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## The Constitution as an Obstacle to Government Ethics - Reformist Legislation After National Treasury Employees Union

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# THE CONSTITUTION AS AN OBSTACLE TO GOVERNMENT ETHICS—REFORMIST LEGISLATION AFTER *NATIONAL TREASURY EMPLOYEES UNION*

GEORGE D. BROWN\*

## I. INTRODUCTION: THE IMPORTANCE OF GOVERNMENT ETHICS LAWS

Widespread cynicism about government and outright distrust of public institutions—as well as of those people who occupy them—represent a top priority item on the American national agenda. Many people feel that their elected representatives do not represent them and that their appointed public servants do not serve them. “Reforms” are essential, but they are often hard to achieve. A major obstacle to reform arises from the fact that the same public institutions in which change is sought are usually those that must act to bring it about. Often they refuse to do so.

Campaign finance reform died in the United States Senate in 1994 despite the fact that it was a major issue for the Democratic Party, which controlled both houses of Congress as well as the presidency.<sup>1</sup> Term limits figure prominently in the Republican Contract with America.<sup>2</sup> Nevertheless, the ability of the Republican Party, which now controls both houses of Congress, to

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1. An important mechanism of the proposed legislation, Senate Bill 3, was a tax on campaign receipts. S. 3, 103d Cong., 1st Sess. (1993). For a discussion of the bill and the constitutional issues presented, see Kenneth J. Levit, Note, *Campaign Finance Reform and the Return of Buckley v. Valeo*, 103 YALE L.J. 469, 476-77, 486-503 (1993).

2. See RESTORING THE DREAM 12, 32-33 (Stephen Moore ed., 1995) (outlining Republican Party's commitment to term limits).

bring about federal term limits initiatives is in doubt.<sup>3</sup> At the state level, term limits have succeeded primarily because citizens groups have been able to bypass the normal legislative process through referenda and initiatives.<sup>4</sup> Elected public officials are not always receptive to the call of "Physician, heal thyself."

Elected officials, however, sometimes do enact reforms. Congress has passed an array of ethics statutes, particularly in the post-Watergate era.<sup>5</sup> President Clinton's first Executive Order dealt with ethics,<sup>6</sup> and at least three-quarters of the states have enacted statutes dealing with this set of issues.<sup>7</sup>

In general terms, ethics laws deal with practices by public officials that present dangers such as undue private influence upon governmental decisions, use of public office for private gain, and unequal treatment of citizens.<sup>8</sup> A recurring underlying theme in ethics laws is the importance of public confidence and the need for the appearance of a government free from improprieties.<sup>9</sup> These laws ban or limit many specific practices, including gratuities to public officials, private supplementation of public salaries, action by officials in matters in which they have a per-

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3. Grover G. Norquist, *A Limited Future*, AM. SPECTATOR, Aug. 1995, at 58, 59.

4. The Norquist article includes a chart of 20 states with state legislator term limits. Nineteen of these provisions were adopted by popular vote. *Id.*

5. According to an American Bar Association Committee Report, "[a]t no time in the history of our country has government ethics been more intensively scrutinized and extensively regulated." Cynthia Farina, ABA Comm. on Gov't Standards, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 290 (1993).

6. Exec. Order No. 12,834, 58 Fed. Reg. 5,911 (1993).

7. Kevin V. McAlevy, Note, *Conflicts of Interest and State Legislatures: Virginia As a Case Study*, 5 J.L. & POL. 209, 213 (1988). Throughout this Article, I use the terms "public official" and "public employee" interchangeably.

8. 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, 71-81 (1992) (outlining goals of conflict of interest regulation).

9. See, e.g., *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961).

The statute is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.

*Id.*

sonal interest, and postemployment activities in which former government employees interact with government—the so-called “revolving door” problem. Taken together, the many federal and state statutes, executive orders, and regulations constitute a true body of law—a set of enforceable commands with their purposes and contents widely known and understood by those subject to them.<sup>10</sup>

Last term, the Supreme Court dealt this body of law a potentially serious blow. In *United States v. National Treasury Employees Union*,<sup>11</sup> the Court struck down a provision of the Ethics Reform Act of 1989<sup>12</sup> (the Act) that prohibited the receipt of honoraria by federal employees and officials.<sup>13</sup> The Court found that the statute violated the First Amendment’s command that “Congress shall make no law . . . abridging the freedom of speech.”<sup>14</sup> The Court relied primarily on prior cases that used a balancing approach to determine the right of the government as employer to discipline employees for words that they had said or written.<sup>15</sup> In the honoraria context, the opinion weighed the interest of public employees in speaking and writing for compensation and the interest of their potential audience against the government’s interests in efficiency and integrity of the public service and its interests in avoiding the appearance of undue influence and its ability to administer an honoraria limitation.<sup>16</sup> The Court held that the government’s asserted interests could not justify imposition of the ban on middle- and lower-ranking employees of the executive branch.<sup>17</sup>

Constitutional questions abound in the ethics-law area. *Na-*

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10. For an excellent discussion of the federal dimensions of this law, see Nolan, *supra* note 8, and for an early but still helpful analysis of the Massachusetts provisions, see William G. Buss, Jr., *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U. L. REV. 299 (1965).

11. 115 S. Ct. 1003 (1995).

12. 5 U.S.C. app. § 501(b) (Supp. V 1993).

13. *National Treasury*, 115 S. Ct. at 1008.

14. U.S. CONST. amend. I.

15. *National Treasury*, 115 S. Ct. at 1012-13 (citing *Waters v. Churchill*, 114 S. Ct. 1878 (1994); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Snepp v. United States*, 444 U.S. 507 (1980); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)).

16. *Id.* at 1012-16.

17. *Id.* at 1016.

*tional Treasury* may be correct on its facts. The law did sweep, in blunderbuss fashion, across a range of expressive activities that pose little danger to ethics in government.<sup>18</sup> The case also is an important reminder of the constitutional rights and private concerns of public employees.

Nevertheless, three distinct aspects of the decision merit serious concern. The first is methodological. The majority seemed to exhibit a grudging attitude towards ethics regulation in general. It showed little or no deference towards Congress's experience and expertise in developing standards for the integrity of the public service or toward Congress's competence in determining how particular practices appear to the public.<sup>19</sup> In the First Amendment context, at least, the Court may have constructed a balancing test that the government can almost never win. A second concern is that the decision casts doubt upon the constitutionality of other ethics laws. For example, questions now will be raised about some aspects of "revolving door" provisions and statutory standards based directly on the concept of appearance of impropriety—what might be referred to as "smell-test ethics." A third concern is that *National Treasury* may have a potentially broad sweep, extending beyond ethics laws into such closely related areas of government reform as campaign finance legislation and restrictions on government employees' political activities.<sup>20</sup>

*National Treasury* suggests answers that bode ill for the cause of reform. For example, it appears to represent a significant reaffirmation of aspects of *Buckley v. Valeo*,<sup>21</sup> a decision that has been a major roadblock to campaign finance legislation.<sup>22</sup> In recent congressional debates, opponents of changes in the

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18. Farina, *supra* note 5, at 320; Nolan, *supra* note 8, at 108-14; see *National Treasury*, 115 S. Ct. at 1020-21 (O'Connor, J., concurring in part and dissenting in part).

19. See *National Treasury*, 115 S. Ct. at 1016 (noting that "several features of the honoraria ban's text cast serious doubt on the Government's submission that Congress perceived honoraria as so threatening to the efficiency of the entire federal service as to render the ban a reasonable response to the threat").

20. See *infra* parts IV-VI.

21. 424 U.S. 1 (1976).

22. See, e.g., Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1211 (advocating overruling *Buckley*).

existing system cited *Buckley* as a constitutional ban to reformist initiatives.<sup>23</sup> Ethics laws have their opponents too; perhaps *National Treasury* will become their *Buckley v. Valeo*.

This Article both analyzes *National Treasury* and explores its broader implications. I have written the piece not only from the perspective of an academic legal analyst but also from that of a public official active in the drafting and interpretation of a comprehensive set of ethics laws.<sup>24</sup> Approaching it wearing either of these hats, I find the decision troubling. Part II of the Article outlines *National Treasury* in some detail and explores its major issues. These issues include the role of First Amendment analysis, the rights and status of public employees, the majority's relative lack of concern with what might be called ethics-law analysis, and its lack of deference to Congress. In the latter context, I suggest some parallels with another major case of the 1994 Term, *United States v. Lopez*.<sup>25</sup>

Part III examines some possible impacts of *National Treasury* on the drafting of laws to address a number of ethics issues, especially those relating to postemployment restrictions and attempts to utilize the notion of appearance of impropriety as a standard of conduct. Strict applications of constitutional prohibitions such as those that occurred in *National Treasury* may pose serious void-for-vagueness problems for standards of the latter type. I also explore some possible nonconstitutional implications of *National Treasury* for the drafting of ethics statutes. The case reflects uneasiness with what the majority referred to as "wholesale prophylactic rule[s]."<sup>26</sup> Such rules are a widely used technique in the field of ethics law. They are subject to some criticism, however, and *National Treasury* may reinforce this criti-

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23. See Levit, *supra* note 1, at 477 (reporting plan by Senate critics to mount challenge based on *Buckley* if reform bill passes).

24. In addition to serving as Chairman of the Massachusetts State Ethics Commission, I also served from September 1994 to June 1995 as an *ex officio* member of the Massachusetts Special Commission Relative to the Conflict of Interest Laws and the Financial Disclosure of Certain Public Officials and Employees. The report of this Commission, cited as *Mass. Special Commission Report*, is discussed *infra* part III.D. See *infra* text accompanying notes 341-46.

25. 115 S. Ct. 1624 (1995).

26. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1017 (1995).

cism, lending to it the Supreme Court's considerable prestige.

Parts IV and V explore the ramifications of the case on laws restricting employee political activity and campaign finance reform. There is a close relationship between these areas and the field of ethics law. In all three contexts, the goals of equal access to government, neutrality in public service, and the avoidance of both impropriety and the appearance of impropriety play fundamental roles.

Part IV focuses on the relationship between *National Treasury* and the cases that upheld the constitutionality of the Hatch Act's restrictions on federal employees' political activity,<sup>27</sup> several of which have subsequently been removed by statute. The Court in *National Treasury* distinguished these cases from the honoraria ban because they primarily utilized an employee protection rationale to validate restrictive legislation.<sup>28</sup> This Article argues that this interpretation misreads both the cases and the statute; the ethics-law concerns that the Court downplayed in *National Treasury* were central to the Hatch Act and the cases upholding it.<sup>29</sup>

Part V focuses on *Buckley v. Valeo*.<sup>30</sup> Although the *National Treasury* opinion did not cite *Buckley*, there are important similarities between the two opinions' use of the First Amendment to invalidate legislation based in part on goals of equalization and neutrality. As noted above, *National Treasury* stands as an apparent reaffirmation of *Buckley*, a fact that will cause little joy in the ranks of campaign finance reform advocates.

## II. *NATIONAL TREASURY*—A VICTORY FOR GOVERNMENT EMPLOYEES, A DEFEAT FOR GOVERNMENT ETHICS?

### A. *The Decision*

Receipt by government employees of honoraria—essentially payments for appearances, speeches, or articles—has been a matter of concern to Congress since the 1970s.<sup>31</sup> Such payments

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27. *Id.* at 1015-16.

28. *Id.* at 1015.

29. *Id.* at 1015-16.

30. 424 U.S. 1 (1976).

31. *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1291

present the possibility of the buying and selling of influence: the payment may not really be made for the matter in question but in order to purchase the recipient's goodwill. The area in which these payments drew the most criticism was that of honoraria for members of Congress itself.<sup>32</sup> In the late 1980s, two blue-ribbon commissions addressed the issue and recommended a ban on all honoraria.<sup>33</sup> Their recommendations went beyond the legislative branch, however, to encompass receipt of honoraria "by all officials and employees in all branches of government."<sup>34</sup> In the 1989 amendments to the Ethics in Government Act, Congress took this broad approach, declaring that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee."<sup>35</sup> Two unions and a group of career executive branch employees, primarily of middle- and lower-rank, challenged the Act on constitutional grounds.<sup>36</sup> The lower courts agreed with the challenges and struck down the statute as it applied to all members of the executive branch.<sup>37</sup>

The Supreme Court, by a margin of six to three, affirmed.<sup>38</sup> Writing for five members of the Court, Justice Stevens presented the question as a classic example of the government's power to restrict the expressive activities of its own employees for internal management purposes, as distinguished from other attempts to place more general restrictions on citizens' expression in furtherance of some social policy.<sup>39</sup> He began by emphasizing that government employment does not cause employees to relinquish

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(D.C. Cir. 1993) (Sentelle, J., dissenting), *aff'd*, 115 S. Ct. 1003 (1995).

32. *National Treasury*, 990 F.2d at 1278.

33. *National Treasury*, 115 S. Ct. at 1008-09.

34. See PRESIDENT'S COMM'N ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR 36 (1989). The President's Commission stated that "we recognize that banning honoraria would have a substantial financial cost to many officials. We feel strongly, however, that the current ailment is a serious one and that this medicine is no more bitter than is needed to cure the patient." *Id.*

35. 5 U.S.C. app. § 501(b) (Supp. V 1993).

36. *National Treasury*, 115 S. Ct. at 1010.

37. *National Treasury Employees Union v. United States*, 788 F. Supp. 4, 13 (D.D.C. 1992), *aff'd*, 990 F.2d 1271 (D.C. Cir. 1993), *aff'd*, 115 S. Ct. 1003 (1995).

38. *National Treasury*, 115 S. Ct. at 1008.

39. *Id.* at 1013.



their First Amendment rights.<sup>40</sup> As First Amendment guidance, the Court used the line of cases following *Pickering v. Board of Education*,<sup>41</sup> which dealt with disciplinary actions against public employees that arose from statements that they had made. This line of cases established a two-step analysis. In the first step, the court inquires whether the employee's statements are about a matter of public concern. If this question is answered in the affirmative, the reviewing court must next "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>42</sup> In prior cases, the Court often showed considerable deference to the government's determination about the presence of such interests.<sup>43</sup>

Justice Stevens found that the kind of articles and speeches covered by the honoraria ban would represent matters of public concern because similar activities in the past had been "addressed to a public audience, were made outside the workplace, and involved content largely unrelated to . . . government employment."<sup>44</sup> The denial of compensation imposed a "significant burden"<sup>45</sup> on this speech, apparently analogous to individual disciplinary actions. Justice Stevens recognized that the analytical fit with *Pickering* was not perfect, inasmuch as *National Treasury* involved a generalized restriction on future speech rather than a specific action based on past speech.<sup>46</sup> Nonetheless, he found the *Pickering* balancing approach applicable, while describing it in a way that indicated that the government would have a hard time prevailing. He described the Act as a "wholesale deterrent to a broad category of expression by a mas-

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40. *Id.* at 1012.

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

42. *National Treasury*, 115 S. Ct. at 1012 (quoting *Pickering*, 391 U.S. at 568).

43. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 154 (1983).

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

45. *Id.* at 1014.

