[107] Because Louisiana's prohibitions are similar to those that the courts have held to be in violation of public employees' protected freedom of expression, they are on constitutionally shaky ground.

A. THE POLICY PERSPECTIVE FOR RELAXING PROHIBITIONS

As illustrated by the passage of the Hatch Act amendments discussed earlier, there has been a nationwide trend toward easing restrictions on political activity for public employees.[108] The original prohibitions were a reaction to an immediate need, triggered by corruption in a newly created federal agency during the New Deal era.[109] The new agencies of that era wielded far more power than federal agencies of the past had, and corruption within them was thus of greater concern.[110] However, as with the initial iteration of many new legislative restrictions, there were

106. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf; *Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2019-028 (St. Civ. Serv., Baton Rouge, La.), July 15, 2019, https://www.civilservice.louisiana.gov/files/general_circulars/2019/GC2019-028.pdf.

107. *See, e.g.*, Bode v. Kenner City, 303 F. Supp. 3d 484, (E.D. La. 2018); Goodman v. City of Kansas City, 906 F. Supp. 537 (W.D. Mo. 1995).

108. *See* discussion *supra* Part I.C.

109. *See* Myers, *supra* note 35, at 36, 41-42.

110. *See id.*

unintended consequences that needed to be refined over time. The Hatch Act was passed over eighty years ago, and since that time, Congress has repeatedly amended the Act, each time striking a better balance between the needs of the government and the needs of its employees and the public at large.[111] However, Louisiana has failed to keep up with the changes occurring in the rest of the nation. Our state prevents a substantial portion of its populace from fully participating in the democratic process. This has significant repercussions in two areas of concern: (1) the harm experienced by employees who have been deprived of their constitutional right to participate in the political process, and (2) the harm experienced by a public who has been deprived of the unique perspectives of those with knowledge of the inner workings of the government.

The first issue of concern is the harm experienced by employees who have been deprived of their constitutional right to participate in the political process. Louisiana unnecessarily restricts the constitutionally protected speech of over five percent of the state's population.[112] This is a large number of people whose protected freedoms are infringed. Some may believe this is an acceptable tradeoff for people who accept public employment because public employment provides other benefits.[113] However, rank-and-file state and local employees, compared to their private-sector counterparts, earn notably less income.[114] Additionally, due to the substantial cutbacks to Louisiana public employees' insurance and retirement systems, as well as the nearly decade-long pay freeze that affected most state employees during and shortly after the Jindal Administration, these benefits are no longer attractive enough to outweigh the pay discrepancy between public and private sector employment.[115] In other words,

111. *See* discussion *supra* Part I.C.

112. *See Louisiana Population 2022,* WORLD POPULATION REV., https://worldpopulationreview.com/states/louisiana-population (last visited Feb. 7, 2022).

113. *See* Kellie Lunney, *Government Employees: Working Hard, or Hardly Working?*, GOV'T EXEC. (Oct. 11, 2012), https://www.govexec.com/pay-benefits/2012/10/government-employees-working-hard-or-hardly-working/58694.

114. *See* BYRON P. DECOTEAU, JR. & BRANDY MALATESTA, LA. ST. CIV. SERV., 2019 ANNUAL UNIFORM PAY PLAN REVIEW 6 (2019), https://www.civilservice.louisiana.gov/files/publications/annual_reports/2018-2019%20Annual%20Pay%20Plan%20Report.pdf ("[A]ll six classified pay schedule midpoints lag private sector medians, on average, by 7.5% to 18.7%.").

115. *See, e.g.*, *States scaling back worker pensions to save money*, THE OAKLAND PRESS, (June 17, 2021, 9:19 AM), https://www.theoaklandpress.com/news/states-

there are no benefits that public employees enjoy by virtue of their employment with the state that justifies or adequately compensates them for this deprivation of their liberties. Furthermore, even if Louisiana state employees did enjoy such benefits, courts have held that "[i]ndividuals do not automatically relinquish their First Amendment rights by accepting government employment."[116]

