THE CASE FOR MINIMAL REGULATION OF PUBLIC EMPLOYEE FREE SPEECH: A CRITICAL ANALYSIS OF THE FEDERAL HONORARIA BAN CONTROVERSY

INTRODUCTION

In the Ethics Reform Act of 1989,[1] Congress responded to pressure from the executive branch and granted pay raises for most federal employees in exchange for a ban on what had been for some a substantial but controversial source of income: honoraria.[2] Congress decided to ban honoraria because of negative public responses to excessive honoraria taken by Congress members and high-level executive branch employees.[3] Specifically, Congress justified the broad ban by claiming

1. Pub. L. No. 101-194, 103 Stat. 1717 (1989) (codified as amended in scattered sections of 2, 5, 18, and 38 U.S.C.).

2. United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1009 (1995) (citing TO SERVE WITH HONOR: REPORT OF THE PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM 36 (1989)); *see id.* at 1008-09 (describing how Congress responded to the Report of the 1989 Quadrennial Commission on Executive, Legislative, and Judicial Salaries, which recommended prohibiting receipt of honoraria in exchange for a pay raise for top officials); Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417, 440-43 (1990) (describing how in government ethics legislation, including the Ethics Reform Act, Congress has determined the scope of ethics rules by judging their potential impact on the government's ability to recruit employees).

3. *See infra* part I (describing the history of the Honoraria Ban); *see also* Brief for Petitioners at 3-6, United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995) (No. 93-1170) (explaining that the ban was based in part on recommendations that

that it prevented the appearance of impropriety from undermining public confidence in the federal workforce. However, Congress not only deprived those federal employees whose practices caused public concern, but also prohibited all federal employees from receiving honoraria.[4]

The Honoraria Ban[5] spawned a five-year constitutional battle over whether Congress could deprive federal employees of the right to be paid for speech.[6] In February 1995, the United States Supreme Court held the Honoraria Ban unconstitutional in *United States v. National Treasury Employees Union*[7] because Congress failed to justify the Ban's chilling effect on speech.[8] The Court concluded that Congress could not justify such a broad deterrent to speech with the vague assertion that honoraria impaired the effectiveness of the public workforce.[9] The Court did not, however, state what sort of ban would be constitutionally acceptable. Thus, if Congress still desires an Honoraria Ban, it must determine what sort of ban comports with the constitutional rights of federal employees.

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receipt of honoraria created an appearance of impropriety); Joseph C. Bryce et al., *Ethics in Government*, 29 AM. CRIM. L. REV. 315 (1992) (describing scandals which motivated the ethics law reform effort); Robert S. Collins, *Ethics and the First Amendment: The Applicability of the Honorarium Ban of the Ethics Reform Act of 1989 to the Executive Branch*, 62 GEO. WASH. L. REV. 888, 892 (1994) (noting that Congress was primarily concerned with congressional honoraria and hardly discussed career government workers' honoraria).

At the time of the Ethics Reform Act of 1989, the only public confidence that had been shattered by receipt of excessive honoraria had been public confidence in Congress. *See* United States v. National Treasury Employees Union, 990 F.2d 1271, 1278 (D.C. Cir. 1993) (stating that the Ban's history "indicates a primary concern with the receipt of honoraria by Members of Congress").

4. *See* 5 U.S.C. app. § 501(b) (Supp. IV 1992).

5. 5 U.S.C. app. § 501(b) (Supp. IV 1992). In this note, 5 U.S.C. app. § 501 is referred to as the Honoraria Ban or the Ban.

6. Initially, federal employees sued to prevent the ban from taking effect, and when the courts denied their motion for an injunction, National Treasury Employees Union v. United States, 927 F.2d 1253 (D.C. Cir. 1991), *aff'd*, 498 U.S. 1020 (1991), they challenged the application of the Ban. *See* National Treasury Employees Union v. United States, 788 F. Supp. 4 (D.D.C. 1992); *aff'd*, 990 F.2d 1271 (D.C. Cir. 1993), *aff'd* 115 S. Ct. 1003 (1995); *see also infra* part III (discussing the litigation challenging the Honoraria Ban).

7. 115 S. Ct. 1003 (1995).

8. *Id.*; *see infra* part III (discussing the Supreme Court's decision).

9. *Treasury Employees*, 115 S. Ct. at 1015-18 (finding that the government failed to provide evidence justifying a blanket limitation on the speech of all federal employees despite the rule's administrative convenience).

Congress should impose another ban only after careful reflection on the respective interests of public employees, their employers, and the public at large.

One of the United States government's most active roles is its role as an employer. The government hires, fires, disciplines, and evaluates its employees everyday.[10] Because the federal government is more than just a private employer,[11] however, it must balance its interests in regulating its employees' activities and maintaining discipline against the employees' rights to be free from unwarranted government interference.[12]

When making employment decisions that may affect employees' fundamental rights, the government should balance several competing interests.[13] Because the government needs to function efficiently as an employer[14] it may minimize public resistance to its actions by sustaining the highest public confidence in the government's integrity.[15] But

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10. *See* Board of Regents v. Roth, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting) ("Employment is one the greatest if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable.").

11. *Cf.* Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 59-65 (1990) (criticizing the Supreme Court for adopting standards for public employee free speech that focus on private employment models and outdated organizational theories).

12. Pickering v. Board of Education, 391 U.S. 563, 568 (1968) (establishing a balancing test to protect public employees from retaliatory discharge for exercising their rights to free speech); *see also* Rankin v. McPherson, 483 U.S. 378, 384 (1987) (noting that the "matter of public concern [is] necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment."); part III.B (discussing the standard of review for public employees' free speech challenges); *cf.* United Public Workers v. Mitchell, 330 U.S. 75, 99 (1947) (upholding the Hatch Act, 18 U.S.C. § 61 (1988), as a valid restriction on public employees' First Amendment rights and remarking that "Congress [sic] and the President are responsible for an efficient public service . . . [i]f, in their judgement, efficiency may be best obtained by prohibiting active participation . . . in politics . . . we see no constitutional objection").

13. *See Pickering*, 391 U.S. at 568.

14. *See, e.g., Rankin*, 483 U.S. at 384 ("On the one hand, public employers are *employers*, concerned with the efficient function of their operations . . . .").

15. *See* Crandon v. United States, 494 U.S. 152 (1990). In *Crandon*, the Supreme Court discussed one of the Federal Conflict of Interest statutes, 18 U.S.C. § 209 (1988), which allows federal employees to receive salary supplements only from the United States. The Court began its analysis of the statute, as applied to pre-employment severance pay,

the government should also foster and encourage employees' development as individuals.[16] The government should take affirmative steps to foster representative government by helping citizens stay informed about important issues.[17] Finally, the government must respond to public concerns as it develops law, shapes policy, and enforces statutes and regulations.[18]

Congress ignored federal employees' interests in unfettered free speech, the public's interest in full access to important information, and the public's ability to gain access to educated and informed government workers' opinions when it banned all federal employees from receiving honoraria.[19] If Congress reformulates the Honoraria Ban, it will probably use a ban that applies only to honoraria received for job-related speech.[20] By discouraging job-related speech, however, Congress will encroach upon employees' rights to speak on a variety of subjects. Such a ban would not achieve Congress' stated goal of preventing the appearance of impropriety because most federal employees lack sufficient influence to peddle. Furthermore, outside the public employment context, the government may only impose such content-based regulations

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by stating that:

> Congress appropriately enacts prophylactic rules that are intended to prevent even the appearance of wrongdoing and may apply to conduct that has caused no actual injury to the United States . . . . Legislation designed to prohibit and to avoid potential conflict of interest in the performance of governmental service is supported by the legitimate interest in maintaining the public's confidence in the integrity of the federal service.

494 U.S. at 164-65.

16. *See* Ingber, *supra* note 11, at 53 (asserting that "the work place is a significant learning environment" that can "readily serve as a locus of personal and collective realization, growth, and expression").

17. At the core of the First Amendment's protection is political speech, therefore the government should protect the fora in which these issues are discussed. *Cf.* FCC v. League of Women Voters of California, 468 U.S. 364 (1984) (holding that Congress cannot prevent the dissemination of editorial opinion by prohibiting it on publicly funded television and radio stations).

18. *See* Pickering v. Board of Education, 391 U.S. 563, 572-73 ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent . . . it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

19. *See infra* part I (discussing Honoraria Ban's legislative history); part II (discussing the Ban's impact on employee rights).

20. *See infra* notes 199-201 (discussing proposed revisions of the Ban).

of speech if it can withstand strict constitutional scrutiny.[21] Thus, a job-related Honoraria Ban would serve no useful purpose and would impose the most harmful sort of restriction on speech.[22] Finally, the Supreme Court's opinion in *Treasury Employees* does not endorse a job-related ban.[23]

This Note proposes that Congress avoid imposing undesirable limits on the constitutional rights of federal employees. Instead of imposing a job-related ban Congress should trust existing conflict of interest rules to prevent influence peddling.[24] Conflict of interest rules prohibit executive branch employees from receiving payment of any sort from parties who do business with their employing agency.[25] Because existing conflict of interest rules also burden speech and speech-related activities, Congress can rely on them to prevent influence peddling, while avoiding

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21. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105, 115-18 (1991) (stating that content-based restrictions on speech are presumptively invalid); Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (requiring that the state "show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end"); FCC v. League of Women Voters of California, 468 U.S. 364, 383 (1984) (stating that regulations are content-based if enforcement requires examination of the message conveyed).

22. With the conclusions reached in this Note, compare David A. Golden, *The Ethics Reform Act of 1989: Why the Taxman Can't Be a Paperback Writer*, 1991 B.Y.U. L. REV. 1025 (1991). Golden evaluates the constitutionality of the Honoraria Ban by applying an amalgam of various First Amendment precedents and a "Paradigm" designed to measure the weight of the government's interest in regulating certain potential and actual conflicts of interest. *Id.* at 1031-45. Golden concludes that as applied to any low-level federal workers the Honoraria Ban should be unconstitutional because it is designed for Congress and is incongruous when applied to others. *Id.* at 1051. In addition to evaluating the Honoraria Ban under the First Amendment, Golden also suggests that the Ban violates the Fifth Amendment's Due Process Clause by infringing on protected liberty interest. *Id.* at 1046-49.

Golden's analysis overlooks the simple fact that the Court has already settled upon the two-part balancing test, described *infra* part II.B, as the appropriate device with which to account for government's unique relation with its employees. Adding an additional device, such as Golden's analytical paradigm, would mean that in some area's the interests of public employees and their governmental employers would be weighed not once but twice.

23. *See infra* notes 188-94 (applying the *Treasury Employees* opinion to a job-related honoraria ban).

24. Particularly, Congress should examine the restraints imposed on federal executive employees by rules promulgated in the 1960s. *See* Exec. Order No. 11,222, 3 C.F.R. 306 (1964-65); *see infra* notes 49-51 and accompanying text (discussing Exec. Order No. 11,222).

25. Exec. Order No. 11,222, § 201 (1), (2), 3 C.F.R. 306-07.

constitutional problems posed by a content-based bar. Additionally, relying on conflict of interest standards would allow free flow of information from informed and experienced government employees to the public at large.

Part I of this Note examines Congress' adoption of the Honoraria Ban.[26] Part II examines constitutional issues raised by the ban. Part III discusses the litigation arising out of the Honoraria Ban. Part IV discusses other constitutionality-related problems that could arise even if Congress implements a new, narrower Honoraria Ban. Finally in Part V, this Note proposes that instead of implementing a new Honoraria Ban, Congress simply rely on existing conflict of interest rules.

