CONSTITUTIONAL LAW—FIRST AMENDMENT—THE BAN ON HONORARIA AS CONTAINED IN § 501(B) OF THE ETHICS IN GOVERNMENT ACT OF 1989 IS UNCONSTITUTIONAL AS APPLIED TO MEMBERS OF THE EXECUTIVE BRANCH BELOW GRADE GS-16—*United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995).

When the state, acting as an employer, attempts to regulate the expression of its employees, difficult First Amendment[1] ques-

[1] The First Amendment to the United States Constitution states in full that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

The protections provided by the First Amendment were made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Fiske v. Kansas, 274 U.S. 380, 385-87 (1927). The Fourteenth Amendment reads in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

Free speech, which involves an unfettered exchange of ideas, promotes self-realization and self-expression in individuals and is especially valuable in a representative system of democracy. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 976 (11th ed. 1985); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982). Furthermore, free speech often serves as a check on the misuse of power by government officials. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

Justice Holmes, in extolling the virtues of the free trade of ideas, wrote that the finest test of truth occurs when an idea is "accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (advocating the opportunity for people to freely discuss grievances and possible remedies). Justice Cardozo believed that protecting free speech was of paramount importance because free expression is an indispensable part of almost every other type of freedom. *See* Palko v. Connecticut, 302 U.S. 319, 327 (1937).

Some jurists, most notably Justice Black, argued passionately that the language and safeguards of the First Amendment are absolute, and as such, should not be subject to other judicial interpretation. *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960). To Justice Black, the words "Congress shall make no law" were plain and easily understood and amounted to a desire by the constitutional Framers to withhold "from the Government all power to act in certain areas." *Id.* at 874-75. Thus the Framers, according to the Justice, did not intend for the First Amendment to be "interpreted" when they adopted it in the absolute form proposed by James Madison. *See* WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT: CASES AND MATERIALS 9 (2d ed. 1995); Barenblatt v. United States, 360 U.S. 109, 141-43 (1959) (Black, J., dissenting) (arguing that the abridgment of First Amendment freedoms cannot be justified by a judicial or congressional balancing process). *But see* Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 441 (1967) (declaring the dispute over balancing tests to be unnecessary and unfortunate).

A majority of the Supreme Court, however, has never adopted this absolutist position, but instead has consistently held that restraints on freedom of expression are permissible for appropriate reasons. *See* Elrod v. Burns, 427 U.S. 347, 360 (1976). For

tions arise based upon the state's dual role as sovereign[2] and employer.[3] This unique relationship potentially affords the state a

example, the Court upheld the conviction of a defendant for violating a law forbidding the use of offensive or derisive language aimed at another person. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942). The Court held that the ban on "fighting words" was appropriate because this class of speech is not protected by the First Amendment. *See id.* at 573. According to the Court, the minimal social value of such words was outweighed by the state's interest in maintaining order and promoting morality. *See id.* at 572; *see also* Feiner v. New York, 340 U.S. 315, 321 (1951) (refusing to reverse a state court conviction of the petitioner who was arrested for delivering an inflammatory speech to a crowd in which he insulted the President of the United States and local politicians).

The Court has also established that obscene expression is not protected by the First Amendment and, therefore, can be permissibly restricted. *See* Roth v. United States, 354 U.S. 476, 492-93 (1957) (concluding that the prevention of certain classes of expression, such as obscene expression, does not raise a constitutional problem). Accordingly, the Court has set out guidelines to assist juries in determining whether expression is indeed obscene. *See* Miller v. California, 413 U.S. 15, 24 (1973). The *Miller* Court held that a jury must determine whether the expression appeals to prurient interests, whether it describes or depicts sexual relations in a patently offensive manner, and whether the expression, "taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.*

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court concluded that commercial speech is afforded less protection than other constitutionally guaranteed expression under the First and Fourteenth Amendments. *See* 447 U.S. 557, 562-63 (1980). The Court justified this distinction by noting that commercial speech typically occurs in an area that is usually subject to government regulation. *See id.* at 562. To determine whether commercial speech is protected, the Court elaborated, the expression must concern legal activity and be truthful. *See id.* at 564. If the governmental interest in restricting the speech is substantial, the Court explained, then a court must determine whether the restriction directly furthers the asserted interest and whether the regulation is not overly extensive. *See id; see also* Buckley v. Valeo, 424 U.S. 1, 143 (1976) (upholding a political campaign contribution limit of $1000 to an individual candidate).

[2] *See* BLACK'S LAW DICTIONARY 1395 (6th ed. 1990) (defining sovereign as "[a] person, body, or state in which independent and supreme authority is vested . . . ").

[3] *See* D. Gordon Smith, Comment, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 249 (1990). The state as an employer has both the ability and the incentive to restrict its employees' expression. *See id.* As both the employer and the sovereign, the state is able to prohibit the speech of its employees not just through the traditional methods the state normally uses as sovereign, such as injunctions and criminal penalties, but also through disciplinary proceedings or terminations. *See id.* at 249-50. The ability to levy sanctions on an employee based upon its position as employer enhances the state's ability to prevent certain types of speech while possibly avoiding judicial proceedings. *See id.* Thus, the magnitude of government sanctions in its role as employer is often greater than the sanctions the government imposes as sovereign. *See* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1319 (1984). Furthermore, employer-based sanctions are more easily imposed and often impact only the least popular groups. *See id.* at 1323. The government as employer frequently invokes two justifications for prohibiting certain types of expression: the importance of establishing a uniform, official position and the need to avoid disrupting working relationships. *See* Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 919 (1986). The government's interest in efficiently achieving its

strong ability and incentive to restrict the speech of its employees.[4] When acting as an employer, the state has significantly more power in the First Amendment area than it does when acting as sovereign.[5] For example, the government has broader discretion with regard to procedural and substantive requirements when restricting its employees' expression than it does when addressing a private citizen's speech.[6]

Prior to the mid-1950s, the Supreme Court consistently stated that public employees could not object to conditions imposed on their employment, even those that allegedly violated their constitutional freedoms.[7] The Court, however, eventually afforded more protection to the constitutional claims of public employees, and by the late 1960s, had significantly limited a public employer's right to place conditions upon employment.[8]

Recently, the Supreme Court in *United States v. National Treas-*

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objectives is "elevated from a relatively subordinate interest when it acts as sovereign to a significant one" in its role as employer. Waters v. Churchill, 114 S. Ct. 1878, 1888 (1994) (plurality).

4 *See* Smith, *supra* note 3, at 249-50. In situations where a public employee challenges a workplace restriction upon his or her First Amendment rights, a court must consider both the employee's right to freely express ideas as a citizen and the government's interest in ensuring the steady operation of the workplace. *See* Cynthia K.Y. Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109, 1109-10 (1988) (citing Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)). A court, therefore, will have to balance the public employee's free expression interests against the government's need to maintain an efficient workplace. *See id.* at 1110.

5 *See Waters*, 114 S. Ct. at 1886. In *Waters*, the Court held that the government has broader powers in regulating the speech of its employees than it has in regulating the speech of individual citizens. *See id.*

6 *See id.* at 1886-87. The plurality explained that while the government cannot restrict the expression of a private citizen solely to advance the efficiency of its operations, such a sanction imposed by the state upon its employee might be permissible. *See id.* at 1888. This, the Court propounded, is appropriate because the government employs its personnel for the exact purpose of efficiently achieving its goals. *See id.*

7 *See* Paul Ferris Solomon, Note, *The Public Employee's Right of Free Speech: A Proposal for a Fresh Start*, 55 U. CIN. L. REV. 449, 450 (1986) (citing Adler v. Board of Educ., 342 U.S. 485, 492 (1952) (holding that the state can refuse employment to individuals based on their memberships to certain proscribed groups)). During this period, the Supreme Court focused exclusively on the interests of the state as employer and concluded that state legislatures could establish any reasonable limitation on the constitutional rights of public employees, such as teachers. *See Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1740 (1984) [hereinafter *Developments in Law*]. Essentially, the state could discipline and sanction its employees' expression as if it were a private employer. *See* Smith, *supra* note 3, at 250.

8 *See* Smith, *supra* note 3, at 250; *see, e.g.*, Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (establishing the current balancing test to decide cases involving questions of public employee free speech).

ury Employees Union,[9] held that § 501(b) of the Ethics Reform Act of 1989[10] abridged the First Amendment rights of the respondents, a class of governmental employees below grade GS-16.[11] In so holding, the Court contended that the section's ban on the receipt of honoraria[12] placed a substantial burden on the employees' free speech rights secured under the First Amendment.[13]

In *National Treasury*, the plaintiffs[14] filed a class action suit in the United States District Court for the District of Columbia on behalf of all Executive Branch[15] employees below grade GS-16[16] challenging the constitutionality of the ban on honoraria contained in § 501(b).[17] The ban prohibited each member of the class from receiving remuneration for presenting a speech or article.[18]

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9 115 S. Ct. 1003 (1995).

10 Ethics Reform Act of 1989, Pub. L. No. 101-194, §§ 501-505, 103 Stat. 716, 1760-62 (1989) (codified as amended in 5 U.S.C. §§ 501-505 (1993)). The Ethics Reform Act of 1989 amended § 501(b) of the Ethics in Government Act of 1978, creating an honoraria ban, which provides: "An individual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. § 501(b) (Supp. 1993).