The deprivation of employees' freedom of expression can also

---

scaling-back-worker-pensions-to-save-money/article_9811f634-fdb1-59e8-a4e7-86f230fe2ddb.html; *see also Member's Guide to Retirement* (La. St. Emp. Ret. Sys.), Oct. 2021, at https://lasersonline.org/wp-content/uploads/2021/09/MembersGuide2Retirement_Full_web1021.pdf (illustrating increases in retirement contribution rates); *id.* at 21 (illustrating changes in retirement eligibility, removing the option to retire after 30 years of service and mandating an age requirement of 60 years for employees hired after July 1, 2006, and 62 years for those hired after July 1, 2015. This changed the prior eligibility requirement that would have allowed an eighteen-year-old hired prior to July 1, 2006 to retire by age 48); *id.* at 22 (illustrating changes in final average compensation (FAC) from a three-year average before July 1, 2006, to a five-year average after that date. After the pay freezes and the changes to the regular 4% merit increases during the Jindal and Edwards administrations, employees are less likely to reach the maximum level on the pay scale outlined in their position descriptions by retirement. This, along with the longer five-year calculation period, results in a lower FAC. Because the formula to calculate the employee's retirement payment is a factor of 2.5% per year of service multiplied by the FAC, this means most employees hired after July 1, 2006 will not only pay a higher contribution rate, but they will receive a lower retirement benefit); *Compare* 2009-2010 *Medical Benefits Comparison*, (La. Off. Grp. Benefits), https://www.groupbenefits.org/ogb-images/docs/2009_10premiums_active.pdf, *with 2022 Active Employees and Non-Medicare Retirees Benefits Comparison* (La. Off. Grp. Benefits), https://info.groupbenefits.org/docs/OGBforms/BenefitComparison/2022/ActiveNonMedicareBCOnorAfter03012015.pdf (illustrating differences in benefits between plans before the OGB cuts and today. Similar popular plans included the OGB HMO plan in 2009-10, and the Magnolia Local Plus plan in 2022. Notable differences include the lack of a deductible under the old plan, and a $400 per person (max $1200) deductible under the current plan; primary care copays of $15 and specialist copays of $25 under the old plan, increased to $25 and $50 respectively under the current plan; out-of-pocket maximums of $1,000 per individual and $3,000 per family under the old plan have increased to $3,500 and $8,500 respectively.); *Compare Official Schedule of Rates*, Effective July 1, 2009 (La. Off. Grp. Benefits), https://www.groupbenefits.org/ogb-images/docs/2009_10premiums.pdf, *with Official Schedule of Monthly Premium Rates*, Effective Jan. 1, 2022 (La. Off. Grp. Benefits), https://info.groupbenefits.org/docs/OGBforms/PremiumRates/2022/Jan2022OGBHealthInsuranceRates75percent.pdf (illustrating that despite the reduction in benefits provided across similar plans, the employee share of the premium rates nonetheless have increased during the intervening years, from $139.66 for a single employee and $486.04 for family coverage under the 2009-10 OGB HMO plan, to $196.44 and $683.62 respectively under the similar 2022 Magnolia Local Plus plan.).

116. *See, e.g.*, Goodman v. City of Kansas City, 906 F. Supp. 537, 541 (W.D. Mo. 1995) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 605-06 (1967)).

negatively impact the workplace environment, as was shown by the author's own experience. In the private sector, an employee can bring their concerns to their manager's administrator or to their CEO's board of directors. Whoever has the ultimate decision-making authority can be notified of issues within the company so that they may choose the best path forward. But for those who work under an elected official, there is no higher authority within the organization: it is the voting public who are the ultimate decision-making authority. The public is analogous to a large board of directors who vote to choose the government's CEO and other officers to run it. When voters are deprived of inside information about the performance of the government, known only by those who work within that government, they are ill equipped to choose the best path forward. The inability to speak out on issues that are caused by poor leadership has a major impact on job satisfaction and employee retention—the consequences of which can be felt for years afterward. This, in turn, can lead to reduced performance by disgruntled employees and reduced competency by a less experienced workforce resulting from a high turnover rate, as Louisiana has seen in recent years.[117]

This impact on government performance leads to the second issue of concern. By preventing public employees from expressing their opinions and concerns about the politicians who are on the ballot to become the leaders of this state, it causes harm to the public by depriving them of the first-hand knowledge and unique perspectives of those who work within the system. If the state suffers due to incompetent leadership, the employees are prohibited from speaking out against the current administration or in favor of a new administration to replace them.[118] If the employees know of or suspect corruption, there are internal

117. *Compare* BYRON P. DECOTEAU, JR., LA. ST. CIV. SERV., STATE OF LOUISIANA REPORT ON TURNOVER RATES FOR NON-TEMPORARY CLASSIFIED EMPLOYEES: FISCAL YEAR 2020-2021 4 (2021), https://www.civilservice.louisiana.gov/files/publications/annual_reports/2020-2021%20Act%20879%20Turnover%20Rate%20Report.pdf, *with* LA. ST. CIV. SERV., REPORT ON TURNOVER RATES FOR NON-TEMPORARY CLASSIFIED EMPLOYEES FISCAL YEAR 2012/13 4 (2013), https://www.civilservice.louisiana.gov/files/publications/annual_reports/2012-2013%20Act%20879%20Turnover%20Rate%20Report.pdf.

118. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, at 3, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

avenues to report such malfeasance,[119] but unless an official investigation is opened, the public is unlikely to learn about it. The employees who know about the alleged corruption are prohibited from speaking out because such speech could be considered opposition to the re-election of the official involved.[120] Furthermore, in other scenarios, it is not the elected officials themselves who are corrupt or incompetent, but rather it is the heads of the agencies, whom they appoint. Any comments made against these individuals or their actions could also be construed as having a political motive, creating a great disincentive for public employees to speak out for fear of retribution in the form of disciplinary action that may very well cost them their jobs. For government employees, who have paid into a public retirement system for fifteen or twenty years instead of paying into Social Security, the fear of losing their job and much of their anticipated retirement as a result of speaking out is very real. Therefore, the speech of an entire class of citizens, those with perhaps some of the most politically important speech available to the public, has been chilled.

