

ENSURING GOOD DEEDS GO UNPUNISHED: THE SCRA, FECRA, IFRFEA, AND PROTECTING FEDERAL EMPLOYEES DURING SHUTDOWNS

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As the nation has seen multiple times in recent years, federal government shutdowns are harmful to the American public, but are disastrous for federal employees. In the most recent shutdown, nearly a million people missed two paychecks, many of whom were nonetheless required to show up to work and thus forego earning a supplemental wage elsewhere. This was not just. Some lawmakers have tried to rectify this by proposing bills that would create a framework for protections based on the Servicemembers Civil Relief Act, which enshrines particular safeguards against litigation and administrative matters for those serving in uniform. This Article discusses those protections and their applicability to unpaid federal employees as well as other protections—some proposed, some not. The Article then reviews the constitutionality of the potential provisions. Finally, the Article addresses the political ramifications of such a law’s passage, namely if increased protections would beget more shutdowns.

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INTRODUCTION

In December 2019, the government began the longest shutdown in United States history. For thirty-five days,¹ the nation went without many government services. For example, many national parks were closed to visitors.² Scientific research labs operating under federal grants or run by government scientists were barren.³ The FDA halted “routine inspections of seafood, fruits, vegetables and other foods at high risk of contamination.”⁴ And FBI investigations into cybercriminals and terrorists were stymied by a lack of funding for wiretaps, subpoenas, and confidential informants.⁵

While the shutdown impacted all Americans, a small percentage—roughly 0.2%—bore a far greater burden: 806,300 federal employees went without pay for the shutdown’s duration.⁶ Of this group, “[r]oughly half of them [we]re on furlough, while the other half, whose jobs are considered

¹ Danielle Paquette, *U.S. Economy Added 304,000 Jobs in January, Shaking off the 35-Day Government Shutdown*, WASH. POST (Feb. 1, 2019), https://www.washingtonpost.com/business/2019/03/01/us-job-growth-looks-strong-january-shaking-off-day-partial-government-shutdown-analysts-predict/?noredirect=on&utm_term=.ee0e25f1cdef.

² Niraj Chokshi, *What Is and Isn’t Affected by the Government Shutdown*, N.Y. TIMES (Jan. 2, 2019), <https://www.nytimes.com/2019/01/02/us/whats-affected-government-shutdown.html>.

³ Alan Blinder, *Toll on Science and Research Mounts as Government Shutdown Continues*, N.Y. TIMES (Jan. 5, 2019), <https://www.nytimes.com/2019/01/05/us/government-shutdown-science.html>.

⁴ Chokshi, *supra* note 2.

⁵ Joseph Marks, *The Cybersecurity 202: FBI Cyber Investigations Hit Hard by Shutdown*, WASH. POST: POWERPOST (Jan. 23, 2019), https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2019/01/23/the-cybersecurity-202-fbi-cyber-investigations-hit-hard-by-shutdown/5c475f7c1b326b29c3778c68/?noredirect=on&utm_term=.f955a888fa3d.

⁶ Ted Mellnik et al., *Federal Workers in Washington Aren’t the Only Ones Going Without Pay*, WASH. POST (Jan. 7, 2019), https://www.washingtonpost.com/graphics/2019/politics/shutdown-federal-worker-impact/?noredirect=on&utm_term=.fbf0f5078c9c.

essential to public health and safety, [were required to] report to work even though Congress ha[d] not appropriated the funds to pay them.”⁷ The roles and salaries of those without pay ranged dramatically,⁸ from SEC lawyers making over \$200,000 a year⁹ to TSA officers with \$32,000 annual salaries.¹⁰ Though all federal employees affected by this shutdown will eventually receive back pay, it is a woefully inadequate substitute for weeks of financial uncertainty.¹¹

Our laws ought to make every effort to protect those who forego higher-paying private sector salaries to serve our country.¹² If shutdowns are intended to be about issues that are, in the words of President Trump’s campaign advisor, Lara Trump, “so much bigger than any one person,”¹³ then their impact should be felt evenly by all.

Some lawmakers have called for legislation to distribute a shutdown’s pain more evenly. Senator Steve Daines (R-MT) offered the No Work, No Pay Act of 2019 to bar federal legislators from drawing salaries during

⁷ Russell Berman, *Why Federal Workers Still Have to Show Up Even if They’re Not Being Paid*, ATLANTIC (Jan. 9, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shutdown-federal-workers-cant-strike/579793>.

⁸ Mellnik et al., *supra* note 6.

⁹ Jugal K. Patel, *A Typical Federal Worker Has Missed \$5,000 in Pay from the Shutdown So Far*, N.Y. TIMES (Jan. 16, 2019), <https://www.nytimes.com/interactive/2019/01/16/us/politics/federal-shutdown-salaries.html>.

¹⁰ Marisa Peñaloza & Sean McMinn, *‘I’m Falling Apart’: Shutdown Squeeze Tightens for Low-Wage Workers*, NPR (Jan. 19, 2019, 8:21 AM), <https://www.npr.org/2019/01/19/686299832/i-m-falling-apart-shutdown-squeeze-tightens-for-low-wage-workers>.