11 *See National Treasury*, 115 S. Ct. at 1008. The class was composed of employees between GS-1 (the lowest position) and GS-15 (ten positions higher). *See id.* at 1010. According to the Office of Personnel Management, these employees earned between $11,903 and $86,589 annually. *See id.* n.5.

12 The statute defined honoraria as "a payment of money or any thing of value for an appearance, speech or article . . . by a Member, officer or employee . . . ." 5 U.S.C. § 505(3) (Supp. 1993). Curiously, the amendment did not include a ban on the receipt of honoraria for a series of articles, speeches, or appearances unless their subject matter was related directly to the official duties of the individual employee. *See National Treasury*, 115 S. Ct. at 1010.

13 *See National Treasury*, 115 S. Ct. at 1014.

14 *See id.* at 1010. The plaintiffs who commenced the lawsuit included two unions and a number of career civil servants who were full-time employees of several Executive Branch agencies and departments. *See id.* The district court then certified the respondent, pursuant to an agreement with the government, "as the representative of a class composed of all Executive Branch employees" lower than grade GS-16. *Id.*

15 *See* BLACK'S LAW DICTIONARY 569 (6th ed. 1990) (stating that the Executive Branch of the federal government is charged with "carrying the laws into effect and securing their due observance").

16 *See National Treasury*, 115 S. Ct. at 1010. Each respondent was a member of the class except for a lawyer for the Nuclear Regulatory Commission who was a GS-16 grade. *See id.*

17 *See id.* Prior to the enactment of the Ethics Reform Act, each individual respondent allegedly received compensation for presenting an article or speech. *See id.* The receipt of such compensation was in compliance with previous ethics regulations. *See id.* Examples included a Postal Service employee who had delivered lectures on the Quaker religion for small fees, a NASA engineer who spoke on black history for $100 per lecture, and an FDA microbiologist who reviewed dance performances on television and in magazines earning him nearly $3000 per year. *See id.* Section 501(b) of the Ethics Reform Act of 1989 made compensation for these types of endeavors illegal. *See id.* (citing 5 U.S.C. § 501 (Supp. 1993)).

18 *See id.*

Thus, the class claimed that the ban on honoraria represented an unconstitutional abridgment of their First Amendment rights by denying them the ability to receive compensation for any speaking or writing delivered outside of their employment.[19]

The district court held the statute unconstitutional as applied to all Executive Branch employees and, consequently, enjoined the enforcement of the statute against any Executive Branch employee, including those who were not class members.[20] The court concluded that the statute was both over-inclusive because of the amount of speech it restricted, and under-inclusive because some forms of speech were not covered by the honoraria ban.[21] Furthermore, the court contended that by enacting the statute, Congress was concerned primarily with the appearance of unethical behavior among its own members, and not members of the Executive Branch.[22] The court therefore held that § 501(b) as it applied to the class before it was severable from the remaining provisions of the statute.[23]

On appeal, the United States Court of Appeals for the District

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19 *See id.*

20 *See* National Treasury Employees Union v. United States, 788 F. Supp. 4, 13 (D.D.C. 1992).

21 *See id.* at 11. According to Judge Jackson, § 501(b) was over-inclusive because it prohibited the acceptance of compensation for all scholarly works in article or speech form. *See id.* The section at the same time, however, was under-inclusive because it did not proscribe the receipt of payment for other types of expression such as a painting, a musical score, or a fictional novel. *See id.* at 10.

22 *See id.* at 12-13.

23 *See id.* at 12. The district court characterized § 501(b) as a content-neutral restriction on "government employees who, as a condition of their employment, have relinquished certain First Amendment prerogatives." *Id.* at 9, 10. The court, however, held that the restriction could "go no farther than necessary to accomplish its objective." *Id.* at 10.

Content-neutral restrictions place limits upon expression regardless of the expression's content. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1257 (2d ed. 1991). These restrictions include a broad range of limitations on expression including prohibiting the use of loudspeakers, banning billboards, and limiting campaign contributions. *See id.*; *see, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (upholding a ban on the use of loudspeakers in city streets); Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (invalidating a prohibition against distributing handbills door-to-door). In determining the validity of a content-neutral statute, the Court weighs the conflicting interests of the rights of the affected parties against the interests offered by the government in imposing such restrictions. *See Martin*, 319 U.S. at 144. A content-neutral restriction will be upheld

> if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968).

of Columbia affirmed, noting that although § 501(b) did not prohibit any speech, it did place a substantial burden upon employees by denying them the opportunity to receive compensation.[24] The court, while recognizing the importance of maintaining the integrity of public service and avoiding the appearance of unethical behavior, nonetheless decided that the statute's significant burden on speech did not advance this goal.[25] Furthermore, the court stressed that the evidence of impropriety among lower-level Executive Branch employees was not substantial enough to justify the honoraria ban's broad restrictions on speech.[26]

As to the remedy, the court of appeals accepted the district court's determination that § 501(b), as it applied to Executive Branch employees, was severable[27] from the rest of the statute.[28] Thus, the court essentially rewrote[29] the statute by redefining the words "officer or employee" in § 501(b) as referring only to "members of Congress, officers and employees of Congress, judicial officers and judicial employees."[30]

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24 *See* National Treasury Employees Union v. United States, 990 F.2d 1271, 1273 (D.C. Cir. 1993). The court concluded that although the ban did not directly prohibit expression, it placed a broad and burdensome financial disincentive on speech. *See id.*; Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991) (invalidating a law that required income derived from the publication of books written by criminals describing their crimes to be given to the Crime Victims Board). Such a law, the Court reasoned, was not sufficiently narrowly tailored and ran afoul of the First Amendment. *See id.*

25 *See National Treasury*, 990 F.2d at 1275. The court held that the ban was overbroad and lacked the narrow tailoring required to pass constitutional muster. *See id.* at 1277.

26 *See id.* The court further rejected the government's argument that difficulties in enforcing the ban justified such a broad prophylactic rule. *See id.* at 1276-77.

27 *See* Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 76 (1937) (explaining that when a court holds part of a law or some application of a law invalid, this portion can be severed from the remainder of the statute). The test for severability is whether the valid portions or applications of the law can be legally effective standing alone, and whether it would have been the intent of the legislature for these acceptable provisions or applications to remain in effect although the invalid portions had been removed. *See* Dorchy v. Kansas, 264 U.S. 286, 289-90 (1924).

28 *See National Treasury*, 990 F.2d at 1279. In so concluding, the court noted that Congress had enacted the statute in response to the acceptance of honoraria by its own members. *See id.* at 1278. Furthermore, the ban was enacted along with a substantial pay raise to a limited number of high-ranking Executive Branch officials, judges, and members of Congress. *See id.*

29 *See id.* at 1280 (Sentelle, J., dissenting). Judge Sentelle, writing in dissent, stated that the statute was constitutional. *See id.* Furthermore, the judge objected to the majority's remedy proclaiming it to be "'nothing less than judicial legislation.'" *Id.* at 1296 (quoting Ballard v. Mississippi Cotton Oil Co., 34 So. 533, 554 (Miss. 1903)).

30 *Id.* at 1279.

The Supreme Court granted certiorari[31] to decide whether the First Amendment rights of the respondents had been abridged.[32] The Court held that § 501(b) abridged the First Amendment rights of the respondent class.[33] The Court, however, enjoined the enforcement of the section only against those parties before the Court.[34] The Court explained that prohibiting the receipt of compensation indisputably imposed a substantial burden on expression.[35] Furthermore, the Court noted that because the ban was so broad and affected such a large number of potential speakers, it, in effect, chilled speech.[36] Thus, the Court concluded, any benefits conferred upon the government by a ban on the receipt of honoraria were not sufficient to justify the substantial impediments to the respondents' expressive activities set out in § 501(b).[37]

Prior to the 1950s, the Supreme Court consistently held that public employees did not have the right to contest conditions placed upon their employment.[38] During this period, the Court

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31 114 S. Ct. 1536 (1994).

32 *See* United States v. National Treasury Employees Union, 115 S. Ct. at 1003 (1995).

33 *See id.*

34 *See id.* at 1018.

35 *See id.* at 1014.

36 *See id.* (citing Near v. Minnesota, 283 U.S. 697, 700 (1931)). See *infra* note 72 and accompanying text for a discussion of the Court's views concerning chilling speech.

37 *See National Treasury*, 115 S. Ct. at 1018.

38 *See* Solomon, *supra* note 7, at 450. For example, the Court upheld the Hatch Act, which prohibited all Executive Branch employees from engaging in partisan political activity. *See* United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 99 (1947).

Furthermore, a municipal employer is not precluded from obtaining information from its employees concerning their fitness for public service simply because the municipality "is an agency of the State." Garner v. Board of Pub. Works, 341 U.S. 716, 720 (1951). In *Garner*, the Court, at the height of "McCarthyism," held valid a city charter that barred from public employment all persons who advocated the violent overthrow of the government, and required city employees to take an oath affirming that they had not been a member or had an affiliation with any group advocating violence against the government. *See id.* at 717-19, 720. This charter, the Court explained, was valid under the Federal Constitution as a reasonable regulation established to safeguard the municipal service. *See id.* at 720-21.

