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## Article

# Money Talks but It Isn't Speech

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### INTRODUCTION

*Buckley v. Valeo* rests on the claim that restrictions on both giving and spending money are tantamount to restrictions on speech, and thus can only be sustained in the service of important or compelling governmental interests.<sup>1</sup> The justification for this claim offered by the Supreme Court in *Buckley* and in related cases that came after it is this: money facilitates speech; money incentivizes speech; and giving and spending money are themselves expressive activities. Therefore, restric-

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1. *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (per curiam). While the Court in *Buckley* recognizes that expenditure and contribution limitations both implicate fundamental First Amendment interests, the Court treats the two as significantly different, subjecting expenditure restrictions to strict scrutiny review and contribution restrictions to intermediate scrutiny. *See id.* The Court reasons that expenditure limitations substantially restrain the quantity and diversity of political speech, while contribution limitations still allow political expression of support and association. *See id.* at 23 ("[A]lthough the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.").

tions on giving and spending constitute restrictions on speech.<sup>2</sup> Missing from this analysis is the recognition that money facilitates and incentivizes the exercise of many other constitutionally protected rights. It does so because money is useful. Moreover, it is not at all obvious that restrictions on the ability to give or spend money to exercise these other rights are constitutionally impermissible. One has the right to vote, but not to buy or sell votes. One has the right to private sexual intimacy, but not to spend money to facilitate the exercise of that right—outlawing prostitution is constitutionally permissible. In order to determine if giving or spending money in connection with a right ought to be protected as a part of that right (within its penumbra, if you will), one needs a *theory*. *Buckley* provided only an inadequate one, resting its account on the claim that money facilitates speech.<sup>3</sup> This Article urges the Court to broaden the lens through which it approaches this issue. Rather than focus on the connection between money and speech, we ought instead to focus on the connection between money and rights more generally. The question we should ask is this: When do constitutionally protected rights include a right to give or spend money to effectuate them? The answer we give to this question will have implications for campaign finance law but will be grounded in a deeper understanding of the connection between money and rights.

A reexamination of *Buckley*'s central premise is important in light of the Supreme Court's recent holding in *Citizens United v. FEC*.<sup>4</sup> In that case, the Court invalidated a federal law that prohibited corporations and unions from "using their general treasury funds to make independent expenditures" for speech in connection with elections.<sup>5</sup> There is much in this opinion to lament. Some critics will focus on the likely effects on the political process.<sup>6</sup> Others will address the Court's rejec-

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2. *Cf. id.* at 14–23 (annunciating the Court's general approach to expenditure and contribution limits).

3. *E.g., id.* at 52 n.58 ("[A] candidate's expenditure of . . . funds directly facilitates . . . political speech.").

4. 130 S. Ct. 876 (2010).

5. *Id.* at 886.

6. *See, e.g.,* James Sample, *Court Reform Enters the Post-Caperton Era*, 58 DRAKE L. REV. 787, 792–93, 800 (2010) (lamenting the effect of *Citizens United* on judicial elections); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365, 2368–69 (2010) (challenging *Citizens United* based on the potential for corruption); Saul Zipkin, *The Election Period and Regulation of the Democratic*

tion of the view that the reasons to respect the freedom of speech of real persons are not consonant with the reasons to protect the speech of corporations and unions.<sup>7</sup> Also disturbing, however, is the way the Court handles the central *Buckley* claim—the Court considered it so obvious that restrictions on spending money amount to restrictions on speech that it needed no discussion at all, not even a citation to *Buckley*.<sup>8</sup>

Money is clearly important to speaking. Without money, how would one publish a newspaper, buy a television advertisement, or pay campaign workers?<sup>9</sup> Sometimes giving money is also itself expressive of one's support for a political candidate.<sup>10</sup> Indeed, giving a lot of money may be a way of expressing very strong support for a candidate or a position.<sup>11</sup> So, spending money facilitates speaking and giving money can be expressive itself. This Article explores whether either of these ways that money is connected to speaking support the claim that limitations on the giving and spending of money ought to be treated as restrictions on speech under the First Amendment.

In order to develop an account of when spending money to speak ought to be protected as a part of the right to free speech, it is helpful to look at when and why other constitutionally protected rights include the right to spend money to effectuate them. In so doing, this Article develops an account of when spending money in connection with rights should be conceived as within the penumbra of the right and when it should not. Using this account, I conclude that spending money in connection with elections need not always be considered a part of the freedom of speech protected by the First Amendment.

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*Process*, 18 WM. & MARY BILL RTS. J. 533, 587–93 (2010) (discussing *Citizens United* in terms of the debate over democratic process).

7. See, e.g., Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 550 (2010); Lyle Denniston, *Analysis: The Personhood of Corporations*, SCOTUSBLOG (Jan. 21, 2010, 6:45 PM), <http://www.scotusblog.com/?p=15376>.

8. *Citizens United* does cite *Buckley* at other points in the case, however. *Citizens United*, 130 S. Ct. *passim*.

9. Cf. Eugene Volokh, *Why Buckley v. Valeo Is Basically Right*, 34 ARIZ. ST. L.J. 1095, 1101 (2002) (discussing the need for money in exercising constitutional rights).

10. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam) (“A contribution serves as a general expression of support for the candidate and his views . . .”).

11. *Id.*

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This Article proceeds as follows. Part I describes the defense of *Buckley's* central claim found in the scholarly literature. It then divides the relationship between money and speech into three components: money provides incentives to speak, money facilitates speech, and giving and spending money can itself be expressive. Only this last component raises a uniquely First Amendment-related concern.

Part II argues that none of these connections between money and speech provide sufficient reason to treat restrictions on giving and spending money as restrictions on speech. It begins by arguing that the expressive dimension of giving and spending money does not provide sufficient reason to treat these activities as speech under the First Amendment. It then turns to the facilitative and incentivizing functions of money. While giving and spending facilitates and incentivizes the exercise of many other constitutionally protected rights, giving and spending are often not treated as protected within the penumbras of these rights. Thus, the fact that money facilitates or incentivizes the exercise of a right is not sufficient to show that giving and spending money in connection with rights should be protected. This conclusion leads to the following question: When do constitutionally protected rights generate a penumbral right to give or spend money?

Part III turns from critique to reconstruction. It proposes a way of understanding why some rights include a right to give and spend money while others do not. Briefly, where the good used to effectuate the right is distributed via the market, then a right which depends on that good includes the right to spend money. For example, abortion services are distributed via the market. Thus the right to abort a pre-viable fetus includes the right to spend money to obtain an abortion. Where the good used to effectuate the right is not distributed via the market, then a right which depends on that good does not include the right to spend money. For example, votes are not distributed via the market. Thus, the right to vote does not include the right to buy or sell votes or even to pay someone to vote. This analysis suggests that restrictions on campaign giving and spending may not be restrictions on speech. When Congress takes electioneering out of the market, especially if it does so by providing public funding of campaigns, then restrictions on giving and spending in elections do not restrict speech and thus do not require heightened judicial review.

I. *BUCKLEY'S* CENTRAL CLAIM AND SUPPORTING RATIONALE

The framework by which courts assess campaign finance laws is set up by *Buckley*. *Buckley's* central claim is that restrictions on giving and spending money should be treated as restrictions on “speech” as that term is used in the First Amendment.<sup>12</sup> For ease of exposition, let’s call this claim “C.” This Article argues against C.

The most common form of argument for C offered in the literature has the following form. If we reject C, we must reject a line of cases that we are likely unprepared to reject—or, if we reject C, we will commit ourselves to some untenable conclusions. For example, Kathleen Sullivan makes an argument of the first kind,<sup>13</sup> which is described in detail below. Eugene Volokh makes an argument of the second kind.<sup>14</sup> If the consequences of rejecting C are indeed untenable, clearly C must be right, or so the argument goes. This section examines these arguments against C. In what follows, this Article focuses on the arguments Kathleen Sullivan presents, because a careful examination of the reasoning in the cases she cites exposes the flaws in the argument for treating restrictions on giving and spending money as restrictions on speech. Recognizing these flaws suggests new lines of inquiry. Eugene Volokh’s argument is taken up in Part III, as it rests on the claim that constitutional rights more generally include a right to spend money to effectuate them,<sup>15</sup> a claim this Article rejects. Thus, an examination of his examples provides an appropriate way to test the theory I propose.

Sullivan argues that “[a]ny blanket reversal of *Buckley's* premise that restrictions on political money implicate the First Amendment thus would bring down a great deal of law in its wake.”<sup>16</sup> If we are unwilling to countenance the reversal of this case law, we must accept that restrictions on political money are restrictions on speech and thus are subject to exacting First Amendment review. The cases she cites are *United States v. National Treasury Employees Union*, in which the Supreme

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12. See *id.* at 14 (“The Act’s contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.”).

13. Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311.

14. Volokh, *supra* note 9.

15. *Id.* at 1096–97.

16. Sullivan, *supra* note 13, at 317.

Court invalidated a federal law that prohibited federal employees from receiving compensation for activities including giving speeches and writing articles;<sup>17</sup> *Village of Schaumburg v. Citizens for a Better Environment*, in which the Supreme Court invalidated a village ordinance which required that non-profit organizations wishing to solicit door-to-door limit administrative and overhead expenses to no more than twenty-five percent of proceeds;<sup>18</sup> *Meyer v. Grant*, which struck down a Colorado law criminalizing the use of paid petition circulators;<sup>19</sup> *Abood v. Detroit Board of Education*, where the Court limited a state law that allowed a government employer and a union to agree to an "agency shop" arrangement whereby all employees must either join the union or pay a fee equal to union dues;<sup>20</sup> and *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*,<sup>21</sup> in which the court invalidated a New York law that required that all proceeds earned by accused, convicted, or admitted criminals from descriptions of their crimes be escrowed in order to be available to victims of these crimes.<sup>22</sup>

While all of these cases address whether limitations on money used in connection with speaking raise First Amendment issues, they do so in different ways. In both *National Treasury Employees Union* and *Simon & Schuster*, restrictions on payment affect *incentives* to speak.<sup>23</sup> In *Meyer*, restrictions on spending limit the ways that money *facilitates* speech.<sup>24</sup> *Abood* focuses on the way that giving and spending money itself can be *expressive*.<sup>25</sup> Finally, *Village of Schaumburg* addresses whether soliciting money can occur in a context that is intimately tied or intertwined with persuasion.<sup>26</sup>

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17. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 457 (1995).

18. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 622 (1980).

19. *Meyer v. Grant*, 486 U.S. 414, 415-16 (1988).

20. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211, 240-41 (1977).

21. 502 U.S. 105, 123 (1991).

22. Sullivan, *supra* note 13, at 316-17.

23. See *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 469 (1995); *Simon & Schuster*, 502 U.S. at 116-17.

24. See *Meyer*, 486 U.S. at 424.

25. See *Abood*, 431 U.S. at 234.

26. See *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632-33 (1980).

## A. MONEY AS INCENTIVE TO SPEAK

In *National Treasury Employees Union*, the Court addressed the way that restrictions on payment affect incentives to speak.<sup>27</sup> The law at issue in the case forbade federal employees from being paid to give speeches or write articles.<sup>28</sup> Is this a restriction on “speech” that would thus require a demanding First Amendment analysis or a restriction on conduct with incidental effects on speech, which is subject to a much lower standard of review?<sup>29</sup> The first point to note is that Justice Stevens’s opinion for the Court provides very little sustained discussion of this question. Instead, he quickly concludes that “[a]lthough § 501(b) neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their message, its prohibition on compensation unquestionably imposes a significant burden on expressive activity.”<sup>30</sup> And how do we know that this burden abridges the freedom of speech, i.e., implicates the First Amendment? After all, the Court admits, the law does not directly restrict speech,<sup>31</sup> and thus we need an argument to show that this law does in fact raise First Amendment issues. Here is what Justice Stevens had to say: “Publishers compensate authors because compensation provides a significant incentive toward more expression. By denying respondents that incentive, the honoraria ban induces them to curtail their expression if they wish to continue working for the Government.”<sup>32</sup> Is this a good argument?

The argument goes like this:

1. The law does not prohibit speech, nor does it distinguish on the basis of viewpoint or content.<sup>33</sup>
2. The law burdens speech.<sup>34</sup>
3. Compensation provides an incentive for people to express themselves.<sup>35</sup>

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27. *Nat’l Treasury Emps. Union*, 513 U.S. at 469–70, 481–82.

28. *Id.* at 457.

29. *See* *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”).

30. *Nat’l Treasury Emps. Union*, 513 U.S. at 468.