¹¹ See Eric Yoder, *Back Pay Approved for Furloughed Federal Employees Once Shutdown Ends*, WASH. POST: POWERPOST (Jan. 17, 2019), https://www.washingtonpost.com/politics/2019/01/17/back-pay-approved-furloughed-federal-employees-once-shutdown-ends/?utm_term=.8daa4411f3fd (stating that unpaid federal employees will receive back pay when funding is restored). Another 500,000 government contractors may never see a paycheck. Tina Smith & Ayanna Pressley, *Federal Contractors Aren’t Getting Back Pay. Our Bill Could Change That.*, WASH. POST (Feb. 5, 2019), https://www.washingtonpost.com/opinions/federal-contractors-arent-getting-back-pay-our-bill-could-change-that/2019/02/05/4c4ee268-2965-11e9-b2fc-721718903bfc_story.html?utm_term=.c65bff23970e. However, protections for federal contractors fall outside this Article’s scope.

¹² See Eric Yoder, *Federal Employees Lag Behind Private Sector Workers in Salaries by 32 Percent on Average, Report Says*, WASH. POST: POWERPOST (Apr. 11, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/04/11/federal-employees-lag-private-sector-workers-in-salaries-by-32-percent-on-average-report-says/?utm_term=.7ab16facc537 (explaining that federal employees’ salaries average thirty-two percent less than that of workers in similar private sector positions).

¹³ Aris Folley, *Lara Trump to Federal Workers not Getting Paid: ‘This Is So Much Bigger than Any One Person,’* THE HILL (Jan. 23, 2019, 8:46 AM), <https://thehill.com/blogs/blog-briefing-room/news/426554-lara-trump-to-federal-workers-not-getting-paid-this-is-so-much>.

shutdowns.¹⁴ But because this bill is unlikely to pass constitutional scrutiny,¹⁵ Representative Ralph Norman (R-SC) introduced a bill to amend the Constitution to that effect.¹⁶

Even if Norman’s constitutional amendment passes, there is little reason to think that it will have a large impact. First, members of Congress are generally wealthy: “More than 200 members of the [115th] Congress enjoyed a minimum net worth of \$1 million or more,”¹⁷ so the amendment would only create a slight incentive for less wealthy congresspersons to end a shutdown. Second, the amendment would do little to redistribute a shutdown’s burdens, as federal employees—14% of whom make under \$50,000 a year¹⁸—would receive no additional protections.

Fortunately, existing legislation provides a model for how Congress could minimize harms to federal employees during shutdowns, namely the Servicemembers Civil Relief Act (SCRA).¹⁹ The SCRA “protects servicemembers by temporarily suspending certain judicial and administrative proceedings and transactions that may adversely affect their legal rights during military service.”²⁰ As explained *infra*,²¹ the law makes life easier for those for whom life is already sufficiently trying.

On January 9, 2019, Senator Brian Schatz (D-HI) and Representative Derek Kilmer (D-WA) introduced the Federal Employee Civil Relief Act (FECRA), “modeled” after the SCRA,²² to address the burdens on federal

¹⁴ S. 74, 116th Cong. (2019). Many lawmakers have refused salaries during shutdowns, *see* Tal Axelrod, *Here Are the Lawmakers Who Will Forfeit Their Salaries During the Shutdown*, THE HILL (Jan. 5, 2019, 3:00 PM), <https://thehill.com/homenews/house/424020-here-are-the-lawmakers-who-will-forfeit-their-salaries-during-the-shutdown>, as was the case during the government shutdown in 2013, when “nearly 250 lawmakers” made such a choice, Ed O’Keefe & David Beard, *Which Lawmakers Will Refuse Their Pay During the Shutdown?*, WASH. POST (Oct. 10, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/10/01/which-lawmakers-will-refuse-their-pay-during-the-shutdown/?utm_term=.f11e9cd36153.

¹⁵ *See* U.S. CONST. amend. XXVII (“No law varying the Compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.”); *cf.* Sarah Kliff, *Federal Employees Don’t Get Paid During a Shutdown. Members of Congress Do.*, VOX (Jan. 22, 2018, 10:40 AM), <https://www.vox.com/policy-and-politics/2018/1/22/16918976/shutdown-2018-congress-salaries-paid>.

¹⁶ H.R.J. Res. 18, 116th Cong. (2019).

¹⁷ Emily Kopp, *Here Are Lawmakers Diverting Pay in Solidarity with Shutdown Employees*, ROLL CALL (Jan. 4, 2019, 3:34 PM), <https://www.rollcall.com/news/politics/heres-are-lawmakers-diverting-pay-solidarity-federal-employees>.

¹⁸ Peñaloza & McMinn, *supra* note 10.

¹⁹ 50 U.S.C. §§ 3901–4043 (Supp. III 2018) (effective Jan. 3, 2016).

²⁰ R. CHUCK MASON, CONG. RESEARCH SERV., THE SERVICEMEMBERS CIVIL RELIEF ACT (SCRA): AN EXPLANATION 1–2 (2014), <https://www.justice.gov/crt-military/file/797396/download>.

²¹ *See infra* Part II.

²² Igor Bobic, *Democrats Introduce Bill to Shield Unpaid Federal Workers from Lenders and Landlords*, HUFFPOST (Jan. 9, 2019, 7:08 PM), <https://www.huffpost.com/entry/government-shutdown-creditors-landlords->

employees during shutdowns. This Article takes up that mantle, supporting the SCRA, commending the FECRA's protections, and championing the FECRA's adoption of more SCRA-prescribed provisions.

This Article begins by tracing the SCRA's history. Part II reviews the applicable protections put forward by the SCRA and FECRA as well as additional safeguards federal employees ought to have that are not found in either law. Part III discusses the constitutionality of the relevant protections, concluding that congressional authority exists under the Commerce Clause. Finally, Part IV addresses the political ramifications of these protections.

