MONEY AND RIGHTS

DEBORAH HELLMAN

I.
INTRODUCTION

Campaign finance laws restrict the ability to give or spend money for political purposes. Supreme Court decisions treat these laws as restrictions on political "speech," which are therefore subject to heightened judicial review.[1] U.S. 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 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.[2] This manner of framing the inquiry is overly narrow, however. The assumption

1. Buckley v. Valeo, 424 U.S. 1, 44–45 (1976) (holding that restrictions on expenditures and contributions are subject to heightened scrutiny).

2. *Id.*

that the right to spend money is inherently protected within the right to political expression itself 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 just as it does the exercise of many other constitutionally protected rights. It would be difficult to obtain an abortion without money, for instance. 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. The right to vote, for instance, does not include the right to buy or sell votes, and the right to sexual intimacy does not include the right to pay a prostitute for sex. I develop these claims in another article, *Money Talks But It Isn't Speech*,[3] in which I argue that we ought to think about restrictions on giving and spending money in politics through a wider lens. Rather than focusing on the connection between money and speech specifically, *Money Talks* suggests we explore the relationship between money and rights in general by examining when constitutional rights include a concomitant right to give or spend money to exercise the right effectively, and when they do not include this concomitant right.[4]

In that article, I contend that that some rights should be understood to include a penumbral right to give or spend money. Abortion exemplifies this sort of right, I argue, because women usually cannot terminate pregnancies without spending money for a doctor's services.[5] However, other rights, notably voting and sexual intimacy, should be understood in the opposite way. The right to vote and the right to sexual intimacy with the partner of one's choosing do not seem to include the right to spend money and this conclusion depends, in part, on the fact that one can vote and have sex without the need to spend or give money.[6]

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 a concomitant right to give or spend money. The final section of that article 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 which depends on that good must include the right to spend money to effectuate it. If a right depends on a good that is not

3. Deborah Hellman, *Money Talks But It Isn't Speech*, 95 MINN. L. REV. 953 (2011).
4. *Id.* at 954.
5. *Id.* at 975–76.
6. *Id.* at 976–78, 980–81.

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.[7]

Money Talks develops this account by testing the theory against hypothetical cases.[8] No state has attempted to limit the right of women to pay abortion providers, so the Court has not needed to address the question whether the right to abort a pre-viable fetus includes the right to spend money to pay a medical provider. The right to spend money for sexual services, i.e. prostitution, is restricted in all states, but these laws have yet to be challenged as inconsistent with the right of sexual intimacy protected in *Lawrence v. Texas*.[9]

This Article continues the project of exploring the connection between money and rights. The overarching question is the same: When do constitutionally protected rights include an accompanying 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 Article, 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.[10] Second, I hope to deepen and to complicate our overly narrow approach to campaign finance issues by embedding questions concerning the constitutionality of campaign finance regulation within the broader discussion of the relationship between money and rights. Restrictions on giving and spending on political activity, I argue, raise general questions about when constitutionally protected rights include the right to give and spend money to effectuate them.

This Article proceeds as follows. Part II describes the two different approaches to the relationship between money and rights that are found in the case law. I call these the "Integral Strand" and the "Blocked Strand." Those cases that adhere to the Integral Strand treat a specific constitutionally protected right as entailing a concomitant right to spend money to effectuate the underlying right. By contrast, cases following the Blocked Strand treat other constitutionally protected rights as not entailing a concomitant right to spend money to effectuate the underlying right. This Part first describes First Amendment cases of each type, then

7. *Id.* at 984–989.

8. *Id.* at 990–995.

9. 539 U.S. 558 (2003) (holding that a state statute criminalizing certain sexual acts between individuals of the same sex violates the Due Process Clause).

10. Louis Michael Seidman has written an interesting and provocative article that does address this general question, but it is one of very few. *See* Louis Michael Seidman, *The* Dale *Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1547 (2008) (arguing that free speech rights can only be given content if the Supreme Court "shield[s] economic entitlements from political revision").

goes on to describe cases focused on other constitutionally protected rights that fall into each category. Part II shows that courts have a choice about whether to treat a particular constitutional right as entailing an accompanying right to spend money. When faced with a new constitutional right, a court therefore must decide whether it falls into the Integral or Blocked Strand. Part III illustrates 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 Supreme Court decision that struck down laws against homosexual sodomy.

Using the cases discussed in Part II and III, Part IV offers 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," Part V suggests that some of the cases described may be incorrectly decided. Part VI explains the ways in which the theory, outlined in Part IV, is consistent with the normative vision I advocate in *Money Talks.*

II.
TWO STRANDS

Constitutional doctrine provides two different answers to the question of how money relates to rights. In what I term "Integral Strand" cases, a constitutionally protected right is treated as including the right to spend money to effectuate the underlying right, whereas in what I refer to as the "Blocked Strand" cases, a constitutionally protected right is not treated as including a concomitant right to spend money to effectuate the right. Interestingly, both the Integral Strand and the Blocked Strand are represented in First Amendment case law, as well as in cases dealing with other constitutionally protected rights. In what follows, I describe the cases that make up the Integral Strand and the Blocked Strand.