31. *See id.*

32. *Id.* at 469.

33. *Id.* at 468.

34. *Id.*

35. *Id.* at 469.

4. Forbidding that incentive induces people to stop speaking or not to speak.<sup>36</sup>

Thus,

5. The law “imposes the kind of burden that abridges speech under the First Amendment.”<sup>37</sup>

This is the order in which the Court presents the argument, but claim 2 is best understood as the conclusion of claims 3 and 4. The argument is best reconstructed as follows:

1. The law does not prohibit speech nor does it distinguish on the basis of viewpoint or message.
2. Compensation provides an incentive for people to express themselves.
3. Forbidding that incentive induces people to stop speaking or not to speak.

Thus,

4. The law burdens speech.

Thus,

5. The law “imposes the kind of burden that abridges speech under the First Amendment.”<sup>38</sup>

Stated nakedly like this, one can easily see the flaws in the argument. Both the preliminary conclusion (at 4) and the final conclusion (at 5) do not clearly follow from the premises that precede them. The fact that a law has an effect on the amount of speaking or the incentives to produce speech does not necessarily lead to the conclusion that a law burdens speech. Second, even if a law burdens speech, a court must assess the degree to which it does so before concluding that this burden puts the law into the category of laws that abridge the freedom of speech—and are therefore only justified if the state produces a compelling justification.

To see the flaw at 4 clearly, consider the following analogy. Federal law prohibits voters from receiving compensation for either the act of voting or for casting a vote in a particular way.<sup>39</sup> Does this law burden the right to vote and thus risk violating the Constitution? Consider the following argument.

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36. *Id.*

37. *Id.* at 470. The Court also mentions that the law burdens the public’s right to read and hear what would otherwise be produced, but acknowledges that there is no way to assess the size of that loss. *Id.* at 455. While the Court notes that a real treasure might thereby be lost, like a Melville or Hawthorne (a point Sullivan emphasizes), the Court acknowledges that the actual law in question would not have applied to their work as the law explicitly allows compensation for works of fiction. *Id.* at 470 n.16.

38. *Id.*

39. 18 U.S.C. § 597 (2006) (“Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against

1. This law does not prohibit voting nor does it distinguish on the basis of which way a voter will cast her ballot.
2. Compensation provides an incentive for people to vote.
3. Forbidding that incentive induces people to stop voting or not to vote at all (witness the large percentage of eligible voters who fail to vote or even to register).

Thus,

4. This law burdens the right to vote.

This argument is clearly wrong. Laws that forbid voters from accepting compensation for voting clearly do not even raise colorable claims to burden the right to vote.<sup>40</sup> Why not? Payment can induce all sorts of actions, not just or especially speech and expression.<sup>41</sup> The voting case shows that blocking this inducement is not enough to establish that the right in question has been burdened. More is needed. What this comparison to voting shows is that merely noting the effect on incentives is not enough to claim that spending or receiving money in connection with a right ought to be seen as integral to the right itself.

Next consider the move from 4 to 5. Suppose, for the sake of argument, that the law at issue in *National Treasury Employees Union* does indeed burden the right to speak. Should one conclude that any burden, no matter its size or nature, raises First Amendment concerns? The current estate tax also likely has an effect on the amount of expression produced, and yet the claim that the estate tax implicates the First Amendment seems farfetched. The argument is, however, analogous.

1. The law [estate tax] does not prohibit speech nor does it distinguish on the basis of viewpoint or message.
2. Having enough money to live without working frees people to produce creative work.

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any candidate; and [w]hoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote [s]hall be fined . . . or imprisoned . . . .”; *id.* § 600 (“Whoever . . . promises any employment, position, compensation, contract, appointment, or other benefit . . . to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office . . . shall be fined under this title or imprisoned not more than one year, or both.”).

40. Laws that require voters to pay a fee to vote, on the other hand, clearly do. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (“[A] State violates the Equal Protection Clause . . . [if] it makes the affluence of the voter or payment of any fee an electoral standard.”).

41. *See, e.g., Meyer v. Grant*, 486 U.S. 414, 414 (1988) (providing an example of a situation where money was used to induce people to circulate petitions).

3. Taking a large proportion of that money away induces people to work at paid jobs rather than devoting their time to creative expression.

Thus,

4. The law burdens speech.

Thus,

5. The estate tax imposes the kind of burden that abridges speech under the First Amendment.

Something is missing between 4 and 5. The fact that a law burdens speech, if it does, is not enough to conclude that this burden brings the law into the category of restrictions that raise First Amendment concerns.<sup>42</sup> As the estate tax example shows, a myriad of laws affect speech and yet clearly do not raise First Amendment issues.<sup>43</sup>

#### B. MONEY AS FACILITATOR OF SPEECH

*Meyer* addresses how restrictions on money can affect speech because spending money facilitates speaking.<sup>44</sup> In this case, the Supreme Court struck down a Colorado statute that criminalized paying money to people to circulate petitions in the context of ballot initiatives.<sup>45</sup> Although the law forbade paying money to petition circulators and not the circulating of petitions itself, Justice Stevens, writing for the Court, concluded that “this case involves a limitation on political expression subject to exacting scrutiny.”<sup>46</sup> He offered two reasons for this conclusion: “[f]irst, it limits the number of voices who will convey appellees’ message and the hours they can speak and, therefore, limits the size of the audience they can reach”; and “[s]econd, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the bal-

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42. *See id.* at 418–19 (implying that some burdens on speech can be overcome by countervailing interests in a way that make such burdens permissible under the First Amendment).

43. Another possible explanation for the outcome of the case is that the law at issue violates the First Amendment because it targets speech. *See infra* Part I.E.

44. *See Meyer*, 486 U.S. at 422–23 (suggesting that a “refusal to permit [proponents of a new law] to pay petition circulators restricts political expression”).

45. State statutory and constitutional law can be changed through ballot initiatives in Colorado. In order to place a measure on the ballot, its proponents must garner a specified number of signatures. The law governing the initiative process provides, in part, that it is a felony to pay petition circulators. *Id.* at 415–16.

46. *Id.* at 420 (citing *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)).

lot, thus limiting their ability to make the matter the focus of statewide discussion.”<sup>47</sup> What do these arguments prove?

If one is not able to pay petition circulators, one will be left only with volunteers. As the Court notes, this law will thus likely “limit[] the number of voices who will convey appellees’ message.”<sup>48</sup> While the Court is surely correct that fewer people will do this work for free than would do so if paid,<sup>49</sup> this fact does not show that the right of free speech is itself implicated.

Laws that set minimum wages or forbid child labor are also likely to affect the ability of the *Meyer* appellee to get his message out. If he could pay less than the minimum wage or employ child labor, his money would go farther, thereby allowing him to have more people to circulate the petitions. Yet, we are unlikely to conclude, based on this fact alone, that these laws raise First Amendment issues. While there might be important or even compelling governmental interests at stake in the case of minimum wage or child labor laws, demonstration of such is not necessary. It seems almost crazy to suggest that such laws limit speech and thus must pass exacting judicial review. Rather, these laws simply do not limit speech at all, despite the fact that they are likely to have a predictable effect on the number of people willing to convey a person’s message. These are only representative examples. It is incredibly easy to come up with examples of laws which would have negative consequences for expression. The fact that a law makes it more difficult to exercise First Amendment rights does not *on its own* demonstrate that the law restricts speech.

### C. GIVING AND SPENDING MONEY AS EXPRESSIVE CONDUCT

Giving and spending money can sometimes be expressive. *Abood* recognized this fact and limited the ways in which the state may constitutionally require that a person give or spend his money.<sup>50</sup> At issue in *Abood* was a Michigan law that allowed a union and a government employer to agree to an “agency shop” arrangement.<sup>51</sup> In such a set up, every employee must either join the union or pay a fee to the union equal to the union dues.<sup>52</sup> The Court ruled that while the nonunion employee

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47. *Id.* at 422–23.

48. *Id.* at 422.

49. *Id.* at 422–23.

50. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977).

51. *Id.* at 213–14.

52. *Id.* at 212.

may be forced to support union activities with which he disagrees, his money cannot be used for expressive activities (speaking, political contributions) that he does not endorse.<sup>53</sup> Forced subsidization of action and of speech are different, in the Court's view.<sup>54</sup> In other words, a person may be forced to express (via giving money) the message implicit in her actions, but she may not be forced to express (via giving money) the message that money makes possible.

While the Court is undoubtedly right that giving and spending money can be expressive, the Court must be careful not to take this point too far else taxpayers object to the uses their tax money is put to on First Amendment grounds.<sup>55</sup> Moreover, the fact that giving and spending money can be expressive does not mean that it is always expressive or that all giving and spending activities are equally expressive. One could describe all actions as expressive of the attitudes or values of the person acting. When I buy an expensive cashmere sweater, I express my attitude about clothes, dressing well, and luxury goods. When I give money to a homeless shelter, I express that I care about the fate of the homeless and perhaps about the obligations we each have to one another. But surely this proves too much. If giving and spending money are always expressive, then all economic regulations risk impinging on the First Amendment.<sup>56</sup>

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53. *Id.* at 235–36 (ruling that while the union may engage in speech and political activity, “such expenditures [must] be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of government employment”).

54. *See id.*

55. *See, e.g.,* *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968) (holding that the Establishment Clause specifically limits the taxing and spending powers of Congress and that taxpayers have standing to assert such constitutional violations). The Court's holding in *Flast* has been limited to specific spending appropriations. *See* *Hein v. Freedom from Religion Found. Inc.*, 551 U.S. 587, 593 (2007) (rejecting taxpayer standing for Establishment Clause violations when Congress fails to “specifically authorize the use of federal funds” for the religious purpose); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 479–80 (1982) (rejecting taxpayer standing for Establishment Clause violations when (1) the challenge is not to a congressional action but to an agency action, and (2) the action is not taken under the Taxing and Spending Clause). Still, if spending decisions are expressive, then taxpayers may have arguments based on notions of compelled speech to object to these decisions.

56. The least relevant case of those cited by Sullivan is *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). In that case, the Court considered the constitutionality of a village ordinance forbid-

## D. ARGUMENT SUMMARY

Sullivan argues that one risks wreaking havoc with First Amendment doctrine if one rejects *Buckley's* central claim that restrictions on giving and spending money in political campaigns are restrictions on speech (previously identified as C).<sup>57</sup> In the cases she cites as at risk, were we to reject C, money incentivizes speech, facilitates speech, or is itself expressive. When money incentivizes or facilitates speech (which are clearly related), this discussion of the cases show that it is not enough to note that forbidding or limiting money will lead to less speech. It is not surprising that money incentivizes and facilitates speech because money is a general purpose and fungible good and is thus useful to the attainment of many ends. Payment of money would likely provide an incentive for people to vote, yet forbidding payment for voting does not violate the right to vote. Paying lower than the minimum wage would likely facilitate the ability to circulate petitions to more people, yet a law forbidding paying less than the minimum wage clearly does not violate the right to free speech. If the holdings of these cases are to be defended, there must be some reason that the facilitative and incentivizing functions of money are especially important in the free speech context or that the limit imposed on money spending here works a particular kind of burden on the exercise of that right.

Giving and spending money can also be expressive. When it is, restrictions on giving and spending money raise First Amendment issues. But not all giving and spending of money

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ding door-to-door solicitation by charitable organizations that do not devote a specified percentage of revenues to charitable purposes. *Id.* at 622. The Court struck down the ordinance on the ground that "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Id.* at 632. In other words, it is not the fact that the government is restricting the collection of money that is the problem. Rather, it is the fact that nonprofit organizations typically combine solicitation with protected speech activities when they canvass door-to-door.

While *Village of Schaumburg* does address the compatibility of restrictions on money with the First Amendment, Sullivan is mistaken to suggest that the holding in the case is relevant to whether restrictions on giving and spending money in the context of political campaigns raise First Amendment concerns. Where giving, spending, or soliciting cannot realistically be separated from clear speech activity, then the state may not prohibit the former. Limitations on how much a person may give to a political candidate or how much a person or candidate may spend in the context of a campaign have no such problem of intertwining speech and money-raising activities.

57. Sullivan, *supra* note 13, at 324–26.

should be seen as expressive enough to raise the specter of the First Amendment. Rather, one must assess whether the money spending is especially expressive such that it warrants review under the First Amendment.