The Court also upheld civil service laws of the State of New York prohibiting a teacher from belonging to an organization that encouraged the overthrow of the United States government. *See* Adler v. Board of Educ., 342 U.S. 485, 485 (1952). The *Adler* Court was concerned that as a person who shapes the attitudes of young people, the teacher holds a sensitive position. *See id.* at 492. As such, school authorities have the duty and the right to screen potential teachers concerning past and present associations and affiliations to determine their fitness for employment and to "preserve the integrity of the schools." *Id.*

See also Bailey v. Richardson, 182 F.2d 46, 65 (D.C. Cir. 1950) (holding that the President could remove from government employment any person whose loyalty was

generally held that public employment was a privilege and not a right.[39] By the 1960s, however, the Court had abandoned the view that governmental employees relinquished their constitutional rights as a result of their employment.[40]

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doubted); *Developments in Law, supra* note 7, at 1743 (commenting that the Court in *Adler* analogized the public employee's position to that of an at-will employee working in the private sector). *But see* Imbrie v. Marsh, 3 N.J. 578, 592, 71 A.2d 352, 360 (1950) (invalidating a statute that required candidates for public office, as well as appointed public officials, to avow that they did not believe in the violent overthrow of the government and to disavow membership in any group or organization that advocated the violent overthrow of the government); C.T. Foster, Annotation, *Validity of Governmental Requirement of Oath of Allegiance or Loyalty*, 18 A.L.R.2d 268 (1951) (providing an excellent summary of the practice of requiring employees to take loyalty oaths during the first half of the twentieth century).

39 *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989) (providing a comprehensive review of court cases involving this principle during the first half of the twentieth century).

Then-Judge Oliver Wendell Holmes's famous comment that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" epitomized the judicial attitude towards public employees that predominated until the middle of the twentieth century. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892). Because the Supreme Court prior to the 1950s viewed public employment as a privilege, it could permissibly be conditioned upon the relinquishment of constitutional rights. *See Adler*, 342 U.S. at 492; Lee, *supra* note 4, at 1112-13. The rationale was that citizens had no constitutional right to be public employees and, therefore, the government could proscribe certain types of expression that would have infringed in other contexts on constitutionally protected rights. *See id.* at 1113. This "distinction between constitutionally protected rights of private citizens and the unprotected privilege of public employment was termed the right-privilege distinction." *Id.* (citing William W. Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1440-42 (1968)). For example, in *Scopes v. State*, John Thomas Scopes was prosecuted for violating Tennessee's law banning the teaching of a theory of creation contrary to the one set out in the Bible. *See* 289 S.W. 363, 363 (Tenn. 1927). According to the court in *Scopes*, the state, in dealing with one of its employees, was not "hampered by the limitations of . . . the Fourteenth Amendment." *Id.* at 365. Thus, as in *McAuliffe*, the legal theory inferable between employer and employee was that of ordinary contract law and not constitutional law. *See* VAN ALSTYNE, *supra* note 1, at 335.

40 *See* Lee, *supra* note 4, at 1115; *see also* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967) (holding that public employment cannot be conditioned upon the employee surrendering his or her constitutional rights); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 288 (1961) (invalidating a state statute that required state employees to sign an oath maintaining that they had never lent support, counsel, influence, or aid to the Communist Party); Wieman v. Updegraff, 344 U.S. 183, 192 (1952) (invalidating a state law mandating that state employees be required to swear that they had no past affiliations with Communists).

Moreover, in *Perry v. Sindermann*, the Court acknowledged that although a citizen has no "right" to governmental employment, he or she may not be denied that employment on a basis that would infringe upon constitutionally protected free speech interests. *See* 408 U.S. 593, 597 (1972). Allowing the government to deny public employment in this manner would in effect permit it "to 'produce a result which [it] could not command directly.'" *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

The shift in favor of providing more protection to constitutional claims made by public employees was substantially furthered in *Pickering v. Board of Education.*[41] In *Pickering*, a high school teacher was dismissed by the school board for sending a letter to a local newspaper that was critical of a proposed tax increase.[42] Consequently, the teacher filed suit, claiming that he was fired for engaging in constitutionally protected speech.[43]

In holding that Pickering's expression was protected by the First Amendment, the Court established a new standard for determining whether or not a public employee's free speech rights had been violated.[44] Justice Marshall, writing for the Court, held that a court must "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[45] Accordingly, the Court concluded that the balancing test weighed in favor of permitting this type of speech and upheld Pickering's claim.[46]

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41 391 U.S. 563, 574 (1968).

42 *See id.* at 564. The letter was critical of the School Board's treatment of certain bond issue proposals and the Board's allocation of money between the school's athletic and educational programs. *See id.* at 566. The letter further accused the superintendent of the school with trying to prevent the teachers from criticizing or opposing the proposed bond issue. *See id.*

43 *See id.* at 565. Pickering appealed the Board's decision to the Circuit Court of Will County. *See id.* The court affirmed Pickering's discharge, concluding that the letter was contrary to the school system's interests. *See id.* The Supreme Court of Illinois, on appeal, upheld the lower court's judgment. *See id.* After granting certiorari, the United States Supreme Court concluded that Pickering's free speech rights were violated. *See id.*

44 *See id.* at 568; Lee, *supra* note 4, at 1115 (noting that the new standard departed from the Court's earlier position that had favored the government's interests in cases involving public employees' First Amendment claims).

45 *Pickering*, 391 U.S. at 568. The Court held that the state's ability to afford the Board of Education the legal right to sue the appellant teacher, were he a member of the public at large, is circumscribed by the actual malice standard announced in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). *See id.* at 573. Thus, the Court reasoned that without proof that Pickering knowingly or recklessly made the statements in his letter, the teacher was justified to speak on matters of public importance. *See id.* at 574-75.

46 *See id.* at 574-75. *Pickering*'s progeny also includes *Givhan v. Western Line Consolidated School District*, in which the Court held that private expression voiced by a public school teacher was also constitutionally protected by the First and Fourteenth Amendments. *See* 439 U.S. 410, 413 (1979). The *Givhan* Court explained that neither the First Amendment nor the Court's decisions indicated that the free speech rights of a public employee were lost simply because that employee communicated privately with his or her employer instead of spreading views publicly. *See id.* at 415-16. In *Mt. Healthy City School District Board of Education v. Doyle*, the school board decided not to rehire a non-tenured teacher after the teacher had several altercations with students

Using the *Pickering* balancing test, the Court, in *Connick v. Myers*,[47] held that the dismissal of an assistant district attorney did not violate the attorney's free speech rights.[48] The majority made a distinction between employee speech "upon matters of public concern" and "upon matters of only personal interest," holding that if a case involves the latter, a federal court is rarely, if ever, the appropriate forum to pass judgment upon an employer's disciplinary proceeding.[49] Because the attorney's expression was critical of office management, it was deemed to be a matter of only private concern, and the Court refused to overturn her employer's disciplinary action.[50]

Relying on the distinction drawn in *Connick* between matters of public and private concern, the Court in *Rankin v. McPherson*[51] overturned the firing of a county constable for allegedly threatening the life of the President.[52] The majority asserted that the constable's comment concerned a matter of great public concern.[53]

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and had leaked to a local radio station the contents of a memorandum concerning the adoption of a school dress code. *See* 429 U.S. 274, 281-82 (1977). The teacher sued, claiming that his dismissal was prompted in response to his communication with the radio station, which he claimed was protected by the First Amendment. *See id.* at 283. The Court held that in a case such as this, the burden is initially placed upon the teacher to show that his or her conduct was protected by the First Amendment, and that this conduct was a "substantial factor" in the determination not to rehire him. *See id.* at 287. If this is proved, the Court concluded, the burden then shifts to the board to prove by the preponderance standard that it would have made the same decision concerning the teacher's reemployment even if the protected conduct had not occurred. *See id.*

47 461 U.S. 138 (1983).

48 *See id.* at 154. The attorney was fired for insubordination because she circulated a questionnaire critical of several office policies. *See id.* at 141. Consequently, the attorney filed suit, maintaining that she had been wrongfully terminated for exercising her constitutional right to free speech. *See id.*

49 *See id.* at 147. Thus, the Court stressed that the balancing test of *Pickering* should be used only in cases involving speech on matters of public interest. *See id.* at 146. The Court stated that whether or not speech is of public concern must be ascertained from its content, form, and context as revealed by an examination of the entire record. *See id.* at 147-48.

50 *See id.* at 154.

51 483 U.S. 378 (1987).

52 *See id.* at 392. In *Rankin*, an employee in a county constable's office, whose job duties were purely clerical, was fired for remarking to another employee about the attempted assassination of President Reagan. *See id.* at 379-80. The Court held that the employee's comment, "[i]f they go for him again, I hope they get him," constituted a matter of public concern. *Id.* at 380, 386.

53 *See id.* at 386. The Court stated that after determining that the comment was on a matter of great public concern, it next had to apply the *Pickering* balancing test. *See id.* at 388. The state, the Court elucidated, bore the burden of justifying McPherson's discharge as being legitimately grounded. *See id.* In performing the test, the Court noted, considerations such as the impairment of discipline by superiors, the detri-

Accordingly, the Court applied the balancing test of *Pickering* and determined that the constable's First Amendment rights outweighed the asserted reasons for the dismissal.[54]

In a recent pronouncement concerning the free speech rights of public employees, the Supreme Court, in *United States v. National Treasury Employees Union*,[55] considered further the right of the government to place restrictions on the expressive activities of its employees.[56] Specifically, the Court resolved whether the First Amendment protects a public employee's right to receive honoraria for expressive activity conducted outside of the workplace.[57] The Court held that amended § 501(b) of the Ethics in Government Act of 1978 ran afoul of the First Amendment.[58]

Writing for the majority, Justice Stevens began the Court's opinion by noting the tradition of federal employees who have published material that has contributed to the "marketplace of ideas."[59] Although none of the respondents published literature comparable to the work of a Melville or Whitman, the Justice averred, their contributions to the marketplace of ideas shared many of the same characteristics as the works of such great writers.[60]

Continuing, Justice Stevens stated that although the respondents were employed by the government, they did not relinquish "'the First Amendment rights they would otherwise enjoy as citi-

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mental impact on working relationships, and interference with the speaker's duties, or the "regular operation of the enterprise" are normally examined. *Id.* at 388-89 (citing Pickering v. Board of Educ., 391 U.S. 563, 570-73 (1968)).

