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Money and Rights

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Many campaign finance laws restrict the ability to give or spend money. U.S. Supreme Court decisions treat such laws as restrictions on "speech" that are therefore subject to heightened judicial review. Our campaign finance doctrine focuses on the connection between restrictions on giving and spending money, and the ability to exercise the right to freedom of speech. The Court has reasoned that, because money facilitates speaking or incentivizes speaking and can itself be expressive, restrictions on giving and spending money should be treated as restrictions on "speech" for purposes of constitutional analysis. This manner of framing the inquiry is overly narrow and has limited the perspective of both the Court and commentators.

The Court is surely right that money is useful to the exercise of First Amendment rights. But this is not because money has a unique connection to speaking. Rather, money facilitates the exercise of the right to free speech, as it does the exercise of many other constitutionally protected rights. For example, it is difficult to obtain an abortion without money. While the right to abort a pre-viable fetus thus likely includes the right to pay a doctor to perform this service, other constitutional rights would not be thought to include the right to spend money to effectuate them. In another article, "Money Talks But It Isn't Speech," I develop these claims.[1] There, I argue that we ought to view restrictions on giving and spending money in politics through a wider

*This chapter also appears in NYU's *Review of Law and Social Change* 35, no. 3 (2011). Reproduced by permission.

lens. When assessing the constitutionality of campaign finance laws, we should ask: When do constitutional rights include a penumbral right to give or spend money to exercise the right effectively?

Some rights likely include a penumbral right to give or spend money. Abortion exemplifies this sort of right because women cannot terminate pregnancies without spending money for a doctor's services in most instances. In the case of other rights, notably voting and sexual intimacy, we would likely conclude the opposite. The right to vote does not include the right to buy or sell votes, and the right to sexual intimacy with the partner of one's choosing does not include the right to engage in prostitution.

These insights lead to the conclusion that the fact that money facilitates or incentivizes the exercise of a right is insufficient on its own to show that a right includes the penumbral right to give or spend money. The final section of "Money Talks" articulates a theory that begins to answer the question of when rights include a right to spend money and when they do not. Briefly, I argue as follows: if the exercise of a constitutional right depends on a good that is distributed via the market, as abortion services are, then a right that depends on that good must include the right to spend money to effectuate it. If a right depends on a good that is not distributed via the market, as votes are not, then the right at issue ought not to include the right to spend money to effectuate it.

This chapter continues the project of exploring the connection between money and rights. The overarching question is the same: When do constitutionally protected rights include a penumbral right to spend or give money to effectuate them? In "Money Talks," I drew on shared intuitions about how hypothetical cases *might* be resolved by courts. In this chapter, I turn from the normative to the descriptive, looking at how the Supreme Court and some lower courts have begun to answer this question. This analysis has two goals. First, I hope to encourage courts and scholars to explore the relationship between money and rights.[2] Second, I hope to deepen, and to complicate, our overly narrow approach to campaign finance issues by situating them within the broader question of the relationship between money and rights. Restrictions on giving and spending on political activity raise general questions about when constitutionally protected rights include the right to give and spend money to effectuate them.

This chapter proceeds as follows. First, I provide two different answers to the question of how money relates to rights. In what I term the *integral strand* cases, a constitutionally protected right is treated as including the right to spend money to effectuate the underlying right. In what I term the *blocked strand,* a constitutionally protected right is not treated as including a concomitant right to spend money to effectuate the right. When faced with a new right, a court therefore must decide whether it falls into the integral or blocked strand. Then, I illustrate this point by describing how both the Fifth and Eleventh Circuits are wrestling with precisely this question in their application of *Lawrence v. Texas*, the 2003 decision that struck down laws against homosexual sodomy. Next, using the cases discussed, I offer an account of why the Supreme Court and other courts treat some rights as following the integral approach and some the blocked approach. Then, using this theory, which I term *adequacy theory,* I suggest that some of the cases described may be incorrectly decided. I then explain the ways in which the theory that underlies the case law is consistent with the normative vision I advocate in "Money Talks."