#### E. TARGETING SPEECH

The fact that the Court's explanations for the cases Sullivan catalogues do not provide an adequate justification for the outcomes does not mean that there is no alternative account that would. While the cases themselves highlight the ways in which money facilitates speech, incentivizes speech, or alternatively is itself expressive, perhaps one can defend the results in some of these cases on the grounds that the laws in question target or aim to suppress speech.<sup>58</sup> For example, one could say that the law at issue in *Simon & Schuster* aimed to suppress distasteful books. Similarly, one could argue that the law at issue in *Meyer* aimed at making it more difficult to circulate petitions. Perhaps, but one might also describe these laws in another way. One could say that the law in *Simon & Schuster* aimed to ensure that a person does not profit from his own wrong.<sup>59</sup> After all, if there were a similar market for trinkets memorializing the crimes as there is for memoirs describing them, the New York law might have been written to apply to profits from these trinkets as well. Similarly, one could describe the law forbidding payment for petition circulators as aimed at ensuring that petitions on the ballot have serious genuine support as evidenced both by signatures and by the dedication of willing volunteers to circulate them.

It is not clear that these laws target speech.<sup>60</sup> Laws that target the suppression of speech surely are suspect on First

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58. *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (holding that "a government regulation is sufficiently justified if . . . the governmental interest is unrelated to the suppression of free expression . . ."); *see also* *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991))).

59. *See Simon & Schuster*, 502 U.S. at 119 (noting that New York "has an undisputed compelling interest in ensuring that criminals do not profit from their crimes").

60. *O'Brien* treats this question as an objective inquiry that is not dependent on the subjective motivations of the legislators at issue. *O'Brien*, 391 U.S. at 383-84 ("Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decisionmaking in this circumstance is

Amendment grounds. If any of the laws in these cases do aim to suppress speech, the laws then raise a First Amendment issue and thus can only be justified by a compelling governmental interest. Part III will return to this alternative explanation and suggest a way to help determine which of these laws, if any, aim at suppressing speech.

## II. THE FUNCTIONS OF MONEY

The prior section highlighted three ways in which money is connected to speaking. First, money can provide incentives to speak.<sup>61</sup> Second, money facilitates speaking.<sup>62</sup> Third, giving and spending money can themselves be expressive.<sup>63</sup> It is important to note that only this last function of money is uniquely connected to the First Amendment. Money can also provide incentives for the exercise of other constitutionally protected rights, and money can facilitate the exercise of these rights. This Part begins with a discussion of the expressive function of money. This connection between money and speech provides the weakest reason for treating restrictions on giving and spending as First Amendment concerns, and so it makes sense to dispose of it first. While giving and spending money can be expressive, giving and spending alone are not expressive enough to bring that activity within the First Amendment. This Part then turns to the facilitative and incentivizing functions of money. While money does facilitate and incentivize the exercise of the First Amendment right to speak, money facilitates and incentivizes the exercise of other constitutionally protected rights as well. Yet, giving and spending are not or ought not to be protected as a part of these rights. This section surveys several such rights and concludes that the fact that money facilitates or incentivizes the exercise of a right is not sufficient to show that a right includes a penumbral right to spend money to effectuate it.

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thought sufficient to risk the possibility of misreading Congress's purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.").

61. *See supra* Part I.A.

62. *See supra* Part I.B.

63. *See supra* Part I.C.

A. THE EXPRESSIVE FUNCTION OF MONEY AND ITS FIRST AMENDMENT IMPLICATIONS

The fact that giving and spending money can be expressive highlights a special connection to the First Amendment. Giving money is one way of expressing one's view, but the relevant question is whether giving or spending money is expressive enough to call the First Amendment into play. And if so, in what way? All actions—including speaking and writing—have meaning, but not all actions constitute “speech” protected by the First Amendment. The threshold question in any case is, as the Court recognized in *Texas v. Johnson*, “whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play.”<sup>64</sup> Answering that question requires the Court to ask whether “a[n] intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”<sup>65</sup> Employing this test, it is not at all clear that *Abood* was rightly decided.<sup>66</sup> The nonunion employees required to contribute to the union in the amount of the regular union dues clearly did not intend to convey a message by contributing.<sup>67</sup> And, more importantly, the agency shop arrangement would neutralize any message that the objective observer would be likely to take from such contribution. As everyone knew that contributions were mandatory, no one would think the nonunion employees in fact endorsed the message conveyed by the union.

The fact that *Abood*<sup>68</sup> may have been wrongly decided does not tell us whether the giving and spending of money in political campaigns is expressive activity protected by the First Amendment. To start, the conduct that the Court has treated as “possess[ing] sufficient communicative elements to bring the First Amendment into play” has been limited to highly symbolic conduct.<sup>69</sup> *Johnson* is an easy case with regard to the ques-

64. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

65. *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

66. Compare *id.* (identifying the relevant inquiry as a determination of intent to convey a particular message), with *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 209 (1977) (demonstrating a lack of intent to convey a particular group message).

67. *Abood*, 431 U.S. at 209–11.

68. For further discussion of this case, which Sullivan threatens we might have to reject if we reject C, see *supra* Part I.C.

69. *Johnson*, 491 U.S. at 404; see also *infra* notes 70–73 and accompanying text.

tion of whether the conduct is expressive, because “the flag as readily signifies this Nation as does the combination of letters found in ‘America.’”<sup>70</sup> Wearing black armbands,<sup>71</sup> conducting a sit-in by blacks in a “whites only” area,<sup>72</sup> and wearing military uniforms in the context of a presentation<sup>73</sup> each carry a specific meaning or message, while giving of money does not.

To test one’s intuition on this point, consider whether giving money in other contexts raises First Amendment concerns. First, consider an estate tax law which limits the amount of money that may be given as a gift in any given year to \$13,000 per recipient before such amount is counted as part of the donor’s estate (and thus subject to estate tax limits). Suppose a wealthy parent were to challenge this law on the grounds that it intrudes on her ability to express the depth of her love for her child (via a gift larger than \$13,000), and thus abridges her freedom of speech. Second, consider a law which prohibits giving money to organizations listed on the State or Treasury Department’s list of terrorist organizations. Suppose a person were to challenge this law on the grounds that forbidding gifts to these organizations infringes his right to express his support for these groups’ activities?<sup>74</sup>

While giving money to a child or a terrorist organization does express love or support for the recipient of the gift, the act of giving money ought not to be viewed as possessing “sufficient communicative elements to bring the First Amendment into play.”<sup>75</sup> First, in these cases, unlike in the case of flag burning, draft-card burning, and arm-band wearing, one cannot say that the “medium is the message.”<sup>76</sup> This is because the action (giving money) does not carry a specific meaning. Second, and this is a related point, there are many alternative ways of making as strong a statement of love for a child or support for a terror-

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70. *Johnson*, 491 U.S. at 405 (noting that the flag is “[p]regnant with expressive content”).

71. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 505 (1969).

72. *Brown v. Louisiana*, 383 U.S. 131, 142 (1966).

73. *Schacht v. United States*, 398 U.S. 58, 62–63 (1970).

74. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134–35 (9th Cir. 2000) (rejecting the argument that the Antiterrorism and Effective Death Penalty Act of 1996 violates the First Amendment by criminalizing the giving of material support to organizations deemed terrorist organizations by the State Department).

75. *Johnson*, 491 U.S. at 404.

76. MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 7 (1964) (emphasizing the significance of a medium to the content of what is expressed).

ist organization that do not involve giving money. These ways of expressing love or support may not be as useful to the recipient, but utility is a different question. By contrast, the special symbolic significance of flag burning, for example, meant that alternative ways to express disapproval of the government would be less potent as expression. Third, treating the giving of money as expressive action would bring lots of conduct within the First Amendment's purview, so much so that one ought to pause before concluding that giving money is expressive enough to constitute protected speech. In sum, it is not at all clear that giving or spending money is expressive enough to bring the First Amendment into play at all.

Even if it were, perhaps giving and spending money should be considered to be conduct that is intertwined with speech—a category that the Court subjects to a lower standard of review.<sup>77</sup> Here, the relevant case is *United States v. O'Brien*.<sup>78</sup> Rather than look at the conduct as speech, one looks at the two aspects separately. There is the expressive conduct that is treated as speech and there is the conduct itself. In the case of draft-card burning, there is an expressive element (conveying an antiwar message) and the simple destruction of the card. *O'Brien* subjects restrictions on such combined cases to a much lower standard of review than is required for restrictions on “pure speech.”<sup>79</sup> The D.C. Circuit opinion, overruled by *Buckley*, applied the analysis from *O'Brien*, and finding it satisfied upheld restrictions on both giving and spending.<sup>80</sup> The previous analysis should leave one unconvinced that giving and spending money in elections is expressive enough to warrant any First Amendment concern. If it were, an *O'Brien* style analysis would be appropriate. However, the *Buckley* Court clearly rejected this approach.<sup>81</sup>

77. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

78. *Id.*

79. *Id.* at 377 (holding that, in combined cases, “a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest”).

80. *Buckley v. Valeo*, 519 F.2d 821, 840 (D.C. Cir. 1975), *overruled by* 424 U.S. 1 (1976).

81. *Buckley*, 424 U.S. at 16, 21 (noting that contribution limitations “involve[] little direct restraint on [the contributor's] political communication” because the restriction still “permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues”).

In fact, it is not at all clear that the *Buckley* Court really treats giving and spending of money as speech because it is expressive, though it appears to endorse this rationale for doing so.<sup>82</sup> Explaining its reason for rejecting the *O'Brien* approach, the *Buckley* Court says the following: “Some forms of communication *made possible* by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two.”<sup>83</sup> Speech that is made possible by money is speech that is, in this Article’s terms, facilitated by money.

In sum, giving and spending money are not expressive enough to warrant First Amendment protection as speech. If they were, surely this expression is mixed with conduct such that an *O'Brien* test should apply. But as the Court suggests in the language above, the strongest argument for First Amendment protection for giving and spending money comes from the way in which money “makes possible” or facilitates speech.<sup>84</sup> Part II.B addresses that argument. Before turning to that discussion, it is worth briefly describing the trouble that the *Buckley* Court’s approach has spawned.

In *Humanitarian Law Project v. Reno*, individuals interested in contributing to the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) brought a First Amendment challenge to the Antiterrorism and Effective Death Penalty Act of 1996, which criminalized such contributions.<sup>85</sup> Relying heavily on *Buckley*, the plaintiffs in *Humanitarian Law Project* argued that “providing money to organizations engaged in political expression is itself both political expression and association,”<sup>86</sup> because giving money to political organizations is itself expressive. While the Ninth Circuit rejected the plaintiffs’ claim, this outcome was made more difficult by the *Buckley* holding. This case ultimately reached the Supreme Court, but when it did, plaintiffs only challenged whether the law’s application to certain specified activities, not including giving money, rendered it unconstitutional.<sup>87</sup>

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82. *Id.* at 21.

83. *Id.* at 16 (emphasis added).

84. *Id.*

85. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134–35 (9th Cir. 2000).

86. *Id.* at 1134.

87. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2708–09, 2716 (2010) (explaining that plaintiffs “do not challenge [the law] . . . in all their

The Supreme Court case did not consider whether giving money to terrorist organizations can be prohibited consistent with the First Amendment. Both the majority and dissent in *Holder v. Humanitarian Law Project* assume that this form of “material support” clearly may be forbidden by Congress.<sup>88</sup> Only the more speech-like activities of advising and training raise challenging issues.<sup>89</sup> But this conclusion should not be obvious under the line of campaign finance cases that began with *Buckley*. While the Court in *Buckley* does sustain contribution limits, it is careful to stress that giving money is protected First Amendment activity and to imply thereby that an outright ban on giving would not be acceptable.<sup>90</sup> Why then is an outright ban on giving to terrorist organizations so easy to dispose of? While this result is surely correct—Congress should be able to ban giving money to terrorist organizations—it is not easy to reach this result under our campaign finance doctrine.

The plaintiffs had a colorable argument that giving money to designated organizations is protected by the First Amendment because *Buckley* held that giving money to political candidates is expressive enough to make the First Amendment relevant.<sup>91</sup> The Ninth Circuit could not distinguish *Buckley* on the grounds that those contributions were to respectable political candidates and these are to terrorist organizations. If giving money is speech, then the plaintiffs are surely entitled to express their support, even for noxious views. Instead, Judge Kozinski, author of the Ninth Circuit decision, explained that while “the First Amendment protects the expressive component of seeking and donating funds, expressive *conduct* receives significantly less protection than pure speech.”<sup>92</sup> On these grounds, the Ninth Circuit concluded that “[t]he government may thus regulate contributions to organizations that engage in lawful—but non-speech related—activities. And it may certainly regulate contributions to organizations performing un-

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applications,” rather “plaintiffs claim that § 2339B is invalid to the extent it prohibits them from engaging in certain specified activities”).