54 *See id.* at 392. The Court concluded that the statement neither adversely affected the efficient operation of the office, nor was there any evidence that McPherson's statement discredited the constable's office. *See id.* at 389. The Court clarified that there was no evidence that any employee heard the statement besides the person to whom it was directed. *See id.* Finally, the Court reasoned that the discharge was unrelated to the operation of the office and was motivated solely by an objection to expression based entirely upon its content. *See id.* at 389-90. After considering the mission of the constable's office, the nature of McPherson's statement, and her position in the office, the Court concluded that the constable's interest in firing McPherson was outweighed by McPherson's First Amendment rights. *See id.* at 392.

55 115 S. Ct. 1003 (1995).

56 *See id.* at 1008.

57 *See id.*

58 *See id.*

59 *See id.* at 1012. Indeed, the Court pointed out that literary figures such as Bret Harte, who was employed by the United States Mint, Walt Whitman, who worked for the Department of Justice, and Herman Melville and Nathaniel Hawthorne, who both worked for the Customs Service, all published literature during their public employment. *See id.*

60 *See National Treasury*, 115 S. Ct. at 1012.

zens to comment on matters of public interest.'"[61] Furthermore, the Justice stressed, the respondents desired compensation for their expressive endeavors as citizens and not as governmental employees.[62] According to the majority, the employees did not address their expression to co-workers or supervisors, but instead directed it to members of the general public.[63] Thus, the Justice concluded that the nature of the respondents' expression had no relevance to their employment.[64]

The Court next noted that Congress may impose certain restrictions upon the speech of public employees even though such restraints would be deemed unconstitutional if applied to the general public.[65] Evoking *Pickering*, the majority posited that a court must balance the rights of the employee to comment on areas of public concern against the rights of the state in advancing the efficiency of the services it offers to all citizens.[66] The balancing test used in *Pickering*, the Court noted, has been applied, however, only in those instances where the employee commented "'*as a citizen* upon matters of public concern'" and not "'*as an employee* upon matters only of personal interest.'"[67] Therefore, the Justice reasoned, if the expression involves "a matter of public concern," the

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

62 *See id.* Generally, the Court noted that the content of the respondents' expressions had no relation to their jobs, and did not negatively affect the efficient operation of the respondents' workplaces. *See id.*

63 *See id.*

64 *See id.* Justice Stevens concluded that despite the identity of the authors, the subject-matter of the expression, and the effect of the expression on the authors' official duties, the expression nonetheless had no relevance to the respondents' employment. *See id.*

65 *See National Treasury*, 115 S. Ct. at 1012; *see also* Snepp v. United States, 444 U.S. 507, 511 (1980) (per curiam) (holding that a former CIA agent had breached a fiduciary obligation to the agency when he failed to submit written material about the CIA for a prepublication review). In *Snepp*, the defendant, a former CIA agent, published a book about Agency operations in South Vietnam without submitting his work to the CIA for a prepublication review. *See Snepp*, 444 U.S. at 507. This violated an express agreement the defendant had executed as a condition of employment with the agency promising not to publish anything related to the CIA without first receiving authorization to do so. *See id.* at 507-08. In granting an injunction for the government, the Court held that even without an express agreement, the CIA could act to safeguard substantial governmental interests by establishing reasonable restrictions on the activities of its employees that might in other contexts be shielded by the First Amendment. *See id.* at 510 n.3.

66 *See National Treasury*, 115 S. Ct. at 1012 (citing *Pickering*, 391 U.S. at 568).

67 *Id.* at 1012-13. (alteration in original) (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)). In *Connick*, an assistant district attorney was fired for distributing a questionnaire to fellow employees that was critical of the office transfer policy. *See* 461 U.S. at 141. The Court held that because all of the questions on the questionnaire except one did not relate to a matter of "public concern," but instead related to mat-

government must justify disciplinary actions taken against the employee.[68]

The Court concluded that the expressive activities of the respondents amounted to citizens commenting on public matters that fell within the protected category of speech.[69] In reaching this conclusion, the majority noted that the speeches and articles offered in the past by the respondents were addressed to audiences composed of members of the general public.[70] Additionally, these expressive activities, according to Justice Stevens, were performed outside the workplace, and were generally unrelated to the respondents' governmental employment.[71]

The Court stated that the honoraria ban imposed severe restrictions upon a large group of potential speakers, and thus the government bore the substantial burden of satisfying the *Pickering* balancing test.[72] Although a greater presumption of validity is accorded to a Congressional judgment than is accorded to a disciplinary action of an individual Executive Branch employee, the majority stated that the ban's vast impact upon speech heightened the government's burden to justify this restriction placed upon its employees.[73] Furthermore, Justice Stevens opined, the ban chilled potential expression.[74] Thus, the Court concluded, the government must prove that the First Amendment interests of the large

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ters of "personal interest," the restriction against distributing such material did not offend the First Amendment. *See id.* at 154.

68 *National Treasury*, 115 S. Ct. at 1013.

69 *See id.*

70 *See id.*

71 *See id.*

72 *See id.* The Justice noted that unlike *Pickering*, *Connick*, and *Rankin*, the case at bar did not involve a post hoc decision based on the employee's expression and its impact upon his or her public responsibilities. *See id.* The adverse employment decisions made in *Pickering*, *Connick*, and *Rankin*, were made after the expression was delivered. *See id.*; *see also* BLACK'S LAW DICTIONARY 1167 (6th ed. 1990) (defining post hoc as "after this time").

73 *See National Treasury*, 115 S. Ct. at 1014 (citing Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445, 2473 n.2 (1994) (Stevens, J., concurring in part and concurring in the judgment)). The *Turner* Court held that only intermediate level scrutiny applied to must-carry cable television provisions because such provisions, which were mandated by the 1992 Cable Act, posed no inherent dangers to free speech rights. *See* 114 S. Ct. at 2469.

74 *See National Treasury*, 115 S. Ct. at 1014; *see also* Near v. Minnesota, 283 U.S. 697, 713, 717 (1931) (holding that the primary function of the First Amendment is to prevent the imposition of prepublication restraints because such restraints chill speech); Kunz v. New York, 340 U.S. 290, 290-91, 293 (1951) (invalidating a city ordinance requiring citizens to first obtain a permit before holding a public worship meeting on city streets because the ordinance was a prior restraint upon First Amendment freedoms).

group of both present and future employees and their potential audiences are outweighed by that speech's "'necessary impact on the actual operation' of the Government."[75]

The majority stressed that although the ban was content-neutral[76] and did not directly prohibit any speech, it nonetheless placed a substantial burden upon expression by prohibiting the re-

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[75] *National Treasury*, 115 S. Ct. at 1014 (quoting Pickering v. Board of Educ., 391 U.S. 563, 571 (1968)).

[76] *See id.* A restriction that does not discriminate "among speakers based on the content or viewpoint of their messages" is content-neutral. *Id.* When the purpose of the government's restriction on speech is not related to the content of the expression, the expression is deemed to be content-neutral. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). In *Ward*, the Court held that a New York City ordinance regulating the volume at which rock bands in Central Park could play was a content-neutral restriction. *See id.* at 803; *see also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43, 52 (1986) (holding a municipal zoning ordinance prohibiting adult theaters within 1000 feet of residential areas, parks, schools, or churches to be content-neutral because the ordinance was aimed at the "secondary effects" of the theaters on the surrounding neighborhoods and not at the films' contents); Heffron v. International Soc'y for Krishna Consciousness, Inc. 452 U.S. 640, 643, 648-49 (1981) (declaring content-neutral a state law that prohibited the sale of any merchandise on fairgrounds unless the sale was made from a fixed location because it applied evenhandedly despite its inevitable impact upon the respondents whose religion required them to sell or distribute literature in public places).