Two Strands

The Integral Strand and the First Amendment: The *Buckley* Answer

In *Buckley v. Valeo*,[3] the Supreme Court addressed the relationship between the right to spend money and the First Amendment right of free speech in connection with political campaigns. There, the Court held that the right to spend money on political expression was protected by the right of free speech because money facilitates, indeed may even be necessary to, the effective exercise of the right to participate in political debate.[4] In a key passage defending its view, the Court explained that "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[5] Because money is necessary for effective political speech, the Court argues that the right to spend money must be protected as part of

the free speech right in this context.[6] The right to spend money on political speech is therefore treated as part of the penumbra of the First Amendment right.[7]

While campaign finance doctrine has waxed and waned in its willingness to tolerate restrictions on the use of money in politics, the doctrine has remained faithful to this basic claim. The right to spend money on political speech is to be treated as part of the right of free speech itself, such that laws that limit this right to spend receive strict scrutiny.[8] In fact, in the most recent campaign finance case, *Citizens United*, the Court treats this approach as so obvious and entrenched that it provides neither supporting argument nor citation to *Buckley*.[9]

The Integral Strand outside of the First Amendment: *Carey v. Population Services International*

The view that a constitutionally protected right should be seen to include a concomitant right to spend money to make the underlying right effective is not unique to *Buckley*'s treatment of the relationship between money and political speech. One prominent example of this approach can be seen in the development of the right of procreative liberty. The right to procreative liberty was first recognized by the Court in *Griswold v. Connecticut*,[10] where the Court invalidated a state law restricting the *use* of contraceptives as applied to married couples.[11] There, the Court held that the state law at issue was particularly offensive to the privacy of the marital relationship protected by the Constitution because "in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, [the law] seeks to achieve its goals by means having a maximum destructive impact upon that relationship."[12] Seven years later, in *Eisenstadt v. Baird*,[13] the Court, relying on an Equal Protection rationale, extended the protection offered in *Griswold* to unmarried couples as well.[14] Because Baird's appeal concerned his conviction for giving away contraceptives to a group of college students, the Court never addressed whether the procreative liberty right protected by *Griswold* included a right to buy and sell contraceptives in the commercial marketplace.[15]

Carey v. Population Services International[16] most closely addresses the question whether the procreative liberty protected by the Constitution includes the right to buy and sell contraceptives. There, the Court considered whether a New York law permitting only pharmacists to distribute contraceptives violated the Constitution.[17] The Court in *Carey* treated *Griswold* as having defined a constitutionally protected right to make decisions about childbearing, rather than as grounded in a narrower right to merely *use* contraceptives.[18] The Court then drew an analogy to the line of cases following *Roe v. Wade* that invalidated various restrictions on a woman's right to abort a pre-viable fetus.[19] Just as these laws made it too difficult for a woman to exercise her right to choose abortion, so too the restriction on who can sell contraceptives at issue in *Carey* made the right to procreative choice too difficult to exercise and thus similarly constitutionally problematic.[20] For the Court in *Carey*, the restriction on who could sell contraceptives was similar in kind (if different in degree) to an outright ban on sale.[21] The Court explained that, because a ban on the purchase or sale would limit a person's access as much, if not more, than a ban on use, prohibiting the commercialization of contraceptives burdens the right to procreative liberty in a constitutionally cognizable way.[22] Thus, *Carey* has come to stand for the proposition that the constitutionally protected right to determine whether to procreate includes the right to buy and sell contraceptives. The right to spend money to obtain contraceptives is part of the penumbra of the right to procreative liberty because a person is unlikely to have access (or adequate access) to contraceptives without buying them.