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

In *Buckley v. Valeo*,[11] 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. The Court held that the right to spend money on political expression is 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.[12] In a key passage defending its view, the Court explained that "virtually every means of communicating ideas in today's mass society requires the

11. 424 U.S. 1 (1976).
12. *Id.* at 19.

expenditure of money."[13] Because money is necessary for effective political speech, the Court argued that the right to spend money must be protected as part of the free speech right in this context.[14] The right to spend money on political speech is therefore treated as part of the penumbra of the First Amendment right.[15]

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.[16] In fact, in the recent campaign finance case, *Citizens United v. FEC*, the Court treated that view as so obvious and entrenched that it provided neither supporting argument nor citation to *Buckley*.[17]

B. *The Integral Strand Outside of the First Amendment:* Carey v. Population Services

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. The development of the right of procreative liberty offers another prominent example of this approach. In *Griswold v. Connecticut*,[18] the Court recognized the right to procreative liberty when it invalidated a state law restricting the use of contraceptives by married couples.[19] The Court held that the state law at issue was particularly

13. *Id.*

14. *Id.*

15. The idea of a penumbral right was introduced in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). In *Griswold*, the Court reasoned that the specific guarantees in the Bill of Rights depend on corollary, or penumbral, rights which give the enumerated rights "life and substance." *Id.* at 484 (identifying the right of privacy as a penumbra of the Third, Fourth, Fifth and Ninth Amendments and identifying the right to association as a penumbra of the First Amendment). *See also* Hellman, *supra* note 3 (discussing the relationship between money and constitutional rights).

16. *Buckley*, 424 U.S. at 44–45).

17. *See e.g.*, Citizens United v. Fed Election Comm'n, 130 S. Ct. 876, 897 (2010) (holding that campaign finance regulations that limit corporate expenditures on electioneering communication prior to elections amount to "a ban on corporate speech" without citing *Buckley* or providing other authority for treating the spending of money as speech). *Citizens United* does cite *Buckley* at other points in the case, however. *See, e.g., id.* at 898 (citing *Buckley* for the proposition that "[s]peech is an essential mechanism of democracy"); *id.* at 901–02 (invoking the "Buckley Court's" recognition of the important government interest in "the prevention of corruption and the appearance of corruption") (citing *Buckley*, 424 U.S. at 25)). *See also* Hellman, *supra* note 3 at 954–55 (discussing the Court's treatment of the connection between money and speech in *Citizens United*).

18. 381 U.S. 479 (1965).

19. *Griswold* examined the constitutionality of two provisions of a Connecticut law.

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."[20] Seven years later, in *Eisenstadt v. Baird*, the Court relied on an Equal Protection rationale to extend the protection offered in *Griswold* to unmarried couples.[21] While the statute at issue in *Eisenstadt* restricted the distribution of contraceptives, the Court never addressed whether the right to procreative liberty protected by *Griswold* included a right to buy and sell contraceptives.[22]

Carey v. Population Services International, which involved a New York law permitting only pharmacists to sell or distribute contraceptives, most closely addresses the question of whether the procreative liberty protected by the Constitution includes the right to buy and sell contraceptives.[23] The law at issue in *Carey* did not prohibit the sale of contraceptives but instead merely limited who the sellers of contraceptives could be. It thus did not raise the question left open by *Griswold*—namely, whether laws restricting the sale of contraceptives should be treated the same as laws restricting their use. Nonetheless, the Court's discussion and reasoning in the case suggest that a law restricting the sale of contraceptives would not survive constitutional review.

In *Carey*, the Court treated *Griswold* as having defined a constitutionally protected right to make decisions about childbearing, rather than merely having protected the right to *use* contraceptives.[24] 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

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381 U.S. at 480. The first punished any "person who uses any drug, medicinal article or instrument for the purpose of preventing contraception . . . ." and the second punished anyone who helps another to do so. *Id.* Procreational liberty had been recognized before, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942) but there the Court decided the case under the equal protection clause because the law at issue permitted sterilization of some repeat offenders but not others.

20. *Griswold*, 381 U.S. at 485 (emphasis in original).

21. 405 U.S. 438, 453 (1972) (explaining that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child") (emphasis in original).

22. *Id.*

23. 431 U.S. 678, 681–82 (1977). The case also addressed whether provisions of the New York law forbidding the sale of contraceptives to minors under sixteen and forbidding the advertising of contraceptives were unconstitutional. *Id.* The Court struck down both provisions. *Id.*

24. *Id.* at 687 ("*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.").

fetus.[25] Just as those laws made it too difficult for a woman to exercise her right to choose abortion, the Court found that the restriction on who can sell contraceptives likewise made the right to procreative choice too difficult to exercise and was thus similarly constitutionally problematic.[26] 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 their sale.[27] Indeed, the Court directly commented on the constitutionality of a ban on the sale of contraceptives in the course of resolving the more limited ban on who can sell these products. The *Carey* Court's reasoning is telling. 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 unconstitutionally burdens the right to procreative liberty.[28] 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.[29] The right to spend money to obtain contraceptives thus forms part of the right to procreative liberty, because of the close link between a person's ability to access (or adequately access) contraceptives and her ability to buy them.

