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The Contradictory Messages of Rehnquist-Roberts Era Speech Law

David Kairys, Temple University

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By David Kairys

INTRODUCTION: QUANTITY LIMITS ON SPEECH

Constitutional invalidation of laws limiting campaign financing as violations of free speech initially faced two main obstacles in well-established First Amendment law, both addressed in the opening passages of Buckley v. Valeo under the heading “General Principles”: the limits were imposed on money, not directly on speech; and they were not prohibitions, but limits on amounts of money. The first obstacle was removed by the controversial conclusion that money is speech. The second was overcome without noticeable controversy at the time or since by reliance on what the majority described as an established first amendment principle – government may not limit the quantity of protected speech.

1 Professor of Law, Temple University, and, when this essay was drafted, Visiting Professor of Law, University of Miami. I appreciate research assistance by Cynthia Morgan, Eric Motylinski, and Sean Siperstein. © 2010 by David Kairys.
3 A third obstacle was that even protected speech is not absolute but can be overcome if government has a “compelling interest” and used the “least restrictive” means. See, e.g., Hill v. Colorado, 530 U.S. 703, 725-26 (2000) (upholding Colorado statute restricting content-based speech after finding it was narrowly tailored to serve the compelling state interest of ensuring its citizens were able to obtain medical treatment unobstructed); Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (upholding New York regulation on noise in Central Park after finding New York City had a substantial interest in protecting citizens from unwelcome noise and that the narrowly tailored requirement was satisfied so long as the city’s interest “would be achieved less effectively absent the regulation”). In this regard, the Buckley Court was criticized for failing to give sufficient weight to the destructive and undemocratic role of large amounts of money in elections. See, e.g., Richard Briffault, Corporations, Corruption, and Complexity: Campaign Finance after Citizen’s United, 20 CORNELL J.L. & PUB. POL’Y 643, 651 (2011) (“Since Buckley v. Valeo, however, modern campaign finance jurisprudence has...dismissed the idea that disproportionate resources for electoral activity and unequal campaign spending are problems that can be addressed by limits on spending.”); J. Skelly Wright, Politics and the Constitution: Is Money Speech?, 85 YALE L.J. 1001, 1020 (1976) (arguing that the campaign reform law at issue in Buckley promoted political dialogue on the merits, as opposed to the ceilings the Court found unconstitutional which actually only took limited political advantages away from wealthy citizens unrelated to any merits); J. Robert Abrahaim, Note, Saving Buckley: Creating a Stable Campaign Finance Framework, 110 COLUM. L. REV. 1078, 1085-86 (2010) (arguing that Buckley focused on campaign contributions corrupting individual candidates, as opposed to the danger of those contributions corrupting the democratic system as a whole). Also, the limits challenged in Buckley were at monetary levels that preserved the system of individual, nonpublic campaign financing.
4 Some have raised questions about the quantity analysis in the campaign finance cases. See Vincent Blasi, Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First
Buckley, *Citizens United v. FEC*\(^5\) and all the protective campaign financing cases in between treat limits on the quantity of speech the same way courts have long treated complete prohibitions or bans of speech – with strict scrutiny, with no consideration of the adequacy of the allowed quantity or alternative avenues of speech, and with the familiar rhetoric of democracy, empowerment and self-expression that regularly accompanies invalidations of violations of the first amendment.\(^6\) “Discussion of public issues and debate on the qualifications of candidates,” the Buckley court said in its per curiam voice,

> are integral to the operation of the system of government established by our Constitution. . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential . . . . [The challenged act] impose[s] direct quantity restrictions on political communications and association . . . .\(^7\)

Campaign finance limits are prohibited because they “necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”\(^8\)

It’s an appealing idea. Government should not dictate or restrict the amount or intensity of views expressed by speech that is protected by the First Amendment. A limit on the quantity of speech represses some quantum of speech and may reduce the clarity, depth, impact, and reach of the message. Once one accepts that money is speech, why not treat the prohibition of each additional dollar over a money limit as if it were a complete ban on speech?