46. *Id.* at 1013-14 ("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.").

sive number of potential speakers."<sup>47</sup> As he described the government's burden, it seems both qualitatively and quantitatively different from what it would be in an individualized disciplinary action under *Pickering*: "The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."<sup>48</sup>

Congress's side of the burden could not be satisfied by "mere speculation,"<sup>49</sup> nor would the normal judicial deference to congressional judgments about matters such as the appearance of integrity within the public service be determinative.<sup>50</sup> In this context, Justice Stevens emphasized that the ban applied to lower-ranking employees "with negligible power to confer favors on those who might pay to hear them speak or to read their articles."<sup>51</sup> He also emphasized the lack of a "nexus" requirement: the payments could come from persons with no interest in the employee's government work, and the subject matter might be unrelated to anything the employee did in government service.<sup>52</sup> As Justice Stevens pointed out, Congress had utilized such a nexus approach when it permitted payments for multiple speeches if there was no connection between the government employment and the source or the subject of the payment.<sup>53</sup> In sum, he found the honoraria ban "crudely crafted"<sup>54</sup> and violative of the plaintiffs' First Amendment rights.<sup>55</sup>

As for the remedy, Justice Stevens disagreed with the action of the courts below, which invalidated the statute as to all executive branch employees.<sup>56</sup> The majority noted that no senior-level executive branch employees were parties and that the broad remedy would not permit an honoraria ban even when

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47. *Id.* at 1013.

48. *Id.* at 1014.

49. *Id.* at 1017.

50. *Id.* at 1018.

51. *Id.* at 1016.

52. *Id.* at 1016-17.

53. *Id.* at 1016.

54. *Id.* at 1018.

55. *Id.*

56. *Id.* at 1018-19.

nexus concerns were satisfied.<sup>57</sup> The Court's solution was to limit relief to the employees who were plaintiffs.<sup>58</sup> The Act's ban thus continues to apply to senior officials, at least until that matter is contested. Justice Stevens nevertheless rejected suggestions that the ban, limited by a nexus requirement, be ruled valid as to all levels. He determined that such action would be inappropriate judicial legislation.<sup>59</sup> Moreover, "[t]he process of drawing a proper nexus, even more than the defense of the statute's application to senior employees, would likely raise independent constitutional concerns whose adjudication is unnecessary to decide this case."<sup>60</sup>

Justice O'Connor, who joined with the majority on the merits, dissented on the remedial point. She would have read a nexus requirement into the statute, primarily because the lack of one with respect to middle- and lower-ranking employees was the statute's principal infirmity.<sup>61</sup> She agreed with the majority that the Act's "broad, prophylactic ban"<sup>62</sup> on payments for non-work-related speech to rank-and-file employees curbed so much speech that the government could not sustain the burden of justifying it.<sup>63</sup> The possibility of some under-the-table payments was not enough, nor was the possibility of an appearance of impropriety. She was unwilling to let deference to Congress carry the government's burden on this point, particularly because the two blue-ribbon commission reports had not specifically addressed receipt of honoraria by rank-and-file executive branch employees.<sup>64</sup>

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented on both the merits and the remedy.<sup>65</sup> Chief Justice Rehnquist emphasized the need for deference to the government's judgments as employer, which the Court had

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57. *Id.* at 1018.

58. *Id.*

59. *Id.* at 1019.

60. *Id.*

61. *Id.* at 1022 (O'Connor, J., concurring in part and dissenting in part).

62. *Id.* (O'Connor, J., concurring in part and dissenting in part).

63. *Id.* at 1021-22 (O'Connor, J., concurring in part and dissenting in part).

64. *Id.* at 1021 (O'Connor, J., concurring in part and dissenting in part).

65. *Id.* at 1024 (Rehnquist, C.J., dissenting).

shown both in individual discipline cases and in upholding the Hatch Act's broad restrictions on partisan activities by federal employees.<sup>66</sup> On the facts before the Court, he would have shown similar deference to the honoraria ban, particularly given "the Government's foremost interest—prevention of impropriety and the appearance of impropriety."<sup>67</sup> The Chief Justice would have let Congress draw the line where the two commissions recommended, even though they did so in general terms.<sup>68</sup> Beyond deference to Congress's judgment in drawing lines, he justified the line drawn by noting that many mid- and lower-level officials, such as "[t]ax examiners, bank examiners, [and] enforcement officials," are in a position to confer favors.<sup>69</sup> Consistent with this observation, he would have limited the relief sought by such plaintiffs in *National Treasury* to honoraria that would not be invalid under a nexus requirement.<sup>70</sup>

## B. *National Treasury and First Amendment Analysis*

### 1. *Balancing Instead of Rules?*

*National Treasury* is obviously an important First Amendment case. This aspect alone merits considerable attention. An initial question concerns what light the case sheds on general questions of First Amendment analysis. In *R.A.V. v. City of St. Paul*,<sup>71</sup> Justice Stevens, the author of *National Treasury*, called for a movement away from a First Amendment jurisprudence purportedly governed by specific categories and concepts.<sup>72</sup> He viewed, with approval, the Court's decisions as establishing "a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech."<sup>73</sup> Justice Stevens's reliance

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66. *Id.* at 1025-27 (Rehnquist, C.J., dissenting).

67. *Id.* at 1027 (Rehnquist, C.J., dissenting).

68. *Id.* at 1027-29 (Rehnquist, C.J., dissenting).

69. *Id.* at 1028 (Rehnquist, C.J., dissenting).

70. *Id.* at 1031 (Rehnquist, C.J., dissenting).

71. 505 U.S. 377 (1992).

72. *Id.* at 417-28 (Stevens, J., concurring).

73. *Id.* at 428 (Stevens, J., concurring). See generally Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 88-89 (1992) (discussing Justice Stevens's opinion in *R.A.V.*).

in *National Treasury* on the *Pickering* balancing approach, a classic example of the contextual analysis that he favors, is thus not surprising. In this respect, it is interesting to compare his *National Treasury* opinion with the D.C. Circuit's opinion in the same case.<sup>74</sup> The lower court applied *Pickering*, but it also relied heavily on the classic First Amendment concepts of "overbreadth" and "narrow tailoring."<sup>75</sup> These concepts appeared only peripherally in the text of Justice Stevens's opinion, in the discussion of remedy, essentially after the merits had been resolved.<sup>76</sup> However, as I develop below, his seemingly contextual, balancing conclusion can easily be restated as a rule, imposing on the government the concepts of heightened scrutiny, strong governmental interest, and narrow tailoring.<sup>77</sup>

## 2. The Demise of "Public Concern?"

Justice Stevens demonstrated the persistence of categories in First Amendment analysis by beginning his application of *Pickering* with a discussion of one such category: whether the employees' speech affected by the honoraria ban fell within the rubric of "matters of public concern."<sup>78</sup> *Pickering* recognized public employees' retention of "the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest."<sup>79</sup> Since *Pickering*, the Court's view of what constitutes such matters has undergone considerable transformation. Obviously, the concept can play a limiting role in determining what public employees can speak about without fear of retaliation. *Connick v. Myers*,<sup>80</sup> an early post-*Pickering* case, took a pro-employer stand, in part by emphasizing the concept's derivation from "the Constitution's special concern with threats to the

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74. *National Treasury Employees Union v. United States*, 990 F.2d 1271 (D.C. Cir. 1993), *aff'd*, 115 S. Ct. 1003 (1995).

75. *Id.* at 1274-75.

76. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1018 (1995).

77. See *infra* text accompanying notes 133-41.

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

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

80. 461 U.S. 138 (1983).

right of citizens to participate in political affairs."<sup>81</sup>

In the later case of *Rankin v. McPherson*,<sup>82</sup> Justice Scalia, in his dissent, attempted to keep the concept a narrow one, emphasizing its close relation to core First Amendment values concerning participation in the political process.<sup>83</sup> In *Rankin*, an employee of a constable's office had commented favorably on the attempt to assassinate President Reagan.<sup>84</sup> Despite the strictures of Justice Scalia and three of his colleagues, the majority had no difficulty finding the statement to be on matters of public concern. For example, Justice Marshall noted that "[i]t came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President."<sup>85</sup> This view of public concern led Justice Scalia to hypothesize that a threat "to blow up the local federal building" would also be entitled to First Amendment protection from discipline because the public would be concerned about it.<sup>86</sup>

Not surprisingly, the lower courts have found the public concern analysis difficult to apply coherently.<sup>87</sup> Examples abound, such as the case in which the district court and court of appeals differed over whether statements by an athletic director about a school's athletic eligibility met the public concern test.<sup>88</sup> Part of the problem is that the public may well be interested in anything that goes on in a public agency or institution.<sup>89</sup> Moreover, it is easy to argue for protecting the employees' rights to speak about all such matters, for employees are in the best position to know what happens.<sup>90</sup> Coffee break gossip and griping thus can easily be elevated to the level of constitutionally protected speech. Perhaps such discourse merits protection not because of the need to protect the political process but because of the self-

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81. *Id.* at 145.

82. 483 U.S. 378 (1987).

83. *Id.* at 395 (Scalia, J., dissenting).

84. *Id.* at 381.

85. *Id.* at 386.

86. *Id.* at 398 (Scalia, J., dissenting).

87. See *Johnson v. Multnomah County*, 48 F.3d 420, 423 (9th Cir.), cert. denied, 115 S. Ct. 2616 (1995).

88. *Hall v. Ford*, 856 F.2d 255, 260 (D.C. Cir. 1988).

89. *Connick v. Myers*, 461 U.S. 138, 149 (1983).

90. *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994).

realization that all people enjoy when they are able to speak freely on a range of subjects.<sup>91</sup>

Justice Stevens's opinion in *National Treasury*, which treated the speech at issue as almost automatically involving matters of public concern, may represent a further watering down of the concept. One cannot know with any precision what the persons subject to the honoraria ban would have said or written. Indeed, the "test" may now be that, excepting what *National Treasury* called "employee comment on matters related to personal status in the workplace,"<sup>92</sup> everything that a public employee says is deemed to be on a matter of public concern. Perhaps Justice Stevens was laying the groundwork for the next step of abandoning the concept altogether, a prospect that would satisfy some academic critics.<sup>93</sup> This prospect also would resolve the difficult conceptual problem of whether speech outside the public concern realm enjoys no constitutional protection.<sup>94</sup> Justice Stevens's desire to emphasize a contextual approach to First Amendment issues may be satisfied, however, by retaining some notion of public concern in a highly watered-down, sliding-scale form. *Connick* already had presaged such a development, stating that "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."<sup>95</sup>

### 3. *Will the Court's Employee Speech Decisions Now Tilt in a Pro-Employee Direction?*

Whether or not the public concern test has been totally abandoned, its continued dilution represents a clear victory for the free speech rights of public employees. The question that natu-

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91. See *Developments in the Law: Public Employment*, 97 HARV. L. REV. 1611, 1769 (1984) [hereinafter *Developments—Public Employment*].

92. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1013 (1995).

93. See, e.g., Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 55 (1990) (noting that "[t]he public concern test rests on an unduly constricted vision of public discourse").

94. *Rankin v. McPherson*, 483 U.S. 378, 384 n.7 (1987).

95. *Connick v. Myers*, 461 U.S. 138, 150 (1983).

rally arises is whether *National Treasury* represents a generalized pro-employee tilt in the Court's employee speech doctrine. Until now, the results have been mixed but, if anything, have tilted somewhat in a pro-employer direction. Some criticized the five-to-four decision in *Connick* on this ground,<sup>96</sup> while the five-to-four decision in *Rankin* goes the other way.<sup>97</sup> Prior to *National Treasury*, the Court's most recent pronouncement on the subject came in *Waters v. Churchill*.<sup>98</sup> *Waters* involved the narrow issue of the extent to which the First Amendment requires a public employer to ascertain precisely what its employee said before taking disciplinary action based on the employee's speech.<sup>99</sup> On this issue, the Court took a pro-employee tack, holding that the employer must engage in a reasonable investigation.<sup>100</sup> Nevertheless, the Court, over a dissent by Justice Stevens, also held that the employer's ultimate findings need only be reasonable, not correct.<sup>101</sup>

On the general issue of government-employer power, the Court's opinion emphasized the need for deference to employer decisions about potential disruptions of the public service.<sup>102</sup> According to Justice O'Connor, the "extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks."<sup>103</sup> Employees' rights must be subordinated so that the government can accomplish its basic mission. One should recognize that this analysis does not carry over to the rights of the citizenry-at-large. Much of constitutional law consists of blocking what the government perceives as its mission in order to protect those rights. As cases like *Waters* indicate, public employee rights may be of a different, and lower, order.<sup>104</sup>

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96. *Developments—Public Employment*, *supra* note 91, at 1756.

97. *Rankin*, 483 U.S. 378.

98. 114 S. Ct. 1878 (1994).

99. *Id.* at 1888-90.

100. *Id.* at 1889.

101. *Id.* at 1890.

102. *Id.* at 1887.

103. *Id.*

104. *Id.* at 1886.



The extent to which *Waters* represents a pro-employer tilt can be seen in the latest installment of the litigation between Doctor Leonard Jeffries and officials of the City University of New York.<sup>105</sup> The university disciplined Jeffries for allegedly making anti-Semitic remarks; Jeffries then sued for reinstatement and damages.<sup>106</sup> After a partial victory for Jeffries in the lower courts, the Supreme Court remanded the case with instructions to reconsider it in light of *Waters*.<sup>107</sup> On remand, the Second Circuit directed judgment for the defendants, emphasizing the deferential thrust of *Waters* and stating that "even when the speech is squarely on public issues—and thus earns the greatest constitutional protection—*Waters* indicates that the government's burden is to make a substantial showing of likely interference, not of an actual disruption."<sup>108</sup>

The lower court got the right message from *Waters*, but does *National Treasury* send a different one? Has the pendulum swung back toward *Rankin*? In my view, the answer is "no." The key is the fundamental difference between the individualized nature of the determinations in the *Pickering* cases and the generalized restriction on speech at issue in *National Treasury*. Despite the Court's insistence that *Pickering* could simply be transposed to the latter context, the presence of a generalized ban triggered some basic First Amendment concerns and principles, even though the language of balancing partially concealed them.<sup>109</sup> When these principles reappeared, deference was relegated to a secondary role.

#### 4. *Transposing the Pickering Approach to a Generalized Restriction—Some Problems*

The majority in *National Treasury*, as well as the concurrence and dissent, analyzed the honoraria ban by utilizing the

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105. *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir.), *vacated*, 115 S. Ct. 502 (1994), *rev'd*, 52 F.3d 9 (2d Cir. 1995).

106. *Id.* at 1241.

107. *Harleston v. Jeffries*, 115 S. Ct. 502, 503 (1994).

108. *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) (emphasis omitted).

109. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1012-15 (1995).

*Pickering* approach.<sup>110</sup> That case and its progeny, however, all dealt with individual disciplinary actions based on a public employee's speech.<sup>111</sup> Justice Stevens recognized that there was a conceptual difference between cases of this sort and a generalized ban on future conduct.<sup>112</sup> The difference is substantial. In the generalized context, a reviewing court has to speculate as to the types of conduct that might occur, the impact that they might have on the various interests present, and the relative weights of those interests. One can call this balancing, but it is very different from analyzing, after the fact, public employer X's dismissal of public employee Y for a specific remark.<sup>113</sup>

In his generalized application of *Pickering* to the honoraria ban problem, Justice Stevens emphasized the ban's "wholesale deterrent to a broad category of expression by a massive number of potential speakers."<sup>114</sup> He also invoked the interests of the audiences of that future speech.<sup>115</sup> Taking them together, Justice Stevens was able to posit the existence of a set of interests of considerable magnitude: "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression."<sup>116</sup>

Although Justice Stevens was willing to speculate about the "enormous quantity"<sup>117</sup> of speech deterred and the chilling ef-

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110. *Id.* at 1013-15, 1020, 1025.

111. *See* *Waters v. Churchill*, 114 S. Ct. 1878, 1883 (1994); *Rankin v. McPherson*, 483 U.S. 378, 381-82 (1987); *Connick v. Myers*, 461 U.S. 138, 140-41 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 564 (1968).