I

A (BRIEF) HISTORY OF THE SCRA

The SCRA traces its lineage back to the Civil War. As part of the war effort, "the United States Congress enacted an absolute moratorium on civil actions brought against Federal soldiers and sailors."²³

First, Congress wanted service members to be able to fight the war without having to worry about problems that might arise at home. Secondly, because most soldiers and sailors during the Civil War were not well paid, it was difficult for them to honor their pre-service debts, such as mortgage payments or other credit.²⁴

Ultimately, this protection lapsed following the war's conclusion.²⁵

Congress returned to this issue during World War I. Again, with the express "purpose of enabling the United States the more successfully to prosecute and carry on the war . . . [by] enabl[ing] [servicepersons] to devote their entire energy to the military needs of the Nation," Congress passed the Soldiers' and Sailors' Civil Relief Act of 1918.²⁶ While the Act did not duplicate the Civil War-era legal moratorium, it "directed trial courts to apply principles of equity to determine the appropriate action to take whenever a servicemember's rights were involved in a controversy."²⁷ Such applications included requiring that default judgments only be entered with court orders upon proof that the defendant was not actively serving,²⁸ permitting courts to stay civil proceedings *sua sponte*,²⁹ barring contract

workers_us_5c367351e4b045f676889f7b; see H.R. 588, 116th Cong. (2019); S. 72, 116th Cong. (2019).

²³ H.R. REP. NO. 105-183, pt. 1, at 2 (1997).

²⁴ *Soldiers' and Sailors' Civil Relief Act of 1940: A Brief History*, U.S. DEP'T OF DEF., https://archive.defense.gov/specials/Relief_Act_Revision/history.html (last visited Apr. 30, 2019).

²⁵ Roy L. Kaufmann, *What Is the History of the Servicemembers Civil Relief Act?*, SERVICEMEMBERS CIV. RELIEF ACT, <https://www.servicememberscivilreliefact.com/blog/what-is-history-of-servicemembers-civil-relief-act> (last visited Apr. 30, 2019).

²⁶ *Soldiers' and Sailors' Civil Relief Act of 1918*, ch. 20 § 100, 40 Stat. 440 (1918).

²⁷ MASON, *supra* note 20, at 1.

²⁸ § 200, 40 Stat. at 441.

²⁹ § 201, 40 Stat. at 442.

finer or penalties for the duration of service,³⁰ and preventing evictions from residences with rents under fifty dollars a month.³¹ The Act “remain[ed] in force until the termination of the war, and for six months thereafter”³²

As R. Chuck Mason recounts, “During World War II, Congress essentially reenacted the expired 1918 statute as the Soldiers’ and Sailors’ Civil Relief Act of 1940, and then amended it substantially in 1942 to take into account the new economic and legal landscape that had developed between the wars.”³³ Since World War II, the law has been repeatedly amended,³⁴ including amending the title to what it reads today: the Servicemembers Civil Relief Act.³⁵ The current incarnation of the law similarly protects against many specific economic and judicial harms that may befall servicemembers on active duty.

II

AN ANALYSIS OF RELEVANT PROTECTIONS

A. *Protections in the SCRA Similarly Put Forward by the FECRA*

As stated earlier, the FECRA was modeled off the SCRA, and with good reason: The SCRA, with its “beneficent purpose,”³⁶ has been widely applauded as “critical” for military personnel and their families.³⁷ Below is a summary of those protections the FECRA co-opted and repurposed.

1. *Evictions*

Under the SCRA, landlords “may not evict a servicemember during a period of military service or his or her dependents from a rented home (such as an apartment, a trailer, or a house),” provided rent is below a threshold amount.³⁸ This protects servicemembers and their families from being

³⁰ § 202, 40 Stat. at 442.

³¹ § 300, 40 Stat. at 443.

³² § 603, 40 Stat. at 449.

³³ MASON, *supra* note 20, at 1; see H.R. REP. NO. 105-183, pt.1, at 2 (1997).

³⁴ See, e.g., Veterans Benefits Act of 2002, Pub. L. No. 107-330, 116 Stat. 2820 (2002) (codified as amended in scattered sections of 38 U.S.C. (2012)) (expanding myriad active duty servicepersons’ benefits).

³⁵ Servicemembers Civil Relief Act, Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified at 50 U.S.C. §§ 3901–4043 (2012)) (further expanding myriad active duty servicepersons’ benefits).

³⁶ *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).

³⁷ Elaine Sanchez, *Troops, Families to Benefit from Landmark Settlement*, VANDENBERG A.F. BASE (Feb. 13, 2012), <https://www.vandenberg.af.mil/News/Article-Display/Article/338790/troops-families-to-benefit-from-landmark-settlement> (quoting Holly Petraeus, Assistant Director for the Consumer Financial Protection Bureau’s Office of Servicemember Affairs).

³⁸ MASON, *supra* note 20, at 12. This amount is increased each year to account for inflation. *Id.*

evicted when times get tight.

This protection is arguably even more applicable to federal employees, as lawmakers have tended to prioritize protecting servicepersons' salaries during funding gaps, but have not done the same for other federal workers.³⁹ The FECRA takes up this cause by proscribing against *any* eviction of a federal employee during a shutdown without a court order.⁴⁰ Moreover, it empowers courts to “adjust the obligation under the lease to preserve the interests of all parties,”⁴¹ protecting both the party directly impacted by the shutdown and the one feeling its secondary effects.