I. HISTORY OF THE HONORARIA BAN

The Ethics Reform Act of 1989[27] primarily strengthened financial disclosure requirements,[28] clarified conflict of interest rules,[29] and increased congressional salaries.[30] In addition to these changes in existing statutes, The Ethics Reform Act also forbade low and middle level federal employees to receive honoraria.[31] The Honoraria Ban

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26. This Note does not discuss the related problem of federal employees' outside earned income. While the Ethics Reform Act of 1989 imposed limits on the amount of income employees may receive, the limits only apply to a smaller number of high level government officials. *See* 5 U.S.C. app. 7 § 501. *See generally* Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57 (1992) (examining thoroughly various types of outside income).

27. Pub. L. No. 101-194, 103 Stat. 1716 (codified as amended in scattered sections of 2, 5, 18, and 38 U.S.C.). For purposes of this Note, the central provisions of the Act are 5 U.S.C. app. §§ 501(b) and 505. 5 U.S.C. app. § 505(b), 505 (Supp. IV. 1992). Congress amended the provisions of the Ethics Reform Act after 1989, but the amendments did not effect the Act's constitutionality and are not, therefore, discussed in this Note. *See* Pub. L. No. 102-90, 105 Stat. 447 (1991).

28. Ethics Reform Act, tit. II, § 202 (codified as amended in 5 U.S.C. app. §§ 101-12).

29. Ethics Reform Act, tit. I, § 101 (amending 18 U.S.C. § 207).

30. Ethics Reform Act, tit. VII, § 703 (raising the salaries of members of the House of Representatives, all persons on the Executive Schedule, and all Federal Judges by twenty-five percent).

31. 5 U.S.C. app. 7 § 501(b) provides: "An individual may not receive any honorarium while that individual is a Member, officer or employee." The Act further provides:

> The term "Member" means a Senator in, a Representative in, or a Delegate or Resident Commissioner to, the Congress.
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> The term "officer or employee" means any officer or employee of the Government

primarily served the government's interest as an employer by attempting to improve public confidence in government.[32] The Office of Government Ethics (OGE) promulgated regulations under the statute.[33] The Act provides civil penalties for violations of the Honoraria Ban.[34]

Congress hoped that the Ethics Reform Act would achieve the following two goals: improving public confidence in government by imposing more stringent ethics rules,[35] and making public service more

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> The term "honorarium" means a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent which such expenses are not paid or reimbursed.

5 U.S.C. app. §§ 505(1)-(3).

32. REPORT OF THE BIPARTISAN TASK FORCE ON ETHICS ON H.R. 3660, GOVERNMENT ETHICS REFORM ACT OF 1989, H.R. Doc. No. 165, 101st Cong., 1st Sess. 1 (1989) [hereinafter BIPARTISAN TASK FORCE REPORT] ("The purpose of the bill is to restore public confidence in the integrity of government officials by promoting the highest professional and ethical standards in public service.").

33. 5 C.F.R. § 2636.203 (1994).

34. 5 U.S.C. app. § 504(a) provides:

> The Attorney General may bring a civil action in any appropriate United States district court against any individual who violates any provision of § 501 or § 502. The court in which such action is brought may assess against such individual a civil penalty of not more that $10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater.

U.S.C. app. § 504(a) (Supp. IV 1992).

35. The Ethics Reform Act responded to a number of prominent scandals involving manipulation of public office for the office-holder's benefit. *See* Bryce, *supra* note 3, at 316 (attributing the move for ethics reform to the HUD scandal, the scandal leading to House Speaker Jim Wright's resignation, and other scandals). *See, e.g.*, Phil Gailey, *Dirty Laundry and Red-faced Reform*, ST. PETERSBURG TIMES, Jan. 19, 1990, at 10A. Involvement with the savings and loan scandal, allegations of influence peddling, and personal financial problems brought many members of congress under public scrutiny. *Id.* House Speaker Jim resigned after public questions arose about a book deal through which he circumvented limits on honoraria. *Id.* At the beginning of 1990, another Senator, David Durenberger, faced similar charges. *Id.*

Many existing ethics laws, including the Ethics in Government Act, had been enacted in response to earlier scandals including Watergate. *See* Bryce, *supra* note 3, at 315 (discussing impetus for the Ethics Reform Act).

appealing by improving government salaries.[36] Congress hoped to bolster its own deteriorating image by restricting receipt of honoraria for speaking and writing, limiting gifts from interest groups, and limiting use of government transportation for personal trips.[37] While much debate focused on linking congressional pay raises and limits on outside income to the problem of honoraria received by high-level officials,[38] little if

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36. The Act granted members of the House of Representatives a twenty-five percent pay raise. Pub. L. 101-194 § 703.

37. *See* BIPARTISAN TASK FORCE REPORT, *supra* note 32, at 6. The report showed concern for the undermined public confidence in both Congress and the federal government as a whole.

> Regardless of any actual corruption or undue influence upon a Member or employee of Congress, the receipt of gifts or favors from private interests may affect public confidence in the integrity of the individual and the institution of the Congress. Legitimate concerns of favoritism or abuse of public position may be raised by disclosure of frequent or expensive gifts from representatives of special interests . . . .

Id. The report stated that the controversy focused "primarily on honoraria fees accepted by Members of Congress." *Id.* at 13. The report concluded that "[i]n 1987, Members of the House and Senate received a combined total of $9.8 million in honoraria. . . . Significant increases in honoraria income in recent years has heightened the public perception that honoraria is a way for special interests to try to gain influence or buy access . . . ." *Id.*

38. Congress apparently believed that the public would only accept pay raises if government employees gave up controversial outside sources of income. However, by combining ethics rules and a congressional pay raise, Congress may have fatally undermined both of its efforts. As Representative Crane stated: "[T]he underlying premise behind [the Act] is that if we reform our errant ways, we are entitled to a 25 percent pay raise in 1991. To link these two issues is, to me, indefensible. Moreover, I would challenge both what is being defined a [sic] unethical behavior as well as the package designed to guarantee ethical reform." 135 CONG. REC. H8627 (daily ed. Nov. 14, 1989) (statement of Rep. Crane).

Many members of Congress protested the attempt to hide the pay raise behind ethics reform. They argued that the combination cheapened ethics reforms. Typical of opponents of the package were those members of Congress who agreed with the need for ethics reform, but, for obvious political reasons, would not support a pay raise. Among these was Mr. Heflin who remarked:

> I am opposed to increasing the pay of Members of Congress. It sends the wrong signal at the wrong time to the American people. [Senator Heflin described the problems caused by impending Gramm-Rudman-Hollings Budget Act cuts which would automatically occur if Congress did not reach a budget agreement]. Congress will appear to be very callous if it votes for a pay raise for itself in the face of these budget deficits. . . . [I] support the ethics package that is in the proposal. . . . Unfortunately, these commendable changes are included as part of the package to raise the pay of Members of Congress. Because of that, I must vote against this proposal.

135 CONG. REC. S15,951 (daily ed. Nov. 17, 1989) (statement of Sen. Heflin).

Those who felt that exchanging increased pay for reduced outside income was a fair

any attention focused on the government-wide ban on honoraria.[39]

In the Ethics Reform Act, Congress adopted, with few changes,[40] proposals made by a commission appointed by President George Bush[41] to investigate scandals and to suggest reforms.[42] The Ethics Reform

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deal ultimately prevailed, but the combination of these two issues returned to haunt Congress. *See, e.g.*, Don Phillips, *House Passes Pay-Ethics Bill, 252-174; Plan Bars Keeping Speech Honoraria*, WASH. POST, Nov. 17, 1989, at A1. Immediately after the House of Representatives passed the Act, the press drew attention to the haste with which the act was passed and the political pressure Congressional leadership used to pass it. The Republican and Democratic Parties circulated a joint letter stating "H.R. 3660 is not an appropriate point of criticism in the coming campaigns. . . . we will publicly oppose the use of this issue." *Id.* The parties were unable to control those outside the House. Democrat David Worley, of Georgia, who had lost a recent election to Newt Gingrich was quoted as saying that the House was "putting a gun to the American taxpayers' head saying 'pay me more or I'll take bribes from special interests'." *Id.*

39. *See* 135 CONG. REC. H8627 (daily ed. Nov. 14, 1989) (statement of Rep. Crane.) (discussing the pressure on Members of Congress to moonlight and the Honoraria Ban's impact on members who practiced medicine); *id.* at H8772 (statement of Rep. Gephardt) (discussing the appearance of impropriety caused by receipt of honoraria by members); *id.* at H8773 (statement of Rep. Michel) ("[I]n this package, we eliminate, as has been alluded to, the practice of receiving honoraria from special interests even though there are those of us who have received little if any criticism from the folks back home when we've reported what we have done."); *id.* at 15,947 (daily ed. Nov. 17, 1989) (remarks of Sen. Mitchell) (referring to the Honoraria Ban as a way to restore public perception of "this institution").

40. *See* BIPARTISAN TASK FORCE REPORT, *supra* note 32, at 1 (describing sources for the legislation). The Presidential Commission on Federal Ethics Reform issued a report entitled "To Serve With Honor." The President proposed legislation based on that report. Congress relied heavily on this proposed bill. *Id.*

41. Statement by President George Bush Upon Signing H.R. 3660, Nov. 30, 1989, 25 WEEKLY COMP. PRES. DOC. 1855 (Dec. 4, 1989). The administration believed ethics rules should be:

> [E]xacting enough to ensure that public officials act with the utmost integrity and warrant the public's confidence; fair, objective, and consistent with common sense; equitable all across the three branches of the Federal Government; and not unreasonably restrictive so as to discourage able citizens from entering public service.

Id.

42. Exec. Order No. 12,668, 54 Fed. Reg. 3979 (1989) (creating the President's Commission of Federal Ethics Law Reform). The order charged the Commission to "review Federal ethics laws, Executive Orders, and policies [and to] make recommendations to the President for legislative, administrative, and other reforms needed to ensure full public confidence in the integrity of all Federal public officials and employees." *Id.* § 2.

Act augmented and modified previous federal ethics legislation.[43] Earlier legislation established rules governing financial disclosure,[44] conflicts of interest,[45] and postemployment activities.[46] Rules governing federal employees' conduct include the Federal Election Campaign Act, which limits the amount of any honorarium a federal employee may receive.[47] A battery of criminal provisions prohibits other conduct that might raise the public's eyebrows or tarnish the image of government service.[48] Among the pre-1989 restrictions on federal employee conduct was Executive Order 11,222, signed in 1965 by President Johnson,[49] which prohibited receipt of anything of monetary value from persons or groups that interacted with the employee's agency.[50] The Order also prohibited outside employment that even appeared to create a conflict of

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43. *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, 18, and 38 U.S.C.).

44. *See* 5 U.S.C. app. §§ 101-11 (Supp. IV 1992) (mandating financial disclosure by federal employees).

45. 18 U.S.C. § 208(a) (1988 & Supp. IV 1992) (punishing federal employees who participate, with knowledge, in government activities involving non-governmental organizations in which the employee has a personal or financial interest).

46. 18 U.S.C. § 207 (1988 & Supp. IV 1992) (limiting former federal employees' rights to appear in proceedings before government agencies for which they previously worked).

47. 2 U.S.C. 441i(a) (1988) ("No person while an elected or appointed official or employee of any branch of the Federal Government shall accept any honorarium of more than $2,000 . . . for any appearance, speech, or article.").

48. *See, e.g.*, 18 U.S.C. § 201(c)(1)(B) (1988) (prohibiting acceptance of gifts by federal officials "for or because of any official act performed or to be performed by such official or person"); 18 U.S.C. § 201(b)(2) (1988) (prohibiting federal officials from receiving "anything of value" "in return for (A) being influenced in the performance of any official act; (C) being induced to do or omit to do any act in violation of [official duty]").