These policy-based reasons for updating Louisiana's prohibition on political activity are compelling, but are they enough to convince the state to change the status quo? They may not have to be. The State of Louisiana is not the only government entity that has enacted such harsh restrictions on the free speech of its employees. In several instances, employees of other government entities have argued that this infringement upon their constitutionally protected rights was impermissible, and courts have agreed.

B. THE LEGAL BASIS FOR RELAXING PROHIBITIONS

The courts usually uphold prohibitions on the political activity of public servants as good public policy when the challenged restrictions are those set forth under the Hatch Act or under substantially similar state statutes.[121] But when

119. *See Complaint Process*, OFF. OF ST. INSPECTOR GEN., https://oig.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&nid=3&pnid=0&pid=4&catid=0 (last visited Mar. 27, 2022).

120. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, at 3, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

121. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973); U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973).

government entities cross the line from prohibitions within the scope of employment to infringement on their employees' freedom of expression within the context of their private lives, the courts have not shied away from finding restrictions similar to those in Louisiana to be unconstitutional.[122] But how do the courts determine whether the public employee's First Amendment rights have been violated? The answer to this question will depend on the form of the challenge brought by the plaintiffs and the test that the court chooses to apply.[123] Those seeking to challenge Louisiana's restrictions on the speech of public employees could argue that these restrictions fail the *Pickering* balancing test for restrictions on the speech of public employees,[124] fail the strict scrutiny to which they may be subject as content-based restrictions,[125] or are vague or overbroad.[126]

1. THE *PICKERING* BALANCING TEST CHALLENGE

In *Pickering v. Board of Education of Township Highschool District 205, Will County, Illinois*, the U.S. Supreme Court established a balancing test for determining whether restrictions on public employees' speech violate the First Amendment.[127] As the Court later explained, "Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large."[128] Nonetheless, "government employees do not surrender their constitutional rights to speak on matters of public concern simply because they are employed by the government."[129] Thus, any restraints on the

122. *See, e.g.*, Goodman v. City of Kansas City, 906 F. Supp. 537 (W.D. Mo. 1995); Bode v. Kenner City, 303 F. Supp. 3d 484 (E.D. La. 2018).

123. *See generally* Kathleen Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992); Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 784 (2007); Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 79 (2018).

124. *See*, *e.g.*, *Goodman*, 906 F. Supp. at 541.

125. *See*, *e.g.*, *Bode*, 303 F. Supp. 3d at 498.

126. *See*, *e.g.*, *id.* at 505; Christopher A. Pierce, *The "Strong Medicine" of the Overbreadth Doctrine: When Statutory Exceptions Are No More than a Placebo*, 64 FED. COMM. L.J., 177, 196 (2011) (explaining how the overbreadth doctrine can provide the court with a "convenient remedy to invalidate [a] statute" without addressing the compelling government interest element under strict scrutiny review).

127. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

128. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465 (1995).

129. Davis v. Allen Par. Serv. Dist., 210 F. App'x 404, 409 (5th Cir. 2006) (citing Connick v. Myers, 461 U.S. 138, 146 (1983)).

speech of public employees must satisfy the *Pickering* test to avoid violating the First Amendment."[130]

The *Pickering* test is a two-part analysis, consisting of a threshold determination and a balancing prong.[131] The threshold determination explores whether the employee spoke "as a citizen upon matters of public concern" or "as an employee upon matters only of personal interest."[132] Courts will consider speech to "address a matter of public concern when it can be 'fairly considered as relating to any matter of political, social, or other concern to the community.'"[133] The government employer will prevail if the employee's speech is characterized as a matter of personal interest, such as a change in the employee's own duties.[134] However, if the employee's speech meets the threshold question and is related to matters of public concern, the court moves on to the second prong of the analysis where "the government bears the burden of justifying its adverse employment action."[135] Here, the Court will balance "the interests of the [employee], 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."[136]

Prior to the 1990's, most cases applying the *Pickering* test had performed post hoc analyses of situations in which individual employees had already violated a government prohibition on political activity, and then individual disciplinary action had been taken against those employees.[137] But in 1995, the Court heard *United States v. National Treasury Employees Union* ("*NTEU*"), in which the Court considered the question of whether the *Pickering* test would apply prospectively to a prohibition that constituted a "wholesale deterrent to a broad category of

130. *Pickering*, 391 U.S. at 568.

131. David L. Hudson Jr., *Pickering Connick test*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1608/pickering-connick-test (last visited Feb. 6, 2022).