On the other hand, there are reasons not to extend heightened constitutional protection to unlimited quantities of speech or money (or anything else). Government actions that impact

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\(^5\) *Amendment After All*, 94 *COLUM. L. REV.* 1281 (1994) (spending limits are content-neutral and therefore should be presumed constitutional); John Bonifaz, Gregory Luke & Brenda Wright, *Challenging Buckley v. Valeo: A Legal Strategy*, 33 *AKRON L. REV.* 39 (1999) (arguing that *Buckley’s absolute protection for the quantity of political expression is not supported in theory or reality*).

\(^6\) *Buckley*, 424 U.S. at 19; *Citizens United*, 130 S. Ct. at 898.

\(^7\) 424 U.S. at 16-17. The Court calls it a “direct” quantity limit on speech based on its conclusion that money is speech; the quantity limits were on amounts of money.

\(^8\) 424 U.S. at 17-19.
speech in any way may limit its quantity while having little or no impact on the strength, clarity or reach of the message; the quantity allowed and alternative avenues may be quite sufficient; the quantity disallowed may be insignificant, or may interfere with others or significant societal interests; accommodating the unlimited quantity demands of some may limit the quantity or means available to others or exceed the capacity of government and society. Extremely large quantity demands can only be made by the wealthiest among us; allowing such demands without limits based on the unlimited-quantity principle could seriously threaten the integrity of the marketplace of ideas and the electoral system, and undermine democracy itself.¹⁰ Strict-scrutiny oversight of all regulations and actions that limit the quantity of speech could invalidate too much, undermine our most fundamental constitutional, social and cultural values, and become the main work of the judiciary.

But whatever the merits of the quantity-limits principle, and despite its centrality to almost four decades of invalidation of campaign financing reforms – the Rehnquist-Roberts era¹⁰

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¹⁰ The role of money in elections, controversial for most of our history, gained widespread criticism since Buckley was decided in 1986. The criticism has grown as the amounts of money have increased, reaching widespread condemnation in the 2012 elections with the advent of “super PACS” and the obvious ability of individuals and corporations willing and able to spend huge amounts of money to affect the issues addressed, tenor and outcome of elections (this essay was finalized in February, 2012). See, e.g., Jonathan Bingham, Democracy or Plutocracy? The Case for a Constitutional Amendment to Overturn Buckley v. Valeo, 486 ANNALS OF THE AM. ACAD. OF POLITICAL & SOC. SCI. 103, 105 (1986) (arguing for the reversal of Buckley because “escalating campaign costs pose a serious threat to the quality of government”); Gregory Abbott, House Administration Democrats Urge Oversight on the Role of Money in Elections and the DISCLOSE 2012 Act, The Comm. on House Admin. Democratic Office (Feb. 15, 2012), http://democrats.cha.house.gov/press-release/house-administration-democrats-urge-oversight-role-money-elections-and-disclose-2012 (“According to recent polling, more than three-quarters of voters think that campaign finance reform is a key issue for the country, and the majority believes secret money plays too great a role in campaigns.”); Elizabeth Drew, Can We Have a Democratic Election, N.Y. REV. OF BOOKS (Jan 24, 2012) (“The election system is being reshaped by the Super PACs and the greatly increased power of those who contribute to them to choose the candidates who best suit their purposes. But…. little notice is taken of the danger to the democratic system itself.”).

¹⁰ What I am calling the Rehnquist-Roberts era and approach starts not when William Rehnquist became chief justice in 1986, but in the mid-1970s, and on some issues a little before that, when he and other mostly self-described conservative justices more or less dominated the Supreme Court. They sometimes drew the support of justices not self or usually described as conservative; this is significant but not for present purposes – to understand and assess the Rehnquist-Roberts era’s approach to and effect on free speech. They have also fell short of a majority on some issues, and though their perspectives in dissent are certainly relevant to an understanding of their vision of speech law, the focus here is cases and trends in which they were in the majority.
– it is not a principle at all, at least not in the sense that principles have general applicability. In the campaign finance cases, the no-quantity-limits principle is presented as obvious, simply asserted without need for support in reasoning or precedent. But the only precedents the campaign finance decisions cite, or can cite, are each other. Outside of the campaign finance context, decisions regularly allow limits on the quantity of speech – even if directly imposed on protected speech itself – without mentioning any first amendment principle prohibiting quantity limits and without applying strict scrutiny.