49. Exec. Order No. 11,222, 3 C.F.R. 306 (1964-1965).

50. The Order stated broadly that, "[e]ach individual officer, employee, or adviser of government must help to earn and must honor [the public trust] by his own integrity and conduct in all official actions." *Id.* § 101. Specifically the order provided that no employee shall:

> [S]olicit or accept . . . any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which — (1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency; (2) conducts operations or activities which are regulated by his agency; or (3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

Id. § 201(a).

interest.[51] Despite this array of rules that, if conscientiously applied, would have prohibited most suspect behavior, Congress adopted a uniform restriction on federal employees' right to receive gifts or honoraria.

II. PROTECTION OF PUBLIC EMPLOYEES' FREE SPEECH RIGHTS

Evaluating the constitutionality of the Honoraria Ban and the permissibility of a narrower, job-related Honoraria Ban requires three levels of analysis.[52] First, this Part assesses the Ban's impact on speech to determine the extent to which the Ban implicates First Amendment concerns. Second, this Part examines the traditional rules governing review of burdens on the expressive rights of public employees. Finally, this Part examines the level at which to scrutinize a burden on speech like the Honoraria Ban.

A. *The Impact of the Honoraria Ban*

The Honoraria Ban burdened federal employees' First Amendment[53] rights to free speech,[54] and might have also burdened the rights of third parties to free speech and association.[55] On its face, the Ban

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51. *Id.* § 202.

52. The briefs submitted to the Supreme Court by the parties to the Honoraria Ban litigation represented distinctly different perspectives on how to analyze the Ban's impact on public employees' free speech rights. The Government argued that the Court should analyze the ban within the established rules for evaluating public employee free speech challenges. Brief for Petitioners at 14-23, United States v. National Treasury Employees Union, 115 S. Ct. 1003 (No. 93-1170) (1995) (arguing that the Court should simply balance the generalized impacts and interests); *see infra* part II.B. (describing the balancing test used to evaluate public employee free speech cases). The Employees argued, however, that the Court should first determine whether the ordinary balancing test even applied or whether a more stringent standard of review might be appropriate. Brief for Respondents at 15-28, *Treasury Employees* (No. 93-1170) (explaining, first, the Honoraria Ban's impact, and then demonstrating that the Ban could not withstand heightened review).

53. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech or of the press . . ." U.S. CONST. amend. I.

54. National Treasury Employees Union v. United States, 990 F.2d 1271, 1272-73 (D.C. Cir. 1993) ("[T]his case involves a government burden on the speech of its own employees . . . [a]lthough § 501(b) prohibits no speech, it places a financial burden on the speech — denial of compensation."); *see also* Sanjour v. Envt'l Protection Agency, 984 F.2d 434 (D.C. Cir. 1993) (recognizing that regulations promulgated under the Ethics Reform Act may burden free speech).

55. *Cf.* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (finding invalid a regulation of corporations' rights to contribute to election campaigns). In *Bellotti*, the

neither prohibited nor discouraged any speech. Nonetheless, the Honoraria Ban chilled valuable expression by singling out expressive activities and burdening them.

In their challenge to the Honoraria Ban, federal employees argued that the Ban had two major impacts.[56] First, they argued that the Ban imposed a serious economic burden on expression.[57] In *Simon & Schuster v. Members of New York State Crime Board*,[58] the Supreme Court held that even though a regulation of speech may not prohibit speech, it may still be invalid if it imposes financial burdens on speech.[59] The employees argued that, under *Simon & Schuster*, the Honoraria Ban impermissibly diminished the incentive for federal employees to engage in expressive activity.[60] Specifically, the employees claimed that the Ban removed the possibility of compensation and made speech more expensive for them.[61]

Second, the employees argued that the Honoraria Ban triggered First Amendment scrutiny by singling out speech from all the forms of income producing activities that Congress might have regulated.[62] Relying on

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Court stated that the lower courts framed the issue too narrowly by examining only the extent of corporations' free speech rights. *Id.* at 776. The Court said that "[t]he proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect." *Id.* at 776. This statement seems to require analysis of class specific restrictions on free speech with regard to the restrictions impact on society as a whole. *But see Sanjour*, 984 F.2d at 439 (finding unpersuasive federal employees' claim that discouraging employees' speech restricts speech of nonemployees).

56. Brief for Respondents at 15-20, United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995) (No. 93-1170).

57. *Id.* at 15-17.

58. 502 U.S. 105 (1991).

59. *Id.* at 115.

60. Brief for Respondent at 16, *Treasury Employees* (No. 93-1170).

61. *Id.* Not surprisingly, the Government argued that the employees' interest in compensation paled in comparison to the government's interest in regulating receipt of outside income. Brief for Petitioner at 15-17, *Treasury Employees* (No. 93-1170). The Government framed its argument by first introducing the Pickering balancing test, *see infra* part II.B. (discussing the standard for public employees' free speech rights), and then discussing the impact of the Ban as merely an interest to be weighed. Brief for Respondent at 17, *Treasury Employees* (No. 93-1170).

62. Brief for Respondent at 17-20, *Treasury Employees* (No. 93-1170).

a line of cases involving taxes on various publications,[63] the employees argued that any regulation that targets speech, but not similar activities, impermissibly burdens expression unless justified by a special characteristic of the speech or an important government objective.[64] Additionally, the employees argued that the Ban's numerous exceptions for certain types of expression increased the burden on speech.[65]

B. *The Traditional Rules of Review for Public Employee Free Speech Challenges*

To determine whether a particular government action has infringed upon public employees' First Amendment rights, courts typically apply a more deferential standard of review than that used for the general public.[66] Since the 1960s, the Supreme Court has repeatedly returned to the question of how much protection the First Amendment affords public employees.[67] Usually, the issue arises when a public employer terminates an employee because of something the employee said.[68]

The Court's test for evaluating these cases consists of two parts: a

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63. *See* Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221 (1987); Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

64. Brief for Respondents at 18, *Treasury Employees* (No. 93-1170).

65. Brief for Respondents at 19-20, *Treasury Employees* (No. 93-1170). The employees argued that the patchwork of exceptions to the Ban, such as those that would allow payment for a comic performance but not a funny speech, required the government to make literary judgments. *Id.* at 19. The employees quoted Justice Holmes who said "acting as a literary critic is 'a dangerous undertaking for persons trained only to the law.'" *Id.* at 19 (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903)).

66. *Treasury Employees*, 115 S. Ct. at 1013 ("[W]e have recognized that Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.").

The Supreme Court has clearly announced that the government may not diminish protection of fundamental rights of other groups. *See* Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503 (1969) (holding that schools may not limit students' rights without justification); *see also*, Bellotti, 435 U.S. at 780 (protecting corporate speech).

67. *See* Waters v. Churchill, 114 S. Ct. 1878 (1994); Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Perry v. Sinderman, 408 U.S. 593 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968).

68. *Treasury Employees*, 115 S. Ct. at 1012.

threshold test and a balancing test.[69] The threshold test is whether the public employee's speech was on a matter of public concern.[70] The Court refuses to protect the employee if the speech did not relate to a matter of public concern.[71] If the speech did relate to a matter of public concern, the Court then balances the interests of the government employer against those of the employee to determine if the speech should be protected.[72] This test allows courts to sort out genuine claims of unconstitutional interference with the right to free speech from cases in which an employee seeks to frustrate a public employer's legitimate employment decisions.[73]

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69. *See generally* Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 6-25 (1987) (describing the prevailing doctrine for review of public employee free speech claims); *Developments in the Law — Public Employment*, 97 HARV. L. REV. 1611, 1756-80 (1984) [hereinafter *Developments in the Law*] (describing the doctrine and evaluating recent decisions applying it).

70. *See, e.g.*, *Waters*, 114 S. Ct. at 1883 ("There is no dispute in this case about when speech by a government employee is protected by the First Amendment: To be protected, the speech must be on a matter of public concern . . . .").

71. *See* Connick v. Myers, 461 U.S. 138, 146 (1983) (holding that if public employee speech "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for [the Court] to scrutinize the reasons of [the employee's] discharge").

72. *See Waters*, 114 S. Ct. at 1883 ("[T]he employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to [the state's interest as an employer].").

73. *Treasury Employees*, 115 S. Ct. at 1012 (contrasting activities of employees challenging the Honoraria Ban to expressive activities merely comprising "employee comment on matters related to personal status in the workplace"); *see Developments in the Law*, *supra* note 69, at 1757-58 (noting that the balancing test is a compromise between giving public employees the same protection for their speech as all other citizens and giving them no protection).

The Court's two part test has been criticized because it favors government supervisors' interests at the expense of the public and the employees. *See Developments in the Law*, *supra* note 69, at 1767-70. *Developments in the Law* criticizes the doctrine as too deferential to employers' interests. It suggests that in *Connick*, the Court actually endorsed the theory that "rigidly hierarchical management maximizes workplace efficiency." *Id.* It further suggests that "a host of legitimate employee interests" weigh "against employers' efficiency concerns." *Id.* at 1770.

Stanley Ingber, another critic of the Supreme Court's test states:

> In fact, courts confronting free speech claims of public employees are notably solicitous toward employers and correspondingly unwilling to treat employees' interests in expression seriously. . . . Accordingly, the tenor of Supreme Court decisions is that government institutions may discipline insubordinate speech that interferes with institutional goals.

Ingber, *supra* note 11, at 55-56.

Scholars argue that *Pickering* measures public employees' free speech rights against the

The Supreme Court first established the two part test in *Pickering v. Board of Education.*[74] In *Pickering*, a teacher sued the School Board alleging that the Board discharged him because he wrote letters critical of the Board to a local newspaper.[75] He claimed that, by discharging him in response to his letters, the Board violated his freedom of speech.[76]

By the time the Supreme Court decided *Pickering*, the Court had abandoned the traditional rule that public employees surrendered fundamental rights as a condition of employment.[77] Thus, the Court

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yardstick of a rigidly hierarchical model of organizational efficiency. *Developments in the Law, supra* note 69, at 1756-80 (criticizing Pickering as "inadequately protect[ing]" public employees' rights); Jonathan Alen Marks, Comment, *Connick v. Myers: Narrowing the Scope of Protected Speech For Public Employees,* 5 U. BRIDGEPORT L. REV. 337 (1984) (criticizing *Connick* as seriously abridging public employee free speech rights); D. Gordon Smith, Comment, *Beyond "Public Concern": New Free Speech Standard for Public Employees*, 57 U. CHI. L. REV. 249, 251-53 (1990) (proposing as a threshold that employers should prove that the employee speech actually disrupted government efficiency and if it does, that the employee must prove that the speech was relatively more valuable); Paul F. Solomon, Note, *The Public Employee's Right of Free Speech: A Proposal for a Fresh Start*, 55 U. CIN. L. REV. 449, 472-76 (1986) (advocating a "public interest" standard for evaluating public employee speech).

The organizational theory underlying the Supreme Court's test, that rigid hierarchy best serves the interest of an efficient public workforce, is outdated. *Developments in the Law supra* note 69, at 1770 (stating that office productivity can increase when employees play an active role in shaping office policy); *see* Ingber, *supra* note 11, at 60 (noting that the Court prefers hierarchies and defers to bureaucracies); *cf.* Massaro, *supra* note 69, at 31 (commenting that limiting protected speech to matters of public concern "infus[es] majoritarian values into the Bill of Rights").

74. 391 U.S. 563 (1968). *See generally* Smith, *supra* note 73, at 251-53 (discussing the balancing test developed in *Pickering*).

75. Pickering protested a tax increase because he believed that the Board had unwisely allocated previous tax increases. *Id.* at 564. The Board dismissed Pickering pursuant to an Illinois statute that permitted the board to dismiss teachers when the "interests of the school require." *Id.* at 564-65 (citing ILL. REV. STAT. c. 122 § 10-22.4 (1963).

76. *Id.* at 565. Pickering claimed that the statute allowing his dismissal was unconstitutional, as applied to him, because it violated the First and Fourteenth Amendments. *Id.* The Supreme Court did not consider Pickering's vagueness and overbroadness challenges. *Id.* at 565 n.1.