The Blocked Strand and the First Amendment: The *Stanley* Approach

Buckley's analysis of the relationship between money and free speech is not the only approach found within First Amendment doctrine. In *Stanley v. Georgia*,[23] the Court adopted the opposite view. There, the Court held that the constitutionally protected right to read and possess obscene materials in the home does not include a penumbral right to spend money to buy this material, nor a related right to sell it.[24]

In *Stanley*, the Supreme Court held that the conviction of a man for possession of obscene materials in his home violated both the First and Fourteenth Amendments on the grounds that the "mere private possession of obscene matter cannot constitutionally be made a crime."[25] However, both *Stanley* itself and subsequent decisions of the Court emphasized that the articulation of this constitutionally protected right does not entail a right to buy or disseminate obscene materials. The Court made clear that this holding does not disturb prior decisions upholding convictions for selling obscene materials.[26] As the Court emphasized, "the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."[27] In other words, the right to read or possess obscene materials in one's home does not include a penumbral right to buy or to sell these materials.

Following *Stanley*, several cases pushed on the viability of this distinction. How could a latter-day Stanley obtain these materials to read privately in his home unless he could buy them and unless someone else has a right to sell them?[28] Nonetheless, the Court repeatedly refused to extend the right to possess obscene material in the home to cover a right to sell, buy, or distribute this material.[29] For example, in *United States v. Reidel,* the Court emphasized that *Stanley* "does not require that we fashion or recognize a constitutional right in people like Reidel to distribute or sell obscene materials."[30] This line of cases established that the First Amendment right protected in *Stanley* does not include the right to spend money to effectuate this right.

The Blocked Strand outside of the First Amendment: Due Process and Procreative Liberty

Just as both the integral and the blocked approach to the relationship between money and rights are represented in First Amendment case law (in *Buckley* and *Stanley* respectively), so too both strands are represented in case law exploring the scope of other constitutionally protected rights. This section begins with an example for the blocked strand in the context of due process and then moves on to discuss the blocked strand in the context of procreative liberty.

Due Process. In *Walters v. National Association of Radiation Survivors*,[31] the Supreme Court addressed the question of whether the Due Process Clause of the Fifth Amendment protects an individual's ability to spend his own money to retain private counsel. There, the Court held that, so long as the state has provided an adequate alternative dispute resolution system, due process is not violated by a statutory restriction that effectively prohibits hiring a private lawyer.[32] In other words, the right to due process protected by the Fifth Amendment of the Constitution does not, at least in all cases, protect the right to spend one's own money to hire a lawyer.

In *Walters*, two veterans groups, along with individual veterans, challenged a federal law that limited the amount that a veteran could pay an attorney to represent him in his claim for veteran's benefits to $10.[33] The Court agreed with the challengers that this limit effectively denied veterans the right to hire private counsel to represent them in their claims for benefits.[34] Nonetheless, the Court upheld the law despite claims that the fee limit violated the Due Process Clause of the Fifth Amendment and the First Amendment rights of veterans.[35]

Justice William Rehnquist, writing for the Court, found that due process was not violated by the restrictions on paying for private counsel because the alternative process afforded by the statute provided an adequate means to be heard.[36] The Due Process Clause was implicated because the state sought to deprive veterans of constitutionally important property interests.[37] The Court thus was required to determine if the process provided to veterans satisfied the constitutional guarantees of due process.[38] What is striking about the *Walters* Court's analysis is that Rehnquist draws no attention to the fact that the cost of additional procedural safeguards—to wit, allowing veterans to hire and pay private attorneys—would be paid by the individuals bringing the challenge, not by the government. As Justice John Paul Stevens points out in his dissenting opinion, "we are not considering a procedural right that would involve any cost to the Government. We are concerned with the individual's right to spend his own money to obtain the advice and assistance of independent counsel in advancing his claim against the Government."[39]