2. *Mortgages*

In other legal areas, society has “stressed ‘the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.’”⁴² Thankfully, both the SCRA and FECRA protect their beneficiaries vis-à-vis mortgage obligations. First, each requires that a court “shall” stay foreclosure proceedings “for a period of time as justice and equity require” or “adjust the obligation to preserve the interests of all parties.”⁴³ As with evictions, the FECRA permits courts a wide berth in balancing equities to protect vulnerable federal employees. Second, both statutes would invalidate any “sale, foreclosure, or seizure of property” against a serviceperson or federal employee during a shutdown, absent a court order.⁴⁴

3. *Liens*

The SCRA and FECRA are nearly identical in their protections from liens enforced against servicemembers and federal employees, respectively.⁴⁵ In short, the laws guard against “foreclos[ure] or enforce[ment of] any lien on such property or effects without a court order granted before foreclosure or enforcement” against the protected individual.⁴⁶

³⁹ See Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018) (guaranteeing military pay prior to the 2018 shutdown); Pay Our Military Act, Pub. L. No. 113-39, 127 Stat. 532 (2013) (same with respect to the 2013 shutdown).

⁴⁰ Federal Employees Civil Relief Act, S. 72, 116th Cong. § 6(a) (2019).

⁴¹ *Id.* § 6(b)(1)(B).

⁴² *Oliver v. United States*, 466 U.S. 170, 178 (1984) (quoting *Payton v. New York*, 445 U.S. 573, 601 (1980)).

⁴³ 50 U.S.C. app. § 533(b) (2012); S. 72 § 7(b).

⁴⁴ 50 U.S.C. app. § 533(c) (2012); S. 72 § 7(c).

⁴⁵ Indeed, the FECRA only differs from the SCRA in terms of organizing the subsection, even though all the terms and protections are defined identically. *Compare* 50 U.S.C. app. § 537 (2012), with S. 72 § 8.

⁴⁶ 50 U.S.C. app. § 537 (2012); *cf.* S. 72 § 8(a)(2).

4. *Income Taxes*

Both the SCRA and FECRA address the collection of taxes. The SCRA permits the delayed collection of taxes for up to 180 days;⁴⁷ the FECRA establishes the same protection, though restricts the time period to the lesser of 90 days or the shutdown's duration.⁴⁸ Importantly, while the collection is deferred, penalties are not accrued.⁴⁹

5. *Insurance Protections*

FECRA Section 11(b) reads:

Without the order of a court, a covered insurance policy shall not lapse or otherwise terminate or be forfeited because a Federal worker does not pay a premium, or interest or indebtedness on a premium, under the policy that is due during a covered period with respect to a shutdown.⁵⁰

In essence, federal workers can't lose insurance coverage for missed payments due to a shutdown. This provision applies not only to medical insurance, but also to life, disability, and motor vehicle plans.⁵¹

The SCRA preserves servicemembers' insurance coverage, but through a slightly different and relatively piecemeal system. For example, 50 U.S.C. app. § 544 proscribes companies from kicking servicemembers off of their insurance policies, but only applies to policies defined by the Secretary of Veterans Affairs.⁵²

B. *SCRA Protections that Should Be Included in the FECRA*

The SCRA includes many protections that the FECRA does not contemplate, from protecting mineral rights⁵³ to power of attorney principles.⁵⁴ Rightly so: The challenges those serving on a ship in the Strait of Hormuz or on a forward operating base in Afghanistan face are not immediately applicable to the experiences of unpaid air traffic controllers⁵⁵ or NSF-funded scientists whose grants have not been processed.⁵⁶

⁴⁷ 50 U.S.C. app. § 570 (2012).

⁴⁸ S. 72 § 10(a).

⁴⁹ *Id.* § 10(b).

⁵⁰ *Id.* § 11(b).

⁵¹ *Id.* § 11(a).

⁵² 50 U.S.C. app. § 544(b) (2012).

⁵³ *Id.* § 565(a).

⁵⁴ *Id.* § 592(a).

⁵⁵ Jeffrey Cook, *Judge Denies 'Essential' Federal Workers' Request to Be Paid During the Shutdown*, ABC NEWS (Jan. 15, 2019, 3:13 PM), <https://abcnews.go.com/Politics/judge-denies-essential-federal-workers-request-paid-shutdown/story?id=60376671>.

⁵⁶ Brandi Vincent, *Shoveling Snow, Walking Dogs: Furloughed Workers Turn to Odd Jobs, Gig Economy*, NBC NEWS (Jan. 16, 2019, 4:42 PM), <https://www.nbcnews.com/tech/tech-news/shoveling-snow-walking-dogs-furloughed-workers-turn-odd-jobs-gig-n959501>.

Nevertheless, the lion's share of the SCRA's protections map well onto the needs of federal workers.⁵⁷ Unfortunately, not all of the SCRA's relevant protections were incorporated into the FECRA—an opportunity lost. Below is a discussion of a few protections afforded to servicemembers in the SCRA that would benefit unpaid federal workers if incorporated into FECRA and passed into law.

1. *Statutes of Limitations*

One of the SCRA's primary features is the tolling of statutes of limitations. As the Supreme Court has explained, statutes of limitations in the civil context “are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.”⁵⁸ While these aims are worthy, one's government service should not inhibit her ability to effectuate justice. Thus, the SCRA's tolling of statutes of limitations protects a servicemember's “right to redeem real estate that has been sold or forfeited to enforce an obligation, tax, or assessment.”⁵⁹ The tolling provision “applies not just to an action or proceeding in a court but also to any federal or state board, commission, or agency”⁶⁰ And the protections “may be exercised by the servicemember's heirs, executors, administrators, or assigns, regardless of whether the right or cause of action arose prior to or during the person's period of military service.”⁶¹

While it is easier to vindicate one's rights while on domestic soil and without the strictures of military life, this provision is still highly applicable to federal employees working without pay. Such employees may need to prioritize affording basic necessities over paying an attorney to realize their rights.