77. Justice Holmes best summarized the old rule regarding public employees by saying: "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (1892). The Supreme Court repudiated this vision of public employment in Wieman v. Updegraff, 344 U.S. 183 (1952) (holding that, under the Due Process Clause a rule requiring public employees to take a loyalty oath in order to retain employment was

described the proper standard of review as one that "[arrives] at a balance between the interest 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."[78] The Court evaluated several factors to reach its conclusion about whether Pickering's comments were protected, including whether the statements threatened good discipline and whether loyalty to the Board or the Superintendent was necessary to the teacher's job.[79] The Court found that Pickering's relationship with the Board did not require undivided loyalty and that his statements had not interfered with either his work or the school's regular operation.[80] Balancing the Board's interest as an employer and Pickering's interest in making the contested remarks, the Court concluded that the Board had no greater interest in limiting Pickering's participation in public debate than it had in regulating an ordinary citizen.[81]

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invalid); *see also* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967) ("[T]he theory that public employment which may be denied altogether may be subject to any conditions, regardless of how unreasonable, has uniformly been rejected."); Cynthia K.Y. Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CALIF. L. REV. 1109, 1112-15 (1988) (describing the Supreme Court's evolution away from treating public employers the same as private employers).

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

79. *Id.* at 569-70.

80. *Id.* Pickering's letter to the editor contained some statements that were true and some that were false. *Id.* at 572. In rejecting the Board's argument that the statements damaged working relations, the Court concluded that "[t]he statements [we]re in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher." *Id.* at 568-70. The Court also found that the employment relationship between Pickering and the Board was not "the kind of close working relationship[] for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.* at 570. The Court also noted that the statements did not indicate in themselves, incompetence, or lack of fitness to teach. *Id.* at 573 n.5.

81. *Id.* at 573. The Court judged Picerking's false comments as it would judge any other part of a public debate on important issues — under the standard for libel against public figures. *Id.* at 574 ("[T]he fact of employment is only tangentially and unsubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be."); *id.* at 574. The Court applied the standard established in New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (establishing that to prove libel against a public figure, the challenged statements must have been knowingly or recklessly false). Because Pickering's statements were not knowingly or recklessly false, the Court found that the Board could not punish Pickering for making them. 391 U.S. at 574. The Court also noted that in some cases "statements made by public officials on matters of public concern

The Supreme Court refined the public concern threshold test in *Connick v. Myers*.[82] In *Connick*, New Orleans Assistant District Attorney Myers challenged District Attorney Connick's decision to dismiss her.[83] Myers responded to the District Attorney's attempt to transfer her to another office by circulating a questionnaire to her fellow employees.[84] The questionnaire asked about office morale and office politics.[85] The District Attorney dismissed Myers for insubordination and for refusing to accept the transfer.[86]

In *Connick*, the Court stated that to decide if speech relates to a matter of public concern, courts must look to "content, form, and context of a given statement, as revealed by the whole record."[87] The Court

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must be accorded First Amendment protection despite the fact that they are directed at their nominal supervisors." *Id.* The Court relied on Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (invalidating a state libel law because "the public-official rule protects a paramount public interest in a free flow of information to the people concerning public officials, their servants. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation . . . . ").

82. 461 U.S. 138 (1983). For more in-depth discussions of *Connick*, see generally Massaro, *supra* note 69, at 13-17; *Developments in the Law*, *supra* note 69, at 1767-70; Marks, *supra* note 73; Solomon, *supra* note 73.

83. *Connick*, 461 U.S. at 140-41.

84. *Id.*

85. *Id.* at 155-56.

86. *Id.* at 141.

87. *Connick*, 461 U.S. at 147-48. The Court noted that when an employee does not comment on a matter of public concern the employer has unbridled discretion to discharge the employee: "Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." *Id.* at 146-47. The Court cited Bishop v. Wood, 426 U.S. 341, 349-350 (1976) (finding that a factually erroneous basis for discharging a police officer did not require review); Board of Regents v. Roth, 408 U.S. 564 (1972) (holding that an untenured professor had no right to a hearing before the college decided not to rehire him); Perry v. Sinderman, 408 U.S. 593 (1972) (holding that where evidence indicated dismissal in violation of First Amendment rights, an informally tenured professor was entitled to a hearing).

The dissent in *Connick* found three errors in the majority opinion:

> First, the Court distorts the balancing analysis required under *Pickering* by suggesting that one factor, the context . . ., is to be weighed *twice*, . . . Second, in concluding that the effect of respondent's personnel policies on employee morale and the work performance of the [office] is not a matter of public concern . . . . Third, the Court misapplies the *Pickering* balancing test in holding that Myers could constitutionally be dismissed for circulating a questionnaire addressing at least one

concluded that only one of the twelve questions Myers circulated related to a matter of public concern.[88] Thus, the Court upheld the discharge due to its minimal impact on protected interests and the fact that the case arose in the context of an employer-employee dispute.[89]

In *Rankin v. Mcpherson*,[90] the Court again returned to the issues raised in *Pickering*. A probationary clerical employee in a constable's office remarked that she hoped assassins would kill President Reagan.[91]

[matter of public concern].
Connick, 461 U.S. at 157-58 (Brennan, J., dissenting).

88. *Id.* at 148. The one question that the Court found was a matter of public concern asked other office employees whether they felt pressured to "work in political campaigns on behalf of office supported candidates." *Id.* at 149. The majority found that the disruptive nature of Myers' actions succumbed in balancing to the employer's interest in efficient operation and maintaining good working relationships. *Id.* at 152. The Court concluded that "Myers' questionnaire touched on matters of public concern in only a most limited sense; her survey, in [its] view, is most accurately characterized as an employee grievance concerning internal office policy." *Id.* at 154.

89. In applying the *Pickering* balance to Myers' discharge, the Court concluded that given the questionnaire's nature, context, and minimal relationship to public concern, it could have constituted grounds for termination. *Id.* at 154.

The Court distinguished the case from Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979), in which an employee had privately communicated concerns about the school district's racial discrimination. The *Connick* Court noted that in *Givhan*, the employee had spoken privately on a matter of public concern that was independent from a personal employment dispute. On the other hand, Myers had spoken privately about something that in the abstract could have been of public concern but that was in context merely a personal grievance. *Connick*, 461 U.S. at 148 n.8.

Focusing on the context in which the contested statements arose, the majority concluded that because the employee spoke primarily in response to an employment decision she did not like, her statements had only diminished value outside her office. *Connick*, 461 U.S. at 153 ("[T]he context in which the dispute arose is also significant . . . . [w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view . . . .").

The dissenters in *Connick* objected that the majority misread *Pickering*. *Connick*, 461 U.S. at 156-58 (Brennan, J., dissenting). They argued that, when public employees speak on matters of public concern, *Pickering* protects public employees speech to the same extent it protects speech by any other person. *Id.* at 157. Justice Brennan stated, "The balancing test articulated in Pickering comes into play only when a public employee's speech implicates the government's interest as an employer. When public employees engage in expression unrelated to their employment while away from the workplace, their First Amendment rights are, of course, no different from those of the general public." *Id.*

90. 483 U.S. 378 (1987), *reh'g denied*, 483 U.S. 1056 (1987).

91. *Rankin*, 483 U.S. at 381. McPherson, while discussing President Reagan's policies with a co-worker, remarked about the assassination attempt that "if they go for him again,

While the employee could have been discharged for any or no reason,[92] the Court invoked *Pickering* and *Connick* to hold the remark a protected comment on a matter of public concern.[93] The Court found that the State's interest in ensuring its office's effective functioning did not outweigh the employee's interest in free speech.[94] *Rankin* differed from *Connick* and *Pickering*, which protected speech that promoted the political process, because the Court protected speech largely to promote individual freedom.[95]

As it is commonly stated, the *Pickering* test answers only the simple cases.[96] Clearly an employee, like Myers, who tries to turn a dispute over the conditions of her employment into a public debate is not protected. On the other hand, a public employee who participates in public debate on a political issue is protected. But is an employee who speaks on a matter of no public interest, outside the workplace protect-

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I hope they get him." *Id.*

92. *Id.* at 383-84. The Court concluded that despite McPherson's status "she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression." *Id.* (citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

93. 483 U.S. at 386-87. The Court stretched the term "matter of public concern" to the limit of good sense. It justified its decision by remarking that the comment came in the midst of a discussion on President Reagan's policies. *Id.* Later in the opinion, however, the Court relied in part on the fact that there was no "danger that McPherson had discredited the office by making her statement in public" to diminish the employer's interest. *Id.* at 389.

94. *Id.* at 388. The Court recognized as "pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.*

The Court applied *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), to find that even though the comment was extreme it deserved First Amendment protection as part of the public discourse. *Rankin*, 483 U.S. at 387.

95. In *Rankin*, the Court seemed to protect the employee's statement because the employer had reacted to it without any justification other than disdain for the content of the remark. 483 U.S. at 390. In *Pickering*, by contrast, the Court protected the employee's speech because it was part of a public debate. *See supra* notes 74-81 and accompanying text (discussing *Pickering*).

96. *See* Smith, *supra* note 73, at 258 ("The most fundamental problem with the public concern threshold test has emerged from attempts to apply it: no one knows what 'public concern' is.").

ed?[97] Is that same employee's comment protected in the workplace if the comment is unrelated to the employer's business? Should a teacher who has radical and unpopular ideas about race be subject to sanction for voicing his opinions?[98]

The Court's opinions, and the rationales behind them, strongly suggest that in all but the most extraordinary cases, employees should be free to speak on subjects related to their employers' activities.[99] For example, in *Pickering*, the Court stated that the teacher, by virtue of participating in a public debate was protected to the same extent as any person. Furthermore, the Court has stated that the *Pickering* test exists to prevent a public employee from attempting to take shelter behind the First Amendment in an employment dispute.[100] This rationale does not support applying the balancing test to employees who participate in a public debate about their employer's activities.

C. *Is a Special Level of Scrutiny Warranted for Broad, Ex Ante Restrictions on Public Employees' Freedom of Speech?*

Ordinarily, the Supreme Court reviews a public employee free speech case when an employer has terminated an employee because of something the employee said.[101] Thus, the Honoraria Ban presented a unique problem for constitutional review because it was not a single employer's response to a single employee's action, but it was a

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97. The two part test simply imposes a content related threshold and a balancing test. Nothing in the test requires any nexus between the speech and employment. *But see Rankin*, 483 U.S. 378, 388 n.13 ("[A] purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee.").

98. *See* Donna Prokop, Note, *Controversial Teacher Speech: Striking a Balance Between First Amendment Rights and Educational Interests*, 66 S. CAL. L. REV 2533, 2537 (1993) ("[P]ublic schools, including universities, should be allowed to place restrictions on teachers for out-of-class speech, including racist speech . . . .").

99. The *Pickering* decision supports this proposition. In *Pickering*, one reason the court protected the teacher's speech was that the public had a significant interest in hearing teachers' opinions regarding how schools are run. *Pickering*, 391 U.S. at 571-73. Similarly, the Court in *Connick* specifically found that circulating a questionnaire about political pressure in the workplace constituted a matter of public concern. *Connick*, 46 U.S. at 149.

100. *Connick*, 461 U.S. 154 ("[I]t would indeed be a Pyrrhic victory for the great principles of free expression if the [First] Amendment's safeguarding of public employee's right, as a citizen, to participate in discussion concerning public affairs were confused with the attempt to constitutionalize the employee grievance we see presented here.").

101. United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995).

prospective prohibition applied to 1.6 million people.[102] Should a court's review of such a rule receive the same or stricter scrutiny than a single action?