C. *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*,[30] the Court adopted the opposite approach regarding whether the First Amendment right at issue entailed a right to spend money. While the Court recognized a constitutionally protected right to read and possess obscene materials in the home, it held that this right did not include a penumbral right to spend money to buy this material, nor a related right to sell it.[31]

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25. *Id.* at 688.

26. *Id.* (reasoning that "[a]n instructive analogy is found in decisions after *Roe v. Wade* . . . that held unconstitutional statutes that did not prohibit abortions outright but limited in a variety of ways a woman's access to them").

27. *Id.* at 689.

28. *Id.*

29. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) ("Constitutional protection was extended to the sale and distribution of contraceptives in *Carey v. Population Services International*"); Curtis Waldo, *Toys Are Us: Sex Toys, Substantive Due Process, and the American Way*, 18 COLUM. J. GENDER & L. 807, 812 (2009) ("[T]he Court ruled in *Carey v. Population Services* that prohibiting the sale of contraceptives was equivalent to prohibiting the use of contraceptives for purposes of fundamental rights analysis, further extending the right of privacy. As prohibiting the sale of contraceptives placed a 'significant burden' on the exercise of a fundamental right, such laws were unconstitutional, even though they regulated commercial relationships.")

30. 394 U.S. 557 (1969)

31. *See id.* at 567–68.

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 because the "mere private possession of obscene matter cannot constitutionally be made a crime."[32] However, both *Stanley* itself and subsequent decisions of the Court emphasized that this constitutionally protected right to possess obscene materials does not also entail a right to buy or disseminate them.[33] Indeed, the *Stanley* Court made clear that its holding did not disturb prior decisions affirming the constitutionality of laws prohibiting the sale of obscene materials,[34] As Justice Marshall's majority opinion 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."[35] In other words, the right to read or possess obscene materials in one's home does not include a right to buy or to sell these materials. While it is hard to see how Stanley or others would obtain pornography other than by purchasing it, the right to read it does not include the right to spend money to get it.

Following *Stanley*, several cases pushed on the viability of this distinction between viewing obscene material and spending money to get it. Given that most people have virtually no ability to obtain pornography without purchasing it—or at least had no ability to obtain it prior to the age of the Internet—how would Stanley come to obtain these materials to read privately in his home unless he could buy them and unless someone else had a right to sell them?[36] 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.[37] In *United States v. Reidel*, the

32. *Id.* at 559.

33. *See, e.g., id.* at 567 (distinguishing *Roth v. United States*, 354 U.S. 476 (1957), which upheld a statute barring the public distribution of obscene materials, on the grounds that the distribution of obscene materials implicated different state interests than mere possession did).

34. *Id.* at 568.

35. *Id. See also* Roth v. United States, 354 U.S. 476, 485 (1957) (upholding conviction for mailing obscene materials); Alberts v. California, 354 U.S. 476, 481 (1957) (upholding conviction for "lewdly keeping for sale obscene and indecent books, and [for] writing, composing and publishing an obscene advertisement of them").

36. Justice Black pointed out the tension in the distinction in his dissent in *United States v. Thirty-Seven Photographs* when he noted that without the ability to purchase obscene material, a man could possess it "only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room." 402 U.S. 363, 382 (1971) (Black, J., dissenting).

37. *See* Smith v. United States, 431 U.S. 291, 307 (1977) ("*Stanley* did not create a right to receive, transport, or distribute obscene material, even though it had established the right to possess the material in the privacy of the home"); United States v. Orito, 413 U.S. 139, 141 (1973) (holding that *Stanley*'s tolerance of obscenity within the privacy of the home created no "correlative right to receive it, transport it, or distribute it"); United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971) ("That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that

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."[38] 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.

D. The Blocked Strand Outside of the First Amendment: Due Process and Procreative Liberty

Just as both the integral and the blocked approaches 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 of the Blocked Strand in the context of due process and then moves on to discuss the Blocked Strand in the context of procreative liberty.

1. Due Process

In *Walters v. National Association of Radiation Survivors*,[39] 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. 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.[40] In other words, the right to due process protected by the Fifth Amendment 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 for representation in a claim for veteran's benefits to ten dollars.[41] The Court agreed with the challengers that this limit effectively denied veterans the right to hire private counsel to represent them in claims for benefits.[42] Nonetheless, the Court upheld the law despite the plaintiffs' argument that the fee limit violated the Due Process and First

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he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce"); United States v. Reidel, 402 U.S. 351, 354–55 (1971) (rejecting the argument that *Stanley* created a right to distribute or sell obscene material).

38. 402 U.S. 351, 402 (1971).

39. 473 U.S. 305 (1985).

40. *Id.* at 334.

41. *Id.* at 307.

42. *See id.* at 323 (acknowledging that the fee limitation makes lawyers less freely available but approving of Congress's desires to protect veterans from having to share their benefits awards with their attorneys and to create a more informal, less adversarial system).