2. *Termination of Purchase and Lease Contracts*

The SCRA offers a range of protections pertaining to breaches of leases and contracts. For example, one who has collected a deposit for the purchase of property cannot “repossess the property or cancel the sale, lease, or bailment because of the failure to meet the terms of the contract, if the buyer enters active duty military service after paying the deposit and subsequently

⁵⁷ Some SCRA protections are inapposite to furloughed or unpaid federal employees. *See, e.g.*, 50 U.S.C. app. § 571(a)(1) (2012) (dictating residence for tax purposes when soldiers may be deployed or stationed in a different location, a problem inapposite to federal employees).

⁵⁸ *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

⁵⁹ *MASON*, *supra* note 20, at 10–11.

⁶⁰ *Id.*

⁶¹ *Id.*

breaches the terms of the contract.”⁶² Put another way, if an individual purchases something under an installment contract and begins service before the contract’s culmination, the property owner cannot summarily terminate the contract or claim that the individual was in breach.

Importantly, these protections extend not only to contracts for property purchases but also to some common leases and service contracts. For instance, when a serviceperson leases “premises occupied, or intended to be occupied, by [the] servicemember or [the] servicemember’s dependents for a residential, professional, business, agricultural, or similar purpose,”⁶³ “a motor vehicle used, or intended to be used, by a servicemember or a servicemember’s dependents for personal or business transportation,”⁶⁴ or “commercial mobile service, telephone exchange service, internet access service, or multichannel video programming service,”⁶⁵ the serviceperson is protected in the event that she is deployed or reassigned to a new duty station.

As with evictions, these protections would be helpful to federal employees who, during a shutdown, may need to make harsh and immediate budget cuts to afford even basic necessities. Requiring federal employees to suffer the consequences of a failure to make a car payment on a car they may be using to get to their unpaid job is ironic at best. This provision thus staves off not only breach of contract actions, but also the resultant longer-term harms of lost employment and lowered credit scores.

C. *What the FECRA Aims to Protect that the SCRA Does Not*

The FECRA provides protections for student loan debt that the SCRA does not. The FECRA limits defaults and collections on eligible student loan debts during a shutdown as well as makes federal employees “eligible for deferment, during which, with respect to a student loan, periodic installments of principal need not be paid and interest shall not accrue.”⁶⁶

As of 2018, “there are more than 44 million borrowers who collectively owe \$1.5 trillion in student loan debt in the U.S. alone. The average student in the Class of 2016 has \$37,172 in student loan debt.”⁶⁷ Given that 51.74% of federal civilian employees have at least a college degree,⁶⁸ as compared to

⁶² *Id.* at 13.

⁶³ 50 U.S.C. § 3955(b)(1) (2012).

⁶⁴ *Id.* § 3955(b)(2).

⁶⁵ *Id.* § 3956(b).

⁶⁶ Federal Employees Civil Relief Act, S. 72, 116th Cong. § 9(c) (2019).

⁶⁷ Zack Friedman, *Student Loan Debt Statistics in 2018: A \$1.5 Trillion Crisis*, FORBES (June 13, 2018, 8:32 AM), <https://www.forbes.com/sites/zackfriedman/2018/06/13/student-loan-debt-statistics-2018/#6a6af5eb7310>.

⁶⁸ See *Profile of Federal Civilian Non-Postal Employees*, U.S. OFFICE OF PERS. MGMT. (Sept. 30, 2017), <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/profile-of-federal-civilian-non-postal-employees>.

only approximately 21% of military personnel,⁶⁹ many would likely benefit from this provision. Moreover, as many commentators have stated, lacking such protections can only hasten the brain drain that shutdowns cause.⁷⁰

D. *New Protections*

As we critically evaluate the protections necessary to better guard against government shutdowns' disproportionate impact on federal employees, two additional provisions⁷¹ ought to be included in our discussion: protecting credit scores and securing access to capital.

1. *Credit Score Protections*

In 1971, Justice William O. Douglas wrote, “[t]here is no doubt that an adverse credit rating can injure a subject.”⁷² The importance of one’s credit score has only grown in today’s financialized world. Bad credit may inhibit home or car purchase opportunities or may raise interest rates if a purchase is permitted. Credit reports are also now used in holistic background checks for hiring.⁷³ For better or worse, creditworthiness is already heavily regulated under multiple federal statutes, making an amendment to bar negative credit effects suffered by federal employees during shutdowns not just necessary, but quite easy.

2. *Access to Capital at Zero or Low Interest Rates*

The FECRA also does not include increased access to credit lines—and

⁶⁹ See Kim Parker, Anthony Cilluffo & Renee Stepler, *6 Facts About the U.S. Military and Its Changing Demographics*, PEW RES. CTR. (Apr. 13, 2017), <http://www.pewresearch.org/fact-tank/2017/04/13/6-facts-about-the-u-s-military-and-its-changing-demographics> (stating that seven percent of enlisted personnel have a bachelor’s degree, while at least eighty-four percent of officers have such a degree); U.S. DEP’T OF LABOR, *Military Careers*, BUREAU OF LAB. STAT., <https://www.bls.gov/ooh/military/military-careers.htm> (last modified Apr. 12, 2019).