The Supreme Court has upheld ex ante restrictions on public employee conduct that might fall under the First Amendment's protective umbrella.[103] In upholding a statute prohibiting federal employees from participating in partisan political activities, the Supreme Court recognized that the *Pickering* test requires a balance between the interests of the employee and the interest of the government.[104] The Court then recited four "obviously important interest[s]" that sufficed to sustain the prohibition.[105] So, while the Court used balancing as its analytical framework, it sustained the Act because the government's interest clearly outweighed the employees' interests, and not just because the balanced tipped slightly in favor of the government.[106]

Recently, in a case outside the public employment arena, the Court noted the importance of a strong justification for laws with widespread impact on speech.[107] *Pickering* does not adequately address such laws because the *Pickering* test requires only that a court balance the interests

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102. *Treasury Employees*, 115 S. Ct. at 1014 n.13 (noting that the government employed 1,680,516 employees in the GS-1 to GS-15 grades in 1992).

103. *See* Snepp v. United States, 444 U.S. 507 (1980) (upholding a constructive trust imposed on the profits earned by a former CIA employee who had signed a pledge allowing the CIA to review anything he wrote). In *Snepp*, the Court stated "[T]his Court's cases make clear that — even in the absence of an express agreement — the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." *Id.* at 509 n.3 (citations omitted); *see also* United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973) (upholding the Hatch Act, 5 U.S.C. § 7342 (1988), which prohibits federal employees from participating in partisan politics).

104. *Letter Carriers*, 413 U.S. at 564.

105. *Id.* at 564-66. The Court found that the following reasons supported the prohibition on political activity: the need to have government workers follow the law and not their political inclinations, encouraging the appearance that public employees shun partisan politics, preventing the government workforce from becoming a political machine, and protecting employees from coercion to participate in political activity. *Id.*

106. *See Treasury Employees*, 115 S. Ct. 1003, 1013 ("Because the discussion in that case essentially restated in balancing terms our approval of the Hatch Act in Public Workers v. Mitchell, 330 U.S. 75 (1947), we did not determine how the components of the Pickering balance should be analyzed in the context of a sweeping statutory impediment to speech.").

107. *See id.*

of the employer and the employee. *Pickering* does not state a level of scrutiny. An increased level of scrutiny, however, is an appropriate addition to the analysis of statutes like the Honoraria Ban that impose sweeping impediments to speech.[108] Heightened scrutiny would allow courts to compensate for the lack of a precise factual background in which to perform the *Pickering* balance by more thoroughly examining Congress' actions. When an employer fires an employee because of his or her speech, a court can evaluate the evidence and balance the specific concerns of the employer and the employee. In the case of a statutory ban, however, a reviewing court cannot perform such a factual balance but can make only general assumptions about what the ordinary case arising under the ban might entail.[109] Courts should not act so imprecisely when essential freedoms are at stake.

III. THE HONORARIA BAN LITIGATION

In *National Treasury Employees Union v. United States*,[110] federal

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108. City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994) (holding unconstitutional a city ordinance prohibiting a political yard sign and noting that such prohibitions are invalid if they prohibit too much speech).

109. Reviewing the Honoraria Ban, the Supreme Court explained that:

> We normally accord a stronger presumption of validity to a congressional judgement than to an individual executive's disciplinary action. The widespread impact of the honoraria ban, however, gives rise to far more serious concerns than could any single supervisory decision. In addition, unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens. For these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action. The Government must show that the interest of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the Government.

Treasury Employees, 115 S. Ct. at 1014 (citations omitted).

The Court did not clarify why a statutory ban should suffer heightened scrutiny other than because it was a wide-ranging statutory ban.

110. 788 F. Supp. 4 (D.D.C. 1992); *see* Tracy Thompson, *Judge Lets Stand January 1 Start for Honoraria Ban; Federal Employees' Groups to File Appeal*, WASH. POST, Dec. 21, 1990, at A17 (describing employees' efforts to prevent application of the Ban).

Federal employees also sought guidance from the Office of Government Ethics (O.G.E.). In a November 28, 1990 memorandum, the Office finally interpreted the ban to apply to all federal employees without regard to the content of the compensated expression. O.G.E. Informal Advisory Memorandum 90 x 24 (Nov. 28, 1990), *available in* 1990 WL 485702. Subsequently, the O.G.E. said that federal employees could receive payment for writing science fiction. O.G.E. Informal Advisory Letter 90 x 28 (Dec. 27, 1990), *available in* 1990 WL 485706 (reaffirming interpretation of act to exempt works of fiction). The

employees, in 1990,[111] sought to enjoin the government enforcement of the Honoraria Ban by challenging its constitutionality in the courts.[112] The employees challenged the Ban,[113] claiming that it violated the First Amendment.

The employees[114] challenged the statute as overbroad.[115] They claimed that the Ban should fail for want of narrow tailoring because it targeted some speech that lacked a nexus with the employees' work.[116]

O.G.E. also answered the concerns of a Senator's constituent, O.G.E. Informal Advisory Letter 90 x 25 (Dec. 12, 1990), *available in* 1990 WL 485703 (stating that consulting fees may be prohibited under the ban on payment for speeches and appearances).

111. The Honoraria Ban did not become effective until January 1, 1991. Ethics Reform Act of 1989, Title VI, § 603, 103 Stat. 1716. Prior to the effective date, federal employees sought an injunction to prevent enforcement of the act.

112. When the plaintiffs filed their suit in the District Court for the District of Columbia, they moved for a preliminary injunction to prevent enforcement of the Ban while the litigation proceeded. The courts denied the motion. National Treasury Employees Union v. United States, 927 F.2d 1253 (D.C. Cir. 1991), *aff'd*, 498 U.S. 1020 (1991).

113. Under Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (invalidating a loitering statute because on its face it permitted too much opportunity for law enforcement official to intrude on protected speech), a statute must fail if it regulates expressive rights not legitimately within the ambit of governmental regulation. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1022-24 (2d ed. 1988). Sometimes, the Court allows standing for attacks on overbroad statutes without requiring the plaintiff to prove that his or her conduct would be protected even under a narrowly drawn statute. Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973).

114. The plaintiffs included several Executive Branch and federal agency employees, none of whom had been politically appointed. *Treasury Employees*, 788 F. Supp. at 5-6. The National Treasury Employees Union represented a class consisting of all affected executive branch employees below GS-16. 990 F.2d at 1272. Peter G. Crane, one of the individually named plaintiffs did not fall within the class because he was a GS-16 employee. *Id.* at n.1.

115. *Id.* at 1275 The Court of Appeals discussed two possible doctrines that it could use to strike the statute: overbreadth and lack of narrow tailoring. *Id.* at 1274. Facial overbreadth requires that "protected activity is a significant part of the law's target [and] there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications . . .." TRIBE, *supra* note 109, at 1022. Professor Tribe notes that courts generally apply the doctrine when paring away a statute's improper applications would unsatisfactorily burden speech. *Id.* at 1023. Courts do not typically find statutes facially overbroad unless they deter substantial amounts of protected speech. *See* Broadrick v. Oklahoma, 413 U.S. at 612 (noting that overbreadth is not an available theory if an offending part of a statute can be struck).

116. The Supreme Court recently discussed the standard of what constitutes a narrowly tailored statute. In Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989)(upholding a requirement that performers using city's band shell utilize city employee to mix sound),

The employees noted that most of the honoraria they received could not possibly create the appearance of impropriety.[117] They argued that prohibiting employees from receiving harmless honoraria could not further Congress' purpose of preventing private interests' use of honoraria to buy influence in the federal government.[118] The District Court and the Court of Appeals agreed, stating that a statute restricting the right to free speech must proscribe only so much speech as is necessary to prevent the perceived harm.[119]

The Court of Appeals recognized that even though the Ban did not prohibit speech, the financial disincentive created a constitutionally cognizable burden on speech.[120] The court balanced the government's interest in preventing the appearance of impropriety against the employees rights.[121] The court concluded that while the Ban might be

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the Supreme Court stated that with respect to content-neutral regulations (such as time, place, and manner restrictions) "narrow tailoring is satisfied 'so long as the national regulation promotes a substantial government interest that would be achieved less efficiently absent the regulation.'" (citing United States v. Albertini, 472 U.S. 675, 689 (1985)). With respect to content-based regulations, the Court has said that a regulation is not narrowly tailored if "a less restrictive alternative is readily available." Boos v. Barry, 485 U.S. 312, 329 (1988)(striking down a District of Columbia statute prohibiting offensive picketing outside embassies).

117. The plaintiffs included a lawyer who wrote on Russian History, a mailhandler who lectured on Quaker religion, and an electronics technician who wrote on Civil War ironclads. 990 F.2d at 1275.

118. *Id.* at 1274.

119. 990 F.2d at 1277, 788 F.Supp. at 10 (citing Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (noting that a regulation of speech "must not discriminate between speakers or speech indistinguishable from one another insofar as its regulatory objective is concerned").

120. The court followed Simon & Schuster v. New York State Crime Victims Board, 502 U.S. 105 (1991). The court found that the Honoraria Ban placed a burden on speech which affected the weight of the plaintiffs' interest. 990 F.2d 1273. The court reasoned:

> Though at times seeming to characterize the statute as content-based, the Court ultimately declined to say whether it was or not, and invalidated it as not "narrowly tailored" enough under the "more lenient tailoring standards applied" to content-neutral provisions . . . . The point that the burden was simply denial of compensation played no apparent role in the Court's 'tailoring' analysis. Similarly, the financial character of the limitation here affects only the 'weight' of the employees' interest in the *Pickering* balance.

Id. (citations omitted).

121. The court found:

> [W]e can safely assume for the purposes of this opinion that the interest in avoiding the appearance of impropriety is strong enough to outweigh government employees'

proper in some cases, it failed the *Pickering* balance[122] in a significant number of cases.[123] The government produced no evidence of administrative difficulties that might justify the prophylactic Ban.[124] Because the Honoraria Ban applied to a significant number of circumstances where it would not further the government's interest,[125] the court struck the statute for want of narrow tailoring.[126] In applying the *Pickering* balancing test, the court concluded that, as applied to executive branch employees, the Honoraria Ban violated the First Amendment.[127]

The government, believing that preventing corruption and inefficiency demanded an all-out ban on honoraria, appealed the case to the Supreme Court. Citing the artistic contributions of several famous government employees, and the fact that the speech influenced by the Honoraria ban was "addressed to the public, . . . made outside the workplace, . . . and involved content largely unrelated to [the

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interest in engaging in speech for compensation where the compensation creates such an appearance, and so is strong enough to justify a ban on compensation in those circumstances.

990 F.2d at 1274.

122. The Circuit Court read "the 'public concern' criterion as referring not to the number of interested listeners or readers but to whether the expression relates to some issue of interest beyond the employee's bureaucratic niche." 990 F.2d at 1273. Under such an interpretation, all non-job-related speech would be included as well as some job-related speech that did not focus on the employees tasks.

123. 990 F.2d at 1276, n.4 (remarking that the existence of some "easily identifiable" valid applications does not protect the statute).

124. *Id.* at 1276 (suggesting that enforcement difficulties might justify the broad prohibition, but only where "manageable lines are available to limit the Ban to genuinely troubling compensation . . .").

125. *Id.* The court found that "the government point[ed] neither to improprieties in the pre-§ 501(b) era that would have been prevented by § 501(b) but not by prior regulations, nor to any serious enforcement or line-drawing costs associated with those regulations." *Id.*

126. *Id.* at 1277. The court distinguished Buckley v. Valeo, 424 U.S. 1 (1976) (upholding a restriction on political contributions that could result in political favors), by stating that "the government does not suggest that the public actually perceives a risk of corruption by low-level government employees in receipt of remuneration for talks on topics wholly unrelated to their functions . . . . " *Id.* at 1277.