Amendment rights of veterans.[43]

Justice 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.[44] In reaching this conclusion, Rehnquist relied on the analysis in *Mathews v. Eldridge*[45] which sets forth the factors to be considered in determining when additional process is required before the termination of benefits.

What is striking about Rehnquist's application of *Mathews* is that it takes no account of 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 Stevens pointed 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."[46]

Notwithstanding this significant difference between the facts of *Walters*, where the private party would have paid for the added process of counsel, and those in *Mathews*, where the government would have shouldered the costs of the hearings, the Court upheld the restriction on the use of private funds to hire lawyers for several reasons.[47] First, the government's interest in ensuring that the benefits awarded are not shared with lawyers, though paternalistic, was justifiable.[48] Second, if veterans were allowed to hire private attorneys, a more adversarial and complex process might develop, which in turn might press all veterans to hire lawyers.[49] Finally, and most importantly the process provided by the Veterans' Administration sufficiently safeguarded the interests of veterans.[50] 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.[51] It emphasized that the scheme set up by the statute provided veterans with non-lawyer representatives, noting that there was

43. *Id.* at 334–35.

44. *Id.* at 333.

45. 424 U.S. 319 (1976) (holding that evidentiary hearings are not required prior to the termination of disability benefits).

46. *Walters*, 473 U.S. at 369–70 (Stevens, J., dissenting) (footnotes omitted).

47. Congress later amended the act at issue in this case and replaced it with a system that allowed veterans to hire lawyers only after the decision of the Board of Veterans Affairs becomes final. This system was upheld in *In re* Fee Agreement of James W. Stanley, 9 Vet. App. 203, 215 (1996).

48. *Walters*, 473 U.S. at 322–23.

49. *Id.* at 326.

50. *Id.* at 334.

51. *Id.* at 331.

insufficient evidence to show that some cases are too complex to be handled adequately by the non-lawyer representatives.[52] 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 private lawyers.[53]

2. 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 is becoming more and more common.[54] One such method, surrogacy, and in particular paid contract surrogacy, has been controversial at least since the well-known case, In re *Baby M*.[55] In that case, the New Jersey Supreme Court refused to enforce a surrogate parenting agreement on the grounds that it violated both public policy and state statutes that prohibited the sale of babies and regulated the termination of parental rights.[56] In the years since the *Baby M* decision, many 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 enforced contractual agreements exchanging gestational services for pay.[57] Others have permitted both paid

52. *Id.*

53. This conclusion is also consistent with the Supreme Court's decision in *United States Department of Labor v. Triplett.* 494 U.S. 715 (1990) (upholding the discipline of a lawyer for improperly collecting fees in violation of the Black Lung Benefits Act and holding that the fee scheme in that act, which requires that attorney fees be reasonable, approved by the department, and collectible only at the close of a successful claim, does not violate the Due Process Clause of the Fifth Amendment because there was insufficient evidence to show that this scheme deprived claimants of adequate representation).

54. Daniel J. DeNoon, *CDC: Half of IVF Babies Are Twins, Triplets, or Higher Multiple Births*, WEB MD (June 20, 2008), http://www.webmd.com/infertility-and-reproduction/news/20080620/1percent-of-newborns-now-test-tube-babies (stating that "the popularity of IVF is dramatically increasing").

55. *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

56. *Id.* at 1240.

57. In Florida, it is prohibited to pay "valuable consideration" in order to purchase, sell, or transfer parental rights of a child, unborn fetus, or a "fetus identified in any way but not yet conceived." FLA. STAT. § 63.212(1)(h) (2007). However, the law does allow payments made for "preplanned" adoptions. As defined in FLA. STAT. § 63.213(6)(h)

and unpaid surrogacy but, like New Jersey, refused to enforce these agreements.[58] Still others have permitted only unpaid surrogacy, forbidding or criminalizing payments to a surrogate that exceed reimbursement for actual medical expenses.[59]

Attempts by states to prohibit only paid contract surrogacy raise the question whether the right of procreative liberty includes within its ambit the right to spend money to effectuate this liberty. If procreative liberty is a constitutional right, and the ability to procreate via surrogacy is a protected part of that right, may states constitutionally forbid paid contract surrogacy?

In 1992, the Court of Appeals of Michigan addressed this question in *Doe v. Attorney General*.[60] In *Doe*, infertile couples and prospective surrogate mothers asked the court for a declaratory judgment that the Michigan Surrogate Parenting Act, violated their constitutional rights.[61] While the parties initially disputed what the Act said, the trial court found that "the statute prohibited surrogacy contracts where the surrogate mother receives compensation and agrees to voluntarily relinquish her parental rights" but that it was "still permissible to enter into a surrogacy contract where no compensation, other than medical expenses, is paid to the mother."[62] The plaintiffs argued that "if the Surrogate Parenting Act were interpreted as being an outright ban on surrogacy contracts for pay,

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(2007), the intended parents may pay for all reasonable legal, medical, and living expenses (as well as reasonable compensation for inconvenience, discomfort, and medical risk) of the volunteer mother. Illinois allows gestational surrogacy contracts. 750 ILL. COMP. STAT. 47/1 (2006). Through the Gestational Surrogacy Act, any child born through gestational surrogacy shall automatically become the legal child of the intended parents. 750 ILL. COMP STAT. 47/15 (2006).

