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Constitutional Conditions: Regulating Independent Political Expenditures by Government Contractors after Citizens United

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Regulating Independent Political Expenditures
by Government Contractors after *Citizens United*

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Table of Contents

Part I: The <i>Buckley</i> Framework and Corporations.....	4
A. Corporate Campaign Speech.....	5
Part II: Government Contractors and the First Amendment.....	11
A. Strict Scrutiny and Government Interests	12
1. Anti-distortion.....	13
2. Shareholder Protection.....	15
3. <i>Quid Pro Quo</i> Corruption	16
B. Analogous Case Law Dealing with Contributions by Government Contractors	19
C. Government Contractors Pose Unique Threats to Democracy	21
D. Not So Fast: the Wake of <i>Citizens United</i>	22
Part III: Alternative Means of Restricting Government Contractor Speech.....	25
A. Extending <i>Rust v. Sullivan</i>	25
1. Unconstitutional Conditions and the Substantial Nexus Problem	26
2. Challenges in Line-Drawing	32
3. Categorical Restrictions on Speech	35
B. The Hatch Act, Government Employees, and Government Agency	37

Introduction

From a blistering dissenting opinion written by Justice Stevens,¹ to critiques by legal scholars in the media,² to a rebuke from the President during his State of the Union address,³ the Supreme Court's holding in *Citizens United v. FEC* has been widely criticized. In holding that the First Amendment does not tolerate restrictions on a corporation or union's right to spend treasury funds independently on electioneering communications, the Court in *Citizens United* overturned *Austin v. Michigan Chamber of Commerce* and parts of *McConnell v. FEC*, which was decided only 7 years earlier, and mooted two other cases in the field: *FEC v. Wisconsin Right to Life* ("WRTL") and *FEC v. Massachusetts Citizens for Life* ("MCFL").⁴ Only two weeks after the Court's decision, Senator Charles Schumer and Representative Chris Van Hollen unveiled a proposal to push back against the Court's holding.⁵

On June 24, 2010, the House of Representatives passed the DISCLOSE Act (the "Act"), an acronym for Democracy is Strengthened by Casting Light on Spending in Elections.⁶ The Act

¹ *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010). (Stevens, J., dissenting).

² Richard Hasen, *Money Grubbers: The Supreme Court Kills Campaign Finance Reform*, SLATE.COM, Jan. 21, 2010, <http://www.slate.com/id/2242209/>.

³ In a surprising move, President Obama criticized the decision directly during his address, causing Justice Alito to break the tradition of stoicism in the chamber and shake his head. See Mary Hall, *State of the Union: Obama Walking in the Footsteps of FDR*, THE HUFFINGTON POST, Feb. 3, 2010, http://www.huffingtonpost.com/mary-hall/state-of-the-union-obama_b_447056.html.

⁴ *Citizens United*, 130 S. Ct. at 876.

⁵ See James Oliphant, *Congress pushes back against Supreme Court ruling on corporate spending*, LOS ANGELES TIMES, Feb. 11, 2010, <http://www.latimes.com/news/nation-and-world/la-na-campaign-funding12-2010feb12,0,5494783.story>.

⁶ See Caitlin Huey-Burns, *House Passes Campaign Finance Disclose Act*, U.S. NEWS & WORLD REPORT, June 25, 2010, <http://politics.usnews.com/news/articles/2010/06/25/house-passes-campaign-finance-disclose-act.html>.

has proven highly polarizing. Only two Republican Congressmen voted for the bill and a Republican filibuster prevented a vote in the Senate.⁷ The issue is not dead, however, as Schumer and the Senate Democrats have pledged to keep trying to pass the bill.⁸

Somewhat surprisingly, the most politically controversial elements of the Act pose the least constitutional problems.⁹ The Act's heightened disclosure requirements,¹⁰ pale in comparison to other more ambitious regulations,¹¹ such as restrictions on speech for recipients of the Troubled Asset Relief Program ("TARP")¹² and the provision prohibiting speech by foreign-owned corporations.¹³ The Act's restrictions on speech by government contractors bring up a

⁷ See David M. Herszenhorn, *Campaign Finance Act Is Set Aside*, N.Y. TIMES, July 27, 2010, <http://www.nytimes.com/2010/07/28/us/politics/28donate.html>.

⁸ See Frank James, *Senate Republicans Block Campaign-Finance Bill*, NPR.org, July 27, 2010, <http://www.npr.org/blogs/thetwo-way/2010/07/27/128804094/senate-republicans-block-campaign-finance-bill>.

⁹ Senator McConnell has spearheaded the Republican response and attacked the bill as an incumbency protection plan, a strategy that largely misses the point. See Press Release, Senator Mitch McConnell, *The DISCLOSE Act Restricts First Amendment Rights* (June 24, 2010), (available at <http://mccconnell.senate.gov>, (follow "news" hyperlink; then follow "press releases" hyperlink)).

¹⁰ The proposal would require the CEO of a corporation or head of any other covered organization to appear personally in the organization's independent expenditure or electioneering communication TV ads and take responsibility for the ad by stating that the corporation or other organization approves the message. See DISCLOSE Act of 2010, H.R. 5175, 111th Cong. § 214 (2010).

¹¹ See *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (noting, "disclosure requirements in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist").

¹² TARP provided a federally-funded bailout of certain struggling corporations. As discussed *infra*, the government may condition speech on the receipt of public funds, however the conditions must be included at the time of the grant. An ex post facto restriction on speech fails the unconstitutional conditions test on its face. See *infra*, Part IV.

¹³ Despite Justice Stevens' assertion that the Court would assume that foreign corporations may be restricted from speaking about elections, the majority in *Citizens United* declined to address

more viable constitutional debate, however the prospects of prevailing in the current state of campaign finance jurisprudence, which narrowly defines corruption to include only *quid pro quo* corruption, is doubtful.

While the Act raises many political and legal issues, this paper addresses only the constitutionality of its proposed restrictions on independent expenditures by government contractors. Part I provides a brief history of the Court’s jurisprudence with regard to campaign expenditures by corporations generally. Part II analyzes the extent to which government contractors may be included within the general legal framework that applies to corporations or whether they would merit unique considerations by the Court. Finally, Part III shifts the focus away from traditional First Amendment application in the campaign finance context and proposes a potential new legal framework, arguing that restrictions on campaign expenditures by government contractors may be constitutional under the Court’s government speech doctrine.

Although they have received the lion’s share of the political attention, the disclosure provisions appear relatively safe under the Court’s First Amendment test,¹⁴ but the ban on political expenditures by government contractors may run into more trouble. Ultimately, the current proposal banning “pay to play” speech by government contractors may not survive strict scrutiny under the Court’s current campaign finance standards, but may pass the unconstitutional

this issue. *See Citizens United*, 130 S. Ct. at 911. The Act has also been criticized as unenforceable and problematic to the extent it attempts to define a “foreign corporation” in the modern multi-national business landscape. *See* Bradley Smith, *Democratic xenophobia in pushing the DISCLOSE Act?* THE HILL, June 24, 2010, <http://thehill.com/blogs/congress-blog/politics/105219-democratic-xenophobia-in-pushing-the-disclose-act>.

¹⁴ While there might be a reasonable claim if a plaintiff can show “a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties,” harms imposed on contributors are generally too speculative. *Buckley*, 424 U.S. at 74; *see also* *Doe v. Reed*, ___ S. Ct. ___, 2010 WL 2518466 (U.S.).

conditions doctrine to the extent Congress can condition speech upon the receipt of public funds for certain types of contracts.

Part I: The *Buckley* Framework and Corporations

In the seminal 1976 case, *Buckley v. Valeo*, the Supreme Court established that the acts of giving money in support of a political candidate and making political expenditures were forms of speech protected under the First Amendment.¹⁵ In fact, laws regulating such donations deserved the highest form of scrutiny because political speech is at issue.¹⁶ The Court distinguished between political contributions and political expenditures and, citing the danger of actual or apparent corruption as the compelling state interest, upheld a law which set contribution limits, but overturned restrictions on expenditures.¹⁷ In the Court's view, political contributions to a candidate provide more opportunity for *quid pro quo* corruption whereas independent expenditures in favor of a candidate do not pose the same dangers.¹⁸ Moreover, contributions deserved less protection since they indicate only a general showing of support for a candidate whereas independent expenditures were seen as the product of the speaker's specific interest in a candidate's policies.¹⁹

¹⁵ *See Buckley*, 424 U.S. at 14 (noting, “[FECA’s] contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities”).

¹⁶ *See id.*

¹⁷ *See id.* at 58.

¹⁸ *See id.* at 23.

¹⁹ *See id.* at 21.