127. 990 F.2d at 1279 (finding that in the legislative and judicial branches, concern about appearance of impropriety was great enough to justify maintaining the Ban for those branches); *id.* at 1278-79; *see* Golden, *supra* note 22, at 1051 (concluding that the Honoraria Ban properly restricts legislators, but fails when applied outside that environment). *But see generally* Collins, *supra* note 3, at 918-19 (criticizing the court for severing the Ban).

employees'] government employment," the Court concluded that the employees' speech was on matters of public concern.[128] After concluding that the Honoraria Ban had an impact on speech relating to matters of public concern, the Court concluded that the Ban's broad sweep placed a heavy burden on the government for justification.[129]

The Court articulated the government's burden as showing that the "'necessary impact [of the speech] on the actual operation' of the Government" outweighed "the interests [in free expression] of both potential audiences and a vast group of present and future employees."[130] The majority adopted this increased level of scrutiny because it felt that an extensive statutory proscription of speech-related conduct

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128. 115 S. Ct. at 1013. The court noted that Nathaniel Hawthorne, Herman Melville, Walt Whitman, and Bret Harte had all worked for the federal government. *Id.* at 1012. Later in his opinion for the majority, Justice Stevens remarked that "we cannot ignore the risk that [the Ban] might deprive us of the work of a future Melville or Hawthorne." *Id.* at 1015.

129. *Id.* at 1013 ("Unlike Pickering and its progeny, this case does not involve a post hoc analysis of one employee's speech and its impact on that employee's public responsibilities."). *Id.*

130. *Id.* at 1014. Citing City of Ladue v. Gilleo, 114 S. Ct. 2038, 2045 (1994), the Court stated that the Honoraria BanPart 226, Supp. I, 's "widespread impact" and chilling effect on speech prevented the Court from giving Congress greater deference than a single supervisor would receive. *Treasury Employees*, 115 S. Ct. at 1014.

Justice O'Connor challenged the majority for imposing a higher burden on the government than *Pickering* ordinarily requires. *Id.* at 1020 (O'Connor, J., concurring in judgment in part and dissenting in part). O'Connor noted:

> [R]eliance on the ex ante /ex post distinction is not a substitute for the case-by-case application of Pickering. There are many circumstances in which the Government as employer is likely to prefer the codification of its policies as workplace rules . . . to the ad hoc, on-the-job reactions that have been standard fare in many of our employment cases. In most such circumstances, the Government will be acting well within its bounds.

Id.

Critics of the *Pickering* doctrine, *see supra* note 73, should be glad to see that the Court explicitly recognized the impact of a public employee free speech rule on the public at large. *See* Solomon, *supra* note 73, at 472-73 (proposing that courts emphasize the public's interest in getting the greatest return on its investment, an approach that could subordinate employer and employee interests to public need). *Developments in the Law*, *supra* note 69, at 1760, criticizes *Pickering* for essentially ignoring the employee's own interest in expression. Furthermore, the Court's apparent emphasis on artistic work rather than political commentary suggests, as did *Rankin v. McPherson*, that the Court will protect public employee free speech for noninstrumental reasons. *See supra* note 95 and accompanying text (discussing the shift in focus from *Pickering* to *Rankin*).

required a justification that could support every application of the rule.[131]

In balancing the Government's needs against the employees' rights, the Court rejected the Government's attempt to justify the Ban on grounds of workplace disruption.[132] Because most of the speech involved occurred outside the workplace and had nothing to do with employment, the Court considered the Government's argument for interference with the efficiency of the public service.[133] The Court compared the Honoraria Ban to the Hatch Act,[134] which prohibits federal employees from participating in partisan political activity.[135] The Court distinguished the Hatch Act from the Honoraria Ban because "[u]nlike partisan political activity . . . honoraria hardly appear to threaten employees' morals or liberty."[136] The Court also observed that Congress had been primarily concerned with honoraria abuse by members of Congress and by high-level executive branch employees.[137] The Court concluded that Congress' assumption about the impact of abuse by high-level government employees on government service could not reasonably apply to all federal employees.[138] Finally, the Court

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131. *Treasury Employees*, 115 S. Ct. at 1013 ("[T]he Government must be able to satisfy a balancing test of the Pickering form to maintain a statutory restriction on employee speech."); *see supra* note 109 (quoting the Court's rationale for declining to defer to Congress' judgment that Government's interest outweighed the interests of the employees'). *But see Treasury Employees*, 115 S. Ct. at 1020 (O'Connor, J., concurring in part and dissenting in part) (arguing that public employers should be permitted to accomplish by rule what they could permissibly achieve in a particular case).

Requiring Congress to support a legislative restraint on speech with evidence that the Government's interest in efficiency outweighed the interests of a vast group, both present and future, creates a substantial barrier to such legislation. Essentially, Congress can only proscribe speech when it can prove that in the case of each item of speech that the statute might impair, the Government could win in the *Pickering* balance.

132. *Treasury Employees*, 115 S. Ct. at 1015.

133. *Id.*

134. 5 U.S.C. § 7324(a)(2) (Supp. V 1993).

135. *Treasury Employees*, 115 S. Ct at 1015.

136. *Id.* The Court upheld the Hatch Act in two cases, United Public Workers v. Mitchell, 330 U.S. 75 (1947), and Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973). The Hatch Act survived because Congress intended it to prevent the federal workforce from becoming a political machine. *Letter Carriers*, 413 U.S. at 565-66.

137. 115 S. Ct. at 1016.

138. *Id.* ("Congress could not, however, reasonably extend that assumption to all federal employees below Grade GS-16, an immense class of workers with negligible power

focused on the numerous exceptions and loopholes in the Honoraria Ban that undermined the Government's claim.[139]

After balancing the interests of the Government and the employees, the Court found the Honoraria Ban unconstitutional as applied to the parties to the suit.[140] The Court of Appeals for the District of Columbia Circuit had enjoined the Government from enforcing the Ban against all executive branch employees.[141] The Supreme Court concluded, however, that the Ban might still be valid as applied to senior executive branch employees who had reaped a twenty-five percent pay increase in exchange for the Honoraria Ban and whose conduct had motivated the Ban.[142] Finally, the Court rejected the Government's suggestion to devise a nexus requirement for the Ban.[143]

IV. THE SUPREME COURT ANSWERED THE EASY CASE, BUT WHAT DID IT SAY ABOUT THE HARD ONES?

The Supreme Court's decision in *Treasury Employees* answered the relatively simple question of whether the near absolute ban on honoraria violated the First Amendment. The Court did not tackle the problems that might arise if Congress revisits the Honoraria Ban and adopts a narrowed version.

The Supreme Court rested its decision on the fact that Congress attempted to stretch a justification appropriate for itself to others.[144] The Court suggested that a narrower ban might present a more difficult constitutional question.[145] To anticipate the conflict that might arise if Congress adopts a narrower ban it is useful to look at other facets of free speech protection. A case that arose after Congress imposed the

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to confer favors on those who might pay to hear them speak or to read their articles.").

139. *Id.* at 1016-18.

140. *Id.* at 1018.

141. 990 F.2d at 1279.

142. *Treasury Employees*, 115 S. Ct. at 1018-19. The Court also wanted to avoid unnecessary use of a facial challenge.

143. *Id.* at 1019. The Court declined to adopt the Government's suggestion that the Court limit the ban to cases "involving an undesirable nexus between the speaker's expression or the identity of the payor," because the Court could not be sure whether Congress intended such a nexus requirement. *Id.* at 1019.

144. 115 S. Ct. at 1018.

145. *Id.* (noting that the Ban was "not as carefully tailored as it should have been").

Honoraria Ban confronted some of these issues, specifically, whether employees may claim compensation for all speech, including job related speech.

In *Sanjour v. Environmental Protection Agency*,[146] two Environmental Protection Agency (EPA) employees challenged an agency regulation restricting their right to be paid for speaking about EPA policy.[147] The regulation prohibited Agency employees from accepting "non-official travel expenses."[148] The employees argued that the regulation imposed a severe burden on their speech because they were long-time critics of Agency policy[149] and often received invitations from environmental groups to speak on EPA policy.[150] The regulation prohibited them from accepting reimbursement for expenses they incurred traveling to distant speaking engagements.[151] Thus, the regulation

146. 984 F.2d 434 (D.C. Cir. 1993), *vacated, reh'g granted* 997 F.2d 1584 (1993).

147. North Carolina Waste Awareness and Reduction [hereinafter NC WARN], a coalition of non-profit groups joined EPA employees William Sanjour and Hugh B. Kaufman. Sanjour v. Environmental Protection Agency, 786 F.Supp. 1033, 1035 (D.D.C. 1992).

148. The EPA circulated an ethics advisory that informed employees that they "may not accept non-official travel expenses." EPA Ethics Advisory 91-1 at 3 & n.5 (*quoted in* Sanjour, 984 F.2d at 437). The EPA based its advisory on OGE regulations that prohibited an employee "from receiving compensation, including travel expenses, for speaking or writing on subject matter that focuses specifically on his official duties or on the responsibilities, policies and programs of his employing agency." 5 C.F.R. § 2636.202(b). While the EPA ethics advisory did not provide employees with a definition of "official," 40 C.F.R. § 3.503 provides:

> Writing, speaking, or editing is normally *official* if it results from a request to EPA to furnish a speaker, author or editor. If an invitation is addressed to an employee, the invitation is *official* if it is tendered because of the employee's EPA position rather than the employee's individual knowledge or accomplishments.

Id.

149. *See, e.g.*, Cass Peterson, *EPA Probes Leakage at Toxic-Waste Dumps; Sites Used in Cleanup Said to Violate Law*, WASH. POST, Oct. 31, 1984, at A5 (describing a EPA internal document Sanjour released and noting the Sanjour "has frequently tangled with his bosses on waste issues"); Cass Peterson, *Acting Officials Filling More Roles*, WASH. POST, Apr. 16, 1985, at A17 (calling Sanjour one of the EPA's "most vocal internal critics" but noting that the EPA responded to congressional pressure on a controversial issue by appointing Sanjour to handle the matter). These descriptions show that Sanjour's criticism is both tolerated and, at times, useful, to the EPA.

150. *Sanjour*, 984 F.2d at 437 (noting that Sanjour and Kaufmann declined invitations by organizations to speak outside the Washington, D.C. area).

151. *Id.*

limited the geographical area where they could afford to speak.[152]

The employees claimed that the EPA regulations violated the First Amendment by burdening their right to speak about the EPA.[153] They argued that by denying travel reimbursements, the regulation imposed an impermissible financial burden on speech.[154] They also claimed that by limiting the burden to unofficial speech, the EPA imposed a content-based limitation on speech.[155] The employees also attempted, unsuccessfully, to distinguish the *Pickering* line of cases on the ground that the regulation restricted the speech of people and groups other than federal employees.[156]

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152. *Id.* at 437. The employees claimed that they could no longer travel outside the Washington, D.C. area.

153. The District Court rejected the employees' suggestion to analyze their claim under *Simon & Schuster*, insisting that "[w]hile this Court believes that the challenged regulations would survive the Simon and Schuster test, the applicable test [is *Pickering*]." 786 F. Supp. at 1036.

Analyzing the claim, the District Court stated:

> [T]he prohibition on travel expenses is not designed to inhibit the exercise of employees' First Amendment rights. . . . [a]lthough in practice it may affect more frequently employees speaking critically of the agency because other types of speeches may be made in an official capacity, this is an indirect effect unrelated to the purpose of the regulation.

Id. at 1037-38. The court ultimately found the regulation content-neutral and narrowly tailored. *Id.* at 1038. The court's analysis focused instead on secondary effects of speech. *See infra* notes 172-82 and accompanying text (discussing this analysis). The court overlooked the fact that the regulation uses content (officialness) to determine when to impose the effect targeted burden. Furthermore, for the targeted effect to exist (the appearance of impropriety) an audience must hear and comprehend the content of the speech. Without hearing the speech and receiving its message, listeners would be unable to determine that job-related speech was more inappropriate than any other speech.

The employees also claimed that the Ethics Reform Act did not permit the regulation. 786 F. Supp at 1035. The District Court responded to the statutory claim by stating that "[the] fact that the EPA's definition of honorarium specifically excludes travel expenses does not imply that the reimbursement of travel expenses is always permitted." *Id.* at 1038.