88. *Id.* at 2725–26, 2735.

89. *Id.* at 2725–26, 2729, 2735, 2739.

90. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

91. *See id.*

92. *Humanitarian Law Project v. Reno*, 205 F. 3d 1130, 1134–35 (9th Cir. 2000) (citing *Texas v. Johnson*, 491 U.S. 397, 406 (1989)); *see also United States v. O'Brien*, 391 U.S. 367, 376–77 (1968)).

lawful or harmful activities, even though such contributions may also express the donor's feelings about the recipient."<sup>93</sup>

This discussion sounds reasonable unless one probes a bit more deeply. Giving money can be expressive, just as any action can be expressive. The question is whether giving money to a political organization is expressive enough to call the First Amendment into play. On the one hand, Judge Kozinski is saying (in part because he has to, following *Buckley*) that giving money to a political organization is expressive enough to pass that hurdle ("the *First Amendment* protects the expressive component of seeking and donating funds").<sup>94</sup> On the other hand, because the expressive action is conduct, the government may "regulate" it.<sup>95</sup> This conclusion too is consistent with *Buckley* as the Supreme Court sustained limitations on campaign contributions. But *Humanitarian Law Project* involves not merely a limitation but instead an outright ban.<sup>96</sup> The law at issue forbids, subject to serious criminal penalties, any material support for terrorist organizations.<sup>97</sup> In what sense, then, has the expressive dimension of donating money in fact been protected? While the Ninth Circuit opinion pays lip service to *Buckley's* holding that donating money itself is expressive enough to call the First Amendment into play, it treats the case as one in which there is no real First Amendment value at stake.<sup>98</sup> Supporters of the PKK and the LTTE can speak by supporting their favored organization in any way using words. What they cannot do is express their support by giving money.

#### B. THE FACILITATIVE AND INCENTIVIZING FUNCTIONS OF MONEY AND THEIR FIRST AMENDMENT IMPLICATIONS

Spending money facilitates speech. This is the central reason offered by the Supreme Court in *Buckley* for finding that

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93. *Id.* at 1135. The Supreme Court granted certiorari in this case to determine if the term "material support" is unconstitutionally vague. *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 927–28 (9th Cir. 2009), *cert. granted sub nom.* *Holder v. Humanitarian Law Project*, 130 S. Ct. 48 (2009).

94. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134 (9th Cir. 2000) (emphasis added).

95. *Id.* at 1135 ("[T]he material support restriction here does not warrant strict scrutiny because it is not aimed at interfering with the expressive component of their conduct but at stopping aid to terrorist groups.").

96. *Id.* at 1132–33.

97. *Id.*

98. *See id.* at 1135–36. These conclusions are not disturbed by anything in the Supreme Court's opinion.

restrictions on spending violate the First Amendment.<sup>99</sup> The Court in *Buckley* argued that the Act imposed “direct quantity restrictions on political communication and association” because a “restriction on the amount of money a person or group can spend on political expression 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>100</sup> A spending limit thus *directly* restricts speech because less money will lead to less speech. The reason that less money will yield less speech is because speech costs money: “virtually every means of communicating ideas in today’s mass society requires the expenditure of money,”<sup>101</sup> or so the Court argues. Giving money facilitates speech too but in a more mediated fashion. Giving money facilitates the speech of the person or entity to whom it is given.

This section challenges the argument described above. While money surely facilitates speech, the facilitative function of money is not sufficient to show that restrictions on giving and spending money constitute restrictions on speech. Instead, I argue that while the fact that money helps people to speak is relevant to the issue of whether restrictions on giving and spending money restrict speech, the question is complex and involves consideration of other important factors. Money facilitates the exercise of many other rights as well. Sometimes spending money in connection with a right is treated as a part of the right, and sometimes it is not. When we note this fact, we see that a more comprehensive account is necessary to determine when the right to spend or give money should be treated as part of a First Amendment right. Spending money surely facilitates speech—about that the *Buckley* Court is right. But to move from the obviously true claim that money facilitates speech to the controversial claim that restrictions on spending money are restrictions on speech requires much more.

This Part begins with a discussion of two examples—abortion and voting—to show that constitutional law can be read to sometimes protect spending money in connection with a constitutionally protected right and sometimes not. These examples together illustrate that the fact that money facilitates or incentivizes the exercise of a right is not sufficient to show that giving and spending are protected as part of a right. This

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99. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

100. *Id.* at 18–19.

101. *Id.* at 19.

Part then proceeds to catalogue several other constitutionally protected rights with regard to which giving and spending money is not, or is not always, seen as part of right's penumbra. This catalogue of rights and their connection to money serves two purposes. First, it helps to emphasize that using money to effectuate a right is often permissibly restricted. Second, it suggests an account of when and why this might be the case. Part III then presents this account.

#### 1. Facilitation Is Not Sufficient: Abortion and Voting

The right to abort a previsible fetus first affirmed in *Roe v. Wade*<sup>102</sup> and later reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>103</sup> protects the right to a medical service. While it has never been litigated, it seems clear that this right would require invalidation of a law restricting a woman's ability to pay for an abortion. Why is this? In the United States, medical services are distributed via the market. To obtain most medical services, one must either be able to pay, have insurance (private or public) that provides payment to the provider, be at a hospital with an emergency medical condition requiring immediate stabilization,<sup>104</sup> or be offered charity care. While historically many abortions have been provided outside of the sphere of medical services—provided by friends or done to oneself—it is precisely the availability of abortion as a medical service that was afforded constitutional protection in *Roe* and its progeny.<sup>105</sup> If medical services are distributed via the market, then the ability to obtain an abortion must include the ability to pay a service provider if the protected right is to be exercised at all.

This commitment to the view that medical services, and in particular the provision of an abortion, are to be distributed by market principles is enshrined both by our current practice and in current constitutional law. The Supreme Court has consistently held that the state has no obligation to pay for abortions, even when it is willing to pay for childbirth-related expenses,<sup>106</sup>

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102. 410 U.S. 113, 164 (1973).

103. 505 U.S. 833, 845–46 (1992) (plurality opinion).

104. The Emergency Medical Treatment and Labor Act requires hospitals to stabilize emergency patients before turning them away. 42 U.S.C. § 1395dd(b)(1) (2006).

105. See *Roe*, 410 U.S. at 166 (“[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.”).

106. *Maher v. Roe*, 432 U.S. 464, 469–70 (1977).

and even when abortions are medically necessary.<sup>107</sup> These factors, that abortion is a medical service, that abortions are, for the most part, only available to those who can pay, and that there is no public provision of this service, together create the conditions that determine that the right to spend money to buy an abortion should be considered an integral part of the right to abortion itself.

Recently enacted federal legislation alters the way that health insurance and health care is treated in our country.<sup>108</sup> However, it is unnecessary to decide whether this law is best viewed as transforming medical care from a commodity distributed via the market to a different sort of good, as the law explicitly exempts nontherapeutic abortions from its purview.<sup>109</sup> Thus, abortion remains a good to be distributed via the market. The right to spend one's money to obtain an abortion therefore must be treated as part of the right to abort a nonviable fetus.

Next, consider the right to vote. Should the right to vote be understood to include the right to spend money in connection with voting? Our Constitution protects the right to vote via several constitutional provisions including the Fourteenth Amendment's Equal Protection Clause;<sup>110</sup> the Fifteenth Amendment<sup>111</sup> (no denials based on race); the Nineteenth Amendment<sup>112</sup> (no denials based on sex); the Twenty-Fourth Amendment<sup>113</sup> (prohibiting poll taxes in federal elections); and the Twenty-Sixth Amendment<sup>114</sup> (no denials to citizens eighteen and over). Nonetheless, federal law prohibits people from buying or selling votes.<sup>115</sup> In other words, the right to vote does not include the right to spend money to induce others to vote as one prefers. And rightly so. In fact, it seems odd to suggest that the right to vote should include the right to buy someone else's vote. But why not? The reason this suggestion is odd is that the various laws and constitutional provisions just mentioned

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107. *Harris v. McRae*, 448 U.S. 297, 326–27 (1980) (upholding the constitutionality of a law denying public funding for medically necessary abortions except where necessary to save the life of the mother).

108. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

109. *Id.* § 1303(a)(1), 124 Stat. at 168–69.

110. U.S. CONST. amend. XIV, § 2.

111. *Id.* amend. XV, § 1.

112. *Id.* amend. XIX.

113. *Id.* amend. XXIV, § 1.

114. *Id.* amend. XXVI, § 1.

115. 18 U.S.C. § 597 (2006).

make the vote something the government distributes via non-market mechanisms, and thus, the right to give or spend money in connection with voting seems to conflict with how we understand what the vote is.<sup>116</sup> It is not simply the “one person, one vote” idea affirmed in *Reynolds v. Sims*<sup>117</sup> that is relevant here. After all, each person could have one vote and yet be freely able to trade that vote for money or anything else that she values. Rather, laws that forbid the buying and selling of votes instantiate the view that the sphere of voting should be separated and protected from the sphere of money. This wall of separation between voting and money is at the heart of the rejection of poll taxes in federal elections enshrined in the Twenty-Fourth Amendment, the similar rejection of poll taxes in state elections in *Harper v. Virginia State Board of Elections*,<sup>118</sup> and of property ownership requirements in *Kramer v. Union Free School District*.<sup>119</sup>

Nor can one pay money to another person simply to vote, as contrasted with paying someone money to vote a particular way or for a particular candidate. Federal law prohibits paying a person “either to vote or withhold his vote.”<sup>120</sup> Voter turnout is often lamentably low.<sup>121</sup> Paying voters to come to the polls would likely increase voter participation, yet one cannot pay voters to vote.

The right to abort an early fetus thus likely includes the penumbral right to spend money to effectuate the right. The right to vote does not. The two examples together demonstrate that constitutional rights do not always include the right to give and spend money to effectuate them. Yet spending money would facilitate and incentivize the exercise of both rights. Thus, the fact that spending money facilitates or incentivizes the exercise of a right is insufficient to show that a right entails a penumbral right to spend money. Moreover, the contrast between the two examples suggests that the key to when a right does include the right to spend money may relate to whether

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116. This account draws obviously from Michael Walzer’s important book, *Spheres of Justice*. MICHAEL WALZER, SPHERES OF JUSTICE (1983).

117. 377 U.S. 533, 558 (1964).

118. 383 U.S. 663, 665–66 (1966).

119. 395 U.S. 621, 633 (1969).

120. 18 U.S.C. § 597.

121. Michael Falcone, *One More Round of Voting, as Electors Do Their Duty*, N.Y. TIMES, Dec. 16, 2008, at A18, available at 2008 WL 24053602 (noting that 61.6 percent of Americans eligible to vote actually voted in the 2008 Obama-McCain election, the highest turnout since 1968).

goods used to effectuate the right are distributed via the market. The next section catalogues other constitutionally protected rights that are also unlikely to include the penumbral right to give or spend money to test this hypothesis.

## 2. Constitutional Rights Not Generating a Right to Give or Spend Money

### a. *The Right to Direct One's Medical Care*

The right to direct one's medical care is a plausible reconstruction of the Supreme Court's opinions in *Cruzan v. Director, Missouri Dept. of Health*<sup>122</sup> and *Washington v. Glucksberg*.<sup>123</sup> In fact, Chief Justice Rehnquist, writing for the Court in *Glucksberg*, grounds the right of a competent person to refuse life-sustaining treatment, merely assumed in *Cruzan* but acknowledged in *Glucksberg*, on the "long legal tradition protecting the decision to refuse unwanted medical treatment."<sup>124</sup> That long legal tradition, codified in requirements of informed consent to medical treatment, also requires physicians to inform patients of relevant treatment options and respect the choice of patients regarding which to pursue.<sup>125</sup> In that sense, this right encompasses not simply the right to refuse treatment but also the right to choose treatment among those offered to the patient.

However, this right to direct one's medical care likely does not include the right to spend money to obtain the care one desires in all contexts. One may not buy (or sell) organs for transplant.<sup>126</sup> Notwithstanding the fact that there is a serious short-

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122. 497 U.S. 261, 279–80 (1990) (assuming the right of a competent person to "refuse lifesaving hydration and nutrition," while upholding Missouri's right to insist that "evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence").

123. 521 U.S. 702, 709 (1997) (upholding a law prohibiting assisted suicide where the state also protects a patient's right to refuse or demand the withdrawal of life-sustaining treatment).