58. In California, for example, a court refused to enforce a surrogacy contract, although the state has permitted surrogacy agreements. *See* In re *Marriage of Moschetta*, 25 Cal. App. 4th 1218, 1222 (Cal. Ct. App. 1994) (holding that a surrogate contract without a formal consent from the biological mother was unenforceable because "enforcement of a traditional surrogacy contract *by itself* is incompatible with the parentage and adoption statutes already on the books" (emphasis in original)).

59. Nevada allows surrogacy contracts, but "[i]t is unlawful to pay or offer to pay money or anything of value to the surrogate except for the medical and necessary living expenses related to the birth of the child as specified in the contract." NEV. REV. STAT. ANN. § 126.045(3) (2008). Similar to Nevada, New York allows for payments of reasonable medical expenses related to in vitro fertilization or artificial insemination incurred by the birth mother. N.Y. DOM. REL. LAW § 115(1)(b) (McKinney 1999). However, the state prohibits any party related to the surrogacy or gestational contract "to request, accept, receive, pay or give any fee, compensation or other remuneration, directly or indirectly." *Id.* § 115(2)(a). If the intended parents or the birth mother violates this provision, they are subject to a fine not to exceed $500. If this provision is violated by a third party in connection with arranging a surrogacy or gestational contract, then a fine not to exceed $10,000 will be imposed; a second offense shall be deemed a felony. *Id.* § 115(2)(b).

60. 487 N.W.2d 484 (Mich. Ct. App. 1992).

61. *Id.* at 485.

62. *Id.*

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."[63]

The court disagreed. Although it found that would-be parents and surrogates did have a protected liberty interest in procreating via surrogacy,[64] the court nevertheless upheld the ban on paid surrogacy.[65] However, the court also found that the compelling interests offered by the legislature on behalf of the law outweighed the Act's "intrusion into the plaintiffs' right to procreate in the surrogacy context.[66] This formulation of the court's resolution of the case suggests that the court recognized the plaintiffs' liberty interest in procreating 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 of the case were correct, *Doe* would stand for the proposition that a prohibition on spending money in connection with the exercise of a constitutional right does not ultimately violate the right, *even when spending money is understood to be included within the penumbra of that right.* However, there is good reason to think that the court in *Doe* did not in fact believe that the right to spend or accept payment for surrogacy is part of the protected liberty interest in procreating that it recognized the would-be-parents to possess. If so, the case stands for a stronger proposition: namely, that the procreative liberty interest protected by the Constitution does not always include the right to spend or receive money.

The Michigan Court distinguishes paid and unpaid surrogacy on the grounds that payment commodifies children and procreative labor.[67] This rationale belies its assertion that it recognizes a protected liberty interested in procreating via paid surrogacy that is outweighed by the harms it may cause. These harms are not contingently related to paying a surrogate to

63. *Id.* at 485. In order to avoid constitutional problems, they suggested that the statute should instead be interpreted to prohibit only surrogacy contracts in which payment was made contingent upon the relinquishment of parental rights (rather than merely coincidental with it). *Id.*

64. *Id.* at 486 (agreeing that "the Due Process Clause of the state and federal constitutions, together with the penumbral rights emanating from the specific guarantees of the Bill of Rights, protect 'individual decisions in matters of childbearing from unjustified intrusions by the State'" (quoting Carey v. Population Services Int'l, 431 U.S. 678, 687 (1997))).

65. *Id.* at 489.

66. *Id.*

67. The court cited the state interest in "preventing children from becoming mere commodities," 487 N.W.2d at 486, and its interest in avoiding turning women into "breeding machines" *Id* at 487.

gestate a child. Rather, for those who believe that paid surrogacy inappropriately commodifies children and women's procreative capacity, paying for children and procreative labor is to value them in the wrong sort of way.[68] 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 to do this that is then *outweighed* by the negative consequences of doing so. Rather, if one believes that buying children and women's reproductive capacity values these things in the wrong sort of way—as the court in *Doe* appeared to believe—then the harms the court cites are the necessary correlates of this practice.

Doe is interesting because it provides an example of a judicial decision in which the court finds 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. Therefore, one had a protected liberty interest in procreating via surrogacy, but one does not have a protected liberty interest in procreating via surrogacy for pay.

III.
A LIVE DEBATE BETWEEN THE INTEGRAL APPROACH AND THE BLOCKED APPROACH

In *Lawrence*, the Supreme Court struck down a Texas statute that prohibited non-coital sexual intimacy between same-sex partners on the grounds that it violated the individual liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.[69] The Fifth and Eleventh Circuits have both had to decide whether the same is true of state laws banning the sale of sexual devices.[70] They have had to decide, in other words, what are the implications of the holding in *Lawrence* for the right to buy sex toys.