Speech law is proliferated by judicially sanctioned, and often direct, limits on the quantity of speech imposed by legislatures, public officials and courts: limits on the number of picketers, the number of demonstrators, the number and frequency of permits for demonstrations and parades, the volume of amplifiers, the number and size of protest signs. Regulations that

11 See Randall v. Sorrell, 548 U.S. 230, 246 (2006) (“And, in any event, the connection between high campaign expenditures and increased fundraising demands seems perfectly obvious.”); Buckley v. Valeo, 424 U.S. 1, 18-19 (1976) (using the theoretical notion that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money” as support for holding that restrictions on the amount of money that can be spent on political campaigns reduces quantity of expression).

12 See Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) (invalidating prohibition on corporate independent campaign expenditures citing the Buckley Court’s proposition that a monetary campaign restriction reduces the quantity of expression); Randall v. Sorrell, 548 U.S. 230, 231 (2006) (invalidating a Vermont campaign expenditure limitation as unconstitutional citing the Buckley Court’s finding that “a restriction on the amount of money a person or group can spend on political communication…reduce[s] the quantity of expression”); Colorado Republican Federal Campaign Committee v. Federal Election Com’n, 518 U.S. 604, 615 (1996) (invalidating a provision limiting political party expenditures based on the established Buckley principle that “independent expenditures…represent substantial restraints on the quantity and diversity of political speech”).

13 See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 799 n. 7 (1989) (upheld city limit on volume of music, although it reduced the “quantity of speech,” with an intermediate-scrutiny, time, place and manner analysis rather than strict scrutiny; the substantiality of the reduction of the quantity of speech was relevant to whether the restriction was narrowly tailored); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 and n. 23 (1984) (“we shall assume that the ordinance diminishes the total quantity of their speech.”); NLRB v. National Retail Store Employees, Local 1001 (Safeco), 447 U.S. 607 (1980) (upholding a prohibition of clearly protected, truthful speech urging a boycott that would usually be overturned because it was related to labor union activity); Naser Jewelers, Inc. v. City of Concord, 513 F.3d 27, 37 (1st Cir. 2008) (“we have ‘upheld . . . alternative means of communication despite diminution in the quantity of speech, a ban on a preferred method of communication, and a reduction in the potential audience.’”); Foti v. Menlo Park, 146 F.3d 629 (9th Cir. 1998) (ordinance restricting size and number of picket signs); Frye v. Dist. 1199, Health Care & Social Servs. Union, SEIU, AFL-CIO, 996 F.2d 141 (6th Cir. 1993) (“the Union failed to offer any evidence as to why a larger number of pickets . . . were necessary to convey its message. Additionally, the district court’s order is similar to limitations traditionally imposed by state courts.”); Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers, 735 F. Supp. 745 (M.D. Tenn. 1990) (ordinance provided “no more than one parade permit per month” and less than 250 marchers); City of Watseka v.
directly or indirectly reduce the quantity of speech are regularly allowed without mention of the quantity of speech principle or application of strict scrutiny on that basis.\textsuperscript{14} In these cases and generally, quantity limits on protected speech are characterized as time, place and manner restrictions or as limits on protected expressive conduct.\textsuperscript{15} They are usually allowed, whatever the characterization, if they are content-neutral, narrow tailored to a significant government interest, and leave available alternative avenues.\textsuperscript{16} This is an intermediate scrutiny standard. Strict scrutiny has not been applied to a quantity limit in any case I have found except the cases dealing with limits on campaign financing.\textsuperscript{17}

\textsuperscript{14} For cases dealing with regulations that reduce the quantity of speech but do not consider or mention the quantity of speech principle and do not apply strict scrutiny on that basis, see, e.g., Golan v. Holder, 132 S.Ct. 873, 889, 908 (2012) (copyright and fair use reduce the quantity of speech but are not subject to strict scrutiny, and the quantity of speech principle is not mentioned); Red Lion Broadcasting Co., v. FCC, 395 U.S. 367, 386-88 (1969) (imposed fairness doctrine on broadcasters not subject to strict scrutiny because differences between radio and television broadcast and the human voice justify stricter regulations); Turner Broadcasting Co. v. FCC, 520 U.S. 180, 189 (1997) (law requiring cable companies to devote channels to local broadcasting reduces quantity of channels controlled by the companies, but is not subject to strict scrutiny because the act is content-neutral); Commercial speech, infra.