112. *National Treasury*, 115 S. Ct. 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. Rather, the Government asks us to apply *Pickering* to Congress' wholesale deterrent to a broad category of expression by a massive number of potential speakers.

*Id.* (citations omitted).

113. *But see id.* at 1020 (O'Connor, J., concurring in part and dissenting in part) (partially agreeing with distinction but stating that "[t]o draw the line based on a distinction between *ex ante* rules and *ex post* punishments . . . overgeneralizes and threatens undue interference with 'the government's mission as employer'") (quoting *Waters*, 114 S. Ct. at 1887).

114. *Id.* at 1013.

115. *Id.* at 1014.

116. *Id.*

117. *Id.* at 1013 n.11.

fect of the ban,<sup>118</sup> he would not allow the government to engage in speculation about the existence and strength of its interest.<sup>119</sup> He quoted precedent dealing with regulation of private conduct for the proposition that the government "must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."<sup>120</sup> Justice Stevens's formulation in *National Treasury* suggests that *potential* burdens on expression must be outweighed by that expression's "necessary impact on the *actual* operation' of the Government."<sup>121</sup>

What harm could the government show? Justice Stevens dismissed any possibility of workplace disruption, at least with respect to honoraria for speech outside the workplace and not relating to the speaker's government employment. He also dismissed efficiency/morale arguments, like those the Court used to uphold the Hatch Act, on the ground that the Hatch Act focused on employee protection from partisan retribution and that "[u]nlike partisan political activity . . . honoraria hardly appear to threaten employees' morale or liberty."<sup>122</sup> He viewed as the government's strongest argument the possible misuse of power or the appearance of misuse through the taking of under-the-table payments.<sup>123</sup> While this might be true for legislators and high-ranking executive branch officials, however, he dismissed it as speculative and unsupported by evidence with respect to other executive branch officials—the plaintiffs in *National Treasury*.<sup>124</sup>

Justice Stevens regarded any remaining arguments for a "wholesale prophylactic rule" as justified primarily by adminis-

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118. *Id.* at 1014 (noting that, "unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens").

119. *Id.* at 1013 n.11.

120. *Id.* at 1017 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2450 (1994)) (alteration in original).

121. *Id.* at 1014 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 571 (1968)) (emphasis added).

122. *Id.* at 1015.

123. *Id.* at 1015-16.

124. *Id.* at 1016.

trative convenience.<sup>125</sup> This argument was nevertheless weakened by the fact that the amended regulations had contained a requirement of a nexus between the speech and the employee's work when the employee's speech was a part of a series of articles or speeches.<sup>126</sup> For Justice Stevens, this showed that the government was capable of reaching the core problem of under-the-table purchases of influence, or the appearance thereof, without sweeping so broadly.<sup>127</sup>

Apparently, Justice Stevens found the broad sweep of the ban to be its most troubling aspect. He referred to the ban as a "crudely crafted burden"<sup>128</sup> and noted that the lower court had invalidated it because "it was not as carefully tailored as it should have been."<sup>129</sup> The dissenters relied on precedent, particularly on *Pickering* and the Hatch Act cases,<sup>130</sup> and the concepts of deference to Congress in its regulation of the federal service and the importance of preventing impropriety and the appearance of impropriety.<sup>131</sup> As I develop below,<sup>132</sup> both of these concepts suggest judicial tolerance toward the use of broad prophylactic measures. Indeed, such forms of regulation are staples of ethics law. *National Treasury* calls them both into question.

At this point, however, one should focus on the similarity between Justice Stevens's purported *Pickering* balancing test and classic First Amendment analysis. As the dissenters pointed out, the former is supposed to be easier for the government to satisfy than the latter.<sup>133</sup> For example, great deference to public employer decisions is a hallmark of *Pickering* decisions.<sup>134</sup> Some forms of economic and social legislation get broad deference as well,<sup>135</sup> but laws restricting speech do not. These laws

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125. *Id.* at 1017.

126. *Id.* at 1016.

127. *Id.* at 1016-17.

128. *Id.* at 1018.

129. *Id.*

130. *Id.* at 1025-26 (Rehnquist, C.J., dissenting).

131. *Id.* at 1027 (Rehnquist, C.J., dissenting).

132. See *infra* text accompanying notes 172-88.

133. *National Treasury*, 115 S. Ct. at 1025 (Rehnquist, C.J., dissenting).

134. See, e.g., *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994); *Connick v. Myers*, 461 U.S. 138, 150-51 (1983).

135. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 375 (4th

encounter such concepts as overbreadth challenges and compelling state interest and narrow tailoring requirements.<sup>136</sup> Although the terminology is either absent or plays a secondary role, Justice Stevens's approach in *National Treasury* takes many of these tacks. The invocation of unknown speeches and audiences without any nexus to the speaker's work<sup>137</sup> amounts to a facial challenge for overbreadth. The large amount of speech that the government must justify suppressing puts it in the position of having to show something like a compelling state interest.<sup>138</sup> Most importantly, requiring a nexus to ensure that the government regulates only speech representing dangers that the government may reach is a classic utilization of the First Amendment narrow tailoring requirement.<sup>139</sup> I will leave to others the issue of whether Justice Stevens's balancing approach to First Amendment issues is, conceptually, a major departure from a more categorical form of analysis.<sup>140</sup> At least in *National Treasury*, they look alike.<sup>141</sup> Before turning to the clash between this case and ethics-law analysis,<sup>142</sup> an important related question will be addressed: whether the decision marks a major step towards recognizing in public employees the full panoply of rights enjoyed by other citizens. A court's views as to the nature and extent of public employees' rights will play a

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ed. 1991) ("The Court's turnabout from the *Lochner* era became complete with the *Williamson* decision."); see also *Williamson v. Lee Optical*, 348 U.S. 483, 490-91 (1955) (upholding restrictions on the fitting, duplication, and replacement of frame lenses and other optical appliances).

136. See *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105, 118-23 (1991). These concepts played an important role in the decision below. See *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1273-75 (D.C. Cir. 1993), *aff'd*, 115 S. Ct. 1003 (1995).

137. *National Treasury*, 115 S. Ct. at 1018.

138. Cf. *id.* at 1017 (noting that "[t]he fact that § 501 singles out expressive activity for special regulation heightens the Government's burden of justification"). The Court supported this statement by citation to a case applying the compelling state interest standard. *Id.* (citing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 (1983)).

139. *National Treasury*, 990 F.2d at 1275-76.

140. See Sullivan, *supra* note 73, at 88-89.

141. Moreover, the similarity is bolstered by the fact that the majority cited a number of classic First Amendment cases. See *National Treasury*, 115 S. Ct. at 1017.

142. See text *infra* part II.D.

large role in its evaluation and construction of the ethics laws affecting them.

*C. National Treasury and the Constitutional Status of Public Employees*

The *Pickering* approach to public employee dismissals could lead in either a pro-employee or a pro-employer direction.<sup>143</sup> Courts have viewed it, however, as resting on pro-employer premises<sup>144</sup> and leading to results more deferential to the government than would be the case under general First Amendment principles.<sup>145</sup> *National Treasury's* apparent melding of the two lines of analysis raises the broader question of whether the Court is prepared to revisit the issue of the constitutional status of public employees.<sup>146</sup> Over the years, the Court has changed position on this matter more than once, with decisions spanning a spectrum from relegating public employees to a definite subordinate position to treating them like all other citizens.<sup>147</sup>

The notion of public employees' enjoying fewer rights historically was based on the rights-privilege distinction.<sup>148</sup> Government employment was viewed as a privilege that could be conditioned on the surrender of rights.<sup>149</sup> More recent justifications for according public employees fewer constitutional rights have focused primarily on the nature of the government's role as employer. Justice O'Connor articulated the latter rationale in

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143. *Developments—Public Employment*, *supra* note 91, at 1748-49. In the view of this commentator, the *Pickering* test is neutral on its face, but the current Court's scale of values tends to lead to pro-employer decisions.

144. *See Waters v. Churchill*, 114 S. Ct. 1878, 1886 (1994).

145. *National Treasury*, 115 S. Ct. at 1012 (noting that *Pickering* permits restraint of public employee speech "that would be plainly unconstitutional if applied to the public at large").

146. *Cf. id.* at 1027 (Rehnquist, C.J., dissenting) (criticizing the Court for relying on cases regulating the speech of private actors).

147. *Developments—Public Employment*, *supra* note 91, at 1738-39.

148. *See generally id.* at 1739-44 (discussing the emergence and development of the rights-privilege doctrine over the course of the twentieth century).

149. *E.g., McAuliffe v. Mayor & Bd. of Aldermen*, 29 N.E. 517, 517-18 (Mass. 1892) (discussing government employment as a privilege that may require surrender of certain constitutional rights); *see Developments—Public Employment*, *supra* note 91, at 1742-43 (discussing pre-Warren Court views).

*Waters v. Churchill*.<sup>150</sup> The well-being of all of society depends on government's successful accomplishment of the tasks with which society has charged it. The interests and rights of public employees thus must be subordinated to the achievement of these goals.<sup>151</sup> One may also articulate a fiduciary status rationale for this subordination that focuses on the role and responsibilities of the employees.

Above all, public employees must be neutral and willing to put aside self-interest to perform their duties impartially.

We the People entrust public power to elected and appointed officials for the purpose of furthering the public interest. To accept that power is to undertake a commitment that it will be used only for this purpose, and not to advance the narrow interest of self or of any other person or group.<sup>152</sup>

Although one can easily advance such justifications, the nagging question remains whether it is fair to make public employees give up the panoply of constitutional rights that all other citizens enjoy. Over the years, many have insisted that it is not fair to make such a demand. Justice Black, for example, denounced the Hatch Act's restrictions on public employees' political activity as creating a kind of second-class citizenship.<sup>153</sup> Recent analyses have focused on the importance of recognizing and protecting the employees' private and personal spheres to the greatest extent possible.<sup>154</sup> This approach can be justified both as maximizing the protective role of important constitutional rights intended to be available to all and as enhancing the attractiveness of government service.

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150. 114 S. Ct. 1878, 1886-88 (1994).

151. *See id.* at 1888 ("The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.").

152. Farina, *supra* note 5, at 292; *see* Nolan, *supra* note 8, at 71.

153. *United Public Workers v. Mitchell*, 330 U.S. 75, 111-12 (1947) (Black, J., dissenting).

154. Nolan, *supra* note 8, at 144 ("The rule of justified regulation assumes that public servants are individual citizens first, and government employees second. The rule requires us to consider their liberties and interests in being free of unnecessary regulation before we control private aspects of their lives in the name of public welfare.").

Taken to its furthest point, this approach represents what one commentator has called the "individual rights vision" of public employment.<sup>155</sup> The same commentator views the current Court as having backed away from this vision, towards a middle ground between it and truly second-class status.<sup>156</sup> When the government attempts to restrict the rights of public employees, the employees win some of the time. *National Treasury* is consistent with this analysis and with the perception that the Court is somewhat ambivalent about the entire issue. The employees won, but Justice Stevens's opinion states at least that the government will also win in those cases in which it can make the required showing.<sup>157</sup> The general widespread nature of the ban obviously was key to the outcome. Whether an equally broad ban with some sort of nexus requirement would survive a challenge remains open.<sup>158</sup>

Rather than representing a victory for the constitutional rights of all government employees, perhaps *National Treasury* represents a victory for the rights of some employees—those middle- and lower-rank executive branch employees whom the plaintiffs represented. Justice Stevens's opinion referred several times to the different problem that honoraria for high-ranking officials might present.<sup>159</sup> *National Treasury* may then represent a call upon Congress to differentiate more carefully among the status and responsibilities of public employees before restricting the rights that those employees would otherwise enjoy as citizens. The Court already had taken such a nuanced approach in *Rankin v. McPherson*,<sup>160</sup> an employee-speech dis-

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155. *Developments—Public Employment*, *supra* note 91, at 1739.

156. *See id.* at 1747-49.

157. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1012-13 (1995).

158. *Id.* at 1019.

159. *Id.* at 1014, 1016, 1019. Justice Stevens noted that:

Congress reasonably could assume that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate a similar appearance of improper influence. Congress could not, however, reasonably extend that assumption to all federal employees below Grade GS-16, an immense class of workers with negligible power to confer favors on those who might pay to hear them speak or to read their articles.

*Id.* at 1016.

160. 483 U.S. 378 (1987).



missal case, and in *Elrod v. Burns*,<sup>161</sup> a case involving patronage hiring and dismissals.<sup>162</sup> One might argue for a presumption that all public employees should be treated alike,<sup>163</sup> but many have argued for, in effect, making the presumption rebuttable.<sup>164</sup> The differentiation approach preserves elements of second-class citizenship in that it permits the abridgment of some employees' rights. The approach thus strikes a midpoint between two categorical visions that is consistent with *Pickering* and with the Court's desire to balance the interests on both sides. I view this as a desirable general approach but question whether the Court applied it correctly in *National Treasury*.

#### D. National Treasury—An Ethics-Law Appraisal

Things certainly may be said in favor of *National Treasury*, both in terms of its specific result and its broader implications. The honoraria ban at issue did have an extraordinarily broad sweep, catching in its net many instances of compensated speech that would pose no danger to any of the values that Congress might have sought to protect.<sup>165</sup> The case serves as a reminder to Congress that the First Amendment establishes an outer boundary to the reach of prophylactic statutes. It also serves as a reminder that public employees do not automatically relinquish their constitutional rights upon employment. Within the overall field of ethics, the decision will reinforce the arguments of those who have warned against a tendency to overregulate the matter.<sup>166</sup> Perhaps *National Treasury's* greatest long-term

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161. 427 U.S. 347, 367-68 (1976) (involving differentiation among status of public employees). *Contra* *United Pub. Workers v. Mitchell*, 330 U.S. 75, 102 (1947) (refusing to impose differentiation requirement on Congress).

162. See *Hall v. Ford*, 856 F.2d 255, 261 (D.C. Cir. 1988) (combining *Rankin* and *Elrod* analyses).

163. See Farina, *supra* note 5, at 301.

164. *Id.* at 293, 309, 322; Nolan, *supra* note 8, at 110, 141.

165. See *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1020-21 (1995) (O'Connor, J., concurring in part and dissenting in part); Farina, *supra* note 5, at 316-17; Nolan, *supra* note 8, at 107-10.

166. See Farina, *supra* note 5, at 290-91; Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417, 419 (1990). For an excellent treatment of the issue, see Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57.

impact will come from its emphasis on a more nuanced approach to ethics regulation<sup>167</sup> and the concept of tailoring. Having said all this, however, there is much in the decision that gives me pause.

As a starting point, one should note that those who successfully invoked the judicial process in *National Treasury* are not some discrete, insular minority in need of protection from the courts because they have nowhere else to turn.<sup>168</sup> Public employees are a powerful political lobby in Washington and elsewhere. In 1993, they succeeded in loosening the Hatch Act's restrictions.<sup>169</sup> Indeed, when the Court handed down *National Treasury*, federal employee groups were in the process of trying to get Congress to accomplish the same result, an attempt that was seen as likely to bear fruit.<sup>170</sup> I do not mean to suggest barring the courthouse door to powerful plaintiffs, but the Court might have modified its balancing exercise to take into account the relative strengths of the contending interests. In a sense, "the government" was regulating itself, given that the ban applied across the board to employees of all three branches, including the elected representatives who passed it.<sup>171</sup>

A more fundamental criticism is the majority's relative lack of concern with what I refer to as the ethics-law dimensions of the statute. At times, Justice Stevens seemed to view the problem as one of management. He referred to the potential expression's "impact on the actual operation"<sup>172</sup> of the government and re-

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167. *E.g.*, Farina, *supra* note 5, at 293 (discussing intra- and interbranch distinctions in the formulation of ethical principles).

168. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

169. *See* 5 U.S.C. §§ 7321-7353 (Supp. V 1993); Paula Galowitz, *Restrictions on Lobbying by Legal Services Attorneys: Redefining Professional Norms and Obligations*, 4 B.U. PUB. INT. L.J. 39, 98 n.303 (1994).

170. *See* Nolan, *supra* note 8, at 107-08 & n.188 (discussing proposed Ethics in Government Act Amendments of 1991, H.R. 3341, 102d Cong., 1st Sess. (1991)).

171. 5 U.S.C. app. §§ 501-505. One should note that this amendment was accompanied by a substantial pay increase for members of Congress, federal judges, and executive branch employees above the salary grade GS-15. *See* *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1009 (1995). The fact that the class of persons bringing the suit to challenge the honoraria ban was composed of individuals who did not share in the salary increase is significant.

172. *National Treasury*, 115 S. Ct. at 1014 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 571 (1968)) (emphasis added).

ferred to the governmental interest in "operational efficiency."<sup>173</sup> Although the individual discipline cases on which Justice Stevens drew were primarily concerned with such management matters as the potential for office disruption,<sup>174</sup> he noted that the ban challenged in *National Treasury* was not aimed at disruption. It went beyond any such managerial concerns as "efficiency" to the separate and distinct realm of ethics. Ethics-based concerns about the operation of government may implicate efficiency, but they rest on and advance broader values, particularly "(1) protecting the integrity of services provided to the government; (2) avoiding the appearance of conflicts or misuse of government position; and (3) protecting private citizens from having to pay extraordinary fees to receive ordinary government services."<sup>175</sup>

Justice Stevens recognized, perhaps grudgingly,<sup>176</sup> the force of such concerns. In the context of *National Treasury*, some of the people paying honoraria may well have paid for access. Some of the people receiving them may well have provided it. The biggest problem with the entire practice, approached from the generalized perspective that the Court employed,<sup>177</sup> is that of appearances. As Judge Sentelle's lower court dissent noted:

All the public sees are employees, entrusted with carrying out the business of the government, receiving substantial payments from entities outside of the government—the public

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173. *Id.* at 1016.

174. In cases such as *Connick*, *Rankin*, and *Waters*, the employers focused on the potential effects of the speech on office morale. The possibility always remains, however, that broader issues of a public office's image will be drawn into play. See *Rankin v. McPherson*, 483 U.S. 378, 400 (1987) (Scalia, J., dissenting) (declaring that statements made concerning possible assassination of the President "might also, to put it mildly, undermine public confidence in the Constable's office").

175. Nolan, *supra* note 8, at 71-72.

176. For example, he characterized the government's interest in concerns about appearances as "undeniably powerful," but he completely discounted the role of the Hatch Act cases in validating such concerns. *National Treasury*, 115 S. Ct. at 1016.

177. The Court's approach amounts to a form of overbreadth analysis, although there was surprisingly little discussion of the validity of this approach. Compare *id.* at 1013-14 (holding that, on account of the disputed statute's broad sweep, "the Government's burden is greater . . . than with respect to an isolated disciplinary action") with *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (focusing on determinations of potential overbreadth of a federal statute).

may not pause to consider whether there is a relationship between the payor and payee or the activity for which the honorarium is paid and the payee's job.<sup>178</sup>

As a matter of ethics law, the statute at issue in *National Treasury* dealt with a potentially serious appearances problem. Public cynicism about government employees is almost certainly not limited to those employees in high positions. As a matter of judicial review of legislation, the question becomes how to construct a balancing test that gives adequate weight to the government's concern about cases in which there is *only an appearance* of impropriety. Two key concepts can help carry the government's burden on this issue: deference to Congress and the notion that prophylactic legislation is sometimes necessary. Justice Stevens gave short shrift to both.

In the individual discipline cases, deference to the employer had played an important role.<sup>179</sup> When it came to Congress's enactment of a general ban, that concept was not triggered, in part because of a lack of evidence that would support a ban extending to all levels<sup>180</sup> and in part because of a "powerful and realistic presumption that the federal work force consists of dedicated and honorable civil servants."<sup>181</sup> Nevertheless, if the issue really is a question of how the *public* perceives particular practices on the part of those employees, Congress is in a far better position than the judiciary to make that judgment. Its members are in constant touch with the public, and ethics issues are one of the things they hear about the most.

As for the use of broad prophylactic rules, Justice Stevens analyzed the issue essentially as a matter of "administrative convenience" and ease of enforcement;<sup>182</sup> however, these rules serve a broader function. "Inherent in the very nature of such a rule is the concept that the evil to be avoided has not yet occurred."<sup>183</sup> Indeed, it may never occur. In the landmark federal

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178. *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1292 (D.C. Cir. 1993) (Sentelle, J., dissenting), *aff'd*, 115 S. Ct. 1003 (1995).

179. *E.g.*, *Connick v. Myers*, 461 U.S. 138, 151-52 (1983); see *National Treasury*, 115 S. Ct. at 1017-18 n.21.

180. *National Treasury*, 115 S. Ct. at 1016.

181. *Id.* at 1018.

182. *Id.* at 1017.

183. *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1288

ethics case of *United States v. Mississippi Valley Generating Co.*, the Court stated that the ethics statute in question "establishes an objective standard of conduct, and . . . whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption. The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor."<sup>184</sup> Prophylactic statutes play a particularly important role in the area of ethics. There is a substantial danger of hidden misconduct,<sup>185</sup> it is important to remove temptation before the detrimental acts can occur,<sup>186</sup> and the public needs constant assurance that the government generally is above suspicion.<sup>187</sup>

One might still justify *National Treasury* on the straightforward grounds that notions of deference to the legislature cannot push aside the First Amendment and that the First Amendment's force overrides concerns of ease in legislative draftsmanship. This, however, is what narrow tailoring is all about. Indeed, the Court previously has pointed in this direction when it has grappled with tensions between prophylactic rules and the First Amendment.<sup>188</sup> There are, in my view, two serious flaws with these contentions. The first is the premise of *National Treasury* that a lessened degree of First Amendment protection is in operation. The question is how to apply a balancing test—not a set of absolute rules—in which the government's

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n.10 (D.C. Cir. 1993) (Sentelle, J., dissenting), *aff'd*, 115 S. Ct. 1003 (1995); see *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) ("The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs.").

184. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961).

185. See Ann McBride, *Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 460 (1990).

186. *Mississippi Valley*, 364 U.S. at 550.

187. Cf. Farina, *supra* note 5, at 292 (quoting Daniel Webster's statement that, "[i]n a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done"). For a challenge to a somewhat different regulation of payments related to honoraria, see *Sanjour v. EPA*, 984 F.2d 434 (D.C. Cir.), *vacated*, 997 F.2d 1584 (1993).

188. E.g., *Edenfield v. Fane*, 113 S. Ct. 1792, 1796 (1993) (holding that ban on solicitation by certified public accountants is prophylactic rule and that State failed to show requisite interest to withstand First Amendment challenge); see *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect.").

interest in preserving ethical standards must be given some weight. Prophylactic rules are an important means to further this goal. I would go further and advance a second, quasi-constitutional justification. Ethics statutes perform a vital function in a democratic society. By preserving the people's confidence that the government really is *their* government, ethics laws reinforce the legitimacy of all public institutions.<sup>189</sup> Viewed in this light, they deserve, even in prophylactic form, a heightened degree of weight in any constitutional balancing test.

The analysis in this subsection suggests some fundamental tensions between ethics-law precepts and *National Treasury*. Perhaps a degree of reconciliation is possible along the following lines. Justice Stevens's opinion suggests that the Court would uphold an honoraria ban if the ban required a "nexus . . . between the author's employment and either the subject matter of the expression or the identity of the payor."<sup>190</sup> Nevertheless, even a nexus requirement is a form of prophylactic rule. People who pay an employee to talk about her work may not be trying to curry favor.<sup>191</sup> Even payors who deal with that employee simply may wish to pay her the going rate that any other speaker would receive. A nexus ban says "no" to these innocent motives, based on classic ethics-law principles.

The basic legislative approach to enforcing these principles remains intact. *National Treasury* can thus be viewed simply as an extreme example, a necessary and correct decision about outer limits and the need to observe them. I favor a more nuanced approach to drafting ethics rules, a point elaborated in

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189. See *Mississippi Valley*, 364 U.S. at 562.

The statute is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.

*Id.*; see also Nolan, *supra* note 8, at 71-72. For a discussion of this argument in a different constitutional context, see Adam H. Kurland, *The Guarantee Clause As a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 424-35 (1989).

190. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1016 (1995); see *id.* at 1016-17.

191. Here, however, the related principle of nonsupplementation of public employee salaries, itself a prophylactic rule, comes into play. See 18 U.S.C. § 209 (1994).

Part III.D. Nevertheless, *National Treasury* is more than a drafting primer. It is a constitutional decision, which the legislative branch cannot override, in an area in which deference to the legislature seems particularly important. To further put this aspect of the decision in context, it may be helpful to contrast it with another major decision of the 1994 Term, *United States v. Lopez*.<sup>192</sup>

*E. National Treasury, Deference to Congress, and the "Radical" Lopez Decision*

*National Treasury* was not the only case involving significant questions of judicial deference to Congress before the Court last Term. In *United States v. Lopez*,<sup>193</sup> the Court struck down the Federal Gun-Free Zone Act of 1990.<sup>194</sup> At the heart of the case is a deep division over how much deference the judiciary should accord to Congress's implicit conclusion that widespread gun-related violence in schools has a substantial effect on interstate commerce. Writing for the majority, Chief Justice Rehnquist treated the question of effect on commerce as ultimately a matter for judicial resolution.<sup>195</sup> He found in the rational basis test room for judicial action rather than abdication.<sup>196</sup> The dissenters, notably Justice Breyer,<sup>197</sup> emphasized the Court's longstanding practice of deferring to Congress on matters concerning the Commerce Clause.<sup>198</sup>

*National Treasury* and *Lopez* can be read as significant signposts pointing away from judicial deference in fields in which deference had been accepted practice. Between the two cases, every Justice was willing to join in a result that not only reexamined Congress's factual conclusions but reached different ones.<sup>199</sup> In *Lopez*, for example, Chief Justice Rehnquist de-

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192. 115 S. Ct. 1624 (1995).

193. *Id.*

194. 18 U.S.C. § 922(q) (1994).

195. *Lopez*, 115 S. Ct. at 1632-33.

196. *Id.* at 1633-34.

197. *Id.* at 1657-65 (Breyer, J., dissenting).

198. *Id.* at 1658 (Breyer, J., dissenting).

199. *Lopez*, 115 S. Ct. 1624; *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995).

scribed the statute as having "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."<sup>200</sup> In *National Treasury*, Justice Stevens both noted the lack of "evidence"<sup>201</sup> before Congress and expressed "serious doubt"<sup>202</sup> about the efficacy of the honoraria ban. The dissenters in each case called for deference. In *Lopez*, Justice Breyer saw the matter as one requiring "an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy."<sup>203</sup> In *National Treasury*, Chief Justice Rehnquist chastised the Court for engaging in "unsupported factfinding to justify its conclusion."<sup>204</sup>

Of course, the contexts of the two cases are different; *Lopez* involved the extent of Congress's commerce power, while *National Treasury* involved Congress's power over the federal public service. Nevertheless, the differences emphasize the similarity; when Justices who prize a particular constitutional value see it as threatened by a particular congressional statute, they will forego their advocacy of deference to Congress in other contexts, even though precedent calls for deference in *both* contexts.

In *Lopez*, the majority saw the value at issue as federalism. Justices Kennedy and O'Connor, concurring, reiterated the importance of the availability of judicial review to protect federalism values.<sup>205</sup> Standing up for federalism, however, means standing up to Congress. Justice Stevens viewed the *Lopez* effort as "radical,"<sup>206</sup> mindful no doubt of the broad scope of Congress's commerce power. When the First Amendment was the value at issue, however, he engaged in the probing review of his *National Treasury* majority opinion. One must note that rational basis review is not the proper standard for review of First Amendment claims.<sup>207</sup> If the subject matter is character-

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200. *Lopez*, 115 S. Ct. at 1630-31.

201. *National Treasury*, 115 S. Ct. at 1016.

202. *Id.*

203. *Lopez*, 115 S. Ct. at 1658 (Breyer, J., dissenting).

204. *National Treasury*, 115 S. Ct. at 1027 n.3 (Rehnquist, C.J., dissenting).

205. *Lopez*, 115 S. Ct. at 1637-40 (Kennedy, J., concurring).

206. *Id.* at 1651 (Stevens, J., dissenting).

207. See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 597 (1973) (Douglas, J., dissenting).



ized as Congress's power over the public service, however, there is substantial authority for a high degree of deference.<sup>208</sup>

The lesson drawn from these cases is that rules of deference are, not surprisingly, far from immutable. They vary with the whole context and with the constitutional principle at stake. *Lopez* is the more dramatic case inasmuch as there were two constitutional values in direct opposition—federalism and national power under the Commerce Clause. No such symmetry existed in *National Treasury*. In addition, the balancing present in *National Treasury* is absent from *Lopez*.

Other differences are also evident. Much of the discussion in *Lopez* focused on whether congressional findings would affect the decision,<sup>209</sup> while in *National Treasury* the Justices disagreed over how much credit should attach to evidence Congress appeared to have relied upon.<sup>210</sup> One might even quibble over whether the two cases presented similar factual issues. Perhaps an activity's effect on commerce is a mixed question of law and fact calling for more judicial inquiry than the effect of honoraria on the public service. What counts, I think, is the lesson about the mutability of deference to be drawn from the two cases. The invocations, on all sides, of *Marbury v. Madison*<sup>211</sup> and *Gibbons v. Ogden*<sup>212</sup> in the several *Lopez* opinions show how much the current Court is at odds over first principles. The issue of when and how much deference to apply surely is one of the questions at issue.

For those in the legislative branch, the specific lesson is that the Court may subject their efforts to greater scrutiny in areas previously viewed as relatively shielded from it. In the case of ethics statutes, this point extends to state legislatures as well.

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208. See *Letter Carriers*, 413 U.S. at 566 (deferring to "the joint judgment of the Executive and Congress").

209. See, e.g., *Lopez*, 115 S. Ct. at 1655-57 (Souter, J., dissenting).

210. See, e.g., *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1021 (1995) (O'Connor, J., concurring in part and dissenting in part) ("Neither report noted any problems, anecdotal or otherwise, stemming from the receipt of honoraria by rank-and-file Executive Branch employees. Neither report, therefore, tends to substantiate the Government's administrative efficiency argument, which presumes that abuses may be so widespread as to justify a prophylactic rule.").

211. 5 U.S. (1 Cranch) 137 (1803).

212. 22 U.S. (9 Wheat.) 1 (1824).

One can see in *National Treasury* a harbinger of more exacting judicial review of a variety of ethics statutes on both federal and state levels. The next section of this Article explores some of the decision's possible ramifications for existing and potential laws. Although I begin with constitutional issues, I suggest that its emphasis on tailoring may have an equally great effect in the nonconstitutional areas of construction, drafting, and implementation.