In answering this question, the Circuits differed with regard to how they defined the right articulated in *Lawrence*[71] and whether *Lawrence*'s

68. *See, e.g.*, ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 168–85 (1993).

69. *Id.* at 578–89.

70. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 741 (5th Cir. 2008) (examining the constitutionality of a Texas statute making it a crime to promote or sell sexual devices); Williams v. Morgan, 478 F.3d 1316, 1318 (11th Cir. 2007) (examining the constitutionality of an Alabama statute prohibiting the commercial distribution of devices "primarily for the stimulation of human genital organs").

71. The Eleventh Circuit found that *Lawrence* merely declared unconstitutional criminal prohibitions on consensual homosexual sodomy and refused to extrapolate from it a broader fundamental right to sexual privacy. Williams v. Attorney General of Alabama, 378 F.3d. 1232, 1236 (11th Cir. 2004). In contrast, the Fifth Circuit characterized the right created in *Lawrence* broadly as the "right to be free from governmental intrusion regarding 'the most private human contact, sexual behavior.'" *Reliable Consultants*, 517 F. 3.d at 744

failure to use the language of fundamental rights is significant.[72] What is important for our purpose here, however, is the way each circuit treated the issue of whether the right to possess sexual devices implicates a concomitant right to buy and sell these devices.

Although both the Fifth and Eleventh Circuits viewed *Lawrence* as providing constitutional protection for the right to possess and use sexual devices, they came to opposite conclusions about whether *Lawrence* means that states can no longer constitutionally prohibit the purchase or sale of such devices.[73]

In *Williams v. Morgan*, the Eleventh Circuit found that *Lawrence* protected the use of sexual devices in private but did not extend constitutional protection to the public, commercial sale of such devices.[74] The court emphasized the significance of the distinction between use and sale, stressing that "plaintiffs here continue to possess and use such devices," and that this was a liberty not threatened by the statute.[75] Prohibitions on sales of sexual devices are constitutionally permissible, the court found, because "[s]tates have traditionally had the authority to regulate commercial activity they deem harmful to the public."[76] In *Williams*, the Eleventh Circuit therefore adopted the Blocked Approach and, consistent with *Stanley* and *Walters*, found that recognition of a constitutionally protected right—here the right to possess or use sexual devices privately—does not entail a concomitant right to buy or sell these devices.[77]

(quoting *Lawrence*, 539 U.S. at 558).

72. The Eleventh Circuit reasoned that because *Lawrence* did not specifically invoke strict scrutiny or engage in a *Glucksberg* fundamental rights analysis, it was decided on rational basis grounds and therefore did not recognize a new fundamental right. *Williams*, 378 F.3d at 1238. On the other hand, the Fifth Circuit reasoned that although the *Lawrence* decision did not specifically categorize the right as fundamental, it did not need to do so because it gave specific instructions that interests in public morality cannot sustain a statute infringing on the right to sexual privacy. *Reliable Consultants*, 517 F.3d at 745.

73. The Eleventh Circuit found that *Lawrence* offered protection for private, non-commercial sexual activity. *Williams*, 478 F.3d at 1322. The Fifth Circuit found that *Lawrence* provided protection from governmental intrusion into sexual conduct. *Reliable Consultants*, 517 F.3d at 744.

74. 478 F.3d at 1322–23 (explaining that "[t]his statute targets *commerce* in sexual devices, an inherently public activity, whether it occurs on a street corner, in a shopping mall, or in a living room" and concluding that "because the challenged statute in this case does not target private activity but public, commercial activity, the state's interest in promoting and preserving public morality" is sufficient to justify it) (emphasis in original)).

75. *Id.*

76. *Id.*

77. Notably, the *Williams* court declined to find that *Lawrence* held that sexual privacy is a fundamental right. As a result, the court in *Williams* applied only rational basis review. However, the court here treats the right to use sexual devices as analogous to the right to sexual privacy articulated in *Lawrence*. While *Lawrence* may decline to use the language of fundamental rights, clearly a right of some importance is protected. Thus what the Eleventh Circuit has to say about use versus sale is relevant to the questions addressed in this article.

The Fifth Circuit adopted the opposite view in *Reliable Consultants v. Earle*.[78] As in *Williams*, the court in *Reliable Consultants* explored the implications of *Lawrence* for laws banning the sale of sexual devices, 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."[79] Drawing on the decisions in *Carey* and *Griswold*, the Fifth Circuit found that restrictions on the sale of sexual devices unconstitutionally burden the right to use such devices privately.[80] 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."[81]

After *Lawrence*, both the Fifth and Eleventh Circuits thought it necessary to address the decision's implications 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.

IV.
GENERATING A THEORY

The preceding Parts looked at what courts have said about whether various constitutionally protected rights—such as the right to procreative liberty, the right to sexual privacy, and the right to freedom of speech—include within their ambit the right to spend money to effectuate them. This limited body of case law suggests that some rights include an accompanying right to give and spend money to effectuate the underlying right. Others 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 Court for why a given right includes or does not include a concomitant right to spend money, we can begin to articulate a more general theory of the relationship between money and rights.