124. *Id.* at 725.

125. *See Cruzan*, 497 U.S. at 269 (stating that the "notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment," and that "[t]he informed consent doctrine has become firmly entrenched in American tort law"); AM. MED. ASS'N, CODE OF MED. ETHICS 10.01(1)–(2) (1993) (stating that patients have the right to receive information on treatment and alternatives to treatment and the right to refuse recommended treatment).

126. *See* 42 U.S.C. § 274e (2006) (prohibiting organ sales).

age of organs available for transplant,<sup>127</sup> laws forbid paying money for organs.<sup>128</sup> If the law permitted organs for transplant to be bought and sold, this would likely increase the supply of organs available for transplant and surely would facilitate the ability of a person with the necessary funds to obtain one. Because the transplant lists are long, and the medical conditions necessitating transplant can be life-threatening, the ability to buy an organ could save one's life. Nonetheless, most assume that the constitutional right to direct one's medical care does not include the right to pay for an organ.<sup>129</sup>

b. *Procreative Liberty*

The right of a couple, married or single, and later a woman, in consultation with her doctor, to decide whether to "bear or beget a child"<sup>130</sup> has been protected in a line of substantive due process cases beginning with *Griswold v. Connecticut*<sup>131</sup> and running through *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>132</sup> The understanding of this right, as it has evolved in the case law, begins by drawing a distinction between laws that prohibit the *use* as compared to the *sale* of contraceptives. Justice Douglas, writing for the Court in *Griswold*, emphasized that the Connecticut law in question was particularly odious because it "forbid[s] . . . the *use* of contraceptives rather than regulating their manufacture or sale."<sup>133</sup> While the right to buy and sell contraceptives is later protected in *Carey v. Population Services International*,<sup>134</sup> it is probably not accidental that the strongest case in which to begin to artic-

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127. As of September 24, 2010, 108,725 people were waiting for organ transplants. ORGANDONOR.GOV, <http://www.organdonor.gov> (last visited Nov. 20, 2010).

128. 42 U.S.C. § 274e.

129. Eugene Volokh argues in a provocative article that these restrictions should be abolished. See generally Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1832–46 (2007). Volokh argues that the right to self-defense ought to be understood to include the right to *medical* self-defense. *Id.* at 1824–28.

130. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

131. 381 U.S. 479, 485–86 (1965) (striking down a state law that prohibited the use of contraceptives as it applied to a married couple).

132. 505 U.S. 833, 845–46 (1992) (upholding a woman's right to decide to abort a nonviable fetus without undue burden). This right was limited somewhat in *Gonzales v. Carhart*, 550 U.S. 124, 132 (2007), which permitted a state to outlaw one method of abortion, termed "partial-birth abortion," used in the context of late-term abortions that are not medically necessary.

133. *Griswold*, 381 U.S. at 485.

134. 431 U.S. 678 (1977).

ulate this right is not only one in which the plaintiffs asserting a right are married couples, but also where it is the use, rather than the sale, of contraceptives that is at issue.

The right to privacy the Court first articulated in *Griswold* develops into a right to procreative liberty. In *Casey*, the plurality describes the right in this way: “the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood.”<sup>135</sup> Nonetheless, the buying and selling of babies is prohibited in every state.<sup>136</sup> Given the low supply of healthy infants, many infertile couples might welcome the increased opportunity to obtain such a child for adoption that legalizing the payment of money for a baby would produce.<sup>137</sup> Yet, these laws are not controversial. The fact that babies are in short supply in this country, and that allowing the payment of money for them would provide incentives for people to sell and would facilitate the exercise of a person’s right to decide to become a parent, hardly seems much of an argument for striking down such laws. There is a constitutionally protected right to procreative liberty but it does not include the right to buy or sell a baby.

c. *Privacy as Sexual Intimacy*

*Lawrence v. Texas* arguably established a right to be free from governmental intrusions into decisions about sexual intimacy.<sup>138</sup> The language of the Court in this case is broad. The Court notes that there is “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>139</sup> Moreover, the Court argues that “[i]t suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”<sup>140</sup> And yet, in this same opinion, the Court finds no difficulty in clearly rejecting any

135. *Casey*, 505 U.S. at 849.

136. *See, e.g.*, OR. REV. STAT. § 109.311(3) (2003) (“No person shall charge, accept or pay or offer to charge, accept or pay a fee for locating a minor child for adoption or for locating another person to adopt a minor child . . .”).

137. *See* Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 323–24 (1978) (discussing how the demand for babies has resulted in a black market).

138. *Lawrence v. Texas*, 539 U.S. 558, 563, 579 (2003) (striking down a Texas law that prohibited sex between same-sex partners and other forms of what the statute termed “deviate sexual intercourse”).

139. *Id.* at 572.

140. *Id.* at 567.

implications from this line of reasoning for the continued validity of laws criminalizing sexual intimacy for pay—prostitution.<sup>141</sup> The right to sexual intimacy protected by *Lawrence* simply does not include within its bounds, as the Court currently understands them, the right to engage in paid sexual intimacy in one's own home. In other words, the right at issue—freedom from intrusion into sexual intimacy in the home—does not include the right to spend money in connection with this right.

### 3. Framing the Relationship Between Money and Rights

When do constitutionally protected rights include a right to spend money to effectuate them? Campaign finance case law from *Buckley* to *Citizens United* is inadequate in failing to address the question or provide a reason that the First Amendment right of free speech, exercised in connection with elections, includes a right to give and spend money. One central aim of this Article is to broaden the lens through which courts and commentators approach campaign finance cases. Rather than focusing on the connection between money and speech on its own, one ought to examine the connection between money and rights more generally. Money facilitates and incentivizes the exercise of most rights, including speech. But this fact alone does not show that restrictions on giving and spending money to exercise a right constitute restrictions on that right. Part I and this Part established this much. The task now is to develop an alternative account.

One might think that the answer to the question of when constitutionally protected rights include penumbral rights to spend money lies in how one defines the protected right itself. Take the example of the right to sexual intimacy protected in *Lawrence*.<sup>142</sup> The right at issue in *Lawrence*, one might say, is not the right to *sexual* intimacy, but rather the right to form an intimate personal relationship, that one can express sexually as well as in other ways. If that is correct, then sex-for-pay would not be included within the ambit of the right to sexual intimacy, as the sex you have to pay for is not the expression of an intimate personal bond.<sup>143</sup> One could make a similar argument

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141. *Id.* at 578 (noting that this case “does not involve public conduct or prostitution,” thereby suggesting that if it did, the same analysis would not apply).

142. *See supra* notes 138–41 and accompanying text.

143. *See, e.g., Lawrence*, 539 U.S. at 567 (defending the right in these terms by stating that “[w]hen sexuality finds overt expression in intimate conduct

about why votes cannot be bought and sold. The right to vote just *is* the right to express one's political preference. If one sells that vote, it is no longer an expression of preference or contribution to democratic decisionmaking, but instead simply a thing of value that one can trade for something else one values more.<sup>144</sup>

While seemingly promising, this approach fails to capture widely shared intuitions about which rights should be understood to include the right to spend money in connection with their exercise and which should not. Consider the example of laws forbidding the sale of organs. Eugene Volokh has argued that the right to self-defense includes the right to medical self-defense.<sup>145</sup> This right, he argues, ought to be understood to include the right to buy organs.<sup>146</sup> If we accept Volokh's admittedly controversial assertion that there is a right to medical self-defense, must we also accept that it includes the right to buy organs to save one's life? In considering the arguments against this view, Volokh stresses that organs are different from sex or friendship, love and prizes, in that buying and selling of these changes their nature; commodifying them corrupts them. But not so of organs, Volokh argues: "Love, friendship, and prizes can't properly be gotten for money because paid-for love, friendship, and prizes are not 'love,' 'friendship,' and 'prizes' as we define the terms. But a paid-for kidney is a kidney, just as a paid-for transplant operation is a transplant operation."<sup>147</sup> If

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with another person, the conduct can be but one element in a personal bond that is more enduring").

144. Edward Foley makes an argument of this kind for the claim that people should understand the Constitution to require that each voter has an equal amount of money to spend in connection with campaigns. He calls this the "equal-dollars-per-voter" principle. Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994). According to his view, these dollars would be nontransferable in just the way that votes are today. Foley explains,

[e]ach citizen should receive, along with an equal vote, an equal sum of money for purposes of participating in the electoral process. No citizens should be free to purchase another's electoral funds just because the one has a greater interest in electoral politics than another. Conversely, no citizen should be free to sell her electoral funds to another just because she has less of an interest in participation. Instead, participation in the electoral process should be recognized as a distinctively communal activity, to which all must have an equal right, so that the results of the process may be considered fair.

*Id.* at 1236–37.

145. Volokh, *supra* note 129, at 1815.

146. *Id.* at 1832–45.

147. *Id.* at 1844.

the test for whether a constitutionally protected right includes the right to spend money to effectuate it reduces to the question of whether the right in question is changed or corrupted by its connection with money, then Volokh has a good argument for the right to buy and sell organs. This seems too quick, however.<sup>148</sup> The right to medical self-defense (if it exists) or to direct one's medical care need not include the right to buy and sell organs even though organs are still organs even if paid for. Briefly, one might think that organs ought to be distributed according to principles of medical need and that choices about whether to donate organs ought not to be motivated by money.<sup>149</sup> If so, this suggests something important about when and why a constitutionally protected right ought to include the right to spend money as a part of the protected liberty at issue. It is to that issue that this Article now turns.

### III. MONEY AND RIGHTS: A POSITIVE ACCOUNT

The previous section established that while spending money facilitates expression, incentivizes expression, and can itself be expressive, these facts *alone* are insufficient to establish that restrictions on giving and spending money are restrictions on speech. Rather, only the expressive dimension of giving and spending money is uniquely related to the First Amendment. Moreover, while giving and spending money is expressive, it is usually not expressive enough to warrant First Amendment protection. Spending money also both facilitates speech and provides incentives to speak. However, as I surveyed briefly above, spending money also facilitates and incentivizes the exercise of other constitutionally protected rights as well as the fulfillment of countless interests.<sup>150</sup> This is because money is a general purpose good, useful in the attainment of many other goods and the exercise of many rights. Sometimes the right to give and spend money in connection with the exercise of a right is protected as part of the right itself and sometimes it is not. This observation leads to two conclusions. First, merely noting that spending money facilitates the exercise of a right is not enough to establish that spending money in connection with

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148. Of course, Volokh himself considers other arguments. *See id.* at 1837–45.

149. Volokh considers and rejects these arguments. *See id.* at 1837–45 (considering arguments for why organ donation choices should not be motivated by money).

150. *See supra* Part I.A–B.

the right should be understood as falling within the ambit of the right itself. Second, that being so, we need a theory to explain and justify when we ought to protect money spending in connection with a right as part of that right and when not to do so.

A. SEPARATE “SPHERES”<sup>151</sup>

How should one analyze the question of when constitutionally protected rights include the right to spend money? Approaching this as a question of constitutional law, there are two possible answers to this question. First, the Constitution may provide an answer to this question in the case of some or all rights.<sup>152</sup> The process of constitutional interpretation would then determine which rights include the right to spend money and which do not. Alternatively, the Constitution could be agnostic on this point. If so, democratic decisionmakers would be free to determine if people may spend money in exercising their constitutionally protected rights.<sup>153</sup> This section provides an argument for the agnostic view.

The market provides one method for distributing goods. Goods are “distributed” in the market by ability and willing-

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151. “Spheres” is a reference to Walzer’s book, *Spheres of Justice*. WALZER, *supra* note 116. Walzer argues that inequalities in one sphere, like wealth, educational achievement, politics, etc., ought not to translate into inequalities in other spheres. *See generally id.* Sanford Levinson also notes that Walzer’s views have interesting implications for campaign finance controversies but argues against the direction to which Walzer’s views would point. *See* Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICH. L. REV. 939, 946 (1985) (reviewing ELIZABETH DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION* (1983)). Levinson notes that Walzer’s book is oddly silent about campaign finance controversies. *Id.* at 946, n.32.

152. Edward Foley adopts this view, at least with regard to the right to spend money in connection with election-related speech. Foley, *supra* note 144, at 1225. Mark Graber appears to as well. *See generally* MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 26–44 (1991).