In contrast, an ordinance or law that restricts expression because of its subject matter, content, or message is a content-based restriction. *See* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972). The Court in *Mosley* invalidated a city ordinance which prohibited picketing within the area less than 150 feet from a school unless the picketing was peaceful and was related to a labor dispute at the school. *See id.* at 100-01. The government, the Court held, may not grant access to a forum to groups whose ideas it finds acceptable, but limit access to that same forum to those who desire to express more controversial views. *See id.* at 96. While the Court conceded that reasonable "time, place and manner" restrictions of picketing may be permissible, such regulations must be narrowly tailored and advance a substantial governmental interest. *See id.* at 98, 99. Here the Court agreed that the Chicago ordinance failed to satisfy this requirement because it discriminated among the types of picketing based exclusively on the content of the expression. *See id.* at 102; *see also* Boos v. Barry, 485 U.S. 312, 315-16, 334 (1988) (invalidating as content-based a federal law that prohibited the display of certain types of signs within 500 feet of any embassy of a foreign country); Carey v. Brown, 447 U.S. 455, 460, 471 (1980) (invalidating an Illinois ordinance prohibiting peaceful picketing on public sidewalks and streets); Cohen v. California, 403 U.S. 15, 26 (1971) (overturning the conviction of a defendant who had been charged criminally for publicly displaying a four-letter expletive in reference to the draft); Street v. New York, 394 U.S. 576, 579, 594 (1969) (overturning the malicious mischief conviction of a defendant who burned the American flag and stated "[w]e don't need no damn flag"). The Court in *Street* relied on the language of Justice Jackson who wrote that the Constitution mandates that citizens are free "'to be intellectually and spiritually diverse'" and that the freedom to be different is not limited merely to unimportant things. 394 U.S. at 593 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943) (holding that requiring unwilling schoolchildren to salute the flag violates the First and Fourteenth Amendments)).

ceipt of compensation.[77] According to the majority, denying the respondents the opportunity to receive compensation not only removed an important incentive toward creating more speech, but actually induced them to curtail their expressive activity.[78] Another troubling consequence of the honoraria ban, the Justice propounded, is that it imposed a more significant burden upon the respondents than it did upon the relatively small number of lawmakers and high-ranking executive officers.[79] Such high-ranking officials and lawmakers, the Justice offered, have little time to express views unrelated to their official duties.[80] The ban upon remuneration, the Justice posited, would inevitably reduce the expressive output of the lower paid, rank-and-file employees.[81] Furthermore, the Court noted, this vast disincentive upon the speech of government employees significantly affected the right of the public to know what these employees would have written or said.[82]

The Court summarily dismissed the government's first argument supporting the ban on the receipt of honoraria.[83] Because

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77 *See National Treasury*, 115 S. Ct. at 1014; *see also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 109, 123 (1991) (striking down a state law requiring income derived from the publication of books written by convicted criminals to be deposited in an escrow account for the benefit of the victims' family). The Court held that this law abridged the convicted criminal's First Amendment rights by singling out a particular type of expression based solely upon the content of the speech. *See Simon & Schuster*, 502 U.S. at 123; *see also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 223, 234 (1987) (invalidating an Arkansas sales tax because it violated the First Amendment by taxing "general interest magazines, but exempt[ing] newspapers and religious, professional, trade, and sports journals"); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 591-92 (1983) (declaring a use tax on ink and paper violative of the First Amendment because it imposed a substantial burden on the freedom of the press).

78 *See National Treasury*, 115 S. Ct. at 1014. Justice Stevens cited as an example of this disincentive to speech a newspaper that refused to publish a respondent's articles if he could not receive compensation for it. *See id.* n.15.

79 *See id.* at 1014.

80 *See id.* The majority contended that high-ranking Executive Branch employees and lawmakers, whose receipt of honoraria in the past led to the enactment of the ban, have little time to research and write on topics unrelated to their official duties. *See id.* Instead, Justice Stevens noted that these officials often are given invitations to make speeches on issues related to their work for the government. *See id.* Such officials, the Justice continued, often received travel reimbursements for an appearance. *See id.* In contrast, the majority stressed, rank-and-file employees usually received compensation for expression not related to their official duties, and only received invitations to speak depending upon "the market value of their messages." *Id.*

81 *See id.* at 1014-15.

82 *See id.* at 1015; *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (holding that the First Amendment compels the state to require the free flow of information for the benefit of consumers).

83 *See National Treasury*, 115 S. Ct. at 1015.

most of the expression in this case involved subject matter unrelated to government employment and was conducted outside of the workplace, the majority concluded that the government could not justify the ban as necessary to prevent an immediate workplace disruption.[84]

The Court then addressed the government's second contention, supported by *United Public Workers of America v. Mitchell*, that the ban was permissible "because the prohibited honoraria were 'reasonably deemed by Congress to interfere with the efficiency of the public service.'"[85] The Court noted that the government's reliance upon *Mitchell*, which upheld the Hatch Act's ban on partisan political activity, was misplaced.[86]

Initially, the Court distinguished the Hatch Act from the honoraria ban by noting that the Act protected public employee rights, instead of limiting them.[87] The honoraria ban, the Court conceded, affected the same vast number of federal employees as the Hatch Act.[88] The Court stressed, however, that unlike partisan political activity, receiving honoraria did not threaten employee morale.[89] Finally, the Court concluded that while Congress wrote the Hatch Act to address the demonstrated negative effects of partisan political activity, the government, in contrast, failed to establish how the Act advanced the interests it cited by applying the ban on honoraria to the respondents.[90]

The government, the Court noted, defended the ban as an

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84 *See id.* (citing Pickering v. Board of Educ., 391 U.S. 563, 567 (1968)). Although the *Pickering* Court recognized the school board's interest in preventing disruption, dissention, and controversy in the workplace, the Court held that the balancing test weighed in Pickering's favor. *See Pickering*, 391 U.S. at 567.

85 *National Treasury*, 115 S. Ct. at 1015 (quoting United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 101 (1947)). In *Mitchell*, the Court upheld the validity of the Hatch Act which prohibited all classified federal employees from participating in partisan political activity. *See Mitchell*, 330 U.S. at 99. The Court held that Congress was concerned with the "cumulative effect on employee morale of political activity by all employees." *Id.* at 101; *see also* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973) (holding that the congressional intention in enacting the Hatch Act was that the "rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine."). Additionally, the *Letter Carriers* Court offered that because government service was in no way related to political performance, the government was justified in taking steps to ensure that none of its employees would be pressured to vote for a certain candidate or perform a political task in an effort to please a superior. *See id.* at 566.

86 *See National Treasury*, 115 S. Ct. at 1015-16.

87 *See id.* at 1015.

88 *See id.*

89 *See id.*

90 *See id.*

effective means of assuring that federal officers will not "misuse or appear to misuse power by accepting" remuneration for unofficial and nonpolitical speaking and writing.[91] According to the Court, however, the government failed to produce any evidence of the misuse of power by Executive Branch employees below grade GS-16 related to the receipt of honoraria.[92] Because the legislature intended to avoid the appearance of impropriety among high-ranking executive officials and members of Congress, the Court noted, the government could not justify extending the ban to encompass all federal employees lower than grade GS-16.[93]

The Court next focused on the inconsistencies of the ban's text.[94] The Court noted that receiving honoraria for presenting a series of speeches or articles is only prohibited if " 'the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government.' "[95] The Court recognized, however, that the ban prohibited the receipt of honoraria for any *individual* article or speech, regardless of its relation to government employment.[96] The Justice posited that the ban's exemption for a *series* of speeches or articles containing no nexus to government employment undermined the ban's proscription on honoraria for all *individual* expression.[97] Without the existence of such a nexus, the Justice propounded, the probability of impropriety appeared unlikely.[98]

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91 *National Treasury*, 115 S. Ct. at 1015.

92 *See id.* at 1016. Justice Stevens noted that the government relied on a report done by the General Accounting Office to support its contention that the ban on honoraria was needed to prevent widespread improprieties. *See id.* n.18. According to the majority, however, the report did not mention any instance of impropriety concerning a lower-level employee's writing or speaking on a subject not related to his or her job. *See id.*

93 *See id.* at 1016. Justice Stevens commented that this large group of employees has "negligible power to confer favors on those who might pay to hear them speak or to read their articles." *Id.*

94 *See id.*

95 *Id.* (citing 5 U.S.C. § 505(3) (Supp. 1993)). Therefore, Justice Stevens noted, receiving compensation for a series of speeches or articles is prohibited only if there is a nexus between the individual's employment and the "subject matter of the expression or the identity of the payor." *Id.* In contrast, the Justice emphasized, receiving payment for an individual speech or article is forbidden regardless of the subject matter or the relationship between the payor and the author's official duties. *See id.*

96 *See National Treasury*, 115 S. Ct. at 1016.

97 *See id.* at 1016-17.

98 *See id.* at 1017. The government's sole argument against having a general nexus limitation, the majority explained, was that having "a wholesale prophylactic rule is easier to enforce than one that requires individual nexus determinations." *Id.* But the nexus requirement for a series of speeches or articles, noted the Court, reflected the view that the nexus requirement could be enforced on a more limited scale. *See*

The Court then noted that the statute's definition of honoraria was limited to payment for expressive activities, and did not include payment for serving on a corporate board, consulting, travel, or a number of other entertainment expenses.[99] By restricting honoraria for "'an appearance, speech or article,'" however, the majority asserted that Congress had imposed a greater burden on activities that normally enjoyed more constitutional protection than less protected activities such as serving on a company's board.[100]

Because § 501(b) specifically limited expression, the Justice continued, the government's burden of justifying the restriction was heightened.[101] Alluding to words written by Justice Brandeis, the majority stated that for a burden put upon expression to be reasonable, a stronger justification than the mere speculation of significant harm is required.[102] To satisfactorily justify the suppression of speech, the majority concluded, the government must prove that serious evil could reasonably occur if the expression is practiced.[103] The government, the Justice noted, failed to persuade the Court that § 501(b) was a reasonable response to the harms it had predicted.[104] Accordingly, the majority held that any benefit that might be conferred upon the government by a ban on honoraria would not adequately justify § 501(b)'s crudely crafted, blanket burden upon the expressive activities of the vast number of respondents.[105]

Turning to the appropriate remedy, the Court noted that the remedy upheld by the court of appeals was probably over-inclusive.[106] By enjoining the enforcement of the ban against every member of the Executive Branch, the majority posited, the appeals court had, in fact, affirmed relief to parties not before the court.[107]

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id. A massive burden on the free speech rights of almost 1.7 million people, the Justice concluded, required a stronger justification than a claim of administrative convenience. *See id.*

99 *See id.*

100 *Id.* (quoting 5 U.S.C. § 505(3) (Supp. 1993)).