\textsuperscript{15} The standards for time, place and manner regulations and for protected expressive conduct are very similar, if not the same. See Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293 (1984).

\textsuperscript{16} There are differences in standards and applications, including some cases that apply a reasonableness standard and others that seem to apply intermediate scrutiny, but none applies strict scrutiny. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (content-neutral regulations not subject to strict scrutiny and acceptable as long as they serve a substantial government interest and they do not “unreasonably limit alternative avenues”).

\textsuperscript{17} An exemplary trial court decision considered a town’s limiting some organizations to one permit per year for use of its open, public park for protected speech activities. In Mass. Cannabis Reform Coalition v. Town of Ashland, 3 Mass. L. Rep. 438 (Superior Ct. of Mass., Middlesex Co. 1995), at an event at the Stone Park pavilion in Ashland, Massachusetts held pursuant to a permit, speakers advocated reform of marijuana laws. Ashland reacted with a
Buckley and subsequent cases striking down campaign finance limits do not address the range of allowed quantity restrictions or explain why spending or donating money to support electoral campaigns is not subject to intermediate scrutiny like other quantity limits. Buckley did briefly distinguish campaign finance limits from some restrictions of time, place and manner because campaign finance limits are “direct quantity restrictions” on protected speech and, unlike restriction of the “decibels emitted by a sound truck,” limit the “extent” of protected speech. But many of the allowed quantity limits are imposed directly on speech, such as limits on the number of permits or picketers. The question of directness goes the other way: campaign finance quantity limits are not imposed directly on speech, but on money, and only indirectly reduce the quantity or extent of speech.

And all quantity limits in some sense diminish the extent of speech, as do all time, place and manner restrictions. The reduction may be trivial or extreme; a lot depends on variables like the size of the reduction and the size of what’s left, and on how we measure quantity. In the sound truck example raised in Buckley, the speech is protected, and the extent of speech is limited. The decibel limit directly limits the speaker’s volume. More decibels yield a louder voice that will likely receive more attention from nearby listeners and more reach to those

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regulation that limited use of the pavilion by “non-resident organizations” to “once per year.” The Superior Court found the speech fully protected, the pavilion a public forum, and the regulation a prior restraint on protected speech. The regulation would stand or fall, however, based on whether it was an appropriate “time, place and manner restriction.” There is no mention of an anti-quantity limits principle, nor was strict scrutiny applied to this direct quantity limit on protected speech. A valid time, place and manner restriction must be “content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” The court concluded that the regulation was not narrowly tailored to serve a significant government interest. The court explicitly rejected application of strict scrutiny standards. The standards applied seem close to intermediate scrutiny, although the usual standard for a time, place and manner regulation is reasonableness. The court did not reach the issues raised about content neutrality or discrimination against nonresidents.

424 U.S. at 17-18 and 18 n. 17. In addition, Buckley described campaign finance quantity limits as being more restrictive than time, place and manner limits, id. at 18, which does not address the problem since the other quantity limits were characterized and analyzed as time, place and manner regulations, but campaign finance quantity limits were not. The court also distinguished campaign finance limits as restrictive of speech, rather than a manner or mode of speech.
beyond. With more volume, the speaker may change the message, for example, to include more points made with less words, or move the sound truck faster and thereby cover more ground and listeners. Similarly, more picketers yield more messages or repetitions of the same message, communicate more common agreement and a stronger base, and may change the content, message, coverage, and reach of the message. Limiting the number of picketers also completely bans some speakers as well as their additional messages.

The quantity of speech doctrine raises a range of issues that are contextual and complex, which the Buckley court ignored by relying with complete certainty on a broad generalization about the effect of less money on campaign speech: less money will reduce the “extent of the reasonable use of virtually every means of communication.”19 The court has adopted a loose, broad perspective on quantity when considering campaign finance limits, but a strict, narrow perspective when considering other quantity limits.20

Intermediate scrutiny – which all the other speech-quantity limits are subjected to now – highlights the significant variables and provides an appropriate framework. The Rehnquist-Roberts era resolution of this problem, raised by their creation and selective use of the quantity-of-speech doctrine, is to rely on money-is-speech and be extremely sensitive to reductions of the quantity of money in campaign finance cases, while being quite insensitive to reductions of the quantity of speech or speakers in the range of non-campaign-finance contexts.