Nonetheless, the Court upheld the restriction on the use of private funds to hire lawyers for three reasons.[40] First, the government's interest in ensuring that the benefits awarded are not shared with

lawyers, though paternalistic, was justifiable.[41] Second, if veterans hired private attorneys, a more adversarial and complex process might develop, which in turn might press all veterans to hire a lawyer.[42] Finally, and most importantly, the process provided by the Veterans' Administration sufficiently safeguarded the interests of veterans.[43] This last point seemed most important to the Court. The Court reviewed data demonstrating that veterans do nearly as well without lawyers as with them.[44] The Court emphasized that the scheme set up by the statute provided veterans with non-lawyer representatives, noting that there was insufficient evidence that some cases are too complex to be handled adequately by the non-lawyer representatives.[45] In other words, the fact that the government provided an adequate alternative system of dispute resolution was essential to the Court's decision that the due process right at issue was not violated by the restriction placed on using one's own money to hire counsel.

This case thus stands for the proposition that the due process guaranteed by the Constitution does not require that benefits claimants have an unfettered right to use their own money to hire a lawyer. No constitutional problem exists when the state has established a dispute resolution system that provides sufficient process but forbids hiring of private lawyers.[46]

Procreative Liberty. Procreation occurs increasingly in contexts that require money. Fertility treatments are big business. Paying doctors to harvest eggs, mix eggs and sperm together outside the body, and implant fertilized embryos in women have become more and more common. One such method, surrogacy, and in particular paid contract surrogacy, has been controversial at least since the well-known case of Baby M.[47] In the years since the New Jersey Supreme Court refused to enforce a surrogate parenting agreement, states have passed laws addressing the legality and enforceability of these contracts.

States have adopted a myriad of approaches. Some have permitted both paid and unpaid surrogacy, and have enforced contractual agreements exchanging gestational services for pay. Others have permitted both paid and unpaid surrogacy but, like New Jersey, refused to enforce these agreements. Still others have permitted only unpaid surrogacy, forbidding or criminalizing payments to a surrogate that exceed reimbursement for actual medical expenses.

If procreative liberty is a constitutional right, and the ability to procreate via surrogacy is a protected part of that right, may a state forbid paid contract surrogacy? In 1992, the Court of Appeals of Michigan decided *Doe v. Attorney General*,[48] which addressed this question. In this case, infertile couples and prospective surrogate mothers asked the court for a declaratory judgment that the Michigan Surrogate Parenting Act violated the plaintiffs' constitutional rights.[49] The plaintiffs asserted that "if the Surrogate Parenting Act were interpreted as being an outright ban on surrogacy contracts for pay, the statute would deny them their constitutionally protected privacy rights and would offend the Due Process and Equal Protection Clauses of the state and federal constitutions."[50] The case is interesting because the Michigan court found that would-be parents and surrogates have a protected liberty interest in procreating via surrogacy.[51] Nonetheless, the Michigan court upheld the ban on paid surrogacy.[52]

In this case, the court found that the law restricts the underlying right at issue—here, the right to procreate via surrogacy.[53] However, the court also found that this "intrusion into plaintiffs' right to procreate in the surrogacy context" is outweighed by the compelling interests offered by the legislature on behalf of the law.[54] This formulation of the court's resolution of the case would thus seem to suggest that the liberty interest at stake in the right to procreate via surrogacy *does* include the right to pay a surrogate or to receive pay for being a surrogate, even though the constitutional right itself is not violated because there are compelling governmental interests that justify restrictions on paid surrogacy.

If this interpretation were correct, the case would still be an important exemplar of a decision in which a court finds that a prohibition on spending money in connection with the exercise of a constitutional right does not ultimately violate the right. However, there is good reason to think that the court really does not believe that the right to spend or accept payment for surrogacy is part of the protected liberty interest at stake in the first instance. If so, the case stands for a stronger proposition: the procreative liberty interest protected by the Constitution does not always include the right to spend or receive money.