Despite challenges to the foundations of *Buckley*, it has never been overruled²⁰ and the act of spending money in the political marketplace has consistently been adjudicated under exacting scrutiny.²¹ As a restriction on expenditures, the Act would fall within *Buckley*'s highest form of scrutiny, since expenditure regulations constitute "direct and substantial restraint on the quantity of political speech."²² To anticipate the Court's potential response to a regulation on government contractor speech, we must first consider their rulings on corporate political speech in general, since the vast majority of the contractors covered under the Act are corporations.²³

A. Corporate Campaign Speech

Four main cases discuss a corporation's First Amendment right to spend money independently on campaigns: *First National Bank of Boston v. Bellotti*, *MCFL*, *Austin*, and *Citizens United*. In these cases, the Court has swung back and forth on whether corporate independent expenditures could be restricted, toeing a vaguely defined line until Justice Kennedy got the last word in *Citizens United*.

²⁰ Justice Stevens has argued that money is not speech at all. Rather, it is a commodity that serves as a means for speaking, which could be more heavily regulated under the traditional time, place and manner test. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

²¹ *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 134 (2003); *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 386 (2000); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 610 (plurality opinion); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 491 (1985); *Cal. Medical Assn. v. Federal Election Comm'n*, 453 U.S. 182, 194-195 (1981) (plurality opinion).

²² *Buckley*, 424 U.S. at 39.

²³ *See* USA Spending, follow "data feeds" hyperlink (hereinafter "USA Spending").

In *Bellotti*, the first case addressing restrictions on corporate expenditures, the Court established that Congress may not restrict political speech simply because it comes from a corporation and not an individual.²⁴ In the eyes of the Court, the identity of the speaker does not necessarily influence First Amendment analysis. Rather, the speech itself deserves protection.²⁵ Interestingly, the *Bellotti* Court articulated a list of compelling interests, most of which it would later reject:²⁶ preserving the integrity of the electoral process, preventing corruption, sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government, and preservation of the individual citizen's confidence in government.²⁷ Even though these various state interests were considered "of the highest importance," the Court ultimately struck down the Massachusetts law.²⁸

Until *Citizens United*, however, *Bellotti* was not read to foreclose all corporate restrictions on expenditures. *Bellotti* dealt with expenditures aimed at ballot measures, not express advocacy of candidates.²⁹ A footnote in the decision suggested that this distinction may

²⁴ *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (holding, "[w]e thus find no support ... for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation").

²⁵ *See id.*

²⁶ *See Citizens United*, 130 S. Ct. at 909-10.

²⁷ *See Bellotti*, 435 U.S. at 788-89.

²⁸ *Id.*

²⁹ The Massachusetts statute prohibited corporations from making contributions or expenditures promoting any particular issue submitted to the voters. Mass. Gen. Laws Ann. Ch. 55, § 8 (West Supp. 1977).

be enough for the Court to reach a different result.³⁰ The Court noted that because they relate only to matters of general public concern, ballot measures may pose less of a threat to corruption or political distortion than campaigns for the election of candidates.³¹ While only dicta, this small footnote opened the door to the possibility that corporations may be fundamentally distinct from individuals under the First Amendment, at least in some regards, and more dangerous to the many state interests the Court identified.

These interests in restricting corporate speech arose again in *MCFL*. There, a nonprofit corporation challenged § 441(b) of the Federal Election Campaign Act (“FECA”), claiming that Congress should not be able to restrict it from using treasury funds to promote their opinions on views of abortion.³² The majority again identified a series of interests that Justice Kennedy would later dismiss: “the influence of political war chests funneled through the corporate form, to eliminate the effect of aggregated wealth on federal elections, to curb the political influence of those who exercise control over large aggregations of capital, and to regulate the substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization.”³³

Despite acknowledging that restrictions serving these interests were essential to protect the political marketplace,³⁴ the Court carved out a narrow three-prong test to exempt MCFL from

³⁰ *Bellotti*, 435 U.S. at 788, n. 26 (noting that “a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office”).

³¹ *See id.*

³² *See MCFL*, 479 U.S. at 241.

³³ *Id.* at 257 (internal quotations and citations omitted).

³⁴ *See id.*

§ 441(b).³⁵ First, MCFL was formed expressly to promote political ideas and cannot engage in business activities.³⁶ Second, it has no shareholders or others with claims to its earnings.³⁷ Third, MCFL's treasury funds were donated by individual citizens, not by labor unions or business corporations.³⁸ Because of these relatively unique characteristics, MCFL posed little threat to the political marketplace and the burdens imposed by disclosure, recordkeeping, and PAC requirements were too great.³⁹

In creating the *MCFL* test and focusing on characteristics specific to certain corporations, the Court in some ways undermined the holding in *Bellotti* regarding the value of corporate speech by placing the identity of the speaker at the forefront of its analysis. This may be true simply because of the nature of the case – in an as applied challenge, the Court must consider the effects of the law on the particular appellant – however, had the Court been convinced that *Bellotti's* identity-blind analysis was the correct approach, evaluating different *types* of corporations would not be necessary at all. There the Court declined to distinguish between vastly different types of companies, including the media, banks, multi-national manufacturing companies, and a large electronics developer,⁴⁰ instead treating them all under the rubric of

³⁵ See *MCFL*, 479 U.S. at 263-64.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ The appellants were the First National Bank of Boston, New England Merchants National Bank, the Gillette Co., Digital Equipment Corp., and Wyman-Gordon Co. *Bellotti*, 435 U.S. at 768, n.1.

corporations in general.⁴¹ In this sense, *MCFL* may be read to suggest that while corporate speakers do not necessarily warrant special treatment under the First Amendment, their ability to raise capital alone might justify special restrictions.⁴²

In *Austin*, the Court expanded upon the view that corporations may be held to different standards than individuals, upholding a restriction on corporate expenditures for the first time.⁴³ Once again the corporate form was of paramount importance. Relying on much the same language as used in *MCFL*, the Court opined that “corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”⁴⁴ In some ways this view is a logical continuation of the dangers identified in *MCFL*, but in others it is an implicit disavowal of the entire jurisprudential framework. In combining expenditures and contributions, *Austin* does indeed seem to be overstepping, not only of *Bellotti*, but of *Buckley* as well. Even though *Austin* had not overruled *Bellotti*, the corporate form was enough to limit First Amendment protections on expenditures, not merely contributions.

Further, the Court in *Austin* provided relatively little support for its reading of the restriction. The *Austin* Court cited *Belotti*’s footnote 26, which indicated that expenditures in

⁴¹ *Id.* at n.18 (noting, [i]f we were to adopt appellee’s suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by appellants, the result would not be responsive to the informational purpose of the First Amendment”).

⁴² Indeed, Justice Brennan writing for the majority states this principle explicitly. *MCFL*, 479 U.S. at 259 (“Regulation of corporate political activity thus has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes”).

⁴³ *See Austin*, 494 U.S. at 695 (Kennedy, J., dissenting).

⁴⁴ *Austin*, 494 U.S. at 660.

relation to candidates may not be given the same level of protection as those promoting ballot measures, but applied it only in the context of actual or apparent corruption,⁴⁵ which the Court immediately dismisses as the incorrect judicial inquiry.⁴⁶ If the controlling state interest is the corrosive and distorting effects of corporate wealth, citing *Bellotti* to promote anti-corruption undermines the majority's task.

Next, with little more than a statement of pure opinion, the *Austin* Court claimed that the statute at issue is not an attempt at equalizing the playing field for speakers, addressing Justice Kennedy's opposite view.⁴⁷ With the same facts and case histories leading to diametrically opposed views, the Court's decision here feels much like a he-said, she-said argument. Justice Stevens' assertion that little except the composition of the Court has determined the outcome in recent cases sounds especially true.⁴⁸ The disagreements were fundamental and were bound to continue.

Whatever the merits of *Austin*'s reliance on interests apart from actual or apparent *quid pro quo* corruption, the question of the compelling nature of the anti-distortion interest was

⁴⁵ *Id.* (“[The Court] has also recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections”).

⁴⁶ *Id.* (“Regardless of whether this danger of ‘financial quid pro quo’ corruption may be sufficient to justify a restriction on independent expenditures, Michigan’s regulation aims at 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”) (internal citations omitted).