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19 424 U.S. at 17-18.
20 The Rehnquist-Roberts era campaign finance cases posit a simple measure of the quantity of speech and suggest an almost linear relationship between money and speech; their focus is limits on easily quantifiable numbers of dollars, and less dollars means less speech. 424 U.S. at 65. The conclusion reached in the campaign finance cases is easy only because the slide from speech to an easily quantifiable variable – money – enables avoidance of the central problem that quantifying speech is not easy, precise or clear. A more likely linear relationship is between the amount of money donated or spent and influence with the candidate supported.
MORE SPEECH DOCTRINES, LESS SPEECH (FOR SOME)

The first amendment principle that the quantity of speech cannot be limited and other principles and doctrines established in the early and subsequent campaign finance cases – most notably money is speech and the extension of speech rights previously reserved for people to corporations\(^{21}\) – greatly expanded free speech, leading some to declare the Rehnquist-Roberts era and approach pro-free speech.\(^{22}\) But in the same period, the last three or four decades, these principles and doctrines have not been extended to speakers who express themselves other than by spending large amounts of money on electoral campaigns. Further, the trend in many areas of speech law has been to narrow free speech rights, also often with new principles that have not been generally applied, leading others to characterize the Rehnquist-Roberts era as anti-free speech.\(^{23}\) A brief review of more of the leading principles and doctrines of the era will clarify the matter, starting with three that, like the no-quantity-limits principle, enlarge speech rights, then five that contract them.\(^{24}\)

Money is speech. Some things and activities embody speech and are sometimes referred to as “pure speech”\(^{25}\) – books, pamphlets, speeches, recently blogs – but money and spending

\(^{22}\) “Leading scholars and practitioners have called the Roberts Court the most pro-First amendment court in American history. . . . Floyd Abrams, a prominent First Amendment lawyer, stated ‘It is unpopular speech, distasteful speech, that most requires First Amendment protection, and on that score, no prior Supreme Court has been as protective as this.’’” Adam Liptak, Study Challenges Supreme Court’s Image as Defender of Free Speech, N.Y. Times, Jan. 8, 2012, at A25.
\(^{23}\) See, e.g., Erwin Chemerinsky, The Roberts Court and Freedom of Speech, 63 FED. COMM. L.J. 579, 581 (2011) (“When it comes to freedom of speech, the Roberts Court has been very much a conservative court…[except] with regard to campaign finance.”); Patricia Millett et al, Mixed Signals: The Roberts Court and Free Speech in the 2009 Term, 5 CHARLESTON L. REV. 1, 5 (2010) (arguing that while the Roberts Court has laid down a number of decisions enforcing free speech principles, it has also deferred to governmental judgments and countervailing policy concerns); David Cole, The Roberts Court Free Speech Problem, N.Y. REV. OF BOOKS (June 28, 2010), http://www.nybooks.com/articles/archives/2010/aug/19/roberts-court-vs-free-speech/?pagination=false (arguing that the Roberts Court limited free speech in Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010), by ruling that material aid to foreign terrorist organizations for lawful nonviolent human rights activity could be subject to criminal penalties).
\(^{24}\) This analysis does not include every significant principle, doctrine or case.
\(^{25}\) See, e.g., Watts v. U.S., 394 U.S. 705, 707 (1969) (holding a statute making it criminal to threaten the President a restriction on pure speech and subject to first amendment considerations); Brandenburg v. Ohio, 395 U.S. 444, 448-
money are not among them. Money itself, and its many uses and functions, usually have nothing
to do with political or any other speech, and money does not symbolically or culturally represent
or easily evoke speech. Some expressive conduct is also recognized as speech – picketing,
parading, demonstrating, burning a flag – but the conduct or “nonspeech element” is usually
subject to government regulation.27

Money is a medium of exchange, a form of property, a measure of value, a frequent
object of desire. Spending or donating money, or anything of economic value, can pay for and
facilitate speech (and most everything else) and has an expressive element, although it usually
involves, unlike speech itself, little if any direct communication to others. Donating or spending
money for speech is expressive but seems more a manner or mode of speech, or an expressive or
speech-facilitating activity, rather than speech itself.28