132. *Nat'l Treasury Emps. Union*, 513 U.S. at 466 (quoting *Connick*, 461 U.S. at 147).

133. Watters v. City of Phila., 55 F.3d 886, 892 (1995) (quoting *Connick*, 461 U.S. at 146).

134. *Nat'l Treasury Emps. Union*, 513 U.S. at 466.

135. *Id.*

136. *Pickering*, 391 U.S. at 568.

137. *Nat'l Treasury Emps. Union*, 513 U.S at 466-67 (collecting cases).

expression by a massive number of potential speakers."[138] In such cases, the Court held that the government can prevail on the balancing prong only by showing 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 that expression's 'necessary impact on the actual operation' of the Government."[139] In her concurrence, Justice O'Connor explained that "[a]s the magnitude of intrusion on employees' interests rises, so does the Government's burden of justification."[140] Under these standards, government entities face a much higher burden than under the original *Pickering* test when they impose sweeping restrictions with the potential to "chill[] potential speech before it happens."[141]

While the Fifth Circuit has acknowledged *NTEU*'s "modified version of the *Pickering* analysis . . . for evaluating prospective government restrictions on employee speech,"[142] the circuit court has not had occasion to conduct an in-depth *NTEU* analysis. However, shortly after the *NTEU* decision was announced, a district court in Missouri provided one example of its application.[143] In *Goodman v. City of Kansas City*, the court used the *Pickering* balancing test as modified by *NTEU* when a city employee brought a declaratory action seeking an injunction against allegedly unconstitutional restrictions[144] that were beyond the scope of the Hatch Act and very similar to those imposed by the State of Louisiana. These included prohibitions on the displaying of political bumper stickers on the employee's personal vehicle, posting political signs in the employee's yard, and attending political fundraisers, rallies, and other gatherings.[145]

First, the court held that the *Pickering* test's threshold inquiry was satisfied, as "the public expression of City employees' views regarding City elections . . . clearly involves 'matters of

138. *Id.*

139. *Id.* at 468.

140. *Id.* at 483 (O'Connor, J., concurring).

141. *Id.* at 468 (majority opinion).

142. Fairchild v. Liberty Indep. Sch. Dist., No. 1:06-CV-92-TH, 2008 WL 11446526, at *14 (E.D. Tex. Feb. 11, 2008) (citing United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465-68 (1995)).

143. *See* Goodman v. City of Kansas City, 906 F. Supp. 537, 539 (W.D. Mo. 1995).

144. *See id.* at 541.

145. *Id.* at 539.

public concern.'"[146] Thus, the court proceeded to the balancing prong.[147] The City asserted an interest in "ensur[ing] a '[c]ity government that operates, and appears to [sic] to the public to operate, on an apolitical basis" and "prevent[ing] the rise of another period of political corruption like the Pendergast era."[148] The plaintiffs, on the other hand, defended "the important right of City employees to express themselves on issues and candidates in City elections . . ."[149] The court echoed the reasoning set forth under *NTEU*, considering the massive number of potential speakers impacted by the restrictions[150] and noting that "government employees are in a position to offer the public important insights both into the workings of government generally and into their areas of specialization."[151] Furthermore, the court relied on *NTEU* for the proposition that "in order to justify restrictions on employee speech, the government must demonstrate that the threatened harms from employee speech are real and that the regulations will, in fact, alleviate these harms."[152] Finding that the City had failed to present any evidence to demonstrate that the harms it sought to mitigate were "real and not merely conjectural," the court granted summary judgment in favor of the plaintiffs and issued a permanent injunction against the City's prohibitions.[153]

If challenged under the *NTEU*-modified *Pickering* test, many of Louisiana's restrictions would likely share a similar fate. Without question, these restrictions silence speech related to matters of public concern, satisfying the threshold inquiry. The State would likely assert interests similar to those of the defendant in *Goodman*: ensuring the appearance of apolitical public services and preventing corruption. However, the State could prevail only by showing that the forms of expression that it prohibits have a "necessary impact on the actual operation of the Government" that outweighs the interests of both public employees to engage in political expression and the citizens of

146. *Id.* at 541.
147. *Id.* at 542.
148. *Id.*
149. *Id.* at 544.
150. *Id.* at 541-42 (citing *Nat'l Treasury Emps. Union*, 513 U.S. at 467).
151. *Id.* at 542 (citations omitted).
152. *Id.* at 543 (citing *Nat'l Treasury Emps. Union*, 513 U.S. at 475).
153. *Id.* at 544.

Louisiana to hear what they have to say.[154] Keeping in mind that the State could not rely on mere conjecture,[155] it is highly unlikely that it could satisfy this burden with respect to many of the currently prohibited forms of political expression, such as the wearing of partisan buttons or T-shirts while not at work.