⁴⁷ Addressing Kennedy’s dissent which reads the statute as an attempt to equalize the voices of the wealthy and less-wealthy, the Court notes, “[t]he Act does not attempt to equalize the relative influence of speakers on elections, . . . rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations” (internal quotations omitted). *Id.*

⁴⁸ *Citizens United*, 130 S. Ct. at 942 (Stevens, J., dissenting).

relatively short-lived. *Citizens United* overturned *Austin* and closed *Bellotti's* footnote distinction.⁴⁹ Justice Kennedy firmly established that corporations, like individuals, deserve First Amendment freedom to make independent expenditures regarding elections and as a result, corporations may currently spend freely in favor of both candidates and ballot measures.⁵⁰

Part II: Government Contractors and the First Amendment

Corporate government contractors should not be treated as the equivalent of other corporations in the campaign finance context. Permitting an entity to donate money directly to those who are issuing and paying its contracts raises serious corruption and bias concerns.⁵¹ Indeed, Congress has already restricted the ways in which government contractors can contribute to political candidates.⁵² Government contractors, defined as those who enter into contracts for goods, services, or real estate which are paid by funds appropriated from Congress, are prohibited from contributing to candidates, except through the use of separate segregated funds.⁵³ This provision has not been challenged to date, and several lower court cases have upheld

⁴⁹ *See id.* at 908.

⁵⁰ *Id.* (“we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”).

⁵¹ The Court has recognized these dangers in other contexts as well. Under the Contracts Clause of the Constitution, the Court generally defers to Congress when it passes laws which impair private contracts, but applies strict scrutiny when Congress acts to modify its own contracts. The Court raises the level of scrutiny to protect against the threat that Congress has an incentive to pass laws which will make it easier for them to conduct business. The same is true here. Extra precautions are needed to the extent that Congress has an incentive to reward contractor expenditures. *See U.S. Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 23 (1977).

⁵² *See* 2 U.S.C. 441(c) (2010).

⁵³ 2 U.S.C. 441(c)(a-b) (2010).

restrictions on government contractor contributions.⁵⁴ These cases and their applicability are discussed below.

The Act extends these types of speech restrictions to cover expenditures as well as contributions.⁵⁵ Based on *Buckley*, this extension seems ambitious. There, the Court held that expenditures do not raise the same corruption concerns as contributions,⁵⁶ and the speaker's interest with regard to independent expenditures is greater than that for contributions.⁵⁷ Further, restrictions based on a speaker's identity have been repeatedly struck down.⁵⁸ Even though government contractors may pose a substantial threat to democracy based on their unique relationship to the government, expenditures have historically been treated as a lower-level risk than contributions and restricting them may not pass the Court's exacting scrutiny test.

A. Strict Scrutiny and Government Interests

Since political expenditures have been considered an act of political speech – a form of speech that the Court has long treated with the utmost respect – regulations on the ability to make those expenditures would be subject to strict scrutiny.⁵⁹ Strict scrutiny as applied by the Court requires a compelling state interest and narrowly tailored means.⁶⁰ Justice Kennedy and the majority have gradually narrowed the permissible state interests available to justify

⁵⁴ See *infra*, Part III.

⁵⁵ H.R. 5175, 111th Cong. § 101 (2010).

⁵⁶ See *Buckley*, 424 U.S. at 23.

⁵⁷ *Id.*

⁵⁸ See *Citizens United*, 130 S. Ct. at 898-99 (quoting *Bellotti*, 435 U.S. at 784).

⁵⁹ See *Buckley*, 424 U.S. at 14.

⁶⁰ See *id.*

restrictions on speech and after *Citizens United*, preventing actual *quid pro quo* corruption, or its appearance, is the only recognizable compelling state interest.⁶¹

1. Anti-distortion

First, *Citizens United* throws out any remnants of the anti-distortion argument. Under the anti-distortion theory, recognized most notably in *Austin*, Congress has a compelling state interest in regulating the distortion of the political process by power of corporate wealth.⁶² The majority in *Austin* held that the immense aggregation of wealth, made possible by government benefits such as perpetual life, limited liability and separation of ownership and control, could lead to corrosive and distorting effects on the political process.⁶³ Controlling these effects thus constituted a compelling state interest.⁶⁴

Anti-distortion was upheld as a compelling governmental interest in *McConnell*, with the majority noting that such an interest has been accepted by the “sober-minded” for over a century.⁶⁵ In *Citizens United*, however, the Court took it upon itself to reconsider this interest. Ordering a second round of oral arguments and turning an as-applied challenge into a facial

⁶¹ The majority in *Citizens United* reads *Buckley* and *McConnell* as justifiably relying only on the *quid pro quo* interest, rejecting all others. See *Citizens United*, 130 S. Ct. at 909-910.

⁶² See *Austin*, 494 U.S. at 659-60 (identifying the compelling need to protect against “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”).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *McConnell v. FEC*, 540 U.S. 93, 115 (2003) (the majority quotes the “sober-minded Elihu Root,” who advocated for legislation that would prevent “the great aggregations of wealth, from using their corporate funds, directly or indirectly,” to elect officials who act against the public interest).

challenge,⁶⁶ the Court provided Justice Kennedy with a forum to address anti-distortion, a theory he had considered an aberration in the Court’s jurisprudence. As his dissent in *McConnell* makes clear, Justice Kennedy reads the Court’s precedent to uphold “limits on conduct possessing *quid pro quo* dangers, and nothing more.”⁶⁷

With the self-created forum⁶⁸ to expound upon his interpretation of what constitutes a valid state interest, Justice Kennedy artfully crafted his opinion in *Citizens United* to cast *Austin* as an outlier. First, Kennedy grouped together the Court’s holdings in *Buckley* and *Bellotti*, asserting that *Austin* changed everything in 1990.⁶⁹ While a persuasive rhetorical technique, this view fails to take into consideration cases in the interim like *MCFL*, which acknowledged and promoted the interests that *Austin* built upon. Anti-distortion was not new to *Austin*, it was simply a reformulation and consolidation of the many interests the Court had deemed of “highest importance.”⁷⁰

Ultimately, the majority in *Citizens United* dismissed the anti-distortion rationale as merely a means to level the playing field of potential political speakers – an interest that was

⁶⁶ See *Citizens United*, 130 S. Ct. at 876.

⁶⁷ *McConnell*, 540 U.S. at 293 (emphasis in original); Justice Thomas appears to corroborate this view of corruption in *McConnell* as well. He asks only about *quid pro quo* corruption and points to the fact that the District Court found scant evidence of any actual corruption outside of conjecture. See *id.* at 270 (Thomas, J., dissenting).

⁶⁸ See *Citizens United*, 130 S. Ct. at 932 (Stevens, J., dissenting) (“Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law”).

⁶⁹ See *Citizens United*, 130 S. Ct. at 903 (“Thus the law stood until *Austin*”).

⁷⁰ As noted above, these interests included, among others, preserving the integrity of the electoral process, sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government, and preservation of the individual citizen’s confidence in government. Each of these could accurately be characterized as a form of “distortion” on the electoral process. See *supra* note 27.

rejected decades ago in *Buckley*.⁷¹ Justice Stevens suggested in dissent that the anti-distortion rationale was only complementary to the *quid pro quo* interest in *Austin* and not so essential as to necessitate overturning *Austin*,⁷² but whether the anti-distortion rationale was central or not, *Citizens United* has effectively removed it from future consideration.

2. Shareholder Protection

Similarly, shareholder protection has been removed from the list of available compelling interests.⁷³ For publicly held corporations, shareholders are tied to the speech of the corporation whether they agree with that speech or not.⁷⁴ Minority shareholders can thus be essentially coerced into speaking, an act traditionally subject to strict scrutiny.⁷⁵ In campaign cases, however, the Court has associated forced speech with shareholder protection, an interest that has gained less vibrant support.⁷⁶ Despite the fact that shareholders often do not even know if and when their corporations are speaking,⁷⁷ and that the processes of corporate democracy cannot

⁷¹ See *Citizens United*, 130 S. Ct. at 905. See also *Buckley*, 424 U.S. at 56.

⁷² See *Citizens United*, 130 S. Ct. at 957 (Stevens, J., dissenting).

⁷³ See *id.* at 911.

⁷⁴ *Id.*

⁷⁵ See e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (noting that the right to speak also implies the right to decide “what not to say”); see also *Keller v. State Bar of California*, 496 U.S. 1 (1990) (applying strict scrutiny and holding that a member of the California Bar Association could not be forced to associate with group activities unrelated to the organization’s purpose).

⁷⁶ See *Austin*, 494 U.S. at 657 (Kennedy, J., dissenting) (dismissing the “rationale that the restriction protects shareholders from the use of corporate funds to support speech with which they may not agree”).