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*. The restriction on spending money to exercise one's right to due process was upheld in part because the Court found that the alternative system for resolving benefits claims provided by the Veterans

78. 517 F.3d 738 (5th Cir. 2008).
79. *Id.* at 744.
80. *Id.*
81. *Id.*

Administration granted veterans adequate process.[82] While the Court acknowledged the District Court's conclusion that having a private lawyer provided veterans some small advantage in these cases,[83] it concluded that "the evidence adduced before the District Court as to the 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."[84] Admittedly, this decision rests in part on the Court's understanding that due process is "a flexible concept."[85] However, the Court's decision to apply that flexible approach not only to determinations about whether the state 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 the right to purchase contraceptives, which was recognized in *Carey*.[86] The Court explained that the restrictions at issue were an unconstitutional infringement on the right to make decisions about childbearing "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 . . . ."[87] Because one must be able to purchase contraceptives, and do so with relative ease, in order to adequately exercise one's constitutionally protected right to make decisions about childbearing, laws restricting or limiting the sale of contraceptives violate the Due Process Clause, in the Court's view.

Buckley v. Valeo similarly focuses on whether there is an 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."[88] It is because money is necessary to political expression, in the Court's view, that restrictions on the ability to spend and contribute to political campaigns constitute restrictions 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

82. *See id.* at 334.

83. *Id.* at 315.

84. *Id.* at 334.

85. *See id.* at 320.

86. *Carey*, 431 U.S. at 681–82 (striking down New York law placing limits on sale of contraceptives).

87. *Id.* at 688.

88. *Buckley*, 424 U.S. at 19.

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."[89] In other words, the Court found that limitations on contributions still allowed for adequate 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 (*Carey*, *Buckley*—expenditures), the state must permit individuals to use private funds to effectuate the underlying right.[90]

This approach to the connection between money and rights is not unique to U.S. constitutional doctrine. In *Chaouilli v. Quebec*, the Supreme Court of Canada (SCC) heard a challenge to a Quebec law that prohibited the purchase of private health insurance covering any service provided by the public health service.[91] The SCC struck down the law, on the grounds that it violated the rights to "life and security of the person" protected by the Canadian Charter of Rights and Freedoms. Three members of the Court asserted that the law also violated the right to "personal inviolability" protected by the Quebec Charter of Human Rights and Freedoms.[92] These rights are not violated, the Court found, simply because the law restricts the right of Quebeckers to purchase their own health insurance. Rather, they are violated because "the result is to subject Canadians to long delays with resultant risk of physical and psychological harm."[93] The Court emphasized these delays, and the harms that result from them, as the source of the violation. The basis of the decision was not, therefore, the assertion that the state has an obligation to provide health care to all. Instead, it was that, "[b]y imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of s. 7 of the *Charter*."[94]

This statement suggests two principles. First, it suggests that when the state restricts a person's ability to spend her own money in connection with the exercise of a protected right, it must provide an adequate alternative means by which she can exercise or effectuate that right. This principle is

89. *Id.* at 21.

90. So far, this Article has only considered the question whether restrictions on the right to spend one's own money on the exercise of a right violates that right. One obvious question that emerges from the theory is whether there is a positive right to adequate access to the means to effectuate constitutionally protected rights.

91. Chaoulli v. Quebec, [2005] 1 S.C.R. 791, 2005 SCC 35 (Can.).

92. *Id.* at ¶¶ 100, 102.

93. *Id.* at ¶ 108.

94. *Id.* at ¶ 105.

the primary implication of the court's decision. Second, the reference to the state's failure to "provide public health care of a reasonable standard within a reasonable time" suggests that if the province of Quebec were to provide health care of reasonable quality and timeliness, then the province could restrict the ability of Quebeckers to spend their own funds to purchase health insurance.

V.
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 *Buckley* 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.[95] These cases exemplify 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 played no role in the Court's refusal, in subsequent cases, to extend *Stanley* to the right to buy and sell obscene materials.[96] Thus, the adequacy theory suggests either that the right to read obscene materials at home includes the right to buy and sell this material (unless it is freely available) or that *Stanley* itself was wrongly decided. If one accepts that obscene materials are of low value and are outside of the First Amendment's protection, it is hard to see why a prosecution for possessing

95. *See supra* Part II(C).

96. *See, e.g.*, Smith v. United States, 431 U.S. 291, 307 (1977) ("*Stanley* did not create a right to receive, transport, or distribute obscene material, even though it had established the right to possess the material in the privacy of the home."); United States v. Orito, 413 U.S. 139, 141 (1973) (holding that *Stanley*'s tolerance of obscenity within the privacy of the home created no "correlative right to receive it, transport it, or distribute it"); United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971) ("That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce."); United States v. Reidel, 402 U.S. 351, 354–55 (1971) (rejecting the argument that *Stanley* created a right to distribute obscene material).

such materials in the home should be prohibited. While the home does enjoy a special status in constitutional law,[97] one can still be prosecuted for otherwise illegal actions, such as violence against family members or drug use, even if these actions take place in the privacy of the home. Indeed, the Court has refused to extend *Stanley's* rationale to the context of child pornography,[98] thereby implicitly recognizing the interrelationship of use and sale. Thus, either *Stanley* belongs in the Integral Strand or it should be overruled.[99]

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* recognized that the existence of publicly provided non-lawyer representative makes it possible for the government to prohibit individuals from spending money to procure private counsel without running afoul of the Due Process Clause, so too the public funding of political campaigns should make it possible for the government to limit campaign financing without running afoul of the First Amendment.