153. Although I have drawn on Michael Walzer’s work in this Article, we address the question of the appropriate distributive scheme of various goods in different ways. In Walzer’s view, the correct distributive principle for particular goods is determined by the social meaning of that good. *See* WALZER, *supra* note 116, at 6 (“[D]ifferent social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents; and that all these differences derive from different understandings of the social goods themselves—the inevitable product of historical and cultural particularism.”). What this position would entail in the context of a constitutional democracy is not clear. Walzer may intend that democratic decisionmakers determine the social meanings of various goods and thus the distributive principles they give rise to. Or, he may not.

ness to pay. The fact that the market is a powerful and important method for the allocation of resources need not imply that it is the only distributive mechanism. In fact, many goods are distributed according to other principles. As Michael Walzer notes,

[w]hat should and should not be up for sale is something men and women always have to decide and have decided in many different ways. Throughout history, the market has been one of the most important mechanisms for the distribution of social goods; but it has never been, it nowhere is today, a complete distributive system.<sup>154</sup>

Love and friendship are distributed according to attraction and affection. Organs are distributed according to medical need. Votes are distributed according to age and citizenship. Citizenship is distributed according to birth and blood.<sup>155</sup>

The fact that there are many ways to distribute different goods provides a powerful reason to let democratic decisionmakers decide the appropriate distributive principles for different types of goods. We define ourselves as a community and express our values by determining which goods are distributed via which principles, and in particular by fixing the reach of the market. On the other hand, allowing democratic decisionmakers to decide when money can be used to exercise rights could allow majorities to curtail rights by making their exercise extremely difficult. For example, in the wake of the Court's affirmation of the right to abort a nonviable fetus,<sup>156</sup> a state could forbid women from paying for abortion services. The view I propose below will accommodate both concerns, leaving democratic decisionmakers wide latitude in determining which goods ought to be distributed via which principles, while protecting the rights themselves from encroachment by democratically enacted laws.

Briefly, the view proposed is this. The Constitution does not determine the appropriate distributive mechanism for various types of goods. Therefore, democratic decisionmakers are free to decide that organs, babies, or citizenship should not be for sale. But there are limits which will safeguard rights from majority will. If a constitutional right depends on a good that is distributed via the market, then the right must be understood

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154. WALZER, *supra* note 116, at 4.

155. See generally AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009) (critiquing our global system of citizenship based on birthright).

156. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion).

to include the right to spend money to exercise it. If a constitutional right depends on a good that democratic decisionmakers have determined is not to be distributed via the market, then the right ought not to be understood to include the right to spend money to exercise it.

The argument for this account is presented below and proceeds as follows. Part B brings the lessons of *Lochner* to bear. It argues that appropriate caution about attributing any particular economic theory to our Constitution provides a reason to leave to democratic decisionmakers the decision about which goods ought and ought not to be distributed via the market. Part C then describes the implications of this account for campaign finance regulation. Part D considers objections to the view presented. Part E returns to the aforementioned challenge that laws restricting giving and spending money in campaigns target speech and raise important First Amendment issues for this reason. Finally, Part F shows how the account would treat some of the cases Volokh offered as challenges.

#### B. THE MARKETPLACE OF IDEAS: METAPHOR OR REALITY?

Our current constitutional doctrine treats economic decisions by the elected branches of government deferentially. The lesson of the *Lochner* era is that this deference is appropriate, as the constitution does not adopt any particular economic theory.<sup>157</sup> Societies distribute some goods via markets and some not. Computers and clothes are distributed via the market, but babies and organs are not. Deciding which goods will be distributed via which principles is a basic question for a society in a way that is analogous to the decision about which economic theory to endorse; it therefore ought to be left to democratic decisionmakers. This is an important lesson to draw from the rejection of *Lochner*.<sup>158</sup> Recognizing the legislature's proper role

157. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“[A] constitution is not intended to embody a particular economic theory.”).

158. In the 1990s, critics of then-current First Amendment doctrine, including limitations on Congress's ability to regulate campaign finance, called for a “New Deal” for the First Amendment. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263–300 (1992); accord J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 386; Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986). The thrust of their critique was that First Amendment doctrine mistakenly treats current distributions of speaking power as neutral and prepolitical in much the same way as the *Lochner*-era Supreme Court saw then-current distributions of wealth. See, e.g., Sunstein, *supra*, at 273. But, these critics argue, just as distributions of economic power result

in determining the method of distribution for various types of goods helps to answer the question about money and rights.

Where a good is distributed via the market, as abortion services are, a right which depends on that good must be interpreted to include within its penumbra the right to spend money to effectuate it. So, for example, if individuals have a right to own handguns, they must have a right to buy bullets. On the other hand, if the legislature determines that the good in question is not to be distributed via the market, then a right which depends on that good ought not to be interpreted to include the right to spend money to effectuate it. So, for example, the right to “bear or beget” a child does not include the right to buy babies, as children are not distributed via market principles.

It is easy to see how this view accounts for the constitutional permissibility of laws that restrict buying and selling of votes. It is not simply these particular laws that take voting out of the sphere of the market. Other laws provide an alternative distribution method for the vote. Principles of age, residency, and citizenship determine who has a vote in what election. These laws represent a permissible legislative choice that political participation is not governed by market norms. As I have noted above, one could provide everyone a right to vote and still permit people to buy and sell these votes. But one need not. The ability to buy votes would facilitate the ability of some vot-

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from legal rules that advantage some over others, the ability to influence others or to harm others with speech is a product of legal rights and legal rules as well. *See, e.g., id.* at 275. There is no neutral place to stand, these critics argue, and so one must forthrightly balance the speech interests of those whom speech regulation would harm, as compared with the speech-related interests of those whom speech regulation would benefit. *See, e.g., Fiss, supra*, at 1420. A “New Deal” for the First Amendment would likely leave much of this balancing to legislatures, just as the first “New Deal” meant that courts accorded strong deference to legislatures in balancing the pros and cons of various economic policies. *See, e.g., Balkin, supra*, at 389.

These First Amendment reformers, or “new speech regulators” as Kathleen Sullivan terms them, have engendered strong replies—from both the right and the left. Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 *UCLA L. REV.* 949, 954 (1995); accord Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 *U. CHI. L. REV.* 225, 226 (1992). These critiques range from assertions that exercises of state power are meaningfully different from exercises of private power, *see Fried, supra*, at 236, to arguments that speech is different from economic activity such that there are good reasons to be especially wary of any restrictions on speech, *see Sullivan, supra*, at 955–56. It is an interesting debate, and one that is likely to continue for some time, in the academy if not in the courts. While I do not intend here to take a position in this debate, I raise it because the position I present below has important affinities with the “New Deal” approach, though it is significantly more modest in its claims and thus perhaps less controversial.

ers to elect the candidate of their choice. Still, this is a “blocked exchange.”<sup>159</sup> What we find in the context of voting are both laws that establish the nonmarket method for distribution and laws that forbid the market exchange. Together these clearly establish that Congress has determined that the vote is not a market commodity. The result of this permissible legislative choice about the appropriate distribution method for votes is that the right to vote does not include the right to spend money to effectuate it.

Equally clearly, abortion services are a commodity to be bought and sold in the market. There is no public provision of abortion services. Poor people receiving government provided health services are generally not provided with abortions as part of those services.<sup>160</sup> With these laws, Congress makes a choice to treat abortion services as a commodity and as such one to be distributed via the market. The result of this permissible legislative choice to treat abortion services as a commodity is that the right to abort a nonviable fetus must be understood to include the right to spend money to effectuate it.

This approach provides democratic decisionmakers with latitude to determine which goods ought to be distributed via the market and which should not. At the same time, it also protects rights. It does so because the state cannot simply prohibit private expenditures unless there is an alternative method for distributing the good in question. For example, suppose a state passed a law that prohibited women from paying money to abortion providers. This law would violate the abortion right because it forbids payment for a good that is largely distributed via the market.<sup>161</sup> The alternative to market distribution can be public provision, public funding, or something else. After all,

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159. WALZER, *supra* note 116, at 100–03.

160. *E.g.*, State Children’s Health Insurance Program (SCHIP), 42 U.S.C. § 1397ee(c)(7)(A) (2006) (“Payment shall not be made to a State under this section for any amount expended under the State plan to pay for any abortion or to assist in the purchase, in whole or in part, of health benefit coverage that includes coverage of abortion.”). Congress designed the SCHIP program to provide medical assistance to low-income children. *Id.* § 1397ee(a)(1). *But see* GUTTMACHER INST., STATE POLICIES IN BRIEF: STATE FUNDING OF ABORTION UNDER MEDICAID (2010), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_SFAM.pdf](http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf) (noting that while federal funding cannot be used for abortions except in cases of rape, incest, or life endangerment, some states use their own money to fund abortions beyond what federal law provides). Currently, seventeen states provide Medicaid funding for most medically necessary abortions. *Id.*

161. There are some providers who offer the service free of charge, but these are limited.

the state does not provide babies, yet their sale is restricted. Nonetheless, an entire scheme of laws (family law) regulate the *distribution* (using that term loosely) of babies. Babies belong to their genetic or adoptive parents, etc.<sup>162</sup> Thus, merely passing a law that restricts spending in connection with a right is not enough to establish that democratic decisionmakers are taking the good in question out of market distribution. If it were, then all rights would be vulnerable. The legislature may provide that a good must be distributed via nonmarket principles. But the legislature may not simply forbid using money to effectuate a right if no other nonmarket mechanisms of distribution exist.<sup>163</sup> After *McDonald v. Chicago*,<sup>164</sup> a state cannot avoid violation of the Second Amendment by banning the sale of hand guns or indeed even the sale of bullets.<sup>165</sup>

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162. I do not mean to suggest here that children are the property of their parents. I use the term “belong” here loosely to suggest that parents have parental rights—which include duties of care—with respect to children.

163. One might be tempted to put this point in terms of legislative intentions or purposes—a method familiar in First Amendment doctrine. In that form, one would say that the legislature cannot aim to prevent the exercise of the right. Clearly, laws that forbid the sale of votes do not aim to suppress voting, but the hypothetical law forbidding payment for abortion services that a legislature enacted in a context where there is no other nonmarket mechanism to obtain an abortion would likely have been adopted for precisely that reason. In general, I think it is a mistake to make legislative intentions relevant to the permissibility of laws. But nothing turns on which way this point is articulated here, so a reader more comfortable with this approach can formulate the point in this manner.

164. *McDonald v. Chicago*, 130 S. Ct. 3020, 3026 (2010) (holding that the Fourteenth Amendment incorporates the Second Amendment, and thus that the decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), is applicable to the states).

165. In the 1980s and 1990s, there were various attempts to ban and/or aggressively tax the sale of specific types of bullets, so-called cop-killer bullets in particular. Daniel Patrick Moynihan, *Just Bite the Bullets!*, WASH. POST, Jan. 5, 1995, at A29 (arguing for “an energetic regime of licensure taxing and accounting” on bullets in order to decrease gun violence); see also Scott D. Dailard, *The Role of Ammunition in a Balanced Program of Gun Control: A Critique of the Moynihan Bullet Bills*, 20 J. LEGIS. 19, 23–24 (1994) (summarizing all of Senator Moynihan’s proposals for banning and/or taxing the sale of bullets); Pierre Thomas, *U.S. Review Targets Deadly New Bullets*, WASH. POST, Nov. 12, 1993, at A4. While it may be permissible to ban the sale of specific types of bullets, I take it that neither Congress nor a state could ban the sale of all bullets, nor could it ban the sale of a type of bullet without making out that the bullet has special dangers or is used in a type of gun which itself could be banned. See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 286–87 (2009) (arguing that the *Heller* decision raises a tremendous number of legal questions under the Second Amendment about the permissibility of gun regulations, including regulations on ammunition magazines and types of bullets).

## C. IMPLICATIONS FOR CAMPAIGN FINANCE RESTRICTIONS

We now turn to campaign finance laws and ask whether the right of free speech should be understood to include the right to spend money to effectuate this right. According to the analysis presented here, the answer to this question will depend on whether the legislature has determined that the goods necessary to effectuate the right are to be distributed via the market or via alternative distributive mechanisms. In the case of free speech, unlike abortion or voting, there are many goods that are useful to the exercise of the right: e.g., books, movies, pamphlets, and television and radio advertisements and programs. One possible way to approach the issue is to say that when Congress adopts campaign finance laws, in particular laws that restrict giving money to candidates and spending money on electioneering communications,<sup>166</sup> it removes *electioneering* from the market economy. The relevant good, then, is electioneering. Where Congress also provides for public funding of an election, the claim that Congress has removed electioneering from the market is strongest. For example, suppose Congress were both to provide all presidential candidates (meeting certain eligibility requirements) with a specified amount of money to be spent in connection with the political campaign and simultaneously to forbid candidates from spending private money on these campaigns, while forbidding everyone else from donating money to these candidates. The decision to fund the election constitutes a legislative choice that campaigning ought not to depend on market-based principles. Presumably, there would be criteria to determine which candidates have amassed enough support to qualify for public funding. These principles would thus displace market principles as the method for distributing election funding.