2. THE STRICT SCRUTINY CHALLENGE

However, given the scope of Louisiana's prohibitions, it is possible that a court would circumvent the *Pickering* analysis entirely and simply subject the prohibitions to a strict scrutiny approach as content-based restrictions on speech.[156] Indeed, the *Pickering* opinion itself allows for this possibility. Citing *Pickering*, the Fifth Circuit explained that "where the political activities of a public employee are unrelated to the performance of his duties he is to be treated for purposes of adjudicating his First Amendment rights as a 'member of the general public.'"[157] It is well-settled that—outside of a few narrow exceptions[158]—a content-based restriction applied to the general public is subject to strict scrutiny, regardless of the legislative motives that drive it.[159] In determining whether restrictions abridging free speech are content-based or content-neutral, courts look to whether the restriction applies to "particular speech because of the topic discussed or the idea or message expressed."[160] Importantly, "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."[161]

When a restriction targets the content of a message, courts will apply strict scrutiny and the restrictions are presumptively unconstitutional.[162] When a law is reviewed under strict

154. *Nat'l Treasury Emps. Union*, 513 U.S. at 468.

155. *Id.* at 475.

156. *See, e.g.*, *Bode*, 303 F. Supp. 3d at 498.

157. Hobbs v. Thompson, 448 F.2d 456, 475 (5th Cir. 1971) (citing Pickering v. Bd. of Educ., 391 U.S. 563, 572-73 (1968)).

158. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47, 47 n.2 (1987) (through a series of cases, the Supreme Court has defined examples of speech with low First Amendment value to include express incitement, obscenity, false statements of fact, commercial advertising, fighting words, and child pornography).

159. Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015).

160. *Id.* at 163.

161. *Id.* at 169.

162. *Id.* at 163.

scrutiny, the government carries the burden of proof to show that it is "narrowly tailored to serve compelling state interests."[163] To survive strict scrutiny, the challenged law must not be overinclusive, burdening speech that need not be burdened to advance its asserted purpose,[164] or underinclusive, failing to burden speech that would need to be burdened to achieve its asserted purpose.[165] Furthermore, a law is not narrowly tailored in the strict scrutiny context when a less restrictive alternative is readily available to achieve the same purpose.[166] It is no surprise, then, that the Supreme Court "has invalidated almost every content-based restriction that it has considered in the past thirty years," aside from those that fit within its narrow exceptions.[167] This fact, in turn, explains why legal scholars often refer to strict scrutiny as "strict in theory, fatal in fact"[168] due to the infrequency with which a challenged government action is upheld under its use.[169] Such a characterization is especially accurate in free speech cases[170] and in cases brought against state and local governments,[171] both of which apply to Louisiana's prohibitions.

In 2018, a federal court situated in Louisiana applied strict scrutiny in a challenge to the City of Kenner's prohibition on the political expression of government employees.[172] In *Bode v. Kenner City*, the City of Kenner ("the City") enacted restrictions on non-elected city employees prohibiting "participat[ion] in any political activity on behalf of any city candidate in City of Kenner elections."[173] As to the question of whether the government restrictions were subject to strict scrutiny, the City did not

163. *Id.*

164. *See* Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 121 (1991).

165. *See* Reed v. Town of Gilbert, 576 U.S. 155, 172 (2015).

166. Boos v. Barry, 485 U.S. 312, 329 (1988).

167. *See* Stone, *supra* note 158, at 48.

168. Kathleen Sullivan, *Gerald Gunther: The Man and the Scholar*, 55 STAN. L. REV. 643, 645 (2002) (internal quotations omitted).

169. Sullivan, *supra* note 123, at 296.

170. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 845 (2006) ("[S]trict scrutiny is actually most fatal in the area of free speech, where the survival rate is 22 percent lower than in any other right.").

171. *See id.* at 855-56 (only 21% of state laws are upheld that undergo a strict scrutiny analysis).

172. *Bode*, 303 F. Supp. 3d at 498.

173. *Id.* at 488.

dispute that the prohibitions on its employees' political expression constituted content-based regulation.[174] Thus, for the reasons discussed in *Reed*, the court found the restrictions were subject to strict scrutiny.[175]

Under a strict scrutiny review, the City was then required to prove its restrictions were "narrowly tailored to serve a compelling interest."[176] Because the employees did not dispute that the City had a compelling governmental interest in ensuring a nonpartisan employee workforce,[177] the primary question was whether the restrictions were "narrowly tailored to serve that interest."[178] To answer this question, the court "assume[d] that certain protected speech may be regulated, and then ask[ed] what is the least restrictive alternative that can be used to achieve that goal."[179] This, in turn, required the court to analyze "whether the challenged regulation [was] the least restrictive means among available, effective alternatives."[180] On this question, the City was unable to meet its burden.[181]