The Michigan court cites three reasons to forbid paid surrogacy, each of which it finds compelling. First, the state has a compelling interest in

"preventing children from becoming mere commodities."[55] Second, "the best interest of the child is also an interest that is sufficiently compelling to justify government intrusion."[56] Finally, "a third compelling state interest is that of preventing the exploitation of women."[57]

I begin with the second: protecting the best interests of children. Here, the court cites the effect on children of knowing "of the purchase and sale aspect of one's birth"[58] and the harm to children of custody battles that might ensue. While these are surely real and important concerns, the court's emphasis on them belies its claim that couples and prospective surrogates have a protected liberty interest in procreating via surrogacy. The court notes in this part of the opinion that surrogacy contracts do not look to the child's interest in determining who should raise the child, and in that respect are contrary to the child custody law of the state.[59] Of course, the same could be said about decisions by biological parents or mothers to continue pregnancies. We respect the procreative liberty of women and couples to have and raise their biological children whether or not they would make the best parents for these children. Therefore, the fact that paid surrogacy does not attend to the best interests of children should not be sufficient to restrict procreative liberty. The treatment of this justification as a "compelling" interest to restrict the asserted liberty interest in procreating through paid surrogacy suggests that the Michigan court does not, in fact, treat this liberty interest as constitutionally protected.

This argument is strengthened when we compare whether the court is likely to say the same thing about unpaid surrogacy. These eleemosynary agreements also "focus exclusively on the parents' desires and interests,"[60] so that the child's best interest is not a primary consideration. The Michigan court's perception of a great difference between paid and unpaid surrogacy arrangements suggests that it is not really the fact that the agreements are made to benefit the parents or surrogate that is the problem.

The first and third reasons offered by the court focus on the likely effects of payment itself on children and women in the context of surrogacy.[61] In particular, the court emphasizes that paid surrogacy risks making children into commodities and risks exploiting women by turning them into "breeding machines."[62] These reasons are offered by the court as compelling reasons to restrict the protected

liberty of couples to pay a surrogate to gestate a child.[63] What is odd about them in this context is that they are reasons that go directly to the liberty asserted in the first place. The risk of commodifying children and women's procreative labor is not a risk that just happens to accompany paying a surrogate to gestate a child. Rather, for those who believe that paid surrogacy inappropriately commodifies children and women's procreative capacity, it does so because paying for children and procreative labor is to value them in the wrong sort of way.[64] If this is correct (and I am making no claim about that), then it is hard to see how one has a protected liberty interest in doing this that is then *outweighed* by the negative consequences. Rather, if one believes that buying children and women's reproductive capacity values these things in the wrong sort of way—as the judge appears to believe in this case—then it is hard simultaneously to argue that the constitutionally protected procreative liberty gives one a right to enter into paid surrogacy arrangements.

This Michigan case found that couples and prospective surrogates have no right to enter into paid surrogacy arrangements. The right to engage in unpaid surrogacy is protected, however, as an aspect of procreative liberty. The court reaches this decision by finding that there is a protected liberty interest in procreating via surrogacy but that this interest is outweighed in the context of paid surrogacy by compelling governmental interests. However, I question whether what the court does in fact comports with what it says. While the court describes its holding in this manner, the reasons it offers suggest that the court's decision might be better captured by saying instead that while one has a protected liberty interest in procreating via surrogacy, one does not have a protected liberty interest in procreating via surrogacy for pay.

A Live Debate between the Integral Approach and the Blocked Approach

It is not clear whether most constitutionally protected rights include a penumbral right to spend money to effectuate them or not. In part, this is likely due to the fact that neither courts nor commentators have

identified this as a question that must be answered. Nonetheless, we see a debate over precisely this question in the lower federal courts as they wrestle with the implications of the holding of *Lawrence v. Texas*.[65] Does *Lawrence* entail a right to buy sex toys?

The Fifth and Eleventh Circuits have both considered the implications of *Lawrence v. Texas* in challenges to the constitutionality of state laws that ban the buying and selling of sexual devices.[66] The circuits differ with regard to how they define the right articulated in *Lawrence*[67] and whether *Lawrence*'s failure to use the language of fundamental rights is significant.[68] However, both the Fifth and Eleventh Circuits view *Lawrence* as providing constitutional protection for the right to possess and use sexual devices.[69] Both courts were then faced with the question of whether the right to possess sex toys (derived from *Lawrence*) includes a concomitant right to buy or sell these devices.