This hypothetical campaign finance law is merely an example of one way in which Congress might remove electioneering from the market. This Article argues only that the First Amendment does not limit the ability of Congress and state legislatures to pass some forms of campaign finance reform. Bruce Ackerman and Ian Ayres offer an intriguing alternative

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166. The statute at issue in *Citizens United*, for example, defines electioneering communications in the following way: "An electioneering communication is defined as 'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election." *Citizens United v. FEC*, 130 S. Ct. 876, 881 (2010) (quoting 2 U.S.C. § 434(f)(3)(A)).

approach.<sup>167</sup> They propose that Congress provide all voters with a “Patriot” card with fifty patriot dollars. These dollars can be given to candidates of one’s choice but may not be traded, sold, or used on any other good. While Ackerman and Ayres describe their view as a hybrid of market and nonmarket norms,<sup>168</sup> at its core it represents a method of segregating electioneering from the sphere of wealth. According to Ackerman and Ayres, the ability to participate in politics should be distributed to each registered voter roughly equally: “Patriot merely expands this equal voting principle into the domain of public discourse.”<sup>169</sup>

Ackerman and Ayres, as well as others, make good normative arguments for the view that wealth ought not to influence politics and thus that Congress ought to segregate electioneering from the market. While I find these arguments quite persuasive, this Article’s claim does not rest on a normative argument of this kind. Rather, I argue here that the First Amendment does not bar Congress or states from deciding to adopt such a scheme. The Constitution leaves open the question of the reach of the market and thus democratic decisionmakers are free to remove politics from its scope, if they so choose.

A more complicated case is presented by those campaign finance laws that restrict contributions and expenditures while not providing for public financing at the same time.<sup>170</sup> Such a

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167. BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002).

168. They describe their aim in the following terms: “We are searching for policy hybrids that combine the best features of previously distinct breeds of social power: the electoral system and the market system.” *Id.* at 25. The aspect of the market that Ackerman and Ayres wish to retain, however, is not the influence of wealth but rather the decentralization and flexibility that it makes possible. *Id.* (explaining the combination as aimed to “marry the egalitarian ideals of the ballot box and the flexible response of the marketplace”).

169. *Id.* at 17. Their proposal includes other interesting features including, most significantly, secrecy. The amount of all donations above \$200 would not be able to be disclosed. In this way, Ackerman and Ayres hope to disrupt the link between donations and access or favors. *Id.* at 25–44.

170. For example, current law restricts contributions on congressional elections without providing funding for these elections. See 2 U.S.C. § 431(3) (2006) (“The term ‘Federal office’ means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.”); *id.* § 441a(a)(1)(A) (stating that no person shall make a contribution greater than \$2000 “with respect to any election for Federal office”); R. SAM GARRETT, CONG. RESEARCH SERV., RL 33814, PUBLIC FINANCING OF CONGRESSIONAL ELECTIONS: BACKGROUND AND ANALYSIS 1–2 (2007), available at <http://fpc.state.gov/documents/organization/94355.pdf> (discussing the history of failed proposals to extend public financing to congressional elections). Spending by candidates in these elections is not limited, since the Court’s holding in *Buckley* invalidated such limitations as a violation of the

regime does not clearly move electioneering from the market to the nonmarket domain. On the one hand, contribution limits cap the amount that inequalities in wealth can translate into inequalities in political influence. But on the other hand, since many people lack the resources to contribute at all, or, if they do contribute to campaigns, contribute far less than the legally permitted maximum amount, the political influence that contributing to candidates entails is still, at least in part, treated as a market commodity. Expenditure limits more straightforwardly move electioneering into the nonmarket realm. If each candidate may only spend a specified amount on her election, then the ability to persuade voters does not depend on one's own wealth or the wealth of one's supporters.<sup>171</sup> Were the Court to adopt the analysis proposed in this Article, its decision would focus on these questions. Where public financing is combined with limitations on giving and spending money on election-related activities, we have a clear case in which the legislature has determined that elections ought not to be influenced by wealth. Similarly, were Congress to adopt a different currency for campaign giving, like Ackerman and Ayres's Patriot dollars, we also have a clear instance of moving electioneering out of the market sphere. In such cases, restrictions on giving and spending on elections are not restrictions on speech. Where it is less clear that the legislature is moving the activity outside of the market, it is consequently also less clear that these restrictions do not violate the right of free speech.

As the above analysis illustrates, the approach this Article puts forward would require a court to focus on very different issues than does current campaign finance law. Courts must ask whether Congress or a state legislature has clearly adopted an approach that removes electioneering from the market. If so, restrictions on both giving and spending money in connection

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First Amendment. I am here exploring how my theory would treat restrictions on both giving and spending in connection with campaigns where no public funding is provided.

171. Of course, this fact does not guarantee that winning the election will thus depend on relevant factors. Critics of campaign finance laws often point out that they benefit incumbents. See, e.g., Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 19 ("The importance of money in politics means political inequality as well. Contributors to both parties tend to favor congressional incumbents."). Whether these laws are good or should be struck down on these grounds are entirely different questions than the one I address here. The argument I consider here is meant to refute the claim I call "C"—that laws that restrict giving and spending in connection with campaigns constitute restrictions on speech and thus require heightened judicial review.

with the relevant elections ought not to be treated as restrictions on speech. Moreover, this approach provides Congress with guidance about what sort of legislative approach would pass constitutional muster. So long as Congress is willing to provide the resources necessary for electioneering and identify the relevant nonmarket criteria for their distribution, Congress may restrict both giving and spending in connection with elections. After all, the marketplace of ideas is a metaphor. One need not take the First Amendment as a command that free speech rights are tethered to the actual market.

A decision by elected officials that electioneering ought not to be treated as a market commodity should not be confused with the view that electioneering resources must be distributed equally. There are many nonmarket principles of distribution.<sup>172</sup> For example, today organs are distributed on the basis of need.<sup>173</sup> Some commentators see the obvious alternative to the current system in which money translates into influence as one in which voters have an equal opportunity to influence politics. For example, Frank Pasquale argues for equality as the appropriate distributive principle for the domain of politics.<sup>174</sup> Building on John Rawls's notion that each person is entitled to the "fair value of political liberties," Pasquale argues that each person ought to have the same opportunity to influence politics.<sup>175</sup> David Strauss has argued that in trying to get money out of politics, the real goal is equal political influence.<sup>176</sup> He argues that if each person were equally well-off and could thus spend equally on giving to political candidates, one would no longer worry about campaign giving.<sup>177</sup> In an article critical of

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172. Walzer identifies three primary distributive methods: free exchange, desert, and need. WALZER, *supra* note 116, at 21–26.

173. See *The Matching Process—Waiting List*, ORGANDONOR.GOV, [http://www.organdonor.gov/transplantation/matching\\_process.htm](http://www.organdonor.gov/transplantation/matching_process.htm) (last visited Nov. 26, 2010) (explaining how the organ transplant waiting list is prioritized based on the urgency with which patients require an organ).

174. See Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 602 (arguing for the return to the egalitarian roots of the justification for campaign finance reform).

175. See *id.* at 601, 638 (arguing, based on Rawls, that the justification for campaign finance reform is "to assure that certain powerful groups do not exercise undue influence on its outcome").

176. See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1369 (1994) ("[P]eople who are willing and able to spend more money, it is said, should not have more influence over who is elected to office.").

177. *Id.* at 1373 ("If equality is secured, then because campaign contributions are valuable only as a means to get votes, rewarding a legislator with a

this striving toward equality of political influence, Sanford Levinson too sees the only alternative to the current system as one that aims at equality.<sup>178</sup> Levinson argues that because “[m]oney is not the only socially useful resource that is unequally distributed,”<sup>179</sup> the goal of equalizing influence is doomed. People have different talents for influencing people and different amounts of free time to allocate to politics.<sup>180</sup>

To say that electioneering should not be treated as a market commodity is not to require that influence be distributed evenly. Levinson is surely right that it would be impractical to try to do so. Just listening to President Obama makes clear that oratory skill will make some candidates more influential than others. When the political branches decide to remove transplant organs from the market, they have a choice of possible allocative principles to use in its stead. The transplant list could be headed by those who first listed as in need of a transplant, by those most likely to die soon, by those most likely to benefit, etc. The rejection of the market as the method of distribution does not determine which of these principles should take its place. That decision is up to democratic decisionmakers, within some broad limits.<sup>181</sup> Similarly, campaign finance laws need not aim at equal political influence in order for these laws to legitimately displace the market as the distributive mechan-

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contribution is, in important ways, similar to the unquestionably permissible practice of rewarding her with one’s vote.”).

178. See Levinson, *supra* note 151, at 945–48. Levinson rejects the project of equalization due, in great part, to its impracticability.

179. *Id.* at 948.

180. Perhaps in response to critiques such as Levinson’s, Pasquale describes how the emphasis on equality was displaced by a call for politics governed by fair conversational principles, a development he laments. See Pasquale, *supra* note 174, at 621–23 (characterizing the alternative emphasis as “The Deliberativist Detour”). This “Deliberativist Detour” is influenced by Jürgen Habermas. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 322–23 (William Rehg trans., 1996) (describing the theories of deliberative politics and procedural democracy). An influential example of this Habermasian approach can be found in C. Edwin Baker’s work. See, e.g., C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 3 (1998) (using Habermas’s theory of democracy to support the notion that campaigns are “part of the institutionalized electoral process rather than . . . the broader realm of unregulated political speech”).

181. Graber argues, following Walzer, that “the integrity of the political sphere is preserved when inequalities in political power reflect differences in the ‘rhetorical skill and organizational competence’ of those who seek that good.” GRABER, *supra* note 152, at 229 (citing WALZER, *supra* note 116, at 309).

ism. Thus, the fact that equality of political influence is an elusive goal does not undermine the approach argued for here.

The approach presented in this Article provides a framework for analyzing whether the right to spend money in connection with a constitutionally protected right ought to be seen as part of the penumbra of that right or not. As presented here, it offers only the broad outlines of how courts should address this question. Clearly, there is much that would need to be worked out about how this approach would resolve whether particular and detailed campaign finance laws sufficiently remove electioneering from the market so that restrictions on giving and spending on campaign communications should not be treated as restrictions on speech. If public funding of campaigns is provided, this Analysis yields a clear answer. Restrictions on giving and spending money in connection with these elections do not restrict speech. Where public funding is not provided, courts will always have to ask whether the state has removed electioneering from the market sphere.

#### D. OBJECTIONS

This Article's first contribution is to emphasize that the question addressed in campaign finance cases is not unique to the First Amendment context. Money is useful to the exercise of other constitutionally protected rights as well as, but not limited to First Amendment rights.<sup>182</sup> This Article urges that the courts frame the question posed by campaign finance laws in this broader context. When do restrictions on the ability to give or spend money in connection with rights restrict those rights and when do they not? This Article's second contribution is to offer an answer. This Part sketched the broad outlines of the proposed account. It is not a fully developed theory and thus does not work out all the difficulties and nuances of the account. In doing so, perhaps one will find that this theory is ultimately untenable. I hope not. But if so, progress has still been made by shining a light on the question the courts and commentators must address and in taking some first steps toward providing an answer.

With this caveat in mind, it is worth raising two important objections to the proposed view and offering some replies to these objections. The decision regarding which goods are to be distributed via the market and which are not ought to be left to

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182. See *supra* Part II (discussing how money provides incentives for the exercise of constitutionally protected rights other than First Amendment rights).

democratic decisionmakers, i.e., Congress, state legislatures, or voters (via referenda). These decisionmakers can opt for non-market distribution, and if they do, a right which depends on the good distributed via nonmarket means does not include a right to spend money to effectuate it. One can challenge this view from two different directions.

First, one can ask whether some goods can really be removed from market-based distribution. For example, could Congress decide that abortion services are not to be provided by the market and instead provided by a national health service of some kind? In doing so, market principles of distribution would be replaced by other distributive principles. If such a national health service had limited resources, could it decide which abortions to provide and which to refuse, while simultaneously forbidding those excluded from paying for abortions privately? If so, does this violate the right to choose whether to continue a pregnancy, which is protected by the Constitution?