While the court had many reasons for finding that the City's restrictions were not narrowly tailored,[182] the court's finding that the restrictions were not the least restrictive alternative[183] is particularly relevant. The plaintiffs "assert[ed] that there [were] a number of less restrictive alternative measures that the City could [have] adopt[ed] to accomplish its compelling interests, such as a law similar to the Federal Hatch Act or the Dallas Charter approved by the Fifth Circuit in *Wachsman v. City of Dallas*."[184] Plaintiffs also proposed the alternative of "only restricting political activities during working hours."[185] The court rejected the City's argument that these less restrictive alternatives would be inadequate.[186] It noted that in *Wachsman v. City of Dallas*,[187]

174. *Id.* at 498.
175. *Id.* at 498 n.139.
176. *Id.* at 498 (internal quotations omitted).
177. *Id.*
178. *Id.*
179. *Id.* (citing Ashcroft v. Am. C. L. Union, 542 U.S. 656, 666 (2004)).
180. *Id.*
181. *Id.* at 501.
182. *Id.* at 498-502.
183. *Id.* at 499.
184. *Id.* at 498-99.
185. *Id.* at 499.
186. *Id.* at 498-99.

the Fifth Circuit had approved the Dallas Charter, which allowed for the displaying of yard signs and bumper stickers.[188] It also took note of the Federal Hatch Act, which "allows federal employees to attend rallies, donate money, and express opinions, as long as they are not wearing a government uniform or identifying themselves as federal employees"[189]—all activities that were implicitly prohibited under the City's broad prohibition of "all political activity."[190] Finding that the City had presented no evidence that restrictions mirroring those of the Dallas Charter or the Hatch Act would be less effective, the court held that the City's prohibitions were not the least restrictive means to accomplish its purpose and thus were not narrowly tailored.[191]

A court would also be likely to find that the State of Louisiana's restrictions on the political speech of public employees fail strict scrutiny because less restrictive alternatives are available. There can be little question that Louisiana's restrictions prohibit public discussion of an entire topic by an entire group of people and would thus be classified as content-based—and would be subject to strict scrutiny. In addition, like the City of Kenner, the State of Louisiana has prohibited innocuous acts of political expression such as the wearing of pins, display of yard signs, or placement of bumpers stickers that support a candidate or a political party—even while off duty.[192] Because these restrictions exceed those of the Hatch Act and the Dallas Charter, the State would bear the burden of proving that any lesser restriction would be ineffective.[193] The State would be unlikely to meet that burden because less restrictive regimes have proven effective at the federal level and in other states and localities.[194] Therefore, a court would likely find that Louisiana's prohibitions fail strict scrutiny because less restrictive alternatives are available.

187. *Id.*

188. *Id.* at 499.

189. *Id.* at 499, 502 n.169.

190. *Id.* at 501.

191. *Id.* at 502.

192. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, at 2, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

193. *See Bode*, 303 F. Supp. 3d at 502.

194. *See id.*

3. THE VAGUENESS AND OVERBREADTH CHALLENGES

Finally, Louisiana public employees could also challenge the state's restrictions based on vagueness or overbreadth. A statute is unconstitutionally vague when it "it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits."[195] A statute is unconstitutionally overbroad when it "reaches a substantial amount of constitutionally protected conduct."[196] When a statute is found to be facially vague or overbroad, it is void regardless of whether it has actually been applied to the particular plaintiff in an unconstitutional manner.[197]

In *Broadrick v. Oklahoma*, three public employees challenged restrictions by the State of Oklahoma as vague and overbroad because they "restrict[ed] the political activities of the State's classified civil servants in much the same manner that the Hatch Act proscribes partisan political activities of federal employees."[198] The court held that that the challenged restrictions were not impermissibly vague, noting that it had upheld the Hatch Act in the face of similar challenges.[199] Similarly, the court held that the restrictions in question, which mirrored those of the Hatch Act—such as soliciting contributions for political organizations, becoming a candidate for a paid public office, or taking part in the management of a political party or campaign—were not overbroad.[200] Importantly, however, the court stated that an employee may nonetheless "exercise his right as a citizen privately to express his opinion," and noted that "[t]he State Personnel Board . . . has construed [the statute's] explicit approval of 'private' political expression to include virtually any expression not within the context of active partisan political campaigning . . ."[201] The court went on to suggest in dicta that had the prohibition of activities included those such as "the

195. Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 761 (5th Cir. 2010) (quoting Hill v. Colorado, 530 U.S. 703, 732 (2000)).

196. *Fairchild*, 597 F.3d at 755 (quoting Hoffman Ests. v. Flipside, Hoffman Ests., 455 U.S. 489, 494 (1982)).

197. *See Broadrick*, 413 U.S. at 606.

198. *Id.* at 602.

199. *Id.* at 607 (citing U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973)).

200. *Id.* at 616-19.