154. *Id.*

155. *Id.*

156. 984 F.2d at 439. The employees analogized their coplaintiff NC WARN to Simon & Schuster, claiming that both suffered under government restrictions because the restrictions infringed upon their right to publish the regulated speech. *Id.* at 439. The court responded that *Pickering* dealt with a situation in which the Board of Education's decision to discharge a teacher chilled public debate. *Id.* (noting that the spill-over impact on NC WARN did not distinguish *Pickering* because that case, too, involved a third party — the newspaper).

In reviewing the EPA regulation under *Pickering*,[157] the court found that the government's interest in preventing the appearance of impropriety outweighed the employees' interest in receiving travel reimbursements.[158] The court noted that the regulation did not prohibit speech, but merely limited employees' ability to receive money for speech related to their federal employment.[159] This minimal burden could not survive balancing against the government's strong interest in operational efficiency.[160]

The employee's content discrimination claim is of interest because a similar claim might arise under a job-related honoraria ban. In *Sanjour*, the employees argued that the regulation discriminated based on the content of speech because applying it required the Agency to determine whether speech focused on an employee's work.[161] Therefore, the employees claimed, the court should strictly scrutinize the

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157. 984 F.2d at 438.

158. *Id.* at 447-48. The court stated the interest as "promoting the integrity and efficiency of the EPA's workforce by avoiding the appearance of impropriety that may reasonably be said to result from employees' acceptance of travel-expense reimbursements." To rebut the employees' claim that travel expense reimbursements "cannot give rise to an appearance of impropriety," the court presented a hypothetical case. The court suggested that employees could receive excessive reimbursements for lavish vacations under the guise of travel reimbursements. *Id.* at 445. However, the court ignored the fact that if the regulation allowed receipt of "actual travel expenses" the employer may scrutinize expense reimbursements to determine if they reflect actual expenses or merely a method to channel funds to the employee. The court also seemed to believe that if employees are allowed to receive travel reimbursements they will abandon their jobs for extended speaking trips. *See id.*

159. *Id.* at 441. "As appellees correctly note, the OGE/EPA regulation does not prohibit speech in any way. EPA employees may speak now, as before, on whatever topics they choose. The rule only forbids EPA employees to obtain reimbursement from non-federal sources for speaking or writing . . . ." The dissenting Judge found the employees' interest to be only moderate, but did find that because "government employees — people of generally modest incomes — will not have the means to make speeches involving more than de minimis travel expenses, out-of-town speeches will be as surely eliminated as if the EPA had prohibited them outright." *Id.* at 453 (Wald, J., dissenting) (footnote omitted).

160. The court also rejected the employees' over- and under-inclusiveness claims. *Id.* at 448-51.

161. *Id.* at 442-43 (agreeing that the regulation "is 'content-based' in some sense . . . but not in any meaningful sense").

regulation.[162] The court asserted, however, that officialness did not relate to content but to procedure.[163] The court concluded that the regulation only intended to restrict secondary effects of unofficial speech — the appearance of impropriety.[164]

An important factor Congress should consider in any new honoraria ban is whether such a ban would impose a content-based restriction on speech.[165] In *Treasury Employees*, the Supreme Court suggested that the Ban might also have encountered constitutional problems if it had discriminated based on the content of the speech involved.[166]

In *Police Department of the City of Chicago v. Mosley*,[167] the Supreme Court held that the government may not regulate "expression

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162. *Id.* at 439. The employees also argued that the regulation was view-point based because it affected speech contrary to EPA policy but not speech in support of it. *Id.* at 441. The court admitted later in the opinion that "official speakers" will present the views of the EPA, a statement that lends credence to the employees' assertion. *Id.* at 445.

163. 984 F.2d at 445 (stating that the official speech requirement serves the Agency's need to supervise employee activities).

164. *Id.* The court cited Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989) (finding a restriction on the amplitude of music played in a public park to be content-neutral because it bore no relation to the content of the music and served considerations like peacefulness).

165. This analytical distinction may derive from the Supreme Court's application of fundamental First Amendment concerns. Determining when and why the Court uses this analysis is important because the Court applies a fairly high standard of review to content-based regulations. *See generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983). Stone suggests four possible explanations. "When government restricts only certain ideas, viewpoints, or items of information, people wishing to express the restricted messages receive 'unequal' treatment." *Id.* at 202. "[T]he notion [is] that the government ordinarily may not restrict speech because of its *communicative impact* — that is, because of 'a fear of how people will react to what the speaker is saying' (footnote omitted)." *Id.* at 207. "[C]ontent-based restrictions, by their very nature, restrict the communication of only some messages and thus affect public debate in a content-differential manner." *Id.* at 217. A final possibility is that the Court feels compelled to ferret out improper governmental motivations. *Id.* at 227.

Stone concludes that neither of these factors individually supports the Court's use of higher standards for content-based regulations of speech. But he concludes that together they provide "a sound basis for the . . . distinction." *Id.* at 233. "Although no one of these four considerations may independently explain the distinction in its entirety, in combination they both explain and justify the Court's heightened scrutiny . . ." *Id.*

166. *Treasury Employees*, 115 S. Ct. at 1014 (noting that although the Ban did not discriminate on the basis of content, it still infringed employees' rights).

167. 408 U.S. 92 (1972).

because of its message, its ideas, its subject matter, or its content."[168] The Court concluded that a statute based on or justified solely by reference to the content of speech[169] would be invalid unless narrowly tailored to serve a substantial government interest.[170] This rule can be read as requiring any of three indicia of prohibited content discrimination: purpose, facial discrimination, or discriminatory effect.[171]

After *Mosley*, the Supreme Court added caveats to its seemingly simple content-based analysis. In *City of Renton v. Playtime Theatres, Inc.*,[172] the Court upheld a statute that targeted the secondary effects of speech.[173] In *Renton*, the Court sustained a local zoning ordinance that severely restricted the area in which adult movie theaters could operate.[174] The Court deemed the statute content-neutral because it was justified without reference to the content of speech, or expres-

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168. *Id.* at 95. In *Mosley*, the Court relied on the Equal Protection Clause, U.S. CONST. amend XIV, to invalidate a Chicago ordinance prohibiting picketing within 150 feet of a school, except when the picketing occurred as part of a labor dispute. 408 U.S. at 92-93. One commentator likened the Court's rule to an antidiscrimination principle that would prohibit regulations of speech depending on the content of the speech. Susan H. Williams, *Content Discrimination and the First Amendment,* 139 U. PA. L. REV. 615, 625 n.31 (1991).

169. 408 U.S. at 96.

> There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Id. (footnote omitted). Justice Marshall continued to say that the city could not justify its selective picketing restriction by saying that some picketers were more likely to cause violence. "Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis." *Id.* at 100-01.

170. 408 U.S. at 102.

171. Williams, *supra* note 168, at 626-27.

172. 475 U.S. 41, *reh'g denied* 475 U.S. 1132 (1986).

173. 475 U.S. at 48.

174. *Id.* at 43 (stating that the ordinance "prohibit[ed] adult motion picture theaters from locating within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park or school"). The regulation permitted adult theaters in about five percent of the area of the city. *Id.* at 64 (Brennan, J., dissenting).

sion.[175] Under *Renton*'s secondary effects analysis, the government may regulate effects of certain speech regardless of whether an audience hears a message from the speech.[176] *Renton* departs from *Mosley's* simple rule because it allows government to regulate speech when concern for secondary effects accompanies legislative dislike for the communicated message.[177]

A regulation of secondary effects may nevertheless be invalid if it targets secondary effects that occur only when an audience receives a message.[178] Regulation of this type of secondary effects is an attempt

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175. The ordinance was ostensibly intended only to limit crime and prevent the erosion of nearby property values commonly associated with adult movie theaters. The Court read the purpose of the ordinance to be "to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life." *Id.* at 48. The Court's analysis suggests that it permitted the regulation to stand because it reasonably protected substantial interests. As the dissent pointed out, however, that is not the proper initial inquiry. "The fact that adult movie theaters may cause harmful 'secondary' land-use effects may arguably give Renton a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content neutral." *Id.* at 56 (Brennan, J., dissenting).

176. *See* Williams, *supra* note 168, at 630-31 (arguing that the Court's analysis is justified where the secondary harm is noncommunicative (such as a drop in property values) and not where the harm is communicative (such as being offensive)).

177. In his dissent, Justice Brennan applied a more common sense definition of "content-based." He concluded that the regulation was content-based because the application of the zoning limitations was based solely on the content of films shown in particular theaters. 475 U.S. 57 (Brennan, J., dissenting). Brennan added: "Even assuming that the ordinance should be treated like a content-neutral time, place, and manner restriction, I would still find it unconstitutional." *Id.* at 63. He found the offered conclusory evidence insufficient to support the city's asserted interest. *Id.*

Stone also summarizes the principle underlying the Court's inquiry into the government's motivation:

> In the First Amendment context, the concept of improper governmental motivation consists chiefly of the precept that the government may not restrict expression simply because it disagrees with the speaker's views. This precept has two significant corollaries: the government may not exempt expression from an otherwise general restriction because it agrees with the speaker's views; and the government may not restrict expression because it might be embarrassed by publication of the information disclosed.

Stone, *supra* note 165 at 227-28. The EPA regulation at issue in *Sanjour* might fall within Stone's corollaries — the regulation restricted unofficial speech which was both speech the agency disagreed with and speech that might have embarrassed the agency.

178. *See* Williams, *supra* note 168, at 630 (concluding that "if the harm . . . will only come about if some message is in fact received by a listener, then the harm is a communicative one").

to regulate the communicative impact of speech. In *Boos v. Barry*,[179] the Court distinguished *Renton* and found a restriction on protests directed at foreign diplomats to be an impermissible content-based restriction.[180] The secondary effect asserted by the government in *Boos* was that protests against foreign diplomats violated an international law obligation to protect the dignity of foreign diplomats.[181] The Court reasoned that in order to determine which speech offends the dignity of foreign diplomats, the city would have to evaluate the direct emotive impact of the speech. The Court concluded that looking solely at the emotive impact of the speech violates *Mosley*.[182]

Determining whether a regulation is content-neutral or content-based carries high stakes because the level of scrutiny required for a content-neutral burden on speech is lower than that required for a content-based restriction.[183] Under *Ward v. Rock Against Racism*,[184] a content-neutral regulation survives constitutional scrutiny if its purpose could not be more efficiently achieved another way.[185] Content-based restrictions, however, must be necessary to achieve a compelling state interest.[186] By strictly scrutinizing content-based restrictions, the Court prevents the most dangerous form of government speech regulation — outright censorship.[187]

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179. 485 U.S. 312 (1988).

180. A provision of the District of Columbia Code prohibited "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute'." *Id.* at 315.

181. The Court in *Boos* distinguished *Renton* because the asserted secondary effect, violating an international law obligation to protect foreign diplomats' dignity, depended on the content of the regulated speech. *Id.* at 320, 322-23.

182. 485 U.S. at 321 (noting that the government did not point to any secondary effects to justify the regulation but relied solely on the impact of the speech); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (stating that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration").

183. *Rock Against Racism*, 491 U.S. at 798-99 (stating that the "less restrictive alternative" requirement does not apply to content-neutral restrictions).

184. 491 U.S. 781 (1989).

185. *Id.*

186. Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983).

187. *See* Stone, *supra* note 165, at 198 (suggesting that the First Amendment protects the integrity of public debate).

One court has suggested that this analysis might apply to restrictions on public

A job-related honoraria ban would be a content-based financial burden similar to the rule in *Simon & Schuster*.[188] In order to defeat the accompanying presumption of invalidity, the government would have

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employee free speech. United Faculty of Florida v. Bd. of Regents, 585 So. 2d 991, 994 (Fla. Dist. Ct. App. 1991) (finding a statute restricting faculty members' right to speak to students about labor disputes unconstitutional because it was both a "content-based and viewpoint-based restriction on speech, and regulate[d] speech based on the identity of the speaker").