⁷⁷ See *Citizens United*, 130 S. Ct. at 977-78.

adequately protect minority shareholders in practice,⁷⁸ shareholder protection no longer satisfies the compelling interest requirement of strict scrutiny after *Citizens United*. There, Justice Kennedy quickly dismissed the shareholder protection rationale, pointing to the fact that disputes among shareholders should be left to the workings of corporate democracy.⁷⁹

Kennedy's other attacks on the shareholder protection interest seem to be aimed more at the restriction's tailoring than the interest itself. To that end, he argued that the statute is both over- and under-inclusive.⁸⁰ If Congress had passed the restriction with shareholder protection in mind, it would not have included a media exception since many media corporations are publicly owned.⁸¹ The statute is over-inclusive in that it includes corporations with only single shareholders.⁸² Protecting dissent in that context is irrelevant. By focusing mainly on the problems caused by the statute's tailoring, Kennedy perhaps implied that the shareholder protection interest may remain viable. He clears up that ambiguity quickly, however, in discussing *quid pro quo* corruption.

3. Quid Pro Quo Corruption

Ultimately the only state interest sufficient to justify a significant burden on speech is actual or apparent *quid pro quo* corruption. For Justice Kennedy, and indeed the current majority of the Court, *Buckley* made clear that “the corruption interest only justifies regulating

⁷⁸ See *id.* at 978 (noting that “in practice...many corporate lawyers will tell you that ‘[the rights of shareholders to vote and bring derivative suits for breach of fiduciary duty] are so limited as to be almost nonexistent”).

⁷⁹ *Id.* at 911.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

candidates’ and officeholders’ receipt of what we can call the ‘quids’ in the *quid pro quo* formulation,” and that “campaign finance regulation that restricts speech without requiring proof of particular corrupt action withstands constitutional challenge only if it regulates conduct posing a demonstrable *quid pro quo* danger.”⁸³

The Court has traditionally avoided finding that independent expenditures implicate this narrow definition of corruption.⁸⁴ Before Justice Kennedy narrowed the somewhat amorphous definition of “corruption” to *quid pro quo*, the Court found in *Buckley* that even where independent expenditures are in favor of a candidate, they carry a lesser risk of corruption than contributions since they do not necessarily involve the candidate at all or require any coordination.⁸⁵ In fact, because they are independent, there is the chance that such expenditures might state facts or opinions contrary to the candidate’s interests and actually *harm* the candidate’s election prospects.⁸⁶ This view held true in *Bellotti*, where the Court overturned restrictions on ballot measure expenditures, which are similarly benign in that no person has a direct incentive to exchange a *quid* for a *quo*.⁸⁷

⁸³ *McConnell*, 540 U.S. at 292 (Kennedy, J., dissenting).

⁸⁴ Corruption was lumped in with the other compelling interests. *See supra* note 27.

⁸⁵ *See Buckley*, 424 U.S. at 45-46.

⁸⁶ *See id.* at 47 (noting, “[u]nlike contributions . . . independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive”).

⁸⁷ *See Bellotti*, 435 U.S. at 791 (noting, “[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue”); *see also Citizens United*, 130 S. Ct. at 959 (Stevens, J., dissenting) (“A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation’s retaliation”).

However, as Justices Burger and White pointed out in their *Buckley* dissents, coordination with the candidate does not necessarily end the corruption inquiry.⁸⁸ First, a candidate may still reap the benefits from expenditures made on his or her behalf regardless of whether the candidate authorizes them.⁸⁹ Second, such expenditures may provide an alternative platform to attack political opponents without associating the candidate in the muckraking.⁹⁰ Regardless of whether the candidate is involved in promoting negative ads produced by independent third parties, he or she could be insulated from harm while doing significant political damage to opponents.⁹¹

Practically, Justice Kennedy's requirement of proof of demonstrable *quid pro quo* danger could not be a viable test. Such a test is so narrow that it necessarily removes the still-compelling interest of *appearance* of corruption from the equation.⁹² Corruption rarely occurs out in the open.⁹³ That is, no candidate or officeholder would document any *quos* that they

⁸⁸ See *id* at 261-62 (White, J., dissenting). See also *Id.* at 244, n. 7 (noting, “[t]he distinction between ‘independent’ and ‘authorized’ political activity is unrealistic and simply cannot be maintained”) (Burger, C.J., dissenting).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Indeed, the Second Circuit recently read *Citizens United* as holding that anticorruption is not a compelling government interest as applied to expenditures. This statement is directly at odds with the history of the Court's jurisprudence. *Green Party of Conn. v. Garfield*, Docket Nos. 09-0599-cv(L), 09-0609-cv(CON) (2nd Cir. 2010). Far from removing corruption as a compelling interest, *Citizens United* merely specified the type of corruption required for such a compelling interest. See *infra*.

⁹³ The majority relies on the lower court opinion in *McConnell* for this proposition, noting that “[t]he *McConnell* record was over 100,000 pages long, yet it does not have any direct examples of votes being exchanged for expenditures” (internal quotation and punctuation omitted). *Citizens United*, 130 S. Ct. at 910.

provide for *quids*, making demonstrable proof of any problematic practices incredibly difficult to find.⁹⁴ Indeed, the voluminous record in *McConnell* revealed no actual corruption.⁹⁵ The narrower definition of corruption may help to identify the appearance of corruption in that if one does not know what to look for, nothing – or indeed, anything – could appear problematic, but Kennedy’s reading of the interest to require proof remains restrictively narrow. To the extent that there is any actual proof of *quid pro quo* arrangements, these arrangements would clearly run afoul of bribery laws and the entire anti-corruption framework would be unnecessary.⁹⁶

B. Analogous Case Law Dealing with Contributions by Government Contractors

Although not directly related to the Act, adjudication of contribution restrictions on government contractors can provide a useful guide to the Court’s potential treatment of expenditure restrictions. Lower courts have repeatedly discriminated based on identity of the speaker in these contexts and held that corruption concerns are amplified for corporations which do business with the government. Upholding Section 441(c)’s ban on contributions by government contractors in general, the Court in *FEC v. Weinstein* noted that “there is a greater likelihood that the public will perceive corrupt relationships between elected officials and corporations when those corporations have previously received Government contracts.”⁹⁷

⁹⁴ See *id.* at 965 (pointing out that “[p]roving that a specific vote was exchanged for a specific expenditure has always been next to impossible”) (Stevens, J., dissenting).

⁹⁵ See *id.* at 910.

⁹⁶ See *McConnell*, 540 U.S. at 143 (explaining that, “[i]n *Buckley*, we expressly rejected the argument that antibribery laws provided a less restrictive alternative to FECA’s contribution limits, noting that such laws ‘deal[t] with only the most blatant and specific attempts of those with money to influence governmental action’”).

⁹⁷ *FEC v. Weinstein*, 462 F.Supp. 243, 249 (S.D.N.Y.1978).

Likewise, the Second Circuit recently upheld a Michigan law banning contributions from contractors.⁹⁸

This likelihood of perceived corruption resulting from contributions by certain corporations has been used to apply to specific industries that do business with the government as well. In *Blount v. SEC*, the Court noted that regulations covering pay to play practices in the selection of underwriters for municipal bonds are governed by the same interests.⁹⁹ Indeed, “[i]n every case where a quid in the electoral process is being exchanged for a quo in a particular market where the government deals, the corruption in the market is simply the flipside of the electoral corruption.”¹⁰⁰ For the municipal securities market, the Blount Court found that demonstrable proof of *quid pro quo* corruption is not necessary to uphold a ban on political contributions.¹⁰¹ Rather, contributions by municipal securities professionals “self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity.”¹⁰² Similar bans have been upheld for the gambling industry in Louisiana¹⁰³ and New Jersey,¹⁰⁴ liquor licensees in Illinois,¹⁰⁵ and insurance carriers in Georgia.¹⁰⁶

⁹⁸ See *Green Party*, Docket Nos. 09-0599-cv(L), 09-0609-cv(CON).

⁹⁹ In *Blount*, the Court examined potentially corrupt practices in which political contributions may affect the choice of municipal securities underwriters. See *Blount v. FEC*, 61 F.3d 938 (D.C. Cir. 1995).

¹⁰⁰ *Id.* at 943.

¹⁰¹ *Id.* at 943-45.

¹⁰² *Id.*

¹⁰³ See *Casino Ass'n of Louisiana v. Foster*, 820 So.2d 497 (La. 2002).

C. Government Contractors Pose Unique Threats to Democracy

While these regulations on government contractors have dealt with contributions and not expenditures, the unique dangers posed by government contractors to the perception of corruption could be enough to cross over the wavy line distinguishing contributions from expenditures. Because government contractors are necessarily business corporations who will not fall into the *MCFL* exceptions, such corporations exist solely for the purpose of accumulating capital. Indeed, the law supports this view of the corporation.¹⁰⁷ With no incentive other than financial profit, and because that profit is coming from taxpayer funds, government contractor speech in the political context is inextricably linked to its financial relationship with the government.