101 *See National Treasury*, 115 S. Ct. at 1017.

102 *See id.* (citing Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of free speech and assembly.")).

103 *See id.* (citing *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring) ("To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.")).

104 *See id.* at 1017-18.

105 *See id.* at 1018.

106 *See National Treasury*, 115 S. Ct. at 1018.

107 *See id.* The Justice offered that the relief granted to senior Executive Branch

Furthermore, the Court commented, the injunction prohibited enforcement of the ban even when there existed an obvious nexus between the employee's official job duties and the subject-matter of the expression or the position of the person paying for the expression.[108] The majority noted that as an alternative to an outright reversal, the government requested that the judgment of the lower court be modified by upholding the law, first, as it applied to employees not before the Court and, second, as it related to instances where a nexus existed.[109]

Focusing on the government's first request, the majority agreed that relief should be limited to those parties presently before the Court for three reasons.[110] First, the Justice stated that relief should not be provided to individuals not before the Court when a narrower remedy existed that would fully protect the parties.[111] Second, the Court continued, there might conceivably be different reasons advanced by the government for applying the ban to senior Executive Branch officials than those offered in this case.[112] Finally, the majority noted that the remedy imposed by the lower courts required tampering with the law's text, a practice the Court strives to avoid.[113]

Continuing, the Court rejected the government's second request that a nexus requirement be crafted within the remedy, noting that this type of modification would amount to unnecessary judicial legislation.[114] Rewriting the statute, the Justice commented, should be left to Congress.[115] Therefore, the majority

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officials was over-inclusive because the respondents included only employees graded GS-16 and below. *See id.*

108 *See id.*

109 *See id.* The lower court, the Justice mentioned, did not reach a conclusion on the application of the ban to employees of the Judicial or Legislative Branches. *See id.* n.22.

110 *See id.* at 1018.

111 *See National Treasury*, 115 S. Ct. at 1018. Furthermore, the majority offered, the Court need not decide on the applicability of the ban to senior Executive Branch officers because these officials had received a 25 percent pay increase to offset the ban's effect upon them. *See id.* at 1019.

112 *See id.* This, the majority asserted, would present a different constitutional issue for the Court to rule upon. *See id.* The majority also stated that the Court adheres to a policy of avoiding unnecessary determinations of constitutional questions. *See id.*; *see also* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (stating that the Court will not attempt to anticipate a constitutional question) (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885)).

113 *See National Treasury*, 115 S. Ct. at 1019.

114 *See id.*

115 *See id.* The Court noted that the statute was crudely drafted because it required

concluded, the court of appeals correctly deferred to Congress the responsibility of crafting a narrower statute.[116]

In conclusion, the majority affirmed that part of the judgment of the court of appeals ordering an injunction against enforcing § 501(b) against the respondents.[117] The majority, however, reversed the lower court's relief to parties not involved in the lawsuit and remanded the case for further proceedings.[118]

In an opinion concurring in part and dissenting in part, Justice O'Connor stated that the honoraria ban violated the First Amendment, but chose to write a separate opinion for two reasons.[119] First, the Justice expounded upon the Court's decisions in this area beginning with *Pickering*.[120] Second, Justice O'Connor stated that the remedy imposed by the Court was too broad.[121]

Justice O'Connor commenced by citing the balancing test of *Pickering* as the appropriate measure for determining whether the restriction of the public employees' expression was justifiable under the First Amendment.[122] Because the expression at issue concerned expression conducted during off-hours, the Justice stated that there was no question that the speech was a matter of public concern.[123]

In noting the distinction recognized by the majority between *ex ante* prohibitions of speech and *ex post* disciplinary actions, Justice O'Connor stated that there was little difference between the two.[124] Moreover, the Justice continued, some governmental em-

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a nexus for prohibiting a series of speeches, yet did not require the connection for an individual speech. *See id.* Furthermore, the majority submitted, the Congress had given inconsistent signals concerning which categories of speech should require the nexus. *See id.* n.26. The majority concluded that the process of determining what type of nexus should be required fell within the powers of Congress, and was not the proper situation in which the Court should intervene. *See id.* at 1019 & n.26.

116 *See id.* at 1019.

117 *See id.*

118 *See National Treasury*, 115 S. Ct. at 1019.

119 *See id.* at 1019-20 (O'Connor, J., concurring in part and dissenting in part).

120 *See id.* at 1020 (O'Connor, J., concurring in part and dissenting in part).

121 *See id.*

122 *See id.* (citing Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)). Under this test, the Justice reiterated that the Court must weigh the interest of the public employee to comment upon issues of public concern against the government's interest as employer to maintain the efficiency of the services that it performs. *See id.*

123 *See National Treasury*, 115 S. Ct. at 1020 (O'Connor, J., concurring in part and dissenting in part) (citing Connick v. Myers, 461 U.S. 138, 147 (1983)).

124 *See id.* An *ex ante* prohibition on expression restricts speech before it happens while an *ex post* punishment focuses upon objectionable expression that has already occurred. *See id.*; *see also* Armstrong v. Executive Office of the President, 90 F.3d 553, 564 (D.C. Cir. 1996) (distinguishing *ex ante* approval from *ex post* review). Justice O'Connor stated that the distinction can sometimes be useful because *ex ante* rules,

ployers might prefer the codification of workplace policies providing notice to employees instead of ad hoc reactions to alleged employee misconduct.[125] Drawing a bright line based upon the *ex ante/ex post* distinction, the Justice posited, would be overly intrusive upon "'the government's mission as employer.'"[126]

The Justice, however, agreed with the majority that substantial weight had to be put on the respondents' side of the *Pickering* balancing test given the extent of the restriction on expression presented by the honoraria ban.[127] Furthermore, Justice O'Connor concurred with the majority that removing the incentive to speak had the effect of inhibiting expression on issues of potentially substantial public interest.[128] Justice O'Connor commented that as the extent of the intrusion upon employee expression rises, the government's burden in justifying those restrictions also increases.[129]

Continuing, the Justice also agreed with the Court's conclusion that the government failed to justify the broad ban upon employee speech.[130] Referring to the two reports relied upon by the government as necessitating the imposition of a broad ban on honoraria, Justice O'Connor asserted that neither document substantiated the government's assertions of problems relating to the acceptance of honoraria by lower-level Executive Branch employees.[131] The Justice propounded that more than simply asserting a laudable goal, such as administrative efficiency, is needed to justify far-reaching intrusions upon First Amendment freedoms.[132]

Furthermore, Justice O'Connor agreed with the Court that the

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unlike *ex post* rules, can be over-inclusive or under-inclusive. *See National Treasury*, 115 S. Ct. at 1020 (O'Connor, J., concurring in part and dissenting in part). Reliance upon this distinction, the Justice concluded, should not substitute for the case-by-case method of *Pickering*. *See id.*

125 *See National Treasury*, 115 S. Ct. at 1020 (O'Connor, J., concurring in part and dissenting in part).

126 *Id.* (quoting Waters v. Churchill, 114 S. Ct. 1878, 1887 (1994)).

127 *See id.*

128 *See id.*

129 *See id.* at 1021 (O'Connor, J., concurring in part and dissenting in part).

130 *See National Treasury*, 115 S. Ct. at 1021 (O'Connor, J., concurring in part and dissenting in part).

131 *See id.* The government, the Justice commented, asserted the need for a ban on honoraria to curb real and perceived abuses and to maintain a level of operating efficiency over its public service functions. *See id.* at 1020, 1021 (O'Connor, J., concurring in part and dissenting in part).

132 *See id.* at 1021 (O'Connor, J., concurring in part and dissenting in part); s*ee also* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 550, 556 (1973) (upholding the Hatch Act's prohibition on partisan political activity against a First Amendment challenge)).

statute's loopholes casted some doubt upon the extent of the perceived problem offered in the government's justification of the ban.[133] Moreover, the Justice concluded, such inconsistencies undermined the government's administrative convenience justification, and weakened the government's asserted desire to impose a broad, prophylactic ban.[134]

Consequently, the Justice propounded that although the government possesses leeway in restricting the speech of its employees, the broad ban contained in § 501(b) exceeded the acceptable limits.[135] Absent empirical or anecdotal data demonstrating the necessity for such a far-reaching intrusion upon the First Amendment rights of the affected employees, Justice O'Connor opined that the government had failed to meet its burden.[136] Thus, Justice O'Connor stated that the honoraria ban was unconstitutional as it applied to the respondents in prohibiting them from receiving compensation for expression with no connection to their governmental employment.[137]

Turning to the remedy, Justice O'Connor agreed that relief should be limited to the parties before the Court, but stated that the statute should be invalidated only as it applied to compensation received for expression having no nexus to government employment.[138] Justice O'Connor, like the dissent, stated that the majority's remedy was unduly broad because it enjoined enforcement of the entire section as it applied to the respondent class.[139]

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133 *See National Treasury*, 115 S. Ct. at 1021 (O'Connor, J., concurring in part and dissenting in part). The Justice offered that the writer of a series of speeches can receive compensation so long as those speeches have no connection to the author's official duties with the government. *See id.* at 1021-22 (O'Connor, J., concurring in part and dissenting in part). For an individual speech, however, the Justice observed that the author cannot receive compensation regardless of the existence of any nexus. *See id.*

134 *See id.*; *see also* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2044 (1994) (holding that exemptions to an ordinance banning almost all residential signs detracted from the rationale offered by the government for restricting the expression in the first place).