⁷⁰ See, e.g., Lauren Aratani & Erin Durkin, *Federal Shutdown’s Legacy May Be Brain Drain to Private Sector*, GUARDIAN (Jan. 30, 2019), <https://www.theguardian.com/us-news/2019/jan/30/government-shutdown-brain-drain-private-sector>; David M. Van Slyke, Opinion, *Politicians Fail to See Shutdown’s Long-Term Fallout: Brain Drain*, THE HILL (Jan. 14, 2019, 1:00 PM), <https://thehill.com/opinion/white-house/425193-politicians-fail-to-see-shutdowns-long-term-fallout-brain-drain>.

⁷¹ Certainly people can make a case for other protections too. The discussion of these provisions is meant to be exemplary, not exhaustive.

⁷² *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 906 (1971) (Douglas, J., dissenting from denial of certiorari).

⁷³ See Yoni Blumberg, *What Employers Are Looking for When They Check Your Credit Report*, CNBC (Oct. 24, 2018, 3:28 PM), <https://www.cnbc.com/2018/10/24/why-employers-check-your-credit-report.html>. Note that employers may only check credit reports and not specific scores. Libby Kane, *No, Your Employer Can’t Check Your Credit Score—But Here’s What It Can See*, BUS. INSIDER (May 27, 2014, 3:49 PM), <https://www.businessinsider.com/employers-cannot-check-your-credit-score-2014-5>.

thus some level of cash flow—for employees whose income stream is frozen. Some private lenders voluntarily offered such services during the most recent shutdown:

Launch Federal Credit Union [issued] a zero-percent interest rate for loans of up to \$3,000 to federal government employees. Navy Federal Credit Union [did] the same, but up to \$6,000 The U.S. Employees Credit Union [provided] interest-free loans to impacted members for 60 days, regardless of their credit score. Justice Federal Credit Union [offered] unsecured loans with low interest rates to any impacted workers at the Department of Justice or Department of Homeland Security.⁷⁴

In acts of kindness (or excellent public relations) no less important, institutions like Wells Fargo and FedChoice Credit Union waived applicable late fees for affected workers.⁷⁵ Other banks, such as Bank of America, considered waiving fees and interest charges on a “case-by-case basis.”⁷⁶ Without such protections, employees may have had to take out interest-bearing loans to make ends meet. And while not by definition usurious contracts,⁷⁷ compelling federal workers to take a loan with any interest rate above the rate of inflation penalizes them for working for the government, especially when they are already taking a pay discount to pursue public service.

One proposed bill seeks to effectuate this change: the Immediate Financial Relief for Federal Employees Act, or IFRFEA.⁷⁸ The Act “would require the Treasury Department issue loans to furloughed federal workers with no accrued interest,”⁷⁹ limited to \$6000.⁸⁰ It stipulates that the individual, having been issued the loan on a temporary basis, would have one hundred percent of his or her wages garnished to pay the Treasury back in full upon the end of the shutdown.⁸¹

The IFRFEA provides one of multiple possible solutions to the problem

⁷⁴ Annie Nova, *Where to Get Interest-Free Loans as the Longest-Ever Government Shutdown Continues*, CNBC (Jan. 8, 2019, 9:26 AM), <https://www.cnbc.com/2019/01/07/banks-companies-offer-some-room-to-workers-without-pay-because-of-shutdown.html>.

⁷⁵ *See id.*

⁷⁶ Emily Stewart, *Big Banks Offer to Help Federal Workers on a “Case-by-Case Basis,”* VOX (Jan. 10, 2019, 7:30 AM), <https://www.vox.com/policy-and-politics/2019/1/10/18175389/government-shutdown-federal-worker-pay-loan-banks>.

⁷⁷ *See* 12 U.S.C. §§ 85, 86 (2012) (defining a usurious transaction as one that has a rate of interest that is higher than the rate allowed by the laws of the State, Territory, or District where the bank is located).

⁷⁸ Immediate Financial Relief for Federal Employees Act, H.R. 657, 116th Cong. (2019).

⁷⁹ Steff Thomas, *Updated: Legislation in Support of Federal Workers During Shutdown*, FED. NEWS NETWORK (Jan. 15, 2019, 11:27 AM), <https://federalnewsnetwork.com/government-shutdown/2019/01/updated-legislation-in-support-of-federal-workers-now-includes-back-pay-loans>.

⁸⁰ H.R. 657 § 2(c)(2).

⁸¹ *Id.* § 2(d).

of inaccessible capital.⁸² For example, capping interest rates on short-term loans for federal employees would allow private markets to help ease the strain of a shutdown without additionally burdening the Treasury. Congress could also allow federal workers to withdraw monies penalty-free from tax-protected retirement or savings accounts, subject to repayment immediately upon back payments of wages. Any or all of these protections would go a long way toward alleviating not only the direct pain federal employees feel, but also the indirect pain their creditors, landlords, and suppliers would otherwise suffer.

III

ARE SUCH PROTECTIONS CONSTITUTIONAL?

The Supreme Court has upheld the constitutionality of the SCRA, albeit as an exercise of Congress's war powers. Specifically, Justice Reed wrote that the law was a proper "congressional exercise of a 'necessary and proper' supplementary power."⁸³ But Congress's war powers are unlikely to justify granting protections to non-military personnel, particularly when the need is triggered by non-war events.⁸⁴ However, such protections would still withstand constitutional scrutiny under the Commerce Clause.