In fact, accepting *Buckley's* distinctions between contributions and expenditures would imply that independent expenditures by government contractors may be *more* likely than contributions to cause the appearance of corruption. Expenditures are by nature targeted specifically toward issues that the contractors find relevant whereas contributions merely indicate a general showing of support.¹⁰⁸ The same “self-evident” dangers would apply equally to expenditures and “no smoking gun is needed where ... the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic.”¹⁰⁹

¹⁰⁴ See *Soto v. New Jersey*, 565 A.2d 1088, 1098 (N.J. 1989).

¹⁰⁵ See *Schiller Park*, 349 N.E.2d 61, 65-66 (Ill. 1976).

¹⁰⁶ See *Gwinn v. State Ethics Comm'n*, 426 S.E.2d 890, 892 (Ga. 1993).

¹⁰⁷ See *Dodge v. Ford*, 170 N.W. 668 (Mich. 1919).

¹⁰⁸ See *Buckley*, 424 U.S. at 47.

¹⁰⁹ *Blount*, 61 F.3d at 945.

Indeed, before *Citizens United*, Justice Roberts accepted that “in some circumstances, ‘large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.’”¹¹⁰ Few circumstances could lead to actual or apparent corruption more than corporations who do business with the government spending money in support of a candidate or elected official who has the power to grant or negotiate their contracts. If Justice Roberts is to be believed, a strong argument could be made in favor of restricting expenditures by government contractors.

D. Not So Fast: the Wake of *Citizens United*

Ultimately, these arguments in support of government contractor restrictions will likely fail under the current Court’s jurisprudence. First, even though Justice Roberts acknowledged that certain circumstances could permit restrictions on expenditures, the Court has made these circumstances impossibly narrow. Acceptable circumstances have only been found in *MCFL* and *Austin*, holdings that *Citizens United* either mooted or overturned.¹¹¹ In *MCFL*, the Court carved out narrow exceptions to the rule that few, if any other, corporations could realistically meet.¹¹² Indeed, the Court declined to extend these in *Citizens United*.¹¹³

Second, the law is likely not narrowly tailored to survive strict scrutiny. Government contractors as a group may include up to 75% of the largest publicly traded corporations in the

¹¹⁰ *F.E.C. v. Wisconsin Right to Life*, 551 U.S. 449, 78 (2007) (opinion of Roberts, C.J.) (quoting *Buckley*, 424 U.S. at 45).

¹¹¹ *See Citizens United*, 130 S. Ct. at 876.

¹¹² *See MCFL*, 479 U.S. at 263-64.

¹¹³ Instead, the majority transformed an as-applied challenge into a facial challenge. *See Citizens United*, 130 S. Ct. at 876.

United States.¹¹⁴ These corporations span a huge cross-section of businesses, from Lockheed Martin to Dell, Inc., to Kraft Foods.¹¹⁵ As the top 100 corporations in America, these corporations make up a sizeable part of the U.S. economy and have significant interest in legislative policy. It is doubtful that the Court would deny them the opportunity to speak merely because of their economic significance. As Justice Scalia has pointed out, it would be perverse to deny speech rights to those with the most to discuss.¹¹⁶

An alternative argument could be made that precisely because these corporations are so large, their speech may be restricted. Dell, for example, currently has almost two billion outstanding shares.¹¹⁷ These equity interests are undoubtedly held by a large number of distinct individuals and there is little chance that the company could speak with one voice. As Justice Stevens noted in his *Citizens United* dissent, when dealing with corporations it is difficult to tell “who” is doing the speaking.¹¹⁸ This question is amplified when the corporation is so large. The idea that a corporation of that size could foster a coherent viewpoint is fanciful.

This argument to restrict speech based on a lack of a discernable corporate identity fails to take into consideration the fact that the Court in *Citizens United* has made it clear that

¹¹⁴ INTERNATIONAL TAXATION: Large U.S. Corporations and Federal Contractors with Subsidiaries in Jurisdictions Listed as Tax Havens or Financial Privacy Jurisdictions, Report of the Government Accountability Office 4 (2008), available at <http://www.gao.gov/new.items/d09157.pdf>.

¹¹⁵ *Id.* at 40-54.

¹¹⁶ *McConnell*, 540 U.S. at 257 (Scalia, J., dissenting).

¹¹⁷ Key Statistics for Dell Inc, Yahoo! Finance, <http://finance.yahoo.com/q/ks?s=DELL>.

¹¹⁸ *Citizens United*, 130 S. Ct. at 972.

restrictions based on the identity of the speaker are not permitted under the First Amendment.¹¹⁹ Despite the fact that the restriction at issue in *Bellotti* was on ballot measure spending, not spending in support of or opposition to candidates, the Court in *Citizens United* extended that holding to invalidate limitations on all corporate expenditures for corporate electioneering communications.¹²⁰ Even the fact that *Bellotti* explicitly noted that “a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office,”¹²¹ the Court steamrolled ahead to apply its identity-blind holding to corporations involved in campaign expenditures.¹²²

To do this, the Court has opined that proper application of the First Amendment in this context primarily protects the public’s right to information rather than the corporation’s right to speak.¹²³ Such a view makes any restriction on speech difficult to justify since political speech is so highly valued.¹²⁴ Justice Stevens’ counter-arguments that too much speech can have deleterious effects on elections because it drowns out other legitimate voices and citizens do not have enough time to sift through the noise effectively have not gained majority favor.¹²⁵

¹¹⁹ *See Citizens United*, 130 S. Ct. at 898 (noting that “[prohibited] ... are restrictions distinguishing among different speakers, allowing speech by some but not others”).

¹²⁰ *Id.* at 909 (“we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”).

¹²¹ *Bellotti*, 435 U.S. at 788.

¹²² *See Citizens United*, 130 S. Ct. at 909.

¹²³ *See id.* at 907.

¹²⁴ *See id.* at 898.

¹²⁵ *Citizens United*, 130 S. Ct. at 974 (Stevens, J., dissenting).

Although government contractors might be a prime example of a situation for which the undue influence rationale would be satisfied, restricting their speech under the narrowed definition of corruption from *Citizens United* seems unlikely. Indeed, the ramifications of the narrow holding in *Citizens United* have already begun at the state level. The Colorado Supreme Court recently overturned a state statute which prohibited government contractors and their families from making political contributions.¹²⁶ If the First Amendment cannot permit restrictions on contributions, there is little chance it could tolerate expenditure limitations. Unless the Court recognizes another compelling interest outside of *quid pro quo*, restrictions on independent political expenditures will likely be dead on arrival.

Part III: Alternative Means of Restricting Government Contractor Speech

A. Extending *Rust v. Sullivan*

While the trajectory of campaign finance cases seems to foreclose regulation of expenditures by government contractors, the Act may be constitutional under a different line of legal reasoning: the government speech doctrine. In *Rust v. Sullivan*, the Supreme Court determined that doctors who receive federal funding may be constitutionally prohibited from informing pregnant patients about the possibility of abortion.¹²⁷ This decision was justified on the grounds that in providing government funding, the government was speaking and could support particular viewpoints while omitting others.¹²⁸ The government, like other speakers, is permitted to have a viewpoint.¹²⁹ Under *Rust*, to the extent government contractors receive

¹²⁶ See *Dallman v. Ritter*, Nos. 09SA224 & 90CV1200 (D. Colo. Feb. 22, 2010).

¹²⁷ *Rust v. Sullivan*, 500 U.S. 173 (1991).

¹²⁸ *Id.*

¹²⁹ *Id.*

money from the government, they could be restricted from speaking about certain topics – here they would be restricted from making political expenditures in support of or in opposition to a candidate.

1. Unconstitutional Conditions and the Substantial Nexus Problem

To determine the extent of these regulations, the Court must look to the unconstitutional conditions doctrine, which applies where the government conditions a discretionary benefit with the waiver of a fundamental right.¹³⁰ Here, the fundamental right would be the right to speak freely. To satisfy the unconstitutional conditions doctrine, the restriction at issue must have a substantial nexus with the purpose of the funding.¹³¹ Whether or not this test will be satisfied is not immediately clear. At face value, restrictions on political speech by government contractors have little to do with the purpose of the contracts themselves – contracts for Lockheed Martin to build airplanes, for example, would not necessarily be substantially related to their right to engage in political speech.

On the other hand, restrictions on speech may be substantially related to the contracts themselves to the extent that the speech is representative of a desire to manipulate, or even obtain, the contracts. Indeed, this is exactly the type of *quid pro quo* corruption that Congress has a compelling interest in preventing.¹³² If a particular candidate or officeholder is more likely to grant future contracts or to negotiate favorable terms, actual or apparent *quid pro quo*

¹³⁰ Kathleen Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413, 1415 (1989).