### III. NATIONAL TREASURY AND THE FUTURE OF ETHICS LAWS

#### A. *Employee Speech Issues After National Treasury—Some Initial Problems*

The first place to look for *National Treasury's* impact on ethics laws is the area of employee speech and, specifically, the question of what sort of honoraria ban *can* be enacted. Despite his apparent approval of the nexus approach,<sup>213</sup> Justice Stevens left this issue somewhat open in the remedial portion of his opinion. He declined to engraft a nexus requirement onto the honoraria ban in part because "[t]he process of drawing a proper nexus . . . would likely raise independent constitutional questions whose adjudication is unnecessary to decide this case."<sup>214</sup> The nature of these questions is not immediately apparent, given that a ban on honoraria when either the payor or the subject is related to the employee's work had been addressed in the opinion and represents a prototypical ethics statute.<sup>215</sup> Questions would remain at the margin, such as whether employment relatedness means that the employee must actually have worked on the matter, that the matter was within the broader scope of her potential responsibilities, or that the matter was within the general area for which her department was responsible.<sup>216</sup> I will assume that Justice Stevens is referring to issues

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213. *National Treasury*, 115 S. Ct. at 1017.

214. *Id.* at 1019.

215. *Id.* at 1012.

216. For example, current Office of Government Ethics regulations deal with "teaching, speaking or writing that relates to the employee's official duties." 5 C.F.R. § 2635.807(a) (1995). In the case of a noncareer employee, the restrictions extend to "the general subject matter, industry, or economic sector primarily affected by the

of this second-order variety.

Other instances arise in which ethics provisions may bar or limit compensated employee speech. *National Treasury* makes it clear that the fact of compensation does not remove First Amendment protection and may not significantly lessen it.<sup>217</sup> The American Bar Association Committee on Government Standards has criticized regulations promulgated by the Office of Government Ethics for "an expansive conception—and limitation—of compensated speaking, writing or teaching that 'relates to' the employee's job."<sup>218</sup> Whether such regulations would be challenged in a judicial context sufficiently generalized to trigger *National Treasury's* form of "facial" or overbreadth analysis remains unclear.<sup>219</sup> Legislators who write ethics laws and administrators who promulgate regulations to implement them nevertheless need to keep *National Treasury* front and center. A specific example from the current federal regulations sheds light on how it might apply.

In order to prevent the appearance of government favoritism as well as the exploitation of public office, the current regulations place severe limits on federal employees' use of their title in outside activities.<sup>220</sup> Thus, "[a]n Assistant Attorney General may not use his official title or refer to his Government position in a book jacket endorsement of a novel about organized crime written by an author whose work he admires. Nor may he do so in a book review published in a newspaper."<sup>221</sup>

After *National Treasury*, this regulation may be suspect. On the one hand, the government's interest seems slight; perhaps the author will sell more books, but the use of the title will not affect neutrality in prosecutorial decisions. On the other hand, the reviewer's title is an important part of who he is. Its use conveys his own achievements and expertise and gives the reader important information about the weight of the review or en-

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programs and operations of his agency." *Id.* § 2635.807(a)(2)(E)(3) (1995).

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

218. Farina, *supra* note 5, at 316; see *id.* at 317 (asserting that "there are several distinct ethical concerns that might be raised by employees' outside activities").

219. *National Treasury*, 115 S. Ct. at 1013 n.12.

220. 5 C.F.R. §§ 2635.702, .807(b) (1995).

221. *Id.* § 2635.702(c) example 4.

dorsement. Other regulations may be open to similar challenges.<sup>222</sup> As long as there is a close relationship between the speech and the employment, there is nonetheless a good possibility that the assumed validity of a nexus approach will permit such restrictions. *National Treasury* does not, in theory, do away with the notion that one gives up certain rights while working for the government. The far more serious question is the extent to which the government may restrict the speech of those who no longer work for it.

### B. National Treasury and the "Revolving Door"

So-called "revolving-door" provisions are one of the staples of American ethics law.<sup>223</sup> They limit or prohibit contact between a former government employee and the government of which she was a part. The revolving door is a hot political issue. According to an official of Common Cause, "[t]he spread of revolving door abuses has been one of the chief causes of concern in the current ethics crisis in Washington. Few things are more discouraging and demoralizing to honorable public servants and to the American people than the spectacle of public officials cashing in on their positions of public trust."<sup>224</sup> The problem is thought to be widespread.<sup>225</sup>

Although existing statutes deal with revolving-door abuses to a considerable extent, politicians recently have outdone themselves in efforts to make these restrictions tighter. President Clinton's first Executive Order—dated January 20, 1993—imposed "markedly more stringent post-employment restrictions on high-level appointees."<sup>226</sup> In 1993, a Senate Com-

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222. Farina, *supra* note 5, at 321-22.

223. *E.g.*, 18 U.S.C. § 207 (1994) (placing restrictions on former members of executive and legislative branches); see Nolan, *supra* note 8, at 84-88.

224. McBride, *supra* note 185, at 470.

225. *The Ethics in Government Reform Act of 1993 and the Responsible Government Act of 1993: Hearing on S. 420 and S. 79 Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 103d Cong., 1st Sess. 7-8 (1993) [hereinafter *Hearing*] (testimony of Sen. David L. Boren of Oklahoma).

226. Exec. Order No. 12,834, 58 Fed. Reg. 5,911 (1993); Farina, *supra* note 5, at 290.

mittee held hearings on proposals to impose additional restrictions, some applicable on a government-wide basis.<sup>227</sup> The current Congress is considering a range of proposals, including one to deal with "cross-over lobbying" in which a former member of one branch lobbies a branch with which she was not associated.<sup>228</sup> In the following analysis, I will focus on existing law, with some reference to proposed extensions and restrictions applicable to former executive branch personnel.

The prototypical revolving-door statute is 18 U.S.C. § 207.<sup>229</sup> One of its key concepts is that of the "particular matter," one in which the United States is a party or has an interest and "which involved a specific party or specific parties."<sup>230</sup> Its scope is not limited to adjudicatory proceedings but can include, for example, contracts, claims, applications, and investigations.<sup>231</sup> Under § 207, a former executive branch employee who "participated personally and substantially" in the matter may not "knowingly make[], with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person . . . in connection with [that] particular matter."<sup>232</sup> This is a lifetime ban.<sup>233</sup>

Another important approach of § 207 is to focus on the gener-

227. S. 420, 103d Cong., 1st Sess. § 2(a)(5) (1993).

228. H.R. 1576, 104th Cong., 1st Sess. § 2 (1995); Damon Chappie, *Lobbying, House, Senate Lawmakers Back Tough Provisions To Shut Revolving Door*, Daily Rep. for Execs. (BNA), May 4, 1995, at 86.

229. 18 U.S.C. § 207 (1994) (placing restrictions on former officers, employees, and elected officials of the executive and legislative branches).

230. *Id.* § 207(a)(1)(C). Massachusetts also uses the concept of a "particular matter" in its postemployment restrictions. MASS. GEN. LAWS ANN. ch. 268A, § 5(a) (West 1990).

231. 5 C.F.R. § 2637.102(a)(7) (1995). Massachusetts law defines "particular matter" as:

any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

MASS. GEN. LAWS ANN. ch. 268A, § 1(k).

232. 18 U.S.C. § 207(a)(1).

233. *Id.*

al area of a former federal employee's work. If a matter was within the general area of a former official's responsibility (within one year prior to leaving government), then he may not lobby with respect to it for two years.<sup>234</sup> This provision combines "particular matter" with the concept of official responsibility over the area in which the matter arose. Another provision, applicable to "[v]ery [s]enior [p]ersonnel of the [e]xecutive [b]ranch and [i]ndependent [a]gencies,"<sup>235</sup> precludes such officials from lobbying for one year after departure with respect to any matter anywhere within the executive branch.<sup>236</sup> Here, the provision's applicability depends on the former official's rank. Similarly, President Clinton's Executive Order provides for an "Ethics Pledge" that certain "senior appointees" will not lobby their own agencies for five years after departure.<sup>237</sup>

Revolving-door provisions reflect all of the basic principles on which ethics laws are based.<sup>238</sup> A government employee's entry into the private sector presents the danger of nonneutrality in that the former employee's new boss gets advantages over others, perhaps dating back to the time of employment negotiations or even prior to them. There also may be unequal access for those who cannot hire such high-priced talent. In addition, the former employee may take advantage of inside knowledge. She may be seen as retroactively using public office for private gain. Above all, there is a general appearance problem.<sup>239</sup>

In contrast, serious policy arguments against an overly broad use of postemployment restrictions exist. As the American Bar Association Committee Report puts it, "[n]either sound ethics policy nor good government supports an approach in which individuals can enter government service only at the cost of radically reconfiguring their subsequent professional lives."<sup>240</sup>

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234. *Id.* § 207(a)(2).

235. *Id.* § 207(d).

236. *Id.*

237. Exec. Order No. 12,834, 58 Fed. Reg. 5,911 (1993). It also includes special provisions concerning officials who have participated in trade negotiations.

238. Farina, *supra* note 5, at 327; McBride, *supra* note 185, at 470; Nolan, *supra* note 8, at 84.

239. W.J. MICHAEL CODY & RICHARDSON R. LYNN, HONEST GOVERNMENT: AN ETHICS GUIDE FOR PUBLIC SERVICE 111-12 (1992).

240. Farina, *supra* note 5, at 327.

Postemployment restrictions pose what might be called the "recruitment dilemma." We want citizens to serve in government but expect many of them to return to private life.<sup>241</sup> One of the rewards of government service may well be the knowledge and stature gained while there. The private sector, as well as the former employee, may gain from a greater understanding of government's goals.<sup>242</sup> There are broader questions of individuals' rights to use their skills and society's interest in maximizing economic activity,<sup>243</sup> but the crucial policy question is whether narrowing the revolving door will make government service unattractive.<sup>244</sup>

*National Treasury* is a forceful reminder that these limitations raise serious constitutional questions as well. Section 207 specifically prohibits "communication" in a variety of contexts.<sup>245</sup> Whether that word is used or not, lobbying represents a form of protected speech.<sup>246</sup> One must note that § 207 also covers uncompensated speech, such as lobbying for an environmental cause by a former EPA official.<sup>247</sup> The principle of *National Treasury* is that broad restrictions on public employee speech will be subject to heightened scrutiny if they are likely to chill a large quantity of expression in return for speculative benefits to the government.<sup>248</sup> This principle must apply *a fortiori* when the employee has left the government and becomes a "first-class" citizen with the attendant rights and privileges.<sup>249</sup>

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241. See Nolan, *supra* note 8, at 58-62.

242. See *id.* at 84-88.

243. See *Hearing, supra* note 225, at 170-71 (statement of Robert S. Peck, Legislative Counsel, ACLU).

244. See *id.* at 155-57 (statement of William N. Eskridge, Jr., Professor, Georgetown University Law Center).

245. 18 U.S.C. § 207 (1994).

246. *Hearing, supra* note 225, at 160 (statement of Robert S. Peck, Legislative Counsel, ACLU).

247. Cf. *id.* at 142 (statement of William N. Eskridge, Jr., Professor, Georgetown University Law Center) (criticizing the lifetime ban on some officials from lobbying or advising foreign nationals).

248. See *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1013-14 (1995).

249. Cf. *Developments—Public Employment, supra* note 91, at 1773-74 (discussing attempts by Reagan Administration to impose broad restrictions on former officials). There may also be important private-law questions as to the length of time during which obligations which were part of the employment relationship remain binding.

*National Treasury* may have serious implications for revolving-door provisions. Indeed, lifetime bans may now be questionable.<sup>250</sup> At some point, the utility of the former employee's knowledge and influence will have lost much of its force. Some employees may not have brought a great deal of such knowledge or influence with them in the first place.<sup>251</sup> *National Treasury's* implicit emphasis on tailoring may well argue against some lifetime bans because they fit Justice Stevens's label of "crudely crafted."<sup>252</sup>

Cooling-off periods, during which one may not contact former associates or subordinates, are somewhat more difficult to assess. An across-the-board one-year restriction on all executive branch personnel was proposed in 1993.<sup>253</sup> Its application to lower-ranking employees poses one sort of overbreadth problem addressed in *National Treasury*<sup>254</sup> and is highly questionable. Long cooling-off periods also raise tailoring concerns. Five-year periods based on an official's rank have been criticized as too sweeping.<sup>255</sup> *National Treasury* certainly might be invoked as a warning against such broad deterrence of speech based on speculative benefits. In light of that decision, the constitutional problems increase as it becomes clearer that a given proposal is aimed primarily at an appearances problem. "Cross-over lobbying" seems a particularly vulnerable area because the likelihood that officials of one branch used their tenure there to acquire knowledge or influence within a separate branch is even less than in other scenarios.

In sum, *National Treasury* casts a shadow over postemployment restrictions, particularly over efforts to extend the present system. Perhaps in a judicial challenge, Congress could come up with the sort of evidence that would satisfy the

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250. See *Hearing, supra* note 225, at 163-69 (statement of Robert S. Peck, Legislative Counsel, ACLU). One should note that Mr. Peck focuses on restrictions on former officials who represent foreign governments.

251. See *id.* at 173-74.

252. *National Treasury*, 115 S. Ct. at 1018. *Contra* Farina, *supra* note 5, at 331.

253. S. 420, 103d Cong., 1st Sess. § 2(a)(5) (1993).

254. See *Hearing, supra* note 225, at 200-01 (statement of John N. Sturdivant, National President, American Federation of Government Employees, AFL-CIO).

255. *Hearing, supra* note 225, at 171 (statement of Robert S. Peck, Legislative Counsel, ACLU); Farina, *supra* note 5, at 331.



Court. A particularly interesting question would arise if the legislative history included extensive reliance on public opinion surveys showing that the public felt that the revolving door was leading to corruption. In other words, the Court might face something more than mere "speculation" about the appearance of impropriety. Nevertheless, things may not reach this point.

*National Treasury's* greatest impact may come from making Congress and other legislative bodies think twice about how far they want ethics laws to reach. Constitutional issues slow down the process enough to ensure that policy issues are fully explored.<sup>256</sup> Before reaching its nonconstitutional spillovers, however, one should consider whether *National Treasury* will trigger a hard look at any other constitutional issues that ought to play a greater role in this area.

*C. The Void-for-Vagueness Doctrine and Its Application to Ethics Laws—the Special Problem of "Appearance Ethics"*

The most likely candidate to play a role in evaluating ethics laws is the concept of void for vagueness, in part because of its close association with the First Amendment's overbreadth doctrine.<sup>257</sup> The "Court has long held that laws so vague that a person of common understanding cannot know what is forbidden are unconstitutional on their face."<sup>258</sup> At the root of the vagueness doctrine are due process concepts of fair warning.<sup>259</sup> A second rationale undergirding the concept of void for vagueness is the importance of not delegating unbridled authority to those who apply the law to citizens.<sup>260</sup> The Court frequently justifies the vagueness doctrine as a means of safeguarding First Amendment rights.<sup>261</sup> The rationale is that unclear statutes that may touch upon forms of expression have the effect of chilling such expression because people will not wish to risk violating the

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256. See *Hearing*, *supra* note 225, at 134 (statement of William N. Eskridge, Jr., Professor, Georgetown University Law Center).

257. NOWAK & ROTUNDA, *supra* note 135, at 950-51.

258. *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (Black, J., dissenting).

259. See *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

260. See NOWAK & ROTUNDA, *supra* note 135, at 950.

261. *Id.* at 951.

law.<sup>262</sup> The doctrine potentially is applicable in the civil, as well as the criminal, context.<sup>263</sup>

The vagueness doctrine may be used to challenge statutes in any number of fields, including ethics. The possibility of challenge looms larger in one branch of ethics law after *National Treasury*. This branch might be called "appearance ethics"<sup>264</sup> and is one of the most controversial aspects of the entire field.<sup>265</sup> As discussed earlier,<sup>266</sup> it is widely recognized and accepted that one of the bedrock principles of ethics regulations is the avoidance of appearances of impropriety. Controversy erupts, however, when the concept of appearances is transposed from an underlying principle to an operative standard or rule. As one critic observed, "[i]n the decade and a half since Watergate, the concept of 'appearance of impropriety' has worked its way from relative obscurity to the forefront of our ethics debates."<sup>267</sup> He recognized the long-standing role of the concept as a background understanding but viewed as recent "the promulgation and enforcement of a specific proscription against creating the 'appearance of impropriety.'"<sup>268</sup> For this critic, a major risk is that ethics laws will focus on treating "symptoms instead of causes."<sup>269</sup>

Others have pointed to the ease with which political combatants can level charges of appearance violations at opponents,<sup>270</sup> tarring them with the brush of ethical insensitivity. The major

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262. *Id.* at 950-51.