In *Williams v. Attorney General of Alabama* and the subsequent appeal heard as *Williams v. Morgan*, the Eleventh Circuit found that *Lawrence* protected the use of sexual devices in private and not the public, commercial sale of such devices.[70] The court emphasized the significance of the distinction between use and sale, stressing that "plaintiffs here continue to possess and use such devices," a liberty not threatened by the statute.[71] Prohibitions on sales of sexual devices are constitutionally permissible as "states have traditionally had the authority to regulate commercial activity they deem harmful to the public."[72] Thus, the Eleventh Circuit, consistent with *Stanley* and *Walters*, follows the blocked approach and finds that recognition of a constitutionally protected right—here to possess or use sexual devices privately—does not entail a concomitant right to buy or sell these devices.[73]

In *Reliable Consultants v. Earle*, the Fifth Circuit adopted the opposite view. As in the *Williams* cases, the court in *Reliable* explored the implications of *Lawrence* for laws banning the sale of sexual devices, here asking whether the statute at issue "impermissibly burdens the individual's substantive due process right to engage in private intimate conduct of his or her choosing."[74] Drawing on the decisions in *Carey* and *Griswold*, the Fifth Circuit found that restrictions on sale unconstitutionally burden the right to use sexual devices privately.[75] The Fifth Circuit explained its view in this way: "An individual who wants to legally use a safe sexual device during private intimate moments

alone or with another is unable to legally purchase a device in Texas, which heavily burdens a constitutional right."[76]

After *Lawrence*, both the Fifth and Eleventh Circuits thought it necessary to address the implications of that decision for challenges to laws banning the sale of sexual devices. The Eleventh Circuit followed *Stanley* and the blocked approach, adopting the view that the right to use sex toys privately does not give rise to a right to buy or sell them. The Fifth Circuit followed *Carey* and the integral approach, adopting the view that the right to use these devices privately entails a right to buy or sell them.

Generating a Theory

Some rights include a penumbral right to give and spend money to effectuate the underlying right. Some rights do not. Which are which, and why? By looking at the cases that fall into each category and especially at the *reasons* provided by the Supreme Court for why a given right includes or does not include a penumbral right to spend money, the outlines of a theory emerge. The state may forbid spending money to exercise a right where the state provides an adequate alternative means of securing, effectuating, or providing access to the right in question.

We see this theme most clearly in *Walters*. In *Walters*, the Supreme Court upheld a law that prohibited spending more than $10 to secure private counsel in veterans' benefit claims, precisely because the Court found that the alternative system for resolving benefits claims provided adequate process.[77] While the Court acknowledges that the district court found some small advantage in having a lawyer in these cases, the Supreme Court concludes that "the evidence adduced before the District Court as to success rates in claims handled with or without lawyers shows no such great disparity as to warrant the inference that the congressional fee limitation under consideration here violates the Due Process Clause of the Fifth Amendment."[78]

Admittedly, this decision rests in part on the Court's understanding that due process is "a flexible concept."[79] However, the Court's decision to apply that flexible approach not only to determinations about whether

the state has provided a process that meets the Fifth Amendment's due process guarantee, but also to state-imposed restrictions on the ability of people to expend private resources, is telling.

Access and the adequacy of alternatives also explain the Court's view that the right to use contraception includes within its ambit the right to purchase contraceptives recognized in *Carey*. In explaining why the restrictions at issue in *Carey* violated the constitutionally protected right to make decisions about child bearing, the Court explains: "this is so not because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing."[80] Because one must be able to purchase contraceptives, and do so with relative ease, in order to adequately exercise one's constitutionally protected choice regarding childbearing, laws restricting or limiting the sale of contraceptives violate due process.