Nor has the money-is-speech principle been applied throughout speech law, or applied at
all outside of the campaign finance cases. For example, money donated to support speech
activities in public places – the usual way people of ordinary means raise money to support
expression of their messages – has not been analyzed as itself speech or given strict scrutiny

49 (1969) (finding statute criminalizing verbal advocacy, in this case the offensive and racist remarks of a KKK
activist, a restriction on pure speech subject to First Amendment).
26 One can argue that most all uses of money are speech in the sense that they express something about the spender,
but in that sense, everything we do and say is speech, and the term and concept loses all meaning and significance.
27 U.S. v. O’Brien, 391 U.S. 367, 376-78 (1968) (finding the burning of a draft card to be mixed speech and conduct
for which a compelling governmental interest in regulating the nonspeech element can justify); see also Clark v.
Community for Creative Non-Violence, 468 U.S. 288 (1984) (finding sleeping in tents as part of a demonstration
expressive conduct protected by the First Amendment, but regulations imposed on where tents could be established
justified by State’s interest in maintaining beauty of parks); Texas v. Johnson, 491 U.S. 397, 405-06 (burning
American flag is protected expressive conduct subject to intermediate scrutiny, which shifts to strict scrutiny if the
prohibition is “related to suppression of expression”).
Park near the White House were denied First amendment protection because, although it had an “expressive
element,” the “major value to this demonstration” of sleeping in the park was “facilitative” of participation by the
poor and homeless.
29 All speech can be described as also involving some conduct. Donating or spending money to support speech is
predominantly a matter of writing a check or making a transfer of money or some asset by other means. The
speaker – the check writer – communicates directly to the recipient of the check (a campaign or group or a media
outlet), indirectly to the public, and directly and loudly, but often without words, to the candidate whose election the
check supports.
protection on that basis, and has sometimes been a basis for limiting speech. Usually referred to as solicitation, it has received various levels of protection, but without any recognition or mention that the money-is-speech principle might apply or be at all relevant.30

Asking for donations to support leafleting is “disruptive” and an “inconvenience” and there are “risks of duress,” Chief Justice Rehnquist said in justification of the upheld ban on solicitation in the crowded, noisy open areas of New York City airports that include large, open retail marketplaces and Bloomingdale’s department stores.31 The court ruled that this is not a public forum (with four justices disagreeing),32 therefore only rational basis scrutiny was applicable. Solicitation, but not leafletting,33 could reasonably be banned, the court held, without any recognition or mention that the speech-supporting money involved might itself be speech, subject to strict scrutiny, and not prohibitable because of inconvenience to others or risks of duress or other misconduct.34 And if money spent or donated to support speech were treated, as


31 Krishna v. Lee, 505 U.S. at 678-82, 831.

32 Id. at 680.

33 Chief Justice Rehnquist and three other justices would also have upheld the ban on leafletting. Lee v. Krishna, 505 U.S. at 681.

34 See, e.g., Schneider v. Irvington, 308 U.S. 147 (1939) (invalidated permit requirement for speech on public streets, sidewalks and parks and upheld right to speak there even if it inconveniences and costs some expense to the city, while noting that the right does not include blocking others); Hague v. CIO, 307 U.S. 496 (1939) (government holds title to streets, sidewalks and parks in trust for the people, who have a right to use them for speech).
the campaign finance cases say, as itself speech, the court’s sharp distinction between leafletting and solicitation would make little sense.\textsuperscript{35}

Contributions of large amounts of money to support campaign speech – the cash itself, in addition to the actual speech – are fully protected based on the money-is-speech and no-quantity-limits principles, and can’t be limited even to protect the legitimacy and integrity of the electoral process. Contributions of small amounts of money by ordinary people to support their speech, often requested and given in public places, are an inconvenience that receives little or no protection and sometimes justifies limiting speech rights – without any mention of the money-is-speech principle (or the no-quantity-limits principle). Some people’s money is speech, others’ money is annoying.