The Constitution's Commerce Clause affords Congress the power "to regulate Commerce . . . among the several States . . ."⁸⁵ Though the latitude courts have granted Congress under the Clause has famously waxed and

⁸² What's more, if a shutdown were relatively brief, as was the case in January 2018, *see* Sheryl Gay Stolberg & Thomas Kaplan, *Government Shutdown Ends After 3 Days of Recriminations*, N.Y. TIMES (Jan. 22, 2018), <https://www.nytimes.com/2018/01/22/us/politics/congress-votes-to-end-government-shutdown.html>, federal employees could actually earn money off a zero-interest loan.

⁸³ *Dameron v. Brodhead*, 345 U.S. 322, 325 (1953).

⁸⁴ While it is unlikely to prevail, there is a colorable argument to this effect. Myriad federal employees have responsibilities that bear on the national defense. TSA agents are a prime example. By having their pay suspended, many were forced to miss work in order to partake in a second job to pay rent or meet other financial obligations. *See* Tal Axelrod, *TSA Agents Working Without Pay During Shutdown Are Calling in Sick*, THE HILL (Jan. 4, 2019, 5:04 PM), <https://thehill.com/policy/transportation/tsa/423957-hundreds-of-tsa-agents-calling-out-sick-while-forced-to-work>. As reported by CNN, "Martin Elam, the deputy federal security director overseeing five California airports," issued a memorandum during the shutdown to all TSA personnel stating that absences caused by the shutdown had "adversely impacted security operations." Rene Marsh & Gregory Wallace, *Exclusive: TSA Official Warns of Shutdown Impact on Security Operations at California Airport*, CNN (Jan. 9, 2019, 12:48 AM), <https://www.cnn.com/2019/01/08/politics/shutdown-tsa-security/index.html>. Thus, legislation aimed at diminishing incentives for TSA agents to skip work and thereby bolster our national security, it could be argued, similarly fall under Congress's war powers authority under *Dameron*. The same could be said for the 13,709 FBI agents, 3600 Deputy U.S. Marshals, 4399 Drug Enforcement Administration agents, 54,000 Customs and Border Protection agents and customs officers, and 42,000 Coast Guardspersons. Anne Flaherty & MaryAlice Parks, *Government Shutdown by the Numbers: Who Isn't Getting Paid*, ABC NEWS (Dec. 29, 2018, 1:39 PM), <https://abcnews.go.com/US/government-shutdown-numbers-paid/story?id=60064912>.

⁸⁵ U.S. CONST. art. I, § 8, cl. 3.

waned,⁸⁶ it remains clear that “[t]he power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of [the judiciary], going back almost to the founding days of the Republic, not to interfere.”⁸⁷ Additionally, Congress’s powers under the Commerce Clause are particularly expansive when the regulation at issue is a part of a larger regulatory scheme.⁸⁸

Squarely within the scope of the Clause is “[t]he power to regulate commerce[, which itself includes] the power ‘to prescribe the rule by which commerce is to be governed.’”⁸⁹ The FECRA is, at least in part, a regulation governing the employment conditions of federal workers. The Court has upheld the Fair Labor Standards Act, which regulates minimum wage, overtime pay eligibility, recordkeeping, and child labor standards, under the Commerce Clause.⁹⁰ The Clause was also the constitutional basis for the Williams-Steiger Occupational Safety and Health Act of 1970, more commonly known as “OSHA,”⁹¹ a law requiring workplaces to be “free from recognized hazards . . . likely to cause death or serious physical harm.”⁹² As both of these statutes regulate the workplace and employment more broadly, it stands to reason that the Commerce Clause confers on Congress the authority to regulate workplace conditions, particularly for those employed by the federal government itself.

Congress’s “power . . . to regulate employment conditions” is especially strong where it covers employees whose work has an interstate—if not national—effect.⁹³ Federal workers would clearly qualify under this standard. For example, USDA food regulators may work in particular localities, but the food they inspect feeds mouths across the country. Similarly, FBI Special Agents may have a particular duty station, but their investigations span the country and can impact our national security as a whole. Thus, while federal employees are domiciled and stationed in one state, they work toward the realization of national interests crystallized in federal law.

One could argue that some federal employees’ work has only a

⁸⁶ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 15–16 (2005) (citing *United States v. Lopez*, 514 U.S. 549 (1995)) (noting that the Court’s “understanding of the reach of the Commerce Clause, as well as Congress’s assertion of authority thereunder, has evolved over time”).

⁸⁷ *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964).

⁸⁸ See *Raich*, 545 U.S. at 26–27.

⁸⁹ *United States v. Darby*, 312 U.S. 100, 113 (1941) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824)).

⁹⁰ See *id.* at 119–21.

⁹¹ See Pub. L. No. 91-596, § 2(b), 84 Stat. 1590, 1590 (codified as amended at 29 U.S.C. § 651 (2012)).

⁹² *Id.* § 5(a)(1) (codified as 29 U.S.C. § 654(a)(1)).

⁹³ See 29 C.F.R. § 1975.2 (2019) (citing *Darby*, 312 U.S. 100).

localized impact and thus that the Commerce Clause is inapposite.⁹⁴ However, this is incorrect, as the Court has held that its “case law firmly establishes Congress’s power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”⁹⁵ Because federal employment—including its temporary termination—has such a substantial economic impact, such an argument would be unavailing.