Buckley v. Valeo itself also focuses on whether there is adequate ability to exercise the underlying right. The First Amendment right of free speech includes the right to spend money on political speech because "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[81] It is because money is necessary to political expression, in the Court's view, that restrictions on the ability to spend on political campaigns constitute a restriction on speech. Moreover, the *Buckley* Court's acceptance of contribution limits can too be traced to adequacy. Part of the Court's reasoning was that "a limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it 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."[82] In other words, the Court found that limitations on contributions still allowed for adequate alternative means of showing political support.

The theory that emerges from these cases is this: where alternative methods for effectuating the right exist (*Walters, Buckley*-contributions), the state may restrict the ability to spend money to effectuate the underlying right. Where there are no adequate alternatives, the state must permit individuals to use private funds to effectuate the underlying right (*Carey, Buckley*-expenditures).[83]

Adequacy Theory Suggests Some Cases Are Wrongly Decided

The theory that emerges from the case law suggests that legislatures may restrict one's liberty to spend money in connection with rights where, as in *Walters*, an adequate alternative means of securing the right is provided. Conversely, legislatures may not restrict one's liberty to spend money in connection with rights where, as in *Carey*, no alternative means of gaining access to a good used to exercise a right exists. Applying this theory to *Stanley* and that part of *Buckley* dealing with expenditures suggests that the Court may have its First Amendment cases backwards.

Stanley and the cases that follow it held that a person has a constitutionally protected right to read obscene material at home but no constitutionally protected right to buy or sell this material.[84] This group of cases exemplifies the blocked approach. Adequacy theory suggests that *Stanley* belongs in the blocked strand if, and only if, there is an adequate alternative means for Stanley to procure the obscene material without spending money to buy it. Short of creating it himself, it is hard to see how this is so. While one *could* make the argument that homemade pornography is a sufficient alternative to the store-bought kind, this rationale plays no role in the case law. Thus the adequacy theory suggests either that the right to read obscene materials at home includes the right to buy and sell this material or that *Stanley* itself was wrongly decided. If one accepts that obscene materials are of low value and thus are outside of the First Amendment's protection, it is hard to see why a prosecution for possessing such materials in the home should be protected. While the home does enjoy a special status in constitutional law,[85] still one can be prosecuted for otherwise illegal actions (like violence against family members or drug use) notwithstanding the fact that these actions take place in the privacy of the home. Indeed, the Court has refused to extend the rationale of *Stanley* to the context of child pornography,[86] thereby implicitly recognizing the inter-relationship of use and sale. Thus, either *Stanley* belongs in the integral strand or it should be overruled.[87]

Conversely, the focus on adequacy suggests that *Buckley* and its progeny erred in holding that the right to engage in political speech

entailed a concomitant right to spend money on such speech. The relevant question is whether adequate alternative means for engaging in political expression exist. Where adequate alternatives do exist, the right to free speech may not include the right to spend money. Public funding of campaigns is the obvious example to consider. Just as *Walters* recognizes that the publicly provided non-lawyer representatives made it the case that the right to due process did not include the right to spend money on a lawyer, so too adequate public funding of political campaigns should make it the case that the right of free speech does not include the right to spend money on political speech. Currently, public funding of campaigns is not robust. However, were the Court to embrace the analysis provided here, legislatures would have good reason to enact better-funded public financing systems in the future.