201. *Id.* at 617.

wearing of political buttons or the use of bumper stickers," such prohibitions may have been found impermissible.[202]

In *Bode v. Kenner City*, the plaintiffs also brought vagueness and overbreadth challenges—and here, they prevailed.[203] First, the court noted that the prohibition on "*any* political activity on behalf of any city candidate in the City of Kenner elections"[204] was indeed constitutionally vague because this "undefined term[]" was "so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application."[205] Next, to review the question of overbreadth, the court relied on the federal Fifth Circuit case *Hobbs v. Thompson*.[206] In that case, the Fifth Circuit held that a prohibition on fire department employees from "taking an active part in any election, contributing money to any candidate, or 'prominently identifying themselves in a political race with or against any candidate for office' was overbroad."[207] Most notably, the *Hobbs* court opined that "[t]he very fact that the scheme has been construed to forbid political bumper stickers—a particularly innocuous form of political activity—points out clearly the broadside nature of the . . . prohibitory regulations."[208] Based on this controlling jurisprudence from the Fifth Circuit, the *Bode* court found that the City's prohibitions restricted a "substantial amount of protected political expression that is either unrelated to or attenuated from the City's goals and the Plaintiffs' employment duties," and was therefore unconstitutionally overbroad.[209]

It is likely that some of Louisiana's regulations could also be challenged as overbroad, but not necessarily as vague. Although the argument could be made that the Louisiana State Constitution's definition of political activity as "an effort to support or oppose the election of a candidate for political office or to support a particular political party in an election"[210] is impermissibly vague, it is unlikely this argument would succeed.

---

202. *Id.* at 618.
203. *Bode*, 303 F. Supp. 3d at 508.
204. *Id.* at 499.
205. *Id.* at 505.
206. *Id.* at 506 (citing Hobbs v. Thompson, 448 F.2d 456, 474 (5th Cir. 1971)).
207. *Id.* (citing *Hobbs*, 448 F.2d at 474).
208. *Hobbs*, 448 F.2d at 471.
209. *Bode*, 303 F. Supp. 3d at 506.
210. LA. CONST. art. X, §§ 9(C), 47(C).

Unlike in *Bode*, the Louisiana State Civil Service agency has refined this definition by issuing specific "dos and don'ts" that give more specific guidance on prohibited political activity.[211] In doing so, however, the agency has made these restrictions overbroad, unjustifiably restricting employees' personal rights in their capacities as private citizens, outside the scope of their employment.[212] Indeed, several of the state's prohibitions, including the wearing of political buttons or the use of bumper stickers, were specifically mentioned by the *Broadrick* Court as likely being impermissibly overbroad.[213] Indeed, such forms of expression, when engaged in outside of the scope of one's employment, likely falls within the zone of protected speech that cannot be burdened without violating the First Amendment.

Whether a court reviews a challenge to Louisiana's prohibitions on political activity under the *Pickering* balancing test for public employee speech, the strict scrutiny standard used for content-based speech, or under a facial challenge for overbreadth, it is unlikely that the prohibitions promulgated under Louisiana's State Civil Service agency would survive a challenge in the judicial system.

To wit, we have seen that there are good policy-based reasons why Louisiana should modernize its prohibitions to ease its heavy restrictions, and we have seen that there are strong legal reasons to believe the current restrictions are on very shaky constitutional ground. It is only a matter of time before these restrictions are challenged in court by an affected public employee. So, what should the State do to prevent this costly litigation, in which it is unlikely to prevail? How should it balance the very real needs of the government, which resulted in the passage of these types of prohibitions in the first place, against the right of public employees to constitutionally protected free speech and the right of the public to be informed about the important knowledge that these employees have to share?

---

211. *See Prohibited Political Activity*, GENERAL CIRCULAR NUMBER 2020-048 (St. Civ. Serv., Baton Rouge, La.), July 15, 2020, https://www.civilservice.louisiana.gov/files/general_circulars/2020/GC2020-048.pdf.

212. *See id.* at 2.

213. *Broadrick*, 413 U.S. at 618.

IV. PROPOSALS

There are several possible remedies to resolve the legal and policy-based issues resulting from Louisiana's current, heavily restrictive prohibitions on the political activities of public employees. Aside from a public servant filing for injunctive relief in federal court to hold these prohibitions unconstitutional, the government could take action in any one of several ways. The first and easiest remedy would be for the Louisiana State Civil Service agency, on its own initiative, to modify its regulations interpreting the state constitution. Alternately, the Louisiana legislature could pass a statute, or even a constitutional amendment, to rectify the deprivation of public employees' rights. And finally, if Louisiana will not take action on its own, Congress could use the power of the purse or the powers granted under the Fourteenth Amendment to protect the First Amendment rights of our state's public employees.