135 *See National Treasury*, 115 S. Ct. at 1022 (O'Connor, J., concurring in part and dissenting in part).

136 *See id.*

137 *See id.*

138 *See id.* According to the Justice, the question of the statute's constitutionality as applied to speech bearing a relationship to the author's government employment is a more difficult issue. *See id.* Furthermore, the Justice maintained that the majority overlooked this nuance when it enjoined the enforcement of § 501(b). *See id.* Accordingly, Justice O'Connor concluded that the relief to respondents should be narrowly tailored and should invalidate the statute only as it applied to expression without the nexus to government employment. *See id.*

139 *See id.* at 1023 (O'Connor, J., concurring in part and dissenting in part).

Because the statute contained a nexus requirement for a series of speeches or articles, the Justice propounded that this nexus principle could logically serve as an "appropriate remedial line" for all expression.[140]

Justice O'Connor next stated that by striking the entire honoraria provision instead of invalidating the ban only as it applied to no-nexus speech, the majority had done more than was necessary to correct the problem at hand.[141] The Justice noted that the Court had previously invalidated a particular application of a statute without striking the entire statute.[142] Therefore, Justice O'Connor propounded, the Court had in past cases implicitly concluded that striking only a portion of a statute was preferable and more consistent with legislative intent than invalidating an entire law.[143] Thus, the Justice concluded that severing the application of the ban pertaining to no-nexus speech, and leaving intact the provision as it relates to high-level Executive Branch officials would best effectuate the intent of Congress.[144] Justice O'Connor concluded that § 501(b) was unconstitutional and stated that the pro-

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140 *National Treasury*, 115 S. Ct. at 1023 (O'Connor, J., concurring in part and dissenting in part).

141 *See id.* The majority, Justice O'Connor explained, desired to avoid judicial legislation by invalidating the ban only as it applied to the no-nexus speech. *See id.* By enjoining the enforcement of the entire provision, however, the Justice believed that the Court achieved a result that was "equally if not more inconsistent with congressional intent." *Id.*

142 *See id.*; *see also* Tennessee v. Garner, 471 U.S. 1, 3 (1985) (invalidating a state provision allowing police officers to use all necessary means to arrest a fleeing suspect, but only as applied to unarmed, nondangerous suspects); United States v. Grace, 461 U.S. 171, 172-73, 183 (1983) (striking down a provision of a federal law making it illegal to march in processions in and around the Supreme Court building because the statute's extension to the public fora was inadequately justified). When a statute is challenged by one who desires to exercise protected expression that the law purports to forbid, the law may be invalidated "to the extent that it reaches too far, but otherwise left intact." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985). The *Brockett* Court declared invalid a state obscenity law "only insofar as the word 'lust' is taken to include normal interest in sex." *Id.* at 504-05.

143 *See National Treasury*, 115 S. Ct. at 1023 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor remarked that this is entirely consistent with the Court's precedent concerning severability that hold that congressional silence does not amount to a presumption against severability. *See id.*; *see also* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686-87 (1987) (holding the legislative-veto provision of the Airline Deregulation Act severable from the remainder of the Act because the Court concluded that Congress would have enacted the law even had the legislative veto not been included). When faced with a severability question, the Court must decide whether the legislature would desire the law to remain valid "to whatever extent was constitutionally possible." Stern, *supra* note 27, at 82-83.

144 *See National Treasury*, 115 S. Ct. at 1024 (O'Connor, J., concurring in part and dissenting in part).

vision should be invalidated to the extent that it prohibited the respondents from receiving compensation for non-work related expression.[145]

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented by attacking two aspects of the majority opinion.[146] First, Chief Justice Rehnquist asserted that the majority understated the government's justification of the ban and overstated the amount of expression that would actually be deterred.[147] Second, the Chief Justice propounded, the majority limited its discussion of the ban's impact to only a couple of individual cases, but then invalidated the ban as it applied to the entire respondent class.[148]

Chief Justice Rehnquist began the dissent by distinguishing the honoraria ban with the law rejected in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,[149] which required profits derived from an accused or convicted criminal's works relating to his or her crime to be held in trust.[150] The Chief Justice noted that while the statute at issue in *Simon & Schuster* was content-based because it related only to the speech of criminals, the honoraria ban was content-neutral.[151] Thus, the Chief Justice inferred, the ban did not afford the government potential "control over the marketplace of ideas."[152]

The Chief Justice cited the *Pickering* balancing test as the standard by which a public employer's First Amendment restrictions should be judged.[153] In arriving at this balance, the Chief Justice noted, the Court has given substantial deference to the public employers' predictions of disruptions in the workplace.[154] The government, Chief Justice Rehnquist acknowledged, must possess sufficient discretion and control to effectively manage its personnel.[155]

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145 *See id.*

146 *See id.* (Rehnquist, C.J., dissenting).

147 *See id.*

148 *See id.*

149 502 U.S. 105 (1991).

150 *See National Treasury*, 115 S. Ct. at 1024-25 (Rehnquist, C.J., dissenting) (citing *Simon & Schuster*, 502 U.S. at 109).

151 *See id.* at 1025 (Rehnquist, C.J., dissenting). This is true, the Chief Justice explained, because the honoraria ban prohibited compensation for any speech made by any government employee regardless of the expression's content or viewpoint. *See id.*

152 *Id.*

153 *See id.* (citing Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).

154 *See id.* This has been true, the Chief Justice averred, even when the expression at issue was on "a matter of public concern." *Id.* (citing Waters v. Churchill, 114 S. Ct. 1878, 1887-88 (1994)).

155 *See National Treasury*, 115 S. Ct. at 1025 (Rehnquist, C.J., dissenting) (citing Con-

The Chief Justice next noted that the Court had upheld the Hatch Act's[156] restrictions upon Executive Branch employees' expression most recently in *Civil Service Commission v. National Association of Letter Carriers.*[157] By forbidding Executive Branch employees from engaging in partisan political activities, the Chief Justice continued, the Hatch Act guarded against both actual and perceived impropriety and fostered the overall effectiveness of the federal government.[158] Because the Court applied the *Pickering* balancing test and upheld the Hatch Act, the Chief Justice concluded, the majority erred in deciding that the honoraria ban was unconstitutional.[159]

First, the Chief Justice offered, the majority ignored that the ban would help prevent the appearance of impropriety, and instead focused only upon the burdensome effects that the statute had in a few carefully selected instances.[160] The Chief Justice propounded that the examples cited by the majority represented only a small proportion of the total class and type of expression restricted by the ban.[161] An unknown number of the respondents, Chief Justice Rehnquist continued, would receive compensation for expression that had a direct nexus to their employment with the government.[162] The government, according to Chief Justice Rehnquist, has an especially strong interest in preventing impropriety or the appearance thereof by banning the receipt of compensation for expression directly related to governmental employment.[163]

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nick v. Myers, 461 U.S. 138, 151 (1983) (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part and concurring in the result)).

156 *See* United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 99 (1947). The Court, the Chief Justice explained, upheld the Act's sweeping restrictions placed upon the partisan activities of employees of the Executive Branch. *See National Treasury*, 115 S. Ct. at 1026 (Rehnquist, C.J., dissenting).

157 413 U.S. 548 (1973). In this case, the Court applied the *Pickering* balancing test and determined that the Act was permissible because of the important objectives that it sought to protect against, namely, the ill-effects of partisan political activity by Executive Branch employees. *See id.* at 564-65.

158 *See National Treasury*, 115 S. Ct. at 1026 (Rehnquist, C.J., dissenting).

159 *See id.* at 1026-27 (Rehnquist, C.J., dissenting).

160 *See id.* at 1027 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist argued that the examples cited by the majority involved situations in which the government's interest were low, such as the mail handler who spoke on the Quaker religion and the engineer who spoke about black history. *See id.*

161 *See id.* The examples cited, the Chief Justice posited, by no means represented the breadth of the respondent class, for it included all employees, GS-16 and below. *See id.*

162 *See id.*

163 *See National Treasury*, 115 S. Ct. at 1027 (Rehnquist, C.J., dissenting). The Chief Justice stated that when there is a nexus between the expression at issue and the

The Chief Justice next explained that the honoraria ban was enacted after the recommendations of two commissions.[164] Chief Justice Rehnquist noted that these commissions recommended that the practice of receiving honoraria be banned, and such a ban should apply not just to high-ranking officials, but to employees of all three government branches.[165] The Chief Justice stated that while the commissions realized the serious effects a complete ban on honoraria would have on governmental employees, they concluded that the positive impact of the ban would outweigh its negative effects.[166] The majority, the dissent averred, should have given more weight to the reports of these two commissions.[167]

Chief Justice Rehnquist attacked the majority's belief that employees under GS-16 have negligible power to give favors to those who might offer money in exchange for their expression.[168] According to the Chief Justice, bank examiners, tax examiners, and enforcement officials represent Executive Branch employees below grade GS-16 who have significant power and who could conceivably confer favors.[169]

Chief Justice Rehnquist further disagreed with the majority's dismissal of the Court's past interpretations of the Hatch Act.[170] The Chief Justice posited that because the Act denied Executive

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employment of the speaker, the interests of the government in preventing impropriety should certainly outweigh the employee's interest in receiving compensation. *See id.*; *see also* Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 210-11 (1982) (upholding a law that placed limitations on corporate and union contributions and expenditures related to federal elections).