The law would also withstand any challenge alleging unconstitutional discrimination. The Fourteenth Amendment’s Equal Protection Clause bans “deny[ing] to any person . . . the equal protection of the laws.”⁹⁶ To be sure, the statute would afford particular protections to some Americans, namely federal employees, as compared to non-federal employees. But because federal employees are not close to “discrete and insular minorities,”⁹⁷ any law targeting them—negatively or positively—is only subject to the lowest level of scrutiny: the rational basis test.⁹⁸ The Supreme Court has long held that “[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination”—anything less and the legislature can implement rational regulations.⁹⁹ Said otherwise, laws enacted pursuant to congressional authority are to be upheld save for those undertaken “without any reasonable basis.”¹⁰⁰ The FECRA seeks to protect federal employees during a time when they are uniquely vulnerable because they are unpaid; extending credit and alleviating the financial burden of such employees in such times reasonably and directly addresses this objective. Therefore, the law would withstand any challenge grounded in claims of discrimination.

⁹⁴ See *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (discussing the need to preserve “a distinction between what is truly national and what is truly local” in Commerce Clause jurisprudence).

⁹⁵ *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (citing *Perez v. United States*, 402 U.S. 146, 151 (1971)).

⁹⁶ U.S. CONST. amend. XIV, § 1. While the Fourteenth Amendment on its face only applies to States, it was imputed to the federal government in 1954 under the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

⁹⁷ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁹⁸ Though the rational basis test was first articulated by Justice Holmes’s canonical dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905), the Supreme Court actually adopted the test twenty-nine years later, in *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

⁹⁹ *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955); see also *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177–79 (1980) (holding that Congress may differentiate treatment of distinct classifications of railroad workers when such classifications are not arbitrary and there exist “plausible reasons for Congress’ action”).

¹⁰⁰ See, e.g., *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); see also *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (“If a legislative classification or distinction ‘neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end.’” (alteration in original) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996))).

IV

WOULD THIS INCENTIVIZE MORE SHUTDOWNS?

As with any potential new policy, we must also consider all ramifications of its enactment. Having recognized the proposal's benefits, what are its detriments? The short answer is that shutdowns create pressure on lawmakers to act, and the longer the shutdown endures, the more pressure builds up. Logic would dictate that diminishing, if not altogether alleviating, the individual hardships faced by federal workers would undermine that pressure.

Consider the following: In this recent record-breaking shutdown, initially, the vast majority of the country only saw the impact secondhand, hearing heart-breaking stories about the struggles of furloughed employees.¹⁰¹ These stories were not enough to compel congressional action, and the shutdown continued until Americans began experiencing its impact directly—like when air traffic controllers called in sick, halting flights along the East Coast.¹⁰² By alleviating the burden of shutdowns on federal employees—and the resultant indirect burden on the broader American public—we remove a proportional disincentive for shutdowns. By making shutdowns less costly, politicians may be more willing to let the government enter a spending gap, leading to more frequent, albeit less painful, shutdowns. Thus, there may be logical merit to the argument that a proposed extension of the SCRA would beget additional shutdowns.

But irrespective of an SCRA-like extension for federal workers, politicians have a continuing incentive to engage in shutdowns because the harms created by shutdowns increase their leverage in negotiations and appeal to their base:

[T]here's largely no pain at the polls for most members who help instigate shutdowns, even when people blame them or their party for the disruption But there is often gain for members. Particularly as the electorate has become more polarized around issues such as taxes, health care and now, immigration, members are rewarded by their bases for fighting the good fight, for taking a stand, according to studies. And sometimes, the standoff

¹⁰¹ For example, the story of Mallory Lorge, a federal employee who was rationing insulin to treat her Type I diabetes because she could no longer afford the copay, was one of many particularly distressing stories. Phil McCausland & Suzanne Ciecchalski, *Federal Worker Forced to Ration Insulin Because of Government Shutdown*, NBC NEWS (Jan. 13, 2019, 3:55 AM), <https://www.nbcnews.com/news/us-news/federal-worker-forced-ration-insulin-because-government-shutdown-n958066>.

¹⁰² See Elie Kaufman & Rene Marsh, *The Government Shutdown Ended After Only 10 Air Traffic Controllers Stayed Home*, CNN (Feb. 6, 2019, 5:56 PM), <https://www.cnn.com/2019/02/06/politics/ten-air-traffic-controllers-shutdown/index.html>; Joseph A. McCartin, *How Air Traffic Controllers Helped End the Shutdown—And Changed History*, WASH. POST (Jan. 26, 2019), https://www.washingtonpost.com/outlook/2019/01/26/how-air-traffic-controllers-helped-end-shutdown-changed-history/?utm_term=.05839c31666b.

offers elected officials in Washington leverage, their only chance to demonstrate unyielding commitment to a particular cause and maybe even to score a win, however small.¹⁰³

Thus, without the livelihood of 800,000 federal workers hanging in the balance, the stakes of a shutdown could be diminished, and, as a result, some of the bargaining power that makes shutdowns attractive to politicians in the first place could be eliminated. But, even if shutdowns do continue occurring, that this measure *may* make them more frequent is outweighed by its *certain* impact in easing the suffering of dedicated civil servants who ought not be political pawns.

CONCLUSION

Whatever one thinks about the proper role and size of the federal government, none can argue that the citizens it employs do not serve our country honorably. Whether securing us against terrorism, guarding against foodborne illnesses, or administering justice, federal civil servants make our country better, even if not in the most glamorous or obvious way. They—and their families—should not be harmed as innocent bystanders to political brinksmanship. Enacting protections to safeguard their livelihoods in the case of shutdowns is just one small way we can say “thank you for your service.”

¹⁰³ Fred Barbash, *Congress Can Easily Avoid Shutdowns. Here's Why It Doesn't.*, WASH. POST (Jan. 22, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/01/22/congress-can-easily-avoid-shutdowns-heres-why-they-dont/?noredirect=on&utm_term=.596d8493d3f4.