¹³¹ *Id.* at 1458. (treating the issue as “germaneness” of the Congressional purpose).

¹³² *See Buckley*, 424 U.S. at 26 (noting, “Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent’”) (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565. (1973)).

corruption is directly implicated. Expenditures by corporations could essentially purchase favorable contracts.

In *Brooklyn Institute of Arts and Sciences v. City of New York*, an art museum brought action against the city and mayor, alleging that city's withholding of funds from the museum, based on content in a temporary exhibit, violated the First Amendment.¹³³ There, the Court upheld *Rust* as appellant did not "challenge the principle that government may choose, through its funding, to espouse a viewpoint on a matter of public concern without, as a result, being required to give equal time to an opposing view."¹³⁴ If the government is free to condition its contracts with a limitation on certain types of speech, as they did with the "gag rule" in *Rust*, the government may effectively satisfy all of the interests at stake: taxpayers will not be forced to support speech with which they disagree, their corporate wealth will not distort the political marketplace, and the possibility of *quid pro quo* corruption will largely disappear.

Framing the case of government contractors in the unconstitutional conditions doctrine rather than traditional First Amendment analysis might also better address some of the fundamental disagreements the Court has over First Amendment application. As Justice Stevens points out in his *Citizens United* dissent, corporations should not necessarily be given the same First Amendment protections as humans since they have no conscience, no feelings, and no motivation other than economic gain.¹³⁵ These principles are incontrovertible, but in framing the restrictions through the First Amendment rights of the listener, the Court is able to elide them. If the focus is shifted to whether the corporation is speaking toward its own financial interest in

¹³³ See *Brooklyn Institute of Arts and Sciences v. New York*, 64 F.Supp.2d 184 (E.D.N.Y. 1999).

¹³⁴ *Id.* at 201.

¹³⁵ See *Citizens United*, 130 S. Ct. at 930 (Stevens, J., dissenting).

public funds rather than determining the value of the speech to the political marketplace, the Court will be forced to identify the source of the speaker. This is exactly the type of analysis intended after *MCFL*, where the Court effectively balanced the particular danger of the speaker with the burdens imposed on them.¹³⁶ To the extent this is a valuable test – and the 30 years of campaign jurisprudence between *Buckley* and *Citizens United* would suggest it so – the government speech doctrine may be able to resurrect it for government contractors.

Even if such a shift in jurisprudence is not feasible after *Citizens United*, an unconstitutional conditions analysis may prove instructive under the listeners’ rights approach as well. Perhaps the rights of a listener are not as strong where the speaker has an undisclosed financial interest in that listener’s tax dollars. At least a part of any money spent on elections by government contractors could be traced back to its government source and in some cases, the government may be indirectly supplying the *quids* for its own *quos*. Free political discourse is no doubt a fundamental need of democratic society, but surely a citizen who pays taxes to support that society has a right to choose sides and avoid being forced to finance opposing viewpoints.¹³⁷ A listener may have a right to information, but that right becomes meaningless if the information is supplied by the other side of the same coin.

Despite these benefits, however, the unconstitutional conditions doctrine may not apply in the campaign finance context at all. Indeed, courts have been reluctant to extend the holding in *Rust* to broader applications. The Court in *Brown v. Cal. Dept. of Trans.* narrowed *Rust*, noting that “*Rust* addresses only the government’s ability to exclude from a government-funded

¹³⁶ See *MCFL*, 479 U.S. at 263 (noting, “the concerns underlying the regulation of corporate political activity are simply absent with regard to *MCFL*”).

¹³⁷ While taxpayers would likely not have a cognizable injury for standing purposes, policy considerations would seem to compel a test to prevent such political entrenchment and coerced speech. See *Frothingham v. Mellon*, 262 U.S. 447 (1923).

program speech that is incompatible with the program’s objectives.”¹³⁸ Deciding whether a government policy permitting individuals to display only American flags on highway overpasses constituted impermissible viewpoint discrimination, the Court in *Brown* continued, “[w]e decline to extend the government-funding cases to a situation in which the government has not appropriated any funds toward achieving a policy goal for which it is accountable to the electorate.”

This reading may foreclose the application of *Rust* to restrictions on political expenditures by government contractors. To the extent that restrictions on expenditures made by contractors are viable, those contracts must have been formed in furtherance of, or having a substantial nexus to, “policy goals.” Because U.S. law specifically prohibits outside contractors from performing tasks which require decision- and policy-making,¹³⁹ there would seem to be a presumption that contractors never further policy goals. The line distinguishing what constitutes such an inherently governmental function, however, is fuzzy¹⁴⁰ and merely because contractors are precluded from performing functions which require governmental discretion does not necessarily mean that they are not acting to fulfill policy goals.

¹³⁸ *Brown v. California Dept. of Transp.*, 321 F.3d 1217 (9th Cir. 2003).

¹³⁹ *See* 31 U.S.C. 501 (2008).

¹⁴⁰ Federal law acknowledges three different definitions for inherently governmental functions: the FAR, the FAIR Act, and the Office of Management and Budget Circular A-76. In March 2009, President Obama ordered the Office of Federal Procurement Policy to clarify three competing definitions in Federal Law. OFPP has announced an intention to adopt only the FAIR definition, but a consensus has not yet been reached. The Office of Federal Procurement Policy accepted public comment on the issue until June 1, 2010. 75 F.R. 16189 (Mar. 31, 2010).

Outside contracting makes up a huge part of governmental operations¹⁴¹ and often the contracts border closely on policy-making tasks.¹⁴² For example, while it seems likely that the definition of “inherently governmental” will be clarified to require the exercise of discretion in applying Governmental authority,¹⁴³ it will also retain the list of examples in the Federal Acquisition Regulations (“FAR”), which helps clarify the types of activities covered.¹⁴⁴ That section notes that “certain services and actions that are not considered to be inherently governmental functions may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers the contractor performance.”¹⁴⁵ Contracting for these functions “closely associated” with inherently governmental functions is permitted so long as there is adequate supervision by the contracting government agency.¹⁴⁶

Defense contracts provide an easy example of contracts which could be considered “closely associated” with government policy goals.¹⁴⁷ Defense contracts are also arguably the

¹⁴¹ See Memorandum for the Heads of Executive Departments and Agencies, Subject: Government Contracting, __ WEEKLY COMP. PRES. DOC. __ (Mar. 4, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/ (noting that “Since 2001, spending on Government contracts has more than doubled, reaching over \$500 billion in 2008); See also USA Spending, *supra* note 23 (In 2009, the Federal Government contracted with 267,290 entities, totaling \$537,000,000,000).

¹⁴² See USA Spending, *id.*

¹⁴³ See Federal Activities Inventory Reform Act of 1998, 31 U.S.C. 501 note (1998).

¹⁴⁴ 75 F.R. 16190 (Mar. 31, 2010).

¹⁴⁵ Federal Acquisition Regulations, 48 C.F.R. § 7.503 (2003).

¹⁴⁶ See 10 U.S.C. 2383(a)(2) (2010).

¹⁴⁷ See Michael J. Trebilcock and Edward M. Iacobucci, Privatization and Accountability, 116 HARV. L. REV. 1422 (2003) (“formulation and implementation of a country's foreign or defense

most important to monitor for corruption since they make up by far the largest category of government contract spending.¹⁴⁸ Despite controversy over the company's tactics in Iraq, President Obama recently extended military contracts with the group formerly known as Blackwater to operate in Afghanistan.¹⁴⁹ Effectively operating as substitutes for the U.S. Army, military provider contractors perform war functions that push the limits of what should be inherently governmental under any definition.¹⁵⁰ While not easily classified as mercenaries under the Geneva Conventions, private military providers nonetheless perform "core" military functions.¹⁵¹ These types of contractors "focus on the front line, tactical environment and engage in actual combat activities."¹⁵²

Other more basic contracts for goods like military jets or humvees might still, given the nature of the work, fall within this "closely associated" definition. The government has contracted for defense-related services since the 1950s, but distinguishing between types of

policy [cannot be outsourced] because complexity of objectives and unforeseeable contingencies render delegations of these functions to private actors highly problematic").

¹⁴⁸ The Department of Defense spent \$371.9 billion in 2009, 12 times more than the nearest competitor, the Department of Energy, which spent \$31.7 billion. *See* USA Spending, *supra* note 23, follow "summaries" hyperlink. *See also*, Scott M. Sullivan, Private Force/Public Goods, 42 CONN. L. REV. 853, 859 (2010) (noting that by the year 2000, contractors made up 50% of all defense-related jobs and that a 1996 study indicated that contract and grant employees outnumbered defense civil service employees in every department by 5 to 1).