164 *See National Treasury*, 115 S. Ct. at 1027 (Rehnquist, C.J., dissenting). These two commissions, the Chief Justice explained, were the 1989 Quadrennial Commission on Executive, Legislative and Judicial Salaries and The President's Commission on Federal Ethics Law Reform. *See id.*

165 *See id.* at 1028 (Rehnquist, C.J., dissenting). The Chief Justice stated that the Commissions had further noted that the honoraria paid often camouflaged attempts by individuals to gain favors. *See id.* at 1027 (Rehnquist, C.J. dissenting). Furthermore, many companies that paid honoraria, the Chief Justice continued, often did so in an attempt to enhance their access to government officials. *See id.* at 1028 (Rehnquist, C.J., dissenting).

166 *See id.*

167 *See id.* at 1027-28 (Rehnquist, C.J., dissenting).

168 *See id.* at 1028 (Rehnquist, C.J., dissenting).

169 *See National Treasury*, 115 S. Ct. at 1028 (Rehnquist, C.J., dissenting). Making a distinction between those officials below grade GS-16 and those above was, according to Chief Justice Rehnquist, "seriously flawed." *See id.* Such a distinction, the Chief Justice posited, was rejected by the Court in *Mitchell*. *See id.* There the Court rejected barring only administrative officials and not industrial workers from participating in partisan political activity. *See id.* (citing United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 102 (1947)). Differences between the two types of employees, the *Mitchell* Court noted, are "matters of detail for Congress." *See Mitchell*, 330 U.S. at 102.

170 *See National Treasury*, 115 S. Ct. at 1029 (Rehnquist, C.J., dissenting).

Branch employees the right to participate in partisan political activities, a right secured by the First Amendment,[171] it could hardly be characterized as protecting the rights of workers as the majority opinion stated.[172] Even though the Act shielded employees from potential pressure by their superiors to become involved in politics, the Chief Justice stated that it undoubtedly restricted First Amendment freedoms.[173]

Noting the majority's assertion that the ban was inconsistent because it excepted a series of articles or speeches with no nexus to governmental employment, Chief Justice Rehnquist stated that such an exception demonstrated Congress's desire to inhibit as little expression as possible.[174] According to the Chief Justice, employees are less likely to present a series of articles or speeches without compensation than they would be to offer a single article or speech.[175] Thus, the Chief Justice concluded, this smaller number of employees makes the nexus requirement less difficult to enforce.[176]

Finally, the Chief Justice stated that the honoraria ban, unlike much of the speech to which the *Pickering* doctrine had been applied, prohibited no speech based on its content.[177] The ban, the Chief Justice continued, was content-neutral and placed only a limited burden upon the free speech rights of government employees.[178] Consequently, Chief Justice Rehnquist concluded, Congress was justified in enacting the ban by citing its significant interest in preventing impropriety.[179]

As to the remedy, Chief Justice Rehnquist noted that the majority had rendered the statute inapplicable as to the entire respondent class.[180] Such a broad remedy applying to the entire class

171 *See* Buckley v. Valeo, 424 U.S. 1, 15 (1976) (per curiam) (holding that the First Amendment guarantees the right to engage in political expression and association).

172 *See National Treasury*, 115 S. Ct. at 1029 (Rehnquist, C.J., dissenting).

173 *See id.*

174 *See id.*

175 *See id.*

176 *See id.* This, according to the Chief Justice, blunted the majority's criticism that the nexus requirement is inconsistent and administratively burdensome. *See id.* Because the number of employees who deliver a series of articles or speeches would presumably be smaller, the Chief Justice reasoned, the nexus requirement would also be enforceable and prohibit less speech. *See id.*

177 *See National Treasury*, 115 S. Ct. at 1029-30 (Rehnquist, C.J., dissenting) (citing Rankin v. McPherson, 483 U.S. 378, 381-82 (1987) (examining a case where a public employee was fired based upon the content of the words expressed)).

178 *See id.* at 1030 (Rehnquist, C.J., dissenting).

179 *See id.*

180 *See id.*

regardless of the existence of a nexus was, according to Chief Justice Rehnquist, inappropriate.[181] Because the majority's analysis was limited to the ban's applications where there was no nexus, Chief Justice Rehnquist contended that the remedy imposed was too broad.[182] Thus, Chief Justice Rehnquist concluded that even if § 501(b) was in violation of the First Amendment, the appropriate remedy would be to affirm the judgment only to the extent that it permitted respondents to receive honoraria for expression unrelated to their employment.[183]

By rejecting the application of the honoraria ban as it applied to the respondent class, the Court continued to expand the free speech rights of public employees.[184] Indeed, in this case, the Court overturned a provision of a statute that did not directly prohibit any speech at all, but only prohibited receipt of the incentive to produce more expression.[185] Therefore, the Court in *National Treasury* substantially advanced the First Amendment rights of public employees while at the same time significantly increasing the

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181 *See id.* The Chief Justice described the surprise ending of the majority opinion as "an O. Henry ending." *Id.*

182 *See National Treasury*, 115 S. Ct. at 1030 (Rehnquist, C.J., dissenting). The Chief Justice cited the Court's opinion in *United States v. Grace*, 461 U.S. 171 (1983), as an example of crafting a narrowly tailored remedy. *See id.* In *Grace*, the Court analyzed the constitutionality of 40 U.S.C. § 13k (1986), which prohibited the displaying of a banner, flag, or any other device designed to attract attention on the sidewalks surrounding the Supreme Court building. *See Grace*, 461 U.S. at 183. The Court determined that § 13k was "unconstitutional as applied to those sidewalks." *Id.* Chief Justice Rehnquist commented, however, that the majority opinion in *National Treasury* did not craft a narrow remedy like the one imposed in *Grace*, but instead invalidated the honoraria ban as it applied to all the respondents, even speech that related to their employment. *See National Treasury*, 115 S. Ct. at 1031 (Rehnquist, C.J., dissenting).

183 *See National Treasury*, 115 S. Ct. at 1031 (Rehnquist, C.J., dissenting).

184 *See generally id.* The Court's opinion is consistent with the trend of the last thirty years of granting a greater degree of constitutional protection to the First Amendment rights of public employees. *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (holding that a court must balance the public employee's right to comment on matters of public concern against the government's desire to promote efficiency in the workplace); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 413 (1979) (granting constitutional protection to the privately expressed speech of public employees). Thus, the Court strikes down an overly broad and inconsistent section of a law that was primarily intended as a check on legislators. *See National Treasury*, 115 S. Ct. at 1016-18. The ban on honoraria, though, still applies to all governmental employees not part of the respondent class. If another class action suit is commenced on behalf of all executive branch employees above GS-16 challenging the validity of the ban, it is not clear how the Court would rule, although it is likely that these higher level employees would generate less sympathy from the Justices.

185 *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 591-92 (1983) (holding that a tax on paper and ink violated the First Amendment by placing a significant burden on free expression).

burden on the government when it imposes any restriction upon the expression of its employees.[186]

While the Court made clear that the honoraria ban in § 501(b) as applied to the respondents was unconstitutional, it left the door open to congressional tinkering with the statute.[187] It is therefore conceivable that a similar but more narrowly crafted and consistent honoraria ban may be rendered appropriate by the Court in the future. If Congress does decide to rewrite the ban in § 501(b) to proscribe the receipt of honoraria by all government employees for expression related to their employment, there is a significant possibility that the Court would not reject it.[188]

Thus, this inconsistent and overly broad honoraria ban is still good law except as it applies to lower-level Executive Branch employees. Furthermore, it is not entirely clear how the Court would rule on a challenge to the ban by another group of federal employees, or whether the ban would be acceptable if it were rewritten to only proscribe honoraria when received for expression related to the employee's employment. The majority's opinion leaves many questions about the ban unanswered, and keeps the door open for future litigation.

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186 *See National Treasury*, 115 S. Ct. at 1017. The Court rejected the government's administrative convenience justification for placing a blanket ban on the receipt of honoraria irrespective of the existence of a nexus between the expression and the speaker's employment duties. *See id.* at 1018. Furthermore, the Court noted that because the ban chilled potential speech, the government's burden regarding this statutory restriction is greater than it would be were it attempting to justify an isolated disciplinary action. *See id.* at 1014 (citing Near v. Minnesota, 283 U.S. 697 (1931)). The majority concluded that any benefit the ban may produce for the government was insufficient to warrant its profound restriction upon the respondents' free speech rights. *See id.* at 1018.

187 *See id.* at 1017-19. Indeed, a significant portion of the majority's argument against the ban is that it was not narrowly crafted, and that it contained a nexus requirement for a series of speeches or articles but not for individual speeches or articles. *See id.* at 1016-17. Moreover, the majority does not squarely address situations in which the expression of the expressor is related to his or her employment. *See id.* at 1027 (Rehnquist, C.J., dissenting).

188 *See id.* at 1024 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist and Justices Scalia and Thomas make plain their opinion that even the broader ban is acceptable to them. *See id.* Also, Justice O'Connor, while concurring in the judgment of the Court, disagreed with the majority's remedy and believed that relief to the respondents should have been granted only for speech with no nexus to employment. *See id.* at 1024 (O'Connor, J., concurring in part and dissenting in part). Therefore, at least four Justices would uphold a more limited honoraria ban.