263. See Jeffrey I. Tilden, Note, *Big Mama Rag: An Inquiry into Vagueness*, 67 VA. L. REV. 1543, 1555 (1981).

264. Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593, 595 (1992).

265. For example, Professor Morgan warns against the appearance concept developing into a form of "strict liability ethics." *Id.* at 619.

266. See *supra* text accompanying notes 175-88.

267. Morgan, *supra* note 264, at 593-94.

268. *Id.* at 598; see Nolan, *supra* note 8, at 78 (distinguishing between using appearances as the basis for rules and as a rule in themselves).

269. Morgan, *supra* note 264, at 615.

270. See SUZANNE GARMENT, SCANDAL: THE CRISIS OF MISTRUST IN AMERICAN POLITICS 14 (1991) (explaining that scandals require no true immoral quality, provided that they shock or offend the sensibilities of their audience); BENJAMIN GINSBERG & MARTIN SHEFTER, POLITICS BY OTHER MEANS 6-7 (1990) (noting that the creation of institutional mechanisms for investigating ethical violations, rather than a change in public sensibilities, has led to an increase in ethical and criminal investigations).

objection to an appearance standard is that of vagueness.<sup>271</sup> The notion of the "smell test"<sup>272</sup> sounds good in Capitol Hill debate, but does it belong in positive law? On the one hand, critics view it as "subjective and amorphous, . . . [providing] little guidance for assessing individual conduct."<sup>273</sup> On the other hand, proponents of strong ethics laws may wish to see greater use of specific appearance standards. Ann McBride of Common Cause favorably notes House and Senate rules that embody this approach.<sup>274</sup> She quotes with approval the observation: "[I]n the more impersonal world of politics, reality and appearance blend together so that we cannot often tell the difference."<sup>275</sup> For these defenders of appearance ethics, "[t]here is an ethical obligation to protect the appearance of propriety almost as great as to produce its reality."<sup>276</sup> Once again, we see the importance of the fact that the Court handed down *National Treasury* at a time of great debate over the proper reach of ethics laws. Those who criticize appearance ethics will surely seize on the decision as support for their position.

Currently, some doubt exists as to the utility of the vagueness doctrine in attacking broad ethics laws.<sup>277</sup> Even if a constitutional challenge ultimately succeeds, the monetary and reputational costs of defending against accusations of ethics violations can be extensive.<sup>278</sup> If the challenge reaches the merits, it might well fail, based on a number of Supreme Court precedents. Justice O'Connor's plurality opinion in *Waters v.*

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271. Nolan, *supra* note 8, at 78.

272. *Dodd Tells Gingrich: End Book Deal*, BOSTON GLOBE, Jan. 16, 1995, at 18 (quoting Sen. Christopher Dodd of Connecticut to the effect that a controversial book deal involving House Speaker Newt Gingrich "doesn't pass the smell-test").

273. Nolan, *supra* note 8, at 78.

274. McBride, *supra* note 185, at 474-75.

275. *Id.* at 475 (quoting *Congressional Ethics Rules, Hearings Before the House Bipartisan Task Force on Ethics*, 101st Cong., 1st Sess. 3 (1989) (statement of Dennis F. Thompson, Harvard University)).

276. *Id.* at 476 (quoting *Congressional Ethics Rules, Hearings Before the House Bipartisan Task Force on Ethics*, 101st Cong., 1st Sess. 3 (statement of Dennis F. Thompson, Harvard University)).

277. Thomas L. Patten, *From Ethics Issues to Criminalization: Deterring the Wrong Conduct*, 58 GEO. WASH. L. REV. 526, 532 (1990).

278. *Id.* at 527-30.

*Churchill*<sup>279</sup> stated that public employers could govern employee conduct through standards that would be "too vague when applied to the public at large."<sup>280</sup> In *Arnett v. Kennedy*,<sup>281</sup> a plurality upheld a regulation authorizing removal or suspension without pay for "such cause as will promote the efficiency of the service."<sup>282</sup> A close relationship may exist between these cases and *Parker v. Levy*,<sup>283</sup> in which the Court upheld sanction of a military doctor for "conduct unbecoming an officer and a gentleman."<sup>284</sup> It has been suggested that such lenient applications of the vagueness doctrine reflect the Court's perception that some distinct institutions within society should have a freer hand in sanctioning members than would be acceptable in the case of citizens generally.<sup>285</sup> This theory is consistent with the restrictive notion of the rights of public employees that underlies many ethics laws. Another factor that might protect appearance ethics provisions from a vagueness challenge is public employees' ability to get advice before acting<sup>286</sup> or to insulate their conduct by means of disclosure.<sup>287</sup> The Court has placed substantial emphasis on guidance and advice mechanisms when applying the vagueness doctrine to statutes affecting public employees.<sup>288</sup>

If an appearance ethics provision were challenged on vagueness grounds, would *National Treasury* represent such a major shift in the law that the challenge might succeed? My view is

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279. 114 S. Ct. 1878, 1880 (1994).

280. *Id.* at 1886-87.

281. 416 U.S. 134 (1974), *overruled by* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, 470 U.S. 532, the Supreme Court upheld the "for cause" standard but required additional pretermination procedures.

282. *Id.* at 160 (quoting 5 U.S.C. § 7501(a) (1970)). Justice Powell concurred with the Court on the vagueness issue. *Id.* at 164 (Powell, J., concurring).

283. 417 U.S. 733 (1974).

284. *Id.* at 738, 761.

285. Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491, 503 (1994).

286. See MASS. GEN. LAWS ANN. ch. 268B, § 3(g) (West 1990) (authorizing State Ethics Commission to render advisory opinions to state employees); 5 C.F.R. § 2635.107 (1995) (describing procedures for ethics advice within each federal agency).

287. See MASS. GEN. LAWS ANN. ch. 268A, § 23(b)(3) (validating some conduct from illegality on appearance grounds if proper disclosure made in advance).

288. See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973) (emphasizing availability of preconduct advice from Civil Service Commission).

that the case demonstrates such an important pro-employee shift that the answer may well be "yes." The main impact of the case is that, to the maximum extent possible, public employees' grievances should be tested by the same constitutional rules as everyone else's. The notion of a different vagueness standard is hard to reconcile with this approach.

As for precedent, Justice Stevens dealt with *Arnett* in a footnote that suggested that the key was the facts and circumstances of the individual employee's dismissal, not the validity of the statute applied to him.<sup>289</sup> An appearance ethics provision would, of course, reflect the notion that preventing appearances of impropriety is fundamentally important to the government. The Court's nonreceptivity to the appearance rationale for the honoraria ban might well carry over to the vagueness context.

At the moment, the number of provisions that have appearance as the only standard is unclear. The federal practice appears to have varied.<sup>290</sup> A vagueness challenge would be unlikely to succeed if there were a general statement about appearances backed up by a more specific set of appearance-based rules.<sup>291</sup> In particular, the use of a "reasonable person" test to determine whether there is an appearance of impropriety would probably insulate current statutes that are close to direct incorporation of an appearance standard.<sup>292</sup>

At some point, however, a provision that goes too far in the direction of a pure appearance standard will not survive a

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289. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1013-14 n.12 (1995).

290. *Morgan*, *supra* note 264, at 599-602.

291. *See Nolan*, *supra* note 8, at 78 n.78. Professor Nolan quotes proposed federal standards utilizing a reasonable person test. The final standards appear to delete a sentence that made the applicability of a reasonableness test less certain.

292. For example, the Massachusetts statute, MASS. GEN. LAWS ANN. ch. 268A, § 23 (West 1990), sometimes referred to as an appearance statute, specifically invokes "a reasonable person, having knowledge of the relevant circumstances." Georgia's ethics rules for its public officials uses a similar standard, stating that:

Any person in government service should: . . . Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not, and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.

GA. CODE ANN. § 45-10-1 (1990).

vagueness challenge, especially after *National Treasury*. An example would be a direction that public employees "avoid even the appearance of impropriety."<sup>293</sup> Given the zeal for ever tighter ethics regulation, of which the revolving-door issue is a clear example, such hypotheticals may well become reality. *National Treasury's* renewed emphasis on the constitutional dimensions of ethics statutes will play a key role in the inevitable vagueness challenge.

The big question in ethics regulation today is whether to tighten existing rules even further, primarily based on a desire to convince the public that government really can police itself, or to relax them substantially, based primarily on a desire not to enmesh public employees in a sea of legalism. Constitutional doctrines such as overbreadth and vagueness, as well as others,<sup>294</sup> offer partial answers. But *National Treasury's* importance to the debate over this question does not stop with these answers. The decision's emphasis on the importance of tailoring ethics statutes extends beyond the constitutional realm.

#### *D. National Treasury's Nonconstitutional Dimensions: The Broad Reach of Ethics Statutes and the Arguments for Greater Tailoring*

The ban on honoraria struck down in *National Treasury* is typical of many ethics statutes that also sweep broadly. For example, the federal antisalary supplementation provision states flatly:

Whoever receives any salary, or any contribution to or sup-

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293. A section of the Delaware Code provides as follows:

In order to insure propriety and preserve public trust, a public official or employee should refrain from acting in his official capacity on any matter wherein he has a direct or indirect personal financial interest that might reasonably be expected to impair his objectivity or independence of judgment, and should avoid even the appearance of impropriety.

DEL. CODE ANN. tit. 29, § 5811(2) (1991) (emphasis added). This statute comes close to running afoul of the arguments made here but is saved by the relatively specific context of official action on matters in which the official is potentially interested. The last clause also seems to be modified by a reasonableness standard of some sort.

294. See *Hearing*, *supra* note 225, at 165 (statement of Robert S. Peck, Legislative Counsel, ACLU) (discussing Fifth Amendment's protection of liberty).

plementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality . . . [s]hall be subject to the penalties set forth in section 216 of this title.<sup>295</sup>

Many state provisions are similarly drafted. A section of the Massachusetts Conflict of Interest Statute provides that "[a] state employee who has a financial interest, directly or indirectly, in a contract made by a state agency, in which the commonwealth or a state agency is an interested party, of which interest he has knowledge or has reason to know, shall be punished by [fine or imprisonment]."<sup>296</sup>

Statutes drafted along these lines frequently have specific exceptions,<sup>297</sup> but they may be quite narrow.<sup>298</sup> The reason for such extensive use of this approach is, of course, the prophylactic nature of ethics regulations. The leading commentator on the Massachusetts statute describes the basis for the provision quoted above as follows:

[A]ny state employee is in a position to influence the awarding of contracts by any state agency in a way which is beneficial to himself. In a sense, the rule is a prophylactic one. *Because it is impossible to articulate a standard by which one can distinguish between employees in a position to influence*

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295. 18 U.S.C. § 209(a) (1994).

296. MASS. GEN. LAWS ANN. ch. 268A, § 7 (West 1990 & Supp. 1995).

297. For example, the Massachusetts statute prohibiting financial interests in state contracts has exemptions for special state employees and others in specified circumstances. *Id.* § 7(b)-(e).

298. Revolving-door statutes tend to be drafted with few or no exceptions to the basic statement of coverage. Massachusetts law, for example, provides that

[a] former state employee who knowingly acts as agent or attorney for, or receives compensation directly or indirectly from anyone other than the commonwealth or a state agency, in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest and in which he participated as a state employee while so employed [shall be punished].

*Id.* § 5(a). There is a minor and limited exception for special state employees, essentially unpaid or part-time employees. *Id.* §§ 1(o), 4.

and those who are not, *all* will be treated as though they have influence.<sup>299</sup>

The tendency toward even greater use of this approach is likely to increase as part of what the American Bar Association Committee viewed as "the headlong rush toward even greater levels of ethics regulations."<sup>300</sup>

Thoughtful students of ethics regulation are nevertheless beginning to raise questions about a possible overutilization of the prophylactic technique. Statutes drafted along these lines intrude on the private lives and practices of public employees.<sup>301</sup> They reach so much conduct at, or even beyond, the margin that enforcement resources may be wasted.<sup>302</sup> This fact reflects a larger problem—the potential lack of "fit" between prophylactic statutes and the core conduct that needs to be prevented.<sup>303</sup> The statutes' presumption of a propensity toward evil can have a negative effect on employee morale<sup>304</sup> and recruitment.<sup>305</sup> More generally, increased use of sweeping prophylactic rules might be seen as a manifestation of what one critic calls the "drug"<sup>306</sup> of excessive legalism.

These observations fail to demonstrate the wisdom of abandoning the widespread use of prophylactic ethics statutes. As the analysis earlier in this Article suggests,<sup>307</sup> such statutes are an important weapon in the legal arsenal. My experience in the field of ethics-law administration convinces me that a context-based<sup>308</sup> system requiring a case-by-case inquiry into the presence of an actual core of unethical conduct could soon bog down into unenforceability. Nevertheless, the critics of sweeping ethics laws have a point, and *National Treasury* reinforces it. *National Treasury* required tailoring in the constitutional context, but the

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299. Buss, *supra* note 10, at 374 (emphasis added).

300. Farina, *supra* note 5, at 290-91.

301. See Nolan, *supra* note 8, at 82.

302. Farina, *supra* note 5, at 297.

303. See *id.* at 328-29.

304. See *id.* at 294.

305. See Nolan, *supra* note 8, at 85-86.

306. Vaughn, *supra* note 166, at 433-34.

307. See *supra* text accompanying notes 184-90.

308. Cf. Farina, *supra* note 5, at 319-20 (arguing for "context-sensitive" approach to issues of outside income).



concept need not be thus limited. Constitutional decisions can have relevance beyond the strict contours of that document. All agencies of government can, and should, be on the alert for opportunities to keep overly broad ethics statutes within sound policy bounds.

For example, the courts have a number of construction techniques available to limit the reach of statutes,<sup>309</sup> although these techniques sometimes produce questionable results. A good ethics case illustrating both points is *Crandon v. United States*.<sup>310</sup> In *Crandon*, the United States sought recovery of payments made by the Boeing Company to a group of employees just prior to their joining the government in defense-related positions.<sup>311</sup> The government based its claim on the antisupplementation statute quoted above.<sup>312</sup> Payments like these ring a number of ethics alarm bells. They may serve to purchase goodwill if the employee is in a position to help the payor, and they certainly create an appearance problem among fellow employees and the public.<sup>313</sup> The Supreme Court reversed a lower court decision in favor of the government that had been based, in part, on such classic ethics-law principles.<sup>314</sup>

A principal issue in *Crandon* was whether to construe the statute broadly or narrowly. The payments might be viewed as "compensation" for government service,<sup>315</sup> but they were not received during government employment. The companion paragraph of the statute covering the *payor* states that such persons are liable only if they paid an "officer or employee."<sup>316</sup> The Court took the position that the statute had to be read to apply

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309. See, e.g., *United States v. Bass*, 404 U.S. 336, 349 (1971) (preserving federal-state balance as canon of statutory construction).

310. 494 U.S. 152 (1990).

311. *Id.* at 154-56.

312. *Id.* at 156 (basing its claim on 18 U.S.C. § 209 and the common law).

313. *Id.* at 166; see Nolan, *supra* note 8, at 97-99.

314. See *United States v. Boeing Co.*, 845 F.2d 476, 480 (4th Cir. 1988), *rev'd sub nom.* *Crandon v. United States*, 494 U.S. 152 (1990).

315. *Crandon*, 494 U.S. at 156. Justice Scalia took the view that, even though the payments might be viewed as compensation, they could not be fitted under the category of "salary." *Id.* at 171-76 (Scalia, J., concurring).

316. 18 U.S.C. § 209(a) (1994).

evenhandedly to payor and payee.<sup>317</sup> The Court placed particular emphasis on the fact that the statute is criminal, concluding that "it [was] appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage."<sup>318</sup> It described the rule as a "time-honored interpretative guideline" that serves to further the important goals of fair warning and making sure that law comes from the legislature.<sup>319</sup> It viewed the legislative history as inconclusive.<sup>320</sup> The opinion included an extensive discussion of the policies behind broad prophylactic ethics statutes.<sup>321</sup> Justice Stevens, writing for the Court, found little possibility that these policies were implicated by the pre-employment payments.<sup>322</sup> Any danger of favoritism toward the former employer could be obviated by disqualification in appropriate cases.<sup>323</sup> He also cited "[a]n important countervailing consideration"<sup>324</sup> of public policy: ethics statutes should not impair the government's ability to recruit personnel from the private sector.<sup>325</sup>

Justice Stevens's opinion, particularly his reservations about prophylactic statutes, can be viewed as a nonconstitutional analogue to his *National Treasury* effort. In my view, the opinion is equally open to criticism. As noted, the severance payments to future government employees from a private entity with extensive government interests represent a classic ethics threat of the sort at which prophylactic statutes have long been aimed. The symmetry problem was not insurmountable. Perhaps Congress's intent could be furthered by recovering from the payee even if the payor was not subject to criminal prosecution. Moreover, although *Crandon* was not a criminal case, the Court should have at least paused to consider whether the rule of lenity was automatically applicable. Many ethics statutes have

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317. See *Crandon*, 494 U.S. at 159.

318. *Id.* at 158.

319. *Id.* (citations omitted).

320. *Id.* at 160-63.

321. *Id.* at 164-67.

322. *Id.* at 167-68.

323. *Id.* at 166.

324. *Id.*

325. *Id.* at 166-67.

both civil and criminal application.<sup>326</sup> Whether the same principles of construction are equally applicable is worthy of some consideration.<sup>327</sup>

A particularly troubling aspect of *Crandon* is its relative lack of recognition of a quite different conception of the role of courts in construing federal ethics statutes. The cornerstone decision is *United States v. Mississippi Valley Generating Co.*,<sup>328</sup> which Justice Stevens relegated to a footnote.<sup>329</sup> *Mississippi Valley* also involved civil application of a criminal ethics provision.<sup>330</sup> This statute forbade persons with direct or indirect interests in a private entity from representing the United States in transacting business with that entity.<sup>331</sup> The alleged violators, contending that their interests were too indirect, argued for a narrow construction of the statute. They invoked the rule of lenity, in its alternate form, as "the time-honored canon that penal statutes are to be narrowly construed."<sup>332</sup> The Court rejected the violators' position in tones that sound quite different from

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326. In 1989, Congress added § 216 to Title 18 of the United States Code. Pub. L. No. 101-194, § 407(a), 103 Stat. 1753 (1989). This section specifically provides a range of civil remedies for violations of the criminal ethics-related sections of Title 18. *Id.*

327. Obviously, principles of fair warning argue strongly for uniform construction. A civil context might arise, however, in which the government sought to develop a common-law theory of employee liability using the statute as one source among others. The statute thus could be part of a broader recovery under this theory than if the government sued directly under it.

328. 364 U.S. 520 (1961).

329. *Crandon*, 494 U.S. at 165 n.20.

330. *Mississippi Valley*, 364 U.S. at 323-24 (involving a private party whose contract with the government was possibly tainted with a conflict of interest and who sued to recover under the contract). A suit such as that in *Mississippi Valley* is a possible example of a context in which a federal common-law approach, *see supra* note 327, might be developed.

331. The statute in question read as follows:

Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than \$2,000 or imprisoned not more than two years, or both.

18 U.S.C. § 434 (1958). This section was repealed by Pub. L. No. 87-849, § 2, 76 Stat. 1126 (1962).

332. *Mississippi Valley*, 364 U.S. at 550.

those of *Crandon*. It noted the prophylactic nature of the rule,<sup>333</sup> stating that "the statute establishes an objective standard of conduct, and . . . whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption."<sup>334</sup>

The dissonance between the two cases shows that courts can take quite different approaches to broad, prophylactic ethics laws when nonconstitutional issues are raised. *Mississippi Valley* represents the traditional view of deference both to the legislature and its techniques. *Crandon* indicates a desire to narrow, a refusal to read statutes for all they are worth. Perhaps *Crandon* represents a pre-*National Treasury* endorsement of the tailoring approach and of the critiques of broad-based drafting cited above.<sup>335</sup> Even if one accepts the validity of these revisionist themes—and I certainly think they are worth exploring—it does not follow that the courts should do the tailoring. Maybe the ethics laws need changing, but that change need not come from the courts. Government officials, of all people, ought to know the law as it stands now and be willing to obey it.<sup>336</sup> The biggest problem is that strained construction can produce tailoring of a sort in specific cases, but it presents its own problem of "fit." The courts simply are not in the position to make fundamental changes of the sort that the critics of prophylactic rules view as most needed. While the most important nonconstitutional message of *National Treasury* is, indeed, that the concept of tailoring is of potentially great utility in the field

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333. *Id.*; see also *id.* at 550 n.14, 559 (describing conflict-of-interest statutes as "preventive").

334. *Id.* at 549; see also *id.* at 551 (finding "that Congress intended to establish a rigid rule of conduct"); *id.* at 559 (noting that the rule "lays down an absolute standard of conduct"); *id.* at 560-61 (stating that "the statute establishes an objective, not a subjective, standard, and it is therefore of little moment whether the agent thought he was violating the statute, if the objective facts show that there was a conflict of interest").

335. See *supra* text accompanying notes 302-06.

336. See *McNally v. United States*, 483 U.S. 350, 375 n.9 (1987) (Stevens, J., dissenting) ("When considering how much weight to accord to the doctrine of lenity, it is appropriate to identify the class of litigants that will benefit from the Court's ruling today. They are not uneducated, or even average, citizens."). Earlier in his opinion, Justice Stevens argued against a narrow construction of the criminal statute in question. *Id.* at 375 (Stevens, J., dissenting).

of ethics laws, those who can benefit from this message are entities other than the courts.

To the extent that the use of broad prophylactic statutes needs to be reexamined, the obvious place for that reexamination to occur is in the legislatures that draft them. Broad prohibitions on gifts to public officials<sup>337</sup> are a possible example. The rationale is to reach instances of influence peddling or attempts to purchase influence, without requiring an explicit connection to a specific official act.<sup>338</sup> This could mean, however, that an innocent gift, such as a trophy to a successful football coach, would be illegal as well. As in other instances, a prophylactic statute may sweep too broadly.<sup>339</sup> Recently, a Special Legislative Study Commission recommended amending the Massachusetts law specifically to exempt those gifts that do not present the dangers at which it was aimed.<sup>340</sup> At the federal level, the American Bar Association Committee recommended to Congress specific changes in the ethics statutes that would produce a

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337. Massachusetts law provides that:

[W]hoever otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, gives, offers or promises anything of substantial value to any present or former state, county or municipal employee or to any member of the judiciary, or to any person selected to be such an employee or member of the judiciary, for or because of any official act performed or to be performed by such an employee or member of the judiciary or person selected to be such an employee or member of the judiciary . . . shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

MASS. GEN. LAWS ANN. ch. 268A, § 3(a), (d) (West 1990).

338. The Massachusetts State Ethics Commission has stated that:

[Even] in the absence of any specifically identifiable matter that was, is or soon will be pending before the official, section 3 may apply. Thus, where there is no prior social or business relationship between the giver and the recipient, and the recipient is a public official who is in a position to use his authority in a manner which could affect the giver, an inference can be drawn that the giver was seeking the goodwill of the official because of a perception by the giver that the public official's influence could benefit the giver. In such a case, the gratuity is given for as yet unidentified "acts to be performed."

Mass. State Ethics Comm'n, Advisory No. 8, May 14, 1985.

339. A broad interpretation of the Massachusetts statute has been challenged. See *United States v. Sawyer*, 878 F. Supp. 279, 286-88 (D. Mass. 1995) (rejecting challenge).

340. See *Mass. Special Commission Report*, *supra* note 24, at 18-19.

more context-sensitive approach.<sup>341</sup>

The legislature, however, cannot think of every situation. The administrative process has an important role to play in calibrating broad-based prohibitions.<sup>342</sup> In some cases, administrative agencies have attempted to find flexibility in a statute when their authority to do so was far from clear.<sup>343</sup> The preferable approach would be explicit statutory authority for appropriate tailoring.<sup>344</sup> Again, the Massachusetts Special Legislative Commission's recommendations on gifts provide an example. In addition to a specific set of exemptions within the statute, the study commission recommended that the State Ethics Commission be authorized to extend the coverage of the exemptions both through regulations and case-by-case waivers.<sup>345</sup> In each such instance, the Commission would be required to "balance the public interest in preventing improper attempts to influence the decisions of public employees with the legitimate interests of public employees and their families in receiving items of value that pose no genuine risk of affecting the performance of their official duties."<sup>346</sup>

This kind of double tailoring—at both the legislative and administrative levels—responds to concerns of "fit" while keeping the broad prophylactic approach intact. It accepts as legitimate the point of view of the critics without taking the radical step of abandoning the basic approach of many of the nation's ethics statutes. To the extent that *National Treasury* encourages thinking along these lines, it is a helpful decision. Policymakers need to realize that what makes constitutional sense can have useful implications elsewhere. As I have noted, I am concerned with potential problems of extensive judicial efforts to narrow the reach of ethics laws. Nevertheless, I have even graver concerns

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341. See, e.g., Farina, *supra* note 5, at 297-304 (recommending changes in 18 U.S.C. § 208).

342. See *Crandon v. United States*, 494 U.S. 152, 182-83 (1990) (Scalia, J., concurring).

343. See *id.* at 182 (describing "liberties that the Government has taken with its interpretation of § 209(a)").

344. See *id.* at 183 (recommending direct use of President's authority to promulgate standards for the Executive Branch under 5 U.S.C. § 7301).

345. *Mass. Special Commission Report*, *supra* note 24, at 19-20.

346. *Id.*

about determining just how far the courts will take *National Treasury's* constitutional implications. These ramifications do not stop at the border of government ethics laws. The decision may have important and unfortunate impacts on the related fields of public employee political activity and campaign finance reform. The next two sections analyze briefly the possible impacts.

#### IV. WAS THE HATCH ACT UNCONSTITUTIONAL?

Prior to its amendment in 1993,<sup>347</sup> the Hatch Act<sup>348</sup> significantly curtailed the First Amendment rights of federal employees.<sup>349</sup> The key section provided that a federal employee shall not "take an active part in political management or in political campaigns."<sup>350</sup> This broad prohibition was amplified by rules of the Civil Service Commission, which the Act specifically incorporated.<sup>351</sup> Prohibited activities included serving as an officer of a political party, a local party committee, or a partisan political club; soliciting funds for partisan political purposes; taking an active part in managing a partisan political campaign; running as a party candidate for elective office; soliciting votes for a partisan candidate; serving as a delegate to a party convention; and initiating or circulating nominating petitions.<sup>352</sup>

A close relationship exists between the Hatch Act and the various ethics laws referred to throughout this Article. A principal goal of both types of statutes is to ensure neutrality on the part of public servants. Public employees could easily transfer their staunch commitment to partisan politics to differential treatment of citizens depending on their political persuasion. As

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347. Frank J. Murray, *Clinton Abolishes Many Hatch Act Political Constraints*, WASH. TIMES, Oct. 7, 1993, at A9.

348. 5 U.S.C. § 7324 (1988).

349. *United Public Workers v. Mitchell*, 330 U.S. 75, 111 (1947) (Black, J., dissenting) (asserting that Hatch Act "muzzles several million citizens"); Murray, *supra* note 347, at A9 (quoting President Clinton's statement that "[t]he conditions which once gave rise to the Hatch Act . . . are no longer present, and they cannot justify the continued muzzling of millions of American citizens").

350. 5 U.S.C. § 7324(a)(2).

351. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 576-78 n.21 (1973).

352. *Id.*

the Supreme Court said in upholding the Hatch Act:

A major thesis of the Hatch Act is that to serve this great end of Government—the impartial execution of the laws—it is essential that federal employees . . . not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government.<sup>353</sup>

The Act also has an important appearance dimension.<sup>354</sup> It recognizes the importance of the public's perception that services are administered on a nonpartisan basis.

There is, however, another dimension to the Hatch Act's purposes that aims at protecting employee rights and on-the-job morale.<sup>355</sup> In a highly partisan workplace, those employees who do not go along with the majority may justifiably fear for their advancement or careers.<sup>356</sup> In distinguishing the Hatch Act from the honoraria ban at issue in *National Treasury*, Justice Stevens emphasized the employee rights dimension of the former.<sup>357</sup> As Chief Justice Rehnquist pointed out in dissent, however, the ethics goals of the Hatch Act are at least as important as any employee protection dimension.<sup>358</sup> Moreover, ethics laws also have an employee morale dimension. For example, unduly close relationships between favored public employees and powerful outside interests can breed bitterness and resentment among other employees.<sup>359</sup>

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353. *Id.* at 565.

354. *Id.*

355. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1015 (1995).

356. See *Letter Carriers*, 413 U.S. at 564 (agreeing with view that limiting partisan political activity by federal employees ensures that "employees themselves are . . . sufficiently free from improper influences"). The Court had earlier quoted *United Public Workers v. Mitchell*, 330 U.S. 75, 98 (1947), on the dangers to the public service of "an actively partisan governmental personnel," *Letter Carriers*, 413 U.S. at 555.

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

358. *Id.* at 1026 (Rehnquist, C.J., dissenting).

359. SPECIAL COMM'N ON THE FEDERAL CONFLICT OF INTEREST LAW, ASS'N OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE 211 (1960).



One can easily see the Hatch Act as a first cousin of the ethics laws. They even share a common ancestor—the civil service reform movement of the nineteenth century.<sup>360</sup> The same doubts that *National Treasury* casts upon ethics statutes in general are particularly strong with respect to the Hatch Act, at least in its prior form. It prohibited speech, indeed, speech of a distinctly higher First Amendment value than that at issue in *National Treasury*.<sup>361</sup> The Hatch Act made no distinction between high-level and lower-ranking employees.<sup>362</sup> It also applied to a large number of employees. In addition, much of its impact was felt outside the workplace, cutting deeply into the private lives of public servants. Perhaps most significantly, it reinforced the notion that public employees have fewer rights than citizens generally.<sup>363</sup>

To spend time on the Hatch Act in its prior incarnation may seem fanciful. Nevertheless, the potential combination of a Republican President and Congress might well lead to its restoration. To suggest that *National Treasury* casts any doubt upon the Hatch Act in its prior form or in some future variant may seem equally fanciful. The Supreme Court has twice upheld it,<sup>364</sup> and those cases were cited with apparent approval in *National Treasury*.<sup>365</sup> Nevertheless, the Court's analyses in *National Treasury* and its predecessors are not completely in accord. As Justice Douglas once noted, *United Public Workers v. Mitchell*,<sup>366</sup> the first of these cases, is the product of an earlier time.<sup>367</sup> The Court in that case brushed aside a First Amendment challenge to the Hatch Act, largely on the ground of judi-

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360. *Letter Carriers*, 413 U.S. at 557-58; Vaughn, *supra* note 166, at 419-21.

361. *Cf. Connick v. Myers*, 461 U.S. 138, 147 (1983).

362. *United Public Workers v. Mitchell*, 330 U.S. 75, 113-14 (1947) (Black, J., dissenting).

363. *See id.* at 111 (Black, J., dissenting) ("There is nothing about federal and state employees as a class which justifies depriving them or society of the benefits of their participation in public affairs.").

364. *Letter Carriers*, 413 U.S. 548; *Mitchell*, 330 U.S. 75.

365. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1015 (1995).

366. 330 U.S. 75.

367. *See Letter Carriers*, 413 U.S. at 598 (Douglas, J., dissenting).

cial deference to legislative control over the public service.<sup>368</sup> To give one quote among many, the majority opinion stated that "[w]hen actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required."<sup>369</sup> *Mitchell* contained little First Amendment analysis. The Court had not yet decided *Pickering v. Board of Education*,<sup>370</sup> and an important premise of *Mitchell* was the second-class status of public employees when it comes to asserting constitutional rights.<sup>371</sup>

*United States Civil Service Commission v. National Ass'n of Letter Carriers*,<sup>372</sup> the second case upholding the Hatch Act, was a post-*Pickering* decision. Once again, the theme of deference to Congress and the Executive dominated.<sup>373</sup> As for *Pickering*, the Court in *Letter Carriers* bowed to the need to balance but found determinative the fact that the legislation served "important interests."<sup>374</sup> The balance therefore came out in the employer's favor, due, it must be inferred, to the fact that Congress thought it important to ban partisan political activity.

The great pains that Justice Stevens took in *National Treasury* to distinguish these cases strongly indicate that there is a fundamental disharmony between them and his analysis there. As noted, he treated the Hatch Act as a statute *protecting* employee rights,<sup>375</sup> as opposed to the honoraria ban. He even suggested that this protective dimension had justified the earlier cases' deference to Congress.<sup>376</sup> If anything, however, the Court's willingness to leave public employees at the mercy of Congress led it, in *Mitchell*, to sanction curbing the employees'

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368. *Mitchell*, 330 U.S. at 101-02.

369. *Id.* at 103.

370. 391 U.S. 563 (1968).

371. See *Mitchell*, 330 U.S. at 96-97. The Court said of *Ex Parte Curtis* that "[t]he decisive principle was the power of Congress, within reasonable limits, to regulate, so far as it might deem necessary, the political conduct of its employees." *Id.* at 96.

372. 413 U.S. 548 (1973).

373. *Id.* at 564-65.

374. *Id.* at 564.

375. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1015 (1995).

376. *Id.* at 1017-18 n.21.

rights.<sup>377</sup> Perhaps most indicative of Justice Stevens's unease with the prior cases was his insistence that, even in *Letter Carriers*, "we did not determine how the components of the *Pickering* balance should be analyzed in the context of a sweeping statutory impediment to speech."<sup>378</sup> The Hatch Act certainly swept broadly. The balancing was there as well, even if done in a perfunctory manner. The obviously tenuous nature of these distinctions bears out one of this Article's main points: *National Treasury* casts serious doubt on broad-based reform statutes that limit the First Amendment rights of public employees.

One distinction, perhaps, permits the pro-government Hatch Act cases to coexist with the pro-employee result in *National Treasury*. In the latter case, Justice Stevens stated that "Congress effectively designed the Hatch Act to combat *demonstrated* ill effects of Government employees' partisan political activities."<sup>379</sup> In contrast, he viewed the honoraria ban as resting on speculation without evidence.<sup>380</sup> As his opinion noted, however, the prior cases rest, in part, on what Congress "deemed" to constitute the risks of employee partisanship.<sup>381</sup> The many abuses of the spoils system admittedly had been well-known and often criticized, especially by reformers.<sup>382</sup> In upholding the Hatch Act, the Court could therefore invoke the "judgment of history,"<sup>383</sup> but that judgment consisted in large part of the views of Congress and the executive branch, including the Civil Service Commission.<sup>384</sup> One might also invoke "the judgment of history" to validate sweeping ethics laws that reach a wide range of employee conduct. The prohibition on salary supplementation,

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377. See *id.* at 1025-26 (Rehnquist, C.J., dissenting).

378. *Id.* at 1013.

379. *Id.* at 1015 (emphasis added).

380. *Id.* at 1016.

381. *Id.*; see also *United Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947) (asserting that partisan political activity had only to be "reasonably deemed by Congress to interfere with the efficiency of the public service" in order to be legitimately barred).

382. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 566 n.12 (1973) (citing congressional hearings on reform legislation).

383. *Id.* at 557.

384. See *id.* at 558-63.

for example, dates back to 1917.<sup>385</sup> Like the Hatch Act, well-documented practices, which Congress viewed as abuses, triggered the prohibition.<sup>386</sup> The question arises why Congress cannot alter the ethics laws over time, striking different balances as its judgment dictates. It can, in theory, but *National Treasury* shows a new willingness to second-guess those judgments, at least when the First Amendment is at stake.

#### V. THE REAFFIRMATION OF *BUCKLEY V. VALEO* AND ITS CONTINUING SHADOW OVER CAMPAIGN FINANCE REFORM

The potential anti-reformist implications of *National Treasury* are not limited to the field of government ethics. The case will likely have significant impact on the closely related subject of campaign finance reform. Whether the Court intended to do so or not, *National Treasury* stands as a striking reaffirmation of the principles of *Buckley v. Valeo*,<sup>387</sup> the 1976 decision that struck down important provisions of the Federal Election Campaign Act of 1971<sup>388</sup> as violative of the First Amendment. The Court in *Buckley* ruled that Congress could not limit independent expenditures in aid of candidates,<sup>389</sup> limit the amounts that individuals might spend on their own campaigns,<sup>390</sup> or impose campaign expenditure limitations generally.<sup>391</sup> As the Court saw the problem, "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."<sup>392</sup>

At the same time, the Court ruled that Congress could limit campaign *contributions*, as opposed to expenditures.<sup>393</sup> Contributions were viewed as a step toward political debate, involving

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385. Nolan, *supra* note 8, at 68.

386. *Id.*

387. 424 U.S. 1 (1976).

388. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

389. *Buckley*, 424 U.S. at 7, 51.

390. *Id.* at 57-59.

391. *Id.* at 58.

392. *Id.* at 19.

393. *Id.* at 28-29.

"speech by someone other than the contributor."<sup>394</sup> Moreover, to the extent that the contribution is itself speech, the contributor is still free to make it, subject to the limits.<sup>395</sup> The Court viewed this limit as not reducing the contributor's ability to express his support through the act of contributing.<sup>396</sup> The Court also was swayed by ethics-like arguments based on the dangers of corruption or the appearance of corruption when large contributions are allowed.<sup>397</sup>

Critics, both on and off the Court, have had great sport poking holes in the contributions-expenditure distinction.<sup>398</sup> In the modern, money-driven political campaign, contributions and expenditures are inexorably related. The former is the latter one step removed. Whatever protection the First Amendment provides to this type of speech ought to extend to both. Another weakness of *Buckley* is the Court's ambivalence over whether to defer to Congress in matters of campaign finance reform. The opinion states that Congress could "legitimately conclude,"<sup>399</sup> and "was surely entitled to conclude,"<sup>400</sup> that contributions present the reality or appearance of corruption. When it came to expenditures, however, the Court seemed to substitute its own judgment. The opinion stated, for example, that independent expenditures do not "appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions"<sup>401</sup> and that they "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."<sup>402</sup>

In the words of one critic, *Buckley* has "cast[] a long shadow"<sup>403</sup> over the field of campaign finance reform legislation.

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394. *Id.* at 21.

395. *Id.* at 20-21.

396. *Id.* at 21.

397. *Id.* at 26-27.

398. *Id.* at 241 (Burger, C.J., concurring in part and dissenting in part); *id.* at 259-66 (White, J., concurring in part and dissenting in part); *id.* at 290 (Blackmun, J., concurring in part and dissenting in part); Levit, *supra* note 1, at 473.

399. *Buckley*, 424 U.S. at 27.

400. *Id.* at 28.

401. *Id.* at 46.

402. *Id.* at 47.

403. Levit, *supra* note 1, at 475.

Any such reformist initiatives aim at reducing or eliminating the influence of private money on elections. *Buckley's* refusal to allow spending limits makes an already difficult task even more so. If *Buckley* were ever extended to invalidate contribution limits as well, campaign finance reform might become impossible. Some have concluded that the decision must be overruled.<sup>404</sup> In recent years, Congress has attempted to bypass *Buckley* by devising "voluntary" spending limits schemes to which candidates would agree in return for some form of public financing.<sup>405</sup> Congressional opponents of campaign finance reform repeatedly have invoked *Buckley* as an insurmountable obstacle to all such efforts.<sup>406</sup>

In 1990, the Court appeared to have second thoughts about *Buckley*. In *Austin v. Michigan Chamber of Commerce*,<sup>407</sup> the Court upheld a state law prohibiting corporations from using general treasury funds to support or oppose candidates in state elections. The majority purported to adhere to *Buckley's* distinctions between contributions and expenditures<sup>408</sup> but found it inapplicable when corporations are involved. The Court saw the problem not as one of any potential quid pro quo, but as a matter of "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."<sup>409</sup>

The dissenting Justices saw *Austin* as erasing the line between contributions and expenditures, leaving *Buckley's* status highly uncertain.<sup>410</sup> *Austin's* acceptance of the disparate treatment of corporate expenditures also suggested acceptance of an argument rejected out of hand in *Buckley*—that First Amendment analysis could tolerate the notion that "government

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404. See, e.g., Foley, *supra* note 22, at 1211.

405. See, e.g., Levit, *supra* note 1, at 487-503.

406. See *id.* at 477 (quoting Senator Mitch McConnell's statement that "I'll be the Jim Buckley of 1993.").

407. 494 U.S. 652 (1990).

408. *Id.* at 659.

409. *Id.* at 660.

410. *Id.* at 683-84 (Scalia, J., dissenting); *id.* at 703-05 (Kennedy, J., dissenting).

may restrict the speech of some elements of our society in order to enhance the relative voice of others."<sup>411</sup> A reformist might derive from *Austin* the specific notion that campaign spending limits have validity after all and that some range of wealth equalization is permissible in campaign finance reform and related areas.<sup>412</sup> I contend, however, that *National Treasury* puts *Buckley* back on its pedestal and relegates *Austin* to the background.<sup>413</sup>

The basic premise of this contention is that ethics laws and campaign finance laws seek to further similar goals. These laws aim at increasing public confidence in government through preventing corruption and the appearance of corruption. The neutrality principle is also present. Just as all public employees should treat citizens equally, elected officials should not allow greater access to some based on a financial relationship. Neither set of officials should be able to be bought. Admittedly, there are important distinctions between elected and nonelected officials that weaken the link between ethics laws and campaign finance laws.<sup>414</sup> Elected officials are subject to the additional checks of the electoral process itself. Disclosure laws affect them with particular force.<sup>415</sup> Campaign donations to political candidates from "special interests"—as long as they are not obviously linked to present or future votes—are valid regardless of the obvious resemblance to gifts from prohibited sources.<sup>416</sup>

Despite these differences, the same anticorruption and related rationales that underlie ethics laws rest at the heart of efforts to reform campaign finance laws.<sup>417</sup> As the former President of

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411. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

412. See generally Daniel H. Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381 (1992) (concluding that, although campaign finance reform efforts merit judicial leeway, courts have not applied consistent, constructive review to the efforts).

413. *Austin* might then be viewed primarily as a case dealing with state regulation of corporations. Cf. *Austin*, 494 U.S. at 658-59 (noting the role of state law in creating corporations).

414. See Vaughn, *supra* note 166, at 425-26.

415. *Buckley*, 424 U.S. at 66-68.

416. See *McCormick v. United States*, 500 U.S. 257, 272-74 (1991) (noting the frequency with which legislators who have received contributions act to help the contributor).

417. See Fred Wertheimer & Susan W. Manes, *Campaign Finance Reform: A Key to*

### Common Cause put it:

The pervasive dependence of elected officials on special-interest money is central to the crisis in public confidence that faces our government today. The public's belief that its interests are not being served in Washington is a direct reflection of the way in which monied interests and the pursuit of political-influence money by elected officials have become dominant forces in our political life. The extraordinary public cynicism we see today profoundly threatens our democracy.<sup>418</sup>

The Supreme Court in *Buckley* framed the various issues as the extent to which congressional anticorruption goals can override First Amendment freedoms.<sup>419</sup> Nevertheless, this is precisely what the Court would not allow in *National Treasury*. Congress could not try something new in its long-standing practice of regulating public employee speech when the result would be a "wholesale deterrent to a broad category of expression."<sup>420</sup> This same quantitative approach was important in *Buckley*<sup>421</sup> and will be important in any future balancing of interests. If the government cannot curtail the speech at issue in *National Treasury*, its ability to limit financial speech at the heart of political campaigns is *a fortiori* forbidden. The lack of deference shown by the Court to Congress's anticorruption judgments in both cases is another important unifying element. It is hard to escape the conclusion that *National Treasury* will have an important impact on campaign finance. If, as contended here, *Buckley* emerges strengthened from the seemingly unrelated honoraria controversy, it will continue to cast its long shadow on campaign finance reform.

One might go further and argue that *Buckley*, with its sharp rejection of an equalization rationale, also casts a shadow on ethics laws that aim to neutralize the ability of special interests

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*Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1994).

418. *Id.* at 1127.

419. *E.g.*, *Buckley*, 424 U.S. at 45-49.

420. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1013 (1995).

421. *See Buckley*, 424 U.S. at 19.



to influence nonelected public employees by financial means. A former employee subject to a revolving-door limitation cannot "speak" on behalf of a wealthy client who seeks to gain an advantage over those less wealthy. Might the Court say here as well that "the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment?"<sup>422</sup>

## VI. CONCLUSION

The Constitution always has the potential to get in the way of well-intentioned government acts—from catching terrorists to curbing pornography. It is tempting to regard *National Treasury* as only another example of this phenomenon. The government went too far in its effort to keep employees from receiving questionable outside income in the form of honoraria. The Court, enforcing the First Amendment, stepped in and stopped this abridgment of expression. So far, so good. Nevertheless, few Supreme Court decisions stand alone without "ripple effects" beyond their immediate facts.

Viewed in this way, *National Treasury* is cause for concern. A majority of the Court downplayed Congress's role in attempting to bring about a more ethical government. The case admittedly seems to have turned on a possibly excessive concern about the appearance of impropriety. The way government appears to its citizens, however, is important in framing their views about how it works and whether it is "clean." This is a fundamental issue. It would be unfortunate if *National Treasury* came to be seen as a roadblock to congressional and state legislative efforts in the area of government ethics.

The closely related areas of campaign finance reform and public employee political activity also present potential ripple effects. Here, too, the ability to respond to public cynicism and mistrust is important. The Court needs to show a greater deference to legislative efforts on such matters than it did in *National Treasury*. Public employees have rights, including the right to seek judicial relief from oppressive legislation. In such cases,

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422. *Id.* at 48-49.

however, the judiciary needs to remember that its aid is invoked by one of the most powerful groups in our society. When the government seeks to reform itself, any number of reasons exist for deferring to the judgment of the political process. The absence of this deference may be *National Treasury's* most disturbing legacy.