A. PROPOSALS REQUIRING STATE ACTION

The first remedy is certainly the easiest, and in most respects, the most desirable. The Louisiana State Civil Service agency should simply reinterpret the exclusionary clause in the state constitution for a civil servant to "exercise his right as a citizen to express his opinion privately"[214] to mean in his private capacity as a citizen, in contrast to its apparent current interpretation, which does not allow any political speech in public, regardless of whether an employee is acting in an official or private capacity. This change alone would align Louisiana with both the federal government and with most other states on this issue.[215]

Accordingly, to modify the existing regulations more easily, Louisiana could then adopt the provisions used by the federal government under the Hatch Act and apply those regulations as written to the state, just as many other states have done.[216] In

214. LA. CONST. art. X, §§ 9(A), 47(A).

215. For information on federal prohibitions *see Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last visited Feb. 7, 2022); *50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx (detailing the applicable law dealing with prohibitions on political activity in each state).

216. *See Federal Employee Hatch Act Information*, U.S. OFF. OF SPECIAL COUNS.,

doing so, it would draw a distinction between "restricted" employees, like election officials, who should be held to a higher standard to prevent the appearance of partisanship even when not on duty, and "regular" employees, like road construction workers or A/C repairmen, whose private political preferences are of less public concern. If, however, the state would prefer to retain heavier restrictions than are imposed by the Hatch Act, or conversely, if it would like to use this opportunity to become more progressive in this area like some of our neighbors, including Alabama, the Louisiana State Civil Service agency could review the regulations restricting political activity in other states as models.[217]

If the Louisiana State Civil Service agency declines to amend its rules on these restrictions, a bill could be introduced in the state legislature to mandate statutory changes to the way this provision of the state constitution is interpreted. Because legislation overrides administrative rules and regulations,[218] the Louisiana State Civil Service agency would be bound by any such legislatively enacted modifications on the prohibitions of political activities of public employees.

B. PROPOSALS REQUIRING FEDERAL ACTION

If neither the Louisiana State Civil Service agency nor the Louisiana legislature choose to act, Congress could intervene on this issue. Congress already included a provision in the Hatch Act that withholds funding to states that are found to violate the Act.[219] Congress has also shown its preference to ease the Hatch Act's restrictions through years of amendments.[220] To continue that trend, Congress could also use its spending power in the opposite way, limiting funding to states that go too far in

---

https://osc.gov/Services/Pages/HatchAct-Federal.aspx#tabGroup11|tabGroup31 (last visited Feb. 7, 2022); *see also 50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx (detailing the applicable law dealing with prohibitions on political activity in each state).

217. *50 State Table: Staff and Political Activity – Statutes*, NAT'L CONF. OF ST. LEGIS. (Aug. 24, 2021), https://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx.

218. TODD GARVEY & DANIEL J. SHEFFNER, CONGRESSIONAL RESEARCH SERVICE, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 1 n.6 (2021).

219. 15 U.S.C. § 1506.

220. *See* discussion *supra* Part I.C.

restricting their employees' constitutionally protected freedom of speech.

Congress could also pass another amendment to the Hatch Act that specifies the ways in which states must implement the Act, preempting the state's current rules by way of the Supremacy Clause.[221] However, this would be a very heavy-handed approach that would likely impact many other states, including those that currently have more permissive policies. Ultimately, many of those states might choose to sue the federal government on Tenth Amendment grounds.[222] Therefore, this method would be unlikely to achieve the purpose of avoiding the costs associated with litigating this matter in court. However, in the unlikely event that a challenge to Louisiana's prohibitions were to fail in the courts, and if Louisiana concurrently chooses not to correct this issue on its own, either in a regulatory or a legislative manner, a Congressional mandate would serve as the last hope to prevent Louisiana from silencing the political speech of public employees on important matters of public interest.

CONCLUSION

There is little question, especially in today's politically charged society, that some prohibitions on the political activities of public servants are a necessary evil. The government has a genuine interest in maintaining the appearance of impartiality and combating the political corruption that could result from the free politicization of the government workforce acting in their official capacities. The creation of a Civil Service and the passage of the Hatch Act were necessary to combat the rampant political corruption of the past. But it is important to strike a balance between those needs and the free speech rights of public employees, as well as the right of the populace to benefit from public employees' knowledge of the government's inner workings. There is a point at which speech restrictions exceed the bounds of narrowly tailored public policy, and the liberties of those who are regulated are impermissibly abridged, both as individuals and as a class of citizens. The Hatch Act imposes very reasonable limitations on government employees. However, the SCS

221. *See* U.S. CONST. art. VI, cl. 2; *see also Supremacy Clause*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/supremacy_clause (last visited Feb. 7, 2022) ("[T]he federal constitution, and federal law generally, take precedence over state laws, and even state constitutions.").

222. *See* U.S. CONST. amend. X.

interpretations of the state constitution take its restrictions too far. Government workers have a more in-depth, intimate, hands-on knowledge of how political parties and candidates truly affect the day-to-day operation of the government. Indeed, they must have such knowledge to carry out the daily tasks for which they are employed. It is for this very reason that their political opinions are among the most informed, and therefore, among the most important of any single class of individuals in this state. It is vital that we remove the gag from these citizens and allow them to responsibly enjoy the freedom of expression that the founders of this great nation intended for us all.

Daniel T. Marler