The Supreme Court sometimes applies the same heightened scrutiny to regulations based on the identity of the speaker, or on the audience as it does to content regulation. TRIBE, *supra* note 113, at 803. "The Court has at times attempted to separate these categories, but this is in practice a difficult task. Restrictions based on the 'status' of a speaker, although often upheld, bear a troublesome correlation with viewpoint." *Id. See generally* Stone, *supra* note 165, at 244-51 (discussing the problems with considering speaker-based regulations in the content-based, content-neutral framework).

In *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980), the Court invalidated a restriction prohibiting public utilities from mailing bill inserts that discussed nuclear power. *Id.* at 544. The State prohibited "utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power." The Court reiterated earlier precedent stating that a state cannot restrict corporate speech. *Id.* at 535 (citing First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)), and remarked that by excluding a major actor from the public debate on an important issue the state had struck at the very heart of free speech rights. *Id.* at 535. Combined with the Court's finding that *Mosley* prohibited the state from restricting discussion on an entire topic, *Consolidated Edison* suggests some problems a government may encounter by excluding a speaker from the marketplace of ideas. Geoffrey Stone suggests some solutions to these First Amendment problems:

> How, then, should we deal with speaker-based restrictions? . . . First, for the sake of simplicity, we might treat all speaker-based restrictions as either content-based or content-neutral. Second, we might treat such restrictions as content-based if they correlate 'closely' with specific, identifiable viewpoints. Third, we might treat such restrictions as content-based if they are likely to distort public debate substantially in a viewpoint-differential manner. Fourth, we might treat such restrictions as content-neutral in some contexts, such as subsidies and nonpublic fora, but as content-based in other contexts, such as public fora. And fifth, we might test such restrictions by an intermediate standard of review.

Stone, *supra* note 165, at 250-51.

188. 502 U.S. 105 (1991). The Supreme Court stated that statutes imposing content-based financial burdens on speech are presumed invalid. *Id.* at 115. The Court struck down a New York statute that required all entities contracting with convicted criminals to surrender the income to the state to hold for the benefit of victims. The state could not produce a sufficiently compelling reason to justify the content-based burden imposed by the statute. The Court found that the state's interests in preventing criminals from profiting from their crimes and in ensuring that crime victims are compensated were already served by state law. *Id.* at 116-17.

to show that a compelling interest necessitated content discrimination.[189] Because the government could easily tailor the statute to forbid payment from interested parties, instead of from all parties, the statute would fail strict scrutiny.[190]

The Government does not need a broad honoraria ban to ensure that its workers do their jobs efficiently, free from improper external influence, and without the opportunity to abuse their government positions.[191] The government can use other restrictive means to prevent employees from being improperly influenced, such as limiting employees' political activities.[192] The ample availability of less disruptive tools[193] for controlling government workers suggests that Congress should avoid a job-related honoraria ban.

By restricting federal employees' rights of expression, the government burdens expression and association of many people who are not employed by the government. Discouraging one person's speech deprives potential listeners of opportunities to hear a useful, interesting, or pleasing message. If the discouraged speech is on a political topic,

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189. *Boos*, 485 U.S. at 312. A court might also ask if any less restrictive alternative means existed to achieve the purpose.

190. Furthermore, individual sanctions under a narrower Honoraria Ban would be reviewable under *Pickering*. Such a situation would mirror *Pickering*'s facts. If an employee were punished for speaking against his employer in public on a matter of genuine public interest, a court could not, without ignoring *stare decisis*, uphold the punishment. *See supra* part II.B (discussing the "matter of public concern" standard traditionally applied in free-speech challenges brought by government employees).

191. The government may discharge inefficient, lazy, unruly, and disruptive workers to the same extent that private employers can. Government's ability to discharge or discipline employees is only limited by procedures the government establishes and by employees' right to be free from unconstitutional interference with their rights. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Supreme Court concluded that although the Due Process Clause protects a public employee's right to his or her job, the employee must have "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577. Property rights, the Court pointed out, are established by existing rules and understandings. *Id.* Thus, the rights of public employees are limited to the right to have government comply with the employees' reasonable expectations about the employment relationship.

192. United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) (upholding restrictions on federal employees partisan political activities), *reaffirmed in* United State Civil Service Comm'n v. National Association of Letter Carriers, 413 U.S. 548 (1973).

193. Congress might have imposed the Ban because restricting workers' fundamental rights is simply an easier and less precise method for dealing with errant workers.

the disincentive will strike at core First Amendment values.[194] A job-related honoraria ban would deny compensation to federal employees who might speak critically, or merely informatively, about their jobs and their agencies. By denying compensation, the ban would remove the incentive for federal employees to risk ostracization in their workplace resulting from a perceived impropriety. Thus, a job-related ban would have a dangerous impact — censorship.

V. PROPOSAL: MINIMAL RESTRICTION OF PUBLIC EMPLOYEE SPEECH

One of the major reasons that the Honoraria Ban crumbled under constitutional scrutiny was that it targeted nonexistent problems. The Supreme Court criticized Congress for unreasonably extending concerns about honoraria abuse interfering with public service to employees who had neither abused nor had the power to abuse honoraria.[195] While the Court suggested that the Government's case would have been stronger if the ban had targeted job-related speech, it is not clear that a ban targeting honoraria for job-related speech would survive constitutional scrutiny. Initially, a federal employee speaking about his agency's activities would clearly be speaking on a matter of public concern.[196] Next, after *Treasury Employees*, the government bears a heightened burden of justifying limitations on speech about matters of public concern if the government seeks to impose an ex ante burden on speech.[197] Finally, most government employees do not receive honoraria because of their status or because those paying the honoraria hope to curry favor with the agency. Instead, most federal employees

194. Political speech lies at the heart of First Amendment protection. Mills v. Alabama, 384 U.S. 214, 218 (1966). But the freedom to speak has value aside from ensuring democracy. It encourages citizens to enrich themselves and thus improves everyone's quality of life. *See* TRIBE, *supra* note 113, at 785-89 (suggesting three potential values the First Amendment protects: political discourse, an open marketplace of ideas, and speech as inherently valuable to self and societal enrichment).

195. *See supra* notes 132-39 and accompanying text (discussing the Court's reasoning).

196. The employees in *Sanjour*, for example, spoke about EPA policy, and not about their individual employment. Furthermore, *Pickering*, the case that spawned the public concern threshold test, involved an employee speaking out about what he perceived to be management errors by his employer.

197. *See supra* notes 130-31 and accompanying text (discussing the appropriate standard of review for such restrictions).

receive honoraria because the public wants to hear what they have to say.[198]

Congress should utilize a more specific touchstone for governing receipt of honoraria because the constitutionality of an honoraria ban for job-related speech is not certain, and because a job-related honoraria ban may chill the expression of those who may be most informed about issues of government policy. Legislation introduced in Congress over the past three years make it clear that some members of Congress hope to impose a ban on job-related honoraria.[199] In 1993, Representative Barney Frank of Massachusetts proposed to subject all honoraria to a three step analysis before allowing employees to accept them.[200] The proposed test required that the appearance, speech, or article did not relate to the activities of the employing agency, that it did not involve use of government resources, that it was not paid because of the employee's status or duties, and that the payor had no interest that the employee might affect in the course of the employee's duties. As with Representative Frank's bill, other proposals advocated similar job-

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198. In *Treasury Employees*, the Court noted:

> The ban imposes a far more significant burden on respondents than on the relatively small group of lawmakers whose past receipt of honoraria motivated its enactment. The absorbing and time-consuming responsibilities of legislators and policymaking executives leave them little opportunity for research or creative expression on subjects unrelated to their official responsibilities. Such officials often receive invitations to appear and talk abut subjects related to their work because of their official identities. In contrast, invitations to rank-and-file employees usually depend on the market value of their messages.

Treasury Employees, 115 S. Ct. at 1014.

199. *See, e.g.*, H.R. 3341, 102d Cong., 1st Sess. (1991); S. 242, 102d Cong., 1st Sess. (1991).

200. H.R. 1095, 103d Cong. 1st Sess. (1993). Specifically, the bill provided that individuals may accept honoraria if three conditions are met. These conditions are:

> (i) the purpose of the appearance, or the subject of the speech or article, does not relate primarily to the responsibilities, policies, or programs of the agency or office in which the individual is employed, and does not involve the use of Government time, property, or other resources of the Government or nonpublic Government information;
>
> (ii) the reason for which the honorarium is paid is unrelated to that individual's official duties or status as such officer or employee; and
>
> (iii) the person offering the honorarium has no interest that may be substantially affected by the performance or nonperformance of that individual' official duties.

H.R. 1095, 103d Cong., 1st Sess. (1993).

relatedness tests.[201]

Congress must determine where, within the scope of its constitutional authority, to draw the line for federal employees' receipt of honoraria. If legislators reform the Honoraria Ban, they should consider how new legislation might impact federal employees individually, and how it might affect the quality of debate on public issues in this country. Congress should regulate employee conduct not by deterring categories of speech but by establishing an easily applicable and narrowly focused standard of conduct.

To determine what speech to foster and what to discourage, Congress should rank the various situations when a federal employee is paid for speaking, writing, or appearing in order of their respective inappropriateness. Because Congress must necessarily limit employees' rights to receive honoraria according to the content of their speech, Congress should determine which among the range of possible transactions create the greatest risks of appearances of impropriety. Congress might consider four types of speech related transactions: when a private interest pays an employee who can perform or not perform his duties in a way that effects the private party's interest; when a private interest pays an employee in exchange for the employee's expertise on the agency's operation; when an employee receives compensation for speaking about agency policy, but not in circumstances where he appears to be marketing expertise on the agency; and when an employee receives payment for speech unrelated to agency activity. Only the first two types of payment deserve government restriction. In those cases Congress can safely regulate receipt of payment because self-serving or manipulative speech has only minimal importance, and the threat to government integrity is at the zenith.[202]

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201. *See* S. 242, 102d Cong., 1st Sess. (1991) (providing materially similar conditions on receipt of honoraria). The Senate report accompanying this bill discussed the issue of job-relatedness. S. REP. NO. 29, 102d Cong., 1st Sess. (1991). The Committee on Governmental Affairs modified the proposed provision which required the speech, article, or appearance to be "unrelated" to the employee's job and replaced it with a provision stating that "appearance, speech, or article does not focus specifically on . . . " the employees' job. *Id.*

The Report also questioned the legitimacy of the claim that the government had an interest in regulating honoraria when it refused to take such a strong stance on other types of outside income. *Id.*

202. While the second category seems to lack the invidiousness of the first, it can safely be assumed that an employee selling expertise on his employer is selling it to people

To target these sorts of transactions, Congress need look no further than current conflict of interest rules. Executive Order 11,222, issued in 1965 by President Johnson, prohibits federal employees from receiving money from persons or groups in three categories: people seeking to do business with the employee's agency, people regulated by the agency, and people who have interests that will be substantially affected by variations in the employee's performance of his duties.[203] These three categories encompass the two threatening types of payment for speech. They limit only those activities that actually create an appearance of impropriety without unduly burdening public debate on government policies.

The proscriptions contained in the Executive Order are not as precise as either the enacted or proposed Honoraria Ban. They do, however, convey the same simple message to federal employees: don't take money from people who are trying to buy your help. Simple, easily comprehensible restrictions on employee conduct will allow the federal government to conduct its business without resistance from its own employees or from an angry public.

Ian H. Morrison[*]

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who hope to benefit from enhanced, insider's knowledge of the agency's operations.

203. Exec. Order No. 11,222, 3 C.F.R. 306 (1964-65); *see supra* note 50 (quoting the order).

* J.D. 1995, Washington University.