This example raises important questions about the proposed theory that require a reply. When the state removes a good from the market and substitutes an alternative distributive scheme for market-based distribution, this alternative must be an *adequate alternative method of distribution*. What makes the alternative distribution method adequate in part relates to whether the criteria adopted comport with the definition of the right at issue as the Court understands it. For example, laws forbid buying and selling of votes and, instead, distribute votes on the basis of age and citizenship. This alternative distributive scheme for votes is adequate because it comports with our understanding of the right to vote as a right to participate equally in political deliberation by persons mature enough to take part in such activity. The right to abort a previsible fetus has often been described as a right to *choose* whether to continue a pregnancy.<sup>183</sup> Thus, in order to be considered adequate, any alternative method of distribution must preserve the ability of women, in consultation with their doctors, to make this choice.

A second objection challenges the proposed view from the other direction. It questions whether democratic decisionmakers could constitutionally decide to distribute via the market some goods that we currently distribute via nonmarket means.

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183. See *Roe v. Wade*, 410 U.S. 113, 169 (1973) (characterizing the right to abortion as a "freedom of personal choice" in matters of procreation, which is one of the liberties protected by the Fourteenth Amendment).

For example, suppose Congress were to decide that the buying and selling of votes is permissible. Would this really be constitutional? So long as each person gets one vote to freely sell, perhaps this is no more offensive to democratic principles than the current situation in which the wealthy are able to wield more political influence through contributions and spending. Here too, however, there are limits. The right, as understood by the Court, places some limitations on whether the good can be distributed via the market versus via a nonmarket based distributive scheme. It is reasoning of this sort that may help explain why the right to counsel in a criminal case has a positive dimension. Leaving the good of legal services completely in the market does not adequately meet the needs of criminal defense for defendants unable to purchase lawyers.<sup>184</sup> Therefore, the Constitution is understood to require some public provision of this good.<sup>185</sup>

One caveat is necessary before concluding this section. This Article argues that democratic decisionmakers should decide which goods should be distributed via the market and which should not. However, this position should not be confused with a view that there are no better or worse answers to give to these questions. Rather, I do have a normative view about which goods should be distributed via the market and which should not—at least about many important goods. I do not offer an account or defense of that normative vision here. Perhaps it will become necessary to do so. However, it is clear that people disagree about these questions and that this disagreement is reasonable. That being the case, the best approach—normatively as well as pragmatically—is to leave these questions to resolution by democratic means.

#### E. TARGETING THE SUPPRESSION OF FREE SPEECH

This Article earlier acknowledged that laws that aim to suppress free speech raise important First Amendment concerns.<sup>186</sup> While the cases Sullivan musters in defense of C cannot be justified on the grounds provided, perhaps they can be

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184. See *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (describing the difficulty of many indigent defendants in procuring a defense attorney).

185. See *id.* at 339–40 (“The Sixth Amendment provides, ‘In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.’ We have construed this to mean that . . . counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.” (first alteration in original)).

186. See *supra* text accompanying notes 58–60.

justified on other grounds. In particular, perhaps at least some of the cases can be justified on the grounds that the state cannot adopt laws which target free speech. One can often describe the governmental interest in these cases in multiple ways, as either suppressing speech or something else. Earlier I promised that the account provided by this Article would help to determine which interpretation is best, at least in some cases. It is now time to fulfill that promise.

The answer lies in whether the state provides for the non-market distribution of the good. A law that restricts abortion spending aims to suppress the exercise of the right to abortion because abortions are provided via the market. A law that restricts buying and selling votes does not target the right to vote because votes are not distributed via the market. A law that restricts the amount of money a person can spend buying books would violate the First Amendment. This outcome can be explained in either of two ways. One can say that books (assuming they are not “electioneering communications”) are distributed via the market and thus a law that restricts the right to buy books restricts the freedom of speech. Alternatively, one can say that the law targets speech or aims to suppress free speech because the fact that books are a good distributed in the market demonstrates that the best interpretation of the law is that it aims to suppress speech.

Compare that example with a law that prohibits paying petition circulators in connection with ballot initiatives. This law does not target free speech. The legislature may determine the appropriate method to determine which ballot initiatives are placed on the ballot.<sup>187</sup> There are of course many possible ways to do this. The legislature could forbid ballot initiatives altogether, only allow state senators and representatives to propose them, require a certain number of people to request that a measure be added to the ballot (by requiring X number of signatures, X number of e-mails, X number of text messages), specify the number that are allowed in advance and then auction them off to the highest bidder, etc. The list of possibilities is infinite. Note however that the last possibility makes ballot measures a commodity for sale in the market.<sup>188</sup> If the ten ref-

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187. There are limits to this claim, of course. The distribution method chosen must comply with other constitutional guarantees. For example, the legislature could not require that the ballot initiative be proposed or supported by men only.

188. However, this blatantly market-based approach would probably run afoul of the Constitution. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663,

erenda to be included in each election year are auctioned off, then the method for distributing this good is the market. By contrast, each of the methods that require a specified number of people to sign, e-mail, or text their attestation that they want the measure on the ballot distances the good from the market. They are not neutral. Some people have more time on their hands to collect signatures. Some people are home more than others and thus more likely to receive these solicitations. Some have cell phones and computers, making the e-mail and texting more accessible. Because these devices cost money, reliance on them is surely related to wealth. Nonetheless, the requirement of X number of signatures versus X dollars to get a petition on the ballot is a way to distribute ballot measures by nonmarket principles. This is most clearly seen when we compare this method with an auction or even with a sale at a set price.

The law forbidding paying people to circulate petitions should be examined against this backdrop. If placement of a measure on the ballot is distributed by nonmarket principles (here by the ability to find enough willing volunteers to collect the needed petitions), then the right of free speech at issue in this case ought not to include the right to spend money to get one's message out. By enacting the statute at issue in *Meyer*, Colorado had decided that inclusion of a ballot measure ought to be a function of the ability to find willing volunteers rather than the ability to spend or raise money.<sup>189</sup>

Thus, a law that says one may not spend money to procure sex is not a restriction on the right to sexual intimacy even though the law specifically picks out sex as the thing on which one cannot spend one's money. Nor is a law that forbids buying babies a restriction on procreative liberty despite the fact that the law picks out babies as the one "thing" one cannot buy. Where democratic decisionmakers have opted for a nonmarket distributive method, these restrictions on spending money on a good should not be understood as targeting the right (such as sexual intimacy or procreative liberty), but instead as part of a permissible legislative choice about the appropriate distributive mechanism for a good.

But, one might argue, the right to free speech is different. This right specifically forbids Congress (or states) from passing

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665–66 (1966) (finding that the use of poll taxes to determine voting eligibility is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

189. See *Meyer v. Grant*, 486 U.S. 414, 425–26 (1988) (discussing Colorado's "interest in protecting the integrity of the [ballot] initiative process").

laws that restrict speech and, thus, any law that picks out speech on its face is prohibited.<sup>190</sup> While the First Amendment may be more amenable to facial challenges than other constitutional provisions, and surely subjects laws that pick out expressive actions to heightened judicial review,<sup>191</sup> these facets of the First Amendment do not suffice to answer the basic question of whether a restriction on spending on speech *is* a law that we should describe as restricting speech. If the good used to speak is not distributed via the market then a law that restricts spending on that good is best understood as a law that protects the legislative choice to remove that good from the market rather than a law that abridges speech.

#### F. REASSESSING THE CRITIQUE

Eugene Volokh argues that the fact that money is not speech is not important.<sup>192</sup> It should be treated as part of the right to free speech.<sup>193</sup> In support of this claim, he argues that “[m]oney isn’t lawyering, but the Sixth Amendment secures criminal defendants’ right to hire a lawyer. Money isn’t contraception or abortions, but people have a right to buy condoms or pay doctors to perform abortions.”<sup>194</sup> Volokh’s argument appears to suggest that all constitutionally protected rights include the right to spend money to effectuate them. As we saw in Part II, this is not correct. Moreover, the fact that the right to abort an early fetus and use contraception do include the right to spend money to effectuate them is not dispositive about other rights. As neither Congress nor a state legislature have established a nonmarket distributive mechanism for condoms or abortions, the right to procreative liberty should be understood to include the right to spend money on condoms and abortions.

The right to counsel example is more complex. Currently, criminal defense lawyers are provided for all criminal defend-

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190. See, e.g., Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1268 (2010) (arguing that the text of the First Amendment entails that laws that restrict speech on their face are constitutional nullities).

191. See, e.g., *Meyer*, 486 U.S. at 425 (stating that statutes infringing upon First Amendment freedoms are subject to “exacting scrutiny” and that the burden of states attempting to justify such statutes is “well-nigh insurmountable”).

192. See Volokh, *supra* note 9, at 1101 (“Well, of course money isn’t speech. But so what? The question is not whether the money is speech, but whether the First Amendment protects your right to speak using your money.”).

193. See *id.*

194. *Id.*

ants who are unable to pay for their own counsel.<sup>195</sup> Thus, to a significant extent, counsel in criminal cases has become a non-market good.<sup>196</sup> Suppose a state were to pass a law forbidding people from paying money to secure private counsel in criminal cases. Following the logic of the view I put forward here, this law might well be constitutional. The state is permitted to determine that counsel in a criminal case is a “good” to be distributed to all criminal defendants on the basis of need rather than on ability to pay. The state may determine that inequalities in wealth ought not to translate into inequalities in judicial outcomes in criminal cases and thus that payment for private counsel in criminal cases is a “blocked exchange.”<sup>197</sup> Does this law violate the Sixth Amendment right to counsel? All criminal defendants are entitled to state-provided counsel. The law simply forbids expending private resources on counsel. Perhaps this law shouldn’t be seen to violate the Sixth Amendment so long as the publicly provided counsel is constitutionally adequate. The right to counsel simply does not include the right to spend money to effectuate it, as the legislature has determined that the good of criminal counsel is not to be distributed via the market.<sup>198</sup>

On the other hand, the Sixth Amendment right to counsel may require counsel of one’s choosing rather than state-appointed counsel.<sup>199</sup> Moreover, it may require that such counsel be independent of the state in a more robust way than the protections of professional obligations provide. If so, the means by which the government removes legal services in criminal cases from the market could require a mechanism that protects these ways of understanding the right at issue. A voucher system might address these concerns.

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195. See *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

196. The fact that defendants are constitutionally entitled to have counsel provided if they cannot afford it does not change this analysis.

197. See WALZER, *supra* note 116, at 100–03 (enumerating a list of things that “cannot be had for money,” and that must be distributed using some other mechanism).

198. Interestingly, in a case where a defendant challenged a pretrial forfeiture of assets law on the ground that his Sixth Amendment right to counsel was violated by his inability to spend the money subject to forfeiture to hire counsel of his choice, the Court was unmoved by the burden this law posed to the exercise of Sixth Amendment rights. If the money is subject to forfeiture, the fact that it would be used to hire counsel in no way protects it or necessitates different treatment. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 642 (1989).

199. The Court has not interpreted the right to counsel in this way. I am offering my own views here.

## CONCLUSION

The most oft-quoted passage from *Buckley* is this: “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>200</sup> The appeal of this statement rests on the sleight of hand involved in substituting “speech” for “the giving and spending of money.” The more accurate statement is not so obvious: the concept that the government may restrict the spending power of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. It is not obvious that the government is disabled from determining which goods are to be distributed via market mechanisms and which are not. The First Amendment forbids restricting speech itself. This right does not automatically include the right to effective speech. The Court makes precisely this point in *San Antonio Independent School District v. Rodriguez*, when it declines to invalidate property tax-based school funding in Texas.<sup>201</sup> The plaintiffs in *Rodriguez* made a strikingly similar argument to the one that won the day in *Buckley* and that continues to hold sway. They argued that “education is . . . a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote.”<sup>202</sup> A good education facilitates effective speech in a similar way as money does. Nonetheless, the fact that education facilitates the exercise of the right to free speech and the right to vote does not mean that education is a fundamental right, as the plaintiffs claimed in *Rodriguez*. And it certainly does not show that the right to an education is actually part of the First Amendment right of free speech itself. This assertion seems patently ludicrous. That it does not seem equally ludicrous when made with respect to the giving and spending of money is a result of the fact that when something is repeated often enough, it begins to sound necessary. The fact that the Court in *Citizens United* does not even bother to cite *Buckley* for the proposition that restrictions on spending money should be treated as restrictions on speech, and rather simply treats this claim as so obvious it needs neither citation nor argument, demonstrates that this transformation has become complete. It is thus especially important to examine it now.

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200. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

201. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 1–2 (1973).

202. *Id.* at 35.