The money-is-speech principle turns out to be little more than a rhetorical device used exclusively to provide first amendment protection for all the campaign money – each and every dollar – wealthy people and corporations are willing and able to spend. Unfettered money in elections, as a form of unfettered speech, is now among our most fundamental rights, more fundamental, it seems, than the right to vote, the integrity and legitimacy of elections, or democracy itself.\textsuperscript{36}

\textit{Corporations are people.} To facilitate business and the economy, governments created corporations and endowed them with attributes not extended to people, such as limited liability and perpetual life. This enables large accumulations of wealth that are available for a range of economic activities without personal risk to the corporate managers who control them. Corporations also needed some rights usually reserved for people to function as legal entities, so

\textsuperscript{35} See Lee v. Krishna, 505 U.S. at 831 (“Leafletting presents risks of congestion similar to those posed by solicitation,” Chief Justice Rehnquist, dissenting, joined by Justices White, Scalia and Thomas).

\textsuperscript{36} And its significance goes beyond the legal reasoning or law of free speech. The court’s constitutionalization of money and the privileges of wealth as a required feature of elections has been incorporated into American society and culture as well as American law over the period of more than 35 years.
they could, for instance, make enforceable contracts and sue or be sued. But as the modern
corporation took shape, and for over 100 years since, there was a widespread understanding,
backed by statutory prohibitions, that large, government-enabled corporate treasuries should not
be allowed to dominate or distort politics or elections.\(^{37}\) This longstanding near consensus was
overturned in 2010 by \textit{Citizens United v. FEC}.\(^{38}\)

Despite the common cultural personification of corporations – we can easily say “GM
was embarrassed today” – no one has suggested that they should have all the rights of people.
Most telling is the right to vote, which is, like free speech, vital to self-expression, self-
government and democracy. Corporations do not possess the human qualities that are the
appropriate focus of citizenship, democratic government, and free speech.

The question of additional constitutional rights for corporations beyond their business
purposes is really about additional rights and power for corporate managers, who, despite the
reasoning in \textit{Citizens United},\(^{39}\) are not functionally or in any real sense political or electoral
representatives (or employees) of shareholders. Corporate managers have the same individual
free speech rights as other people, and laws allow them and all corporate employees to pool their
individual campaign donations together in separate, segregated funds (PACs). Corporations also
have the same commercial speech rights as other businesses.\(^{40}\) There is no good social,

\(^{37}\) \textit{See, e.g.,} \textit{Citizens United v. FEC}, 130 S. Ct. 876, 947 (2010) (Stevens J., dissenting) (“The distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also furthest from the core of political expression, since corporations’ First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information.”) (quotation marks omitted); \textit{FEC v. Nat’l Conservative Political Action Comm.}, 470 U.S. 480 (1985) (“preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”); Zeph Teachout, \textit{The Anti-Corruption Principle}, 94 \textit{Cornell L. Rev.} 341, 347 (2009) (arguing that the framers considered political corruption to be a “key threat” and anti-corruption reforms were essential to the framers’ political vision).
\(^{39}\) 130 S. Ct. at 876.
\(^{40}\) Some corporations are nonprofit and so small as to resemble voluntary associations, and the laws or courts have sometimes exempted them from campaign restrictions.
economic or constitutional reason not to keep corporate managers’ wielding corporate treasuries to the business arena and out of the electoral arena.

**Commercial speech.** Commercial speech, including traditional speech activities for commercial purposes, was not protected at all by the Supreme Court until the beginning of the Rehnquist-Roberts era in the mid-1970s.\(^{41}\) Since then, more-or-less intermediate scrutiny has resulted in invalidation of a range of government reforms intended to protect consumers or important social interests: a ban on electric utility advertising that promotes additional use rather than conservation, a ban on gambling advertising, restrictions on placement of tobacco ads.\(^{42}\) Commercial speech has become a significant instrument for judicial intervention to invalidate a range of reforms.\(^ {43}\)

**Incidental effects.** The incidental effects doctrine allows government to prohibit protected expressive conduct if the restriction on speech is “incidental” and “unrelated to suppression of

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\(^{42}\) Central Hudson Gas v. Public Service Comm., 447 U.S. 557, 570-71 (1980) (invalidating regulation which banned promotion advertisement by a utility company even though the government had a legitimate interest in conservation which was furthered by the ban); Greater New Orleans Advertising v. United States, 527 U.S. 173, 187-89 (1999) (invalidating State’s ban on casino advertisements because