The focus on adequacy that underlies the division of cases between the Blocked and the Integral Approaches makes an explicit appearance in at least one other campaign finance case in a way that is suggestive. In *Randall v. Sorrell*, a plurality of the Supreme Court struck down a provision of Vermont's campaign finance law that restricted contributions to state candidates because it found the limits simply too low.[100] The

97. *Compare* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (emphasizing the importance of privacy in the marital bedroom) *and* Lawrence v. Texas, 539 U.S. 558, 562 (2003) (stressing that "[i]n our tradition the state is not omnipresent in the home"), *with* Paris Adult Theater I v. Slaton, 413 U.S. 49, 65 (1973) (refusing to apply *Stanley* because a theater did not warrant the same kind of privacy as a home).

98. *See* Osborne v. Ohio, 495 U.S. 103 (1990) (refusing to extend the right created in *Stanley* to at-home possession of child pornography).

99. *Stanley* has been so limited by subsequent Supreme Court decisions that it only applies to a very narrow right: the right to possess pornographic materials (not involving children) in one's own home for one's own personal use. This narrow reading suggests that the holding in the case may ultimately be limited to its facts. The Court has held that *Stanley* did not create a correlative right to receive or distribute obscene material. *See supra* note 96. The Supreme Court has also limited *Stanley* to the physical confines of a personal residence. *See* Paris Adult Theater I v. Slaton, 413 U.S. 49, 65 (1973) (refusing to apply *Stanley* to a prohibition on adult movie theaters on the grounds that a movie theater is not a private residence); United States v. Orito 413 U.S. 139 (1973) (refusing to apply Stanley to possession of obscene materials in private vehicles). Additionally, the right in *Stanley* does not apply to possession of child pornography, even if it is in a private residence. *See supra* note 98.

100. Randall v. Sorrell, 548 U.S. 230, 236–37 (2006).

Randall plurality followed *Buckley* in finding that contribution limits are generally constitutionally acceptable because, although the limits burden speech, the infringement on this right is justified by the compelling interesting in preventing corruption or the appearance of corruption.[101] However, the specific limit must be narrowly drawn and is subject to some "lower bound."[102] If too little money is available for political activity, "effective [campaign] advocacy" will be compromised.[103] The *Randall* plurality uses this word—effective—several times. The plurality worries that "the critical question concerns . . . the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*."[104] Similarly, in commenting on the Vermont law's inclusion of services donated by volunteers in its definition of "contribution," the plurality finds fault with the law because "the Act may well impede a campaign's ability effectively to use volunteers."[105]

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 state 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 of means to effectuate the constitutionally protected right in the context of contribution limits and not expenditure limits, the approach underlying the plurality's treatment of the relationship between money and rights suggests that this question ought to guide analysis of when and whether expenditure limits violate the First Amendment right to free speech as well.

VI.
THE DESCRIPTIVE AND THE NORMATIVE

This Article's primary goal has been to explore the ways in which courts have viewed the relationship between money and rights. Parts II and III described the two answers—termed the Integral Approach and Blocked Approach—found in the case law. Because there are two alternatives, courts must determine whether a particular constitutional right includes an accompanying right to spend money in particular contexts. In Part IV, I proposed a theory that underlies this account and explained why some rights belong in the Integral Strand and some in the

101. *Id.* at 248.

102. *Id.* (explaining that "[a]t some point the constitutional risks to the democratic electoral process become too great").

103. *Id.*

104. *Id.* at 255.

105. *Id.* at 260.

Blocked Strand. The theory that best explains the way that the Supreme Court and other courts sort rights between the Integral and Blocked Approaches appears to be *adequacy.* As Part IV explains, 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. In that Part, I do not endorse or defend that view, merely describe it.

In addition, I recognize that this account does not explain all the cases as well as it could. Rather, I propose it as the best reconstruction available of the rationale that 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 offer the reciprocal contribution. That article provides an argument for my own view about how courts *ought* to address the connection between money and rights. There, 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, with some notable exceptions. Babies, organs, and the vote are among the things 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 found in the case law 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 article implies that the state cannot cut off one very important way of getting access to a right, i.e. using money, unless there is an alternative method of accessing the right. Such an alternative is likely to be available 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. Moreover, the normative account explains

why we ought to be concerned both that the government not restrict access to rights, as the focus on adequacy stresses, and that the elected branches of government retain the ability to determine which goods belong in the market and which do not.

VII.
CONCLUSION

This Article is intended to contribute 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 Article 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. If this is correct, then courts and commentators must develop a theory to explain when rights generate an attendant right to give or spend money and when they do not.

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. Second, one part of that theory may involve the notion of adequacy. Where an 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.