The focus on adequacy that, I argue, underlies the division of cases between the blocked and the integral approach makes an explicit appearance in at least one other campaign finance case in a way that is suggestive. In *Randall v. Sorrell*,[88] the Supreme Court struck down a provision of Vermont's campaign finance law that restricted contributions to state candidates on the grounds that the contribution limits were too low.[89] The *Randall* Court followed *Buckley* in finding that contribution limits are generally constitutionally acceptable; they burden speech, but the infringement on this right is justified by the compelling interest in preventing corruption or the appearance of corruption. However, the specific limit must also be narrowly drawn. There is some "lower bound."[90] If there is too little money available for political activity, "effective [campaign] advocacy" will be compromised.[91] This word—*effective*—is used by the *Randall* Court several times. The Court worries that "the critical question concerns . . . the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*."[92] Similarly, in commenting on the fact that the Vermont law includes, in its definition of a "contribution," services donated by volunteers, the Court finds fault with the law because "the Act may well impede a campaign's ability effectively to use volunteers."[93]

In other words, the adequacy of the system for providing access to the right (here, the ability to participate in politics) is the central factor to use in assessing whether a legislature may limit the ability

of people to use their own money to effectuate the right. Where the system established by limiting contributions does not provide adequate access to the right, then the law that limits the use of private funds is constitutionally infirm. While *Randall v. Sorrell* applies this focus on adequacy to contribution limits and not expenditure limits, the approach underlying the Court's treatment of the relationship of money and rights more generally suggests that this question ought to guide analysis of when and whether expenditure limits violate the First Amendment right to free speech as well.

The Descriptive and the Normative

I recognize that this descriptive account—that a state may restrict the right to spend money in connection with constitutionally protected rights as long as there are adequate alternative ways to access the right—does not explain all the cases as well as it could. Rather, I propose it as the best reconstruction of what appears to underlie the sorting of cases we see in our law. Because neither the Supreme Court nor lower courts have focused on providing an answer to the question of when and why constitutionally protected rights include a concomitant right to spend money, it is not surprising that the case law is only suggestive of an underlying explanatory theory.

In my prior article, "Money Talks But It Isn't Speech," I argue, as mentioned earlier, that the elected branches of government ought to be left to determine which goods are to be distributed via the market and which should not. For example, in our society, we currently distribute most goods via the market, but notably not all. Babies, organs, the vote, and other goods are distributed via non-market principles. Where a constitutional right depends for its exercise on a good that is distributed via the market, the right should be understood to include a concomitant right to spend money to exercise the underlying right. Conversely, where a constitutional right depends for its exercise on a good that is distributed via non-market principles, that right should not be understood to include a concomitant right to spend money.

The descriptive account of the case law offered here and the normative account offered in "Money Talks" are consistent, if

somewhat different in emphasis. The focus on adequacy of access to constitutionally protected rights described in this chapter entails that the state cannot cut off one very important way of getting access to a right—that is, using money—unless there is an alternative available method of gaining access to the right. There is likely to be such an alternative when the good used in connection with the right is distributed through non-market means. For example, because condoms are distributed via the market, individuals must be able to buy them to secure their constitutionally protected right to procreative choice. By contrast, the non-lawyer advocate used to ensure due process in *Walters* is provided via a non-market mechanism. So long as this advocate is adequate, the restriction on the ability to use one's own money to hire a lawyer does not violate due process protections.

Conclusion

This chapter contributes to the project of looking at campaign finance laws through a wider lens. Rather than asking only whether laws that restrict giving and spending money in connection with campaigns violate the First Amendment, we should instead ask the more general question: When do constitutionally protected rights give rise to an attendant right to give or spend money? Specifically, this chapter contributes to that project by exploring what the Supreme Court and other courts have said about this issue already. These cases suggest two conclusions. First, restrictions on the ability to use money to effectuate rights are not always forbidden. Sometimes they are and sometimes they are not. If this is correct, then courts and commentators must develop an account of when rights generate an attendant right to give or spend money and when they do not.

Second, one part of that theory may involve the notion of adequacy. It is not enough to say—as the Supreme Court does in *Buckley*—that money facilitates the exercise of a right. Money would facilitate the right to representation and thus due process of law in *Walters*, yet the ability to spend money on counsel is permissibly restricted. Where an

adequate alternative system—as we see in *Walters*—provides a way to effectuate the right in question, restrictions on the ability to spend money on the underlying right appear to be permissible.