¹⁴⁹ Chris McGreal, *Blackwater Deal in Afghanistan Questioned by Congress*, THE GUARDIAN, June 28, 2010, <http://www.guardian.co.uk/world/2010/jun/28/blackwater-wins-afghanistan-contract>. *See also* USA Spending, *supra* note 23, showing that Xe Services LLC (Blackwater's new entity) received contracts totaling \$74,831,315 in 2009.

¹⁵⁰ Adam Ebrahim, *Going to War with the Army You Can Afford: The United States and the Private Military Industry*, 28 B.U. INT'L L.J. 181, 187 (2010).

¹⁵¹ *See id.*

¹⁵² *Id.*

private military companies is a relatively new phenomenon.¹⁵³ The Geneva Convention does not differentiate between general defense contractors who provide only security services and goods and those that provide core military functions, instead defining only a single category of “supply contractors.”¹⁵⁴ Any such contractors are deemed closely associated enough with the contracting state to be considered prisoners of war if captured,¹⁵⁵ and in any case are far more substantive in their relationship to government policies than the hanging of American flags in *Brown* and restricting speech by those contractors may be more closely related to achieving policy goals. Contracting for national security and other “closely-associated” functions creates significant risks of significant harm to the U.S. republic, and should justifiably be saddled with heavier regulation and accountability requirements.¹⁵⁶

2. Challenges in Line-Drawing

While theoretically possible to restrict policy-based contracts, crafting legislation which identifies and restricts only those contracts is difficult. Restrictions at issue in the Act illustrate the problems involved with line-drawing. The bill originally set out to ban expenditures by all

¹⁵³ See S. Sullivan, *supra* note 148.

¹⁵⁴ Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(4), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

¹⁵⁵ *Id.*

¹⁵⁶ See, e.g., Martha Minnow, Public and Private Partnerships: Accounting for the New Religion, 116 HARV. L. REV. 1229 (2003) (noting that “[p]rivatization of public services soared precisely when major corporations engaged in unfettered private self-dealing and one major religious group reeled from scandals, cover-ups, and mounting distrust among the faithful. This coincidence in timing should be all the reminder anyone needs of the vital role of public oversight and checks and balances.”); see also Michael J. Trebilcock and Edward M. Iacobucci, Privatization and Accountability, 116 HARV. L. REV. 1422 (2003) (“formulation and implementation of a country’s foreign or defense policy [cannot be outsourced] because complexity of objectives and unforeseeable contingencies render delegations of these functions to private actors highly problematic”).

government contractors, but the final draft of H.R. 5175 included a threshold of contracts worth \$10 million or more.¹⁵⁷ This somewhat arbitrary number¹⁵⁸ may be an attempt to restrict only the largest contracts, which might tend to be more politically substantive than the public works project in *Brown*, garbage collecting in *Umbehr*,¹⁵⁹ and towing services in *O’Hare*,¹⁶⁰ but the relationship between money and political substance is unclear at best. The political views of a garbage collector, for example, would likely have little effect on the government’s message as to how garbage should be collected.¹⁶¹ For these types of goods and services, where the goal of the

¹⁵⁷ The bill originally was intended to cover all contractors. Summary of Citizens United Legislation, Part 2, Ban Pay-to-Play, available at http://campaignfreedom.org/docLib/20100308_schumervanhollenframework.pdf (explaining that “[g]overnment contractors would be barred from making political expenditures); Early drafts gradually raised the monetary limit and the bill passed in the Congress covers contracts worth \$10 million or more. H.R. 5175, 111th Cong.§. 101(a)(2)(B) (2010).

¹⁵⁸ Based on 2009 numbers, 3,926 contractors would be subject to the law, while approximately 260,000 are exempt. *See* USA Spending, *supra* note 23.

¹⁵⁹ *See* Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668, 679 (1996).

¹⁶⁰ *See* O’Hare v. City of Northlake, 518 U.S. 712 (1996)

¹⁶¹ The speech of such service-based contractors is protected to the extent that their criticism of the government officials they contract with is subject to the same *Pickering* balancing test as government employees. The implications for political expenditure restrictions of this holding will be discussed in greater detail in Part B below. *See* Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668, 679 (1996); *see also* O’Hare v. City of Northlake, 518 U.S. 712 (1996).

contract would most reasonably be to get the best quality product for the best value,¹⁶² restrictions on speech would likely fail *Rust's* substantial nexus test.¹⁶³

Drawing any sort of line based solely on the monetary value of the contracts seems to invite as-applied challenges of viewpoint discrimination, and, absent more significant legislative history and evidence, likely would not satisfy any type of heightened scrutiny. Without more indicating a substantial nexus to policy goals, the \$10 million – or most any – economic threshold appears constitutionally problematic, especially considering the Court's insistence on an identity-blind approach in *Citizens United*.¹⁶⁴ It would be difficult to argue a significant appearance of corruption for a corporation with a \$10 million dollar contract, considering the top government contractor in 2009, Lockheed Martin, claimed contracts worth over \$38 billion.¹⁶⁵

A better threshold might be one consistent with the general language about contracts “closely associated” with governmental functions contained in FAR, which may be more appropriately tailored to government objectives. It is well-settled that contractors performing quasi-governmental functions require effective oversight at a bare minimum to protect the system of checks and balances.¹⁶⁶ Language subjecting only these types of organizations to new

¹⁶² See White House Memo, *supra* note 141 (noting, “[f]or decades the Federal Government has relied on the private sector for necessary commercial services used by the Government, such as transportation, food, and maintenance,” and “[i]t should perform its functions effectively while ensuring that its actions result in the best value for the taxpayers”).

¹⁶³ See *Citizens United*, 130 S. Ct. at 899 (Kennedy cites a number of cases where speech was restricted in order to permit governmental entities to perform their functions, however limits the restrictions to situations where the entity could not function without such restrictions).

¹⁶⁴ See *infra*, Part II.D.

¹⁶⁵ In 2009, \$10 million made up under two thousandths of one percent of the value of total government contracts. See USA Spending, *supra* note 23.

¹⁶⁶ See, e.g., Martha Minnow, Public and Private Partnerships: Accounting for the New Religion, 116 HARV. L. REV. 1229 (2003) (noting that “[p]rivatization of public services soared precisely

campaign finance laws might provide the substantial nexus Congress needs to regulate political expenditures under *Rust*.

3. Categorical Restrictions on Speech

Current Supreme Court nominee, Elena Kagan, has argued for a different reading of *Rust* and its progeny altogether, which might provide future support for contractor regulations. In an article comparing *Rust* to another speech case, *R.A.V. v. St. Paul*, she views the question as one of “content-based underinclusion,” a doctrine where the Court has selectively restricted some types of content within certain categories of speech.¹⁶⁷ In her view, speech was permissibly restricted in *Rust* not because it was a form of government speech, but because it was in a category of speech which has no constitutional claim to promotion or protection: federal subsidies.¹⁶⁸ To the extent that government contracts may be considered on a categorical basis, like subsidies in *Rust*, or fighting words in *R.A.V.*, the government may choose to limit it entirely.¹⁶⁹

when major corporations engaged in unfettered private self-dealing and one major religious group reeled from scandals, cover-ups, and mounting distrust among the faithful. This coincidence in timing should be all the reminder anyone needs of the vital role of public oversight and checks and balances.”); *see also* Michael J. Trebilcock and Edward M. Iacobucci, *Privatization and Accountability*, 116 *HARV. L. REV.* 1422 (2003) (“formulation and implementation of a country’s foreign or defense policy [cannot be outsourced] because complexity of objectives and unforeseeable contingencies render delegations of these functions to private actors highly problematic”).

¹⁶⁷ Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 *SUP. CT. REV.* 29, 38-9 (1992).

¹⁶⁸ *See id.* at 39.

¹⁶⁹ Addressing a hypothetical law requiring public funding for all endorsements of incumbent officials, Kagan argues that, “as long as the law covers all candidates and parties, no one can complain that the subsidy plan has effects on public debate that are constitutionally more troublesome than a refusal to subsidize at all.” *Id.* at 65.

While the unconstitutional conditions test creates a plausible forum for a constitutional challenge, justifying restrictions on political expenditures by government contractors remains difficult. There may be a substantial nexus between contractor speech and public funds, and since money has been established as the equivalent of speech, at least in the campaign context,¹⁷⁰ the government may be in a sense creating an entirely new category of speech in paying its contractors. Within that category certain types of speech may be excluded.¹⁷¹ However, the argument still reads as somewhat tenuous since the Court has not accepted Kagan's reading of *Rust*, and applies it only in the sense that when the government uses funds to speak, it may say what it wishes.¹⁷²

Further, the Court has identified only a few categories of unprotected (or lesser-protected) speech, and content-based restrictions are impermissible even within those categories.¹⁷³ Fighting words, the category discussed in *R.A.V.*, remains ostensibly unprotected but the Court has never upheld fighting another words conviction in the 68 years since the category was established in *Chaplinsky v. New Hampshire*.¹⁷⁴ Because the likelihood of creating a new category of speech is remote and the government does not always issue and pay contracts intending to promote a particular message, a better argument is one which, rather than relying on

¹⁷⁰ See *Buckley*, 424 U.S. at 17-18.

¹⁷¹ See Kagan, *supra* note 167 at 39.

¹⁷² *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹⁷³ The court has acknowledged only a few categories of unprotected and low value speech. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 11.3 (3d ed. 2006) (identifying incitement of illegal activity, fighting words and obscenity as unprotected and certain sexual speech, defamatory speech and commercial speech as lower-valued).

¹⁷⁴ *Id.* § at 11.3.3.2 at 1002.

the creation of a new speech category, analogizes government contractors to government employees.

B. The Hatch Act, Government Employees, and Government Agency

Hoping that government contractors might be analogized to government employees, Professors Ackerman and Ayers are optimistic that the Supreme Court’s treatment of the Hatch Act of 1939 can provide support for regulating speech by government contractors.¹⁷⁵ The Hatch Act bars government employees from expressly supporting or opposing a candidate “in a political advertisement, broadcast, campaign literature, or similar material.”¹⁷⁶ The fact that this legislation involves both supporting and opposing candidates indicates that it could cover expenditures as well as contributions, since only expenditures can oppose a candidate.

It is well-settled that government employees face different standards when asserting First Amendment rights in the political context.¹⁷⁷ Concerns about federal employees’ influence in elections dates back at least to 1801 when Thomas Jefferson issued an executive order prohibiting federal workers from taking part in electioneering.¹⁷⁸ More recently, the Supreme Court upheld parts of the Hatch Act twice in the face of First Amendment challenges – first in 1947¹⁷⁹ and then again in 1973.¹⁸⁰ In *United Public Workers v. Mitchell*, the Court upheld

¹⁷⁵ See Bruce Ackerman and Ian Ayers, *Despite Court Ruling, Congress Can Still Limit Campaign Finance*, WASHINGTON POST, Jan. 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/25/AR2010012502970.html>.

¹⁷⁶ 5 CFR 734, section 734.411.

¹⁷⁷ See *Citizens United*, 130 S. Ct. at 945-6, n.45 (Stevens, J., dissenting).

¹⁷⁸ See J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 98 (1899); see also Bridget Hunter, *Law on Political Activity Restricts, Protects Government Workers*, AMERICA.GOV, Sept. 4, 2008, <http://www.america.gov/st/usg-english/2008/September/20080904173155abretnuh0.9774439.html>.

¹⁷⁹ *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

Section 9, which prohibited employees from participating in “any active part ... of political campaigns.”¹⁸¹ Reaffirming the *Mitchell* decision and expanding upon it, the Court in *United States Civil Service Commission v. National Association of Letter Carriers* held that Congress can also constitutionally forbid federal employees from engaging in plainly identifiable acts of political management and political campaigning.¹⁸²

The Court in *Letter Carriers* identified a number of reasons why deference should be granted to Congress, permitting regulation of overt political activities by federal employees. They cited executive branch efficiency, the importance of maintaining public confidence in the political system, the need to keep employees impartial in their execution of federal duties, and the need to eliminate a system where employees feel pressured to curry favor among superiors rather than express their own opinions.¹⁸³ All of these arguments could easily apply with equal, if not greater, force to government contractors whose entire existence is to increase executive branch efficiency.¹⁸⁴ Nothing about the Court’s rationale indicates that the state interests would apply only to a permanent employee rather than a contractor who performs similar duties.

In fact, the Court has directly analogized contractors to government employees in other First Amendment cases. In *Board of County Commissioners v. Umbehr* and *O’Hare v. City of Northlake*, the Court determined that employees and contractors were fundamentally the same

¹⁸⁰ *United States Civil Service Comm’n v. National Ass’n of Letter Carriers*, 413 U.S. 548 (1973).

¹⁸¹ *Mitchell*, 330 U.S. at 78.

¹⁸² *Letter Carriers*, 413 U.S. at 556.

¹⁸³ *Id.* at 564-66.

¹⁸⁴ See White House Memo, *supra* note 141.

under the First Amendment.¹⁸⁵ In determining whether a contract to haul garbage could be terminated for the contractor’s criticism of the county, Justice O’Connor even went so far as to declare that “[t]he similarities between government employees and government contractors with respect to this issue are obvious. The government needs to be free to terminate both employees and contractors . . . to prevent the appearance of corruption.”¹⁸⁶ Similarly, in *O’Hare*, even Justice Kennedy acknowledged that there is no “difference of constitutional magnitude” between contractors and employees.¹⁸⁷ With these two opinions, the Court has made clear that no constitutional challenge may rest on the distinction between employees and contractors.¹⁸⁸ Accordingly, government contractors should be treated as the equivalent of government employees under the First Amendment, and Congress should be free to regulate them in the same ways.

Taking no precautions, however, Congress could moot the issue of whether there is a constitutional distinction between contractors and employees by including language in the bill that deems contractors employees for purposes of the Act. The Hatch Act again proves useful here as an example of a statute which confers such agency in the context of after-school programs. It reads, “any agency which assumes responsibility for planning, developing, and

¹⁸⁵ See *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 679 (1996) (“Determining constitutional claims on the basis of [a formal distinction between government contractor and a government employee], which can be manipulated largely at the will of the government agencies concerned, is an enterprise that we have consistently eschewed.”)(internal citations omitted); *O’Hare v. City of Northlake*, 518 U.S. 712 (1996).

¹⁸⁶ *Umbehr*, 518 U.S. at 674.

¹⁸⁷ *O’Hare*, 518 U.S. at 722 (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 94 (1973)).

¹⁸⁸ *Id.* at 723 (Justice Kennedy notes, “[i]f results were to turn on these sorts of distinctions, courts would have to inquire into the extent to which the government dominates various job markets as employer or contractor. We have been, and we remain, unwilling to send courts down that path.”).

coordinating Head Start programs and receives assistance under this subchapter shall be deemed to be a State or local agency.”¹⁸⁹

If the final draft of the Act includes similar “deeming” language, Congress would make clear that the regulations on contractors were drafted in response to the same issues as those in the Hatch Act that the Court has repeatedly upheld.¹⁹⁰ By explicitly conferring agency on contractors, Congress would ensure that by accepting federal funds, contractors, like employees, would be speaking for the government and may be subject to *Rust’s* gag rules. It seems unlikely that all contractors could be classified as government agents, but with some careful tailoring, the proposed legislation may be able to confer agency on at least some contractors. If contracts to manage something as small as an after-school program are sufficient to grant agency to contractors under the Hatch Act, surely other more dangerous areas – contracts to build military weapons, for example – would fit into that framework. As Justice Stevens has pointed out, “speech can be regulated differentially on account of the speaker’s identity, when identity is understood in categorical or institutional terms.”¹⁹¹ Contractors who perform functions closely associated with inherently governmental functions seem to be the easiest to categorize.¹⁹²

Conclusion

The number of government contracts has increased dramatically in recent years and with it, the danger of political manipulation. At least to the extent that contractors perform tasks that are closely related to inherently governmental functions, they should be regulated. While the

¹⁸⁹ 42 U.S.C. 9851 (2001).

¹⁹⁰ See e.g., *Letter Carriers*, 413 U.S. at 556; see also *Mitchell*, 330 U.S. at 78.

¹⁹¹ *Citizens United*, 130 S. Ct. at 945 (Stevens, J., dissenting) (citing restrictions on students, prisoners, members of the Armed Forces, foreigners and government employees).

¹⁹² See *infra*, Part III.

Court's identity-blind holding in *Citizens United* would seem to foreclose restrictions on expenditures by government contractors, the government speech doctrine may afford Congress the opportunity. Outside of campaign finance cases, the Court has long recognized the importance of separating politics from government operations, limiting employees' political expression. As contractors continue to replace employees, performing many of the same types of tasks, and in many cases becoming more important to the functioning of the executive branch than anyone subject to the Hatch Act, Congress should be permitted to regulate them in the same way, so that "confidence in the system of representative Government is not to be eroded to a disastrous extent."¹⁹³

¹⁹³ *Letter Carriers*, 413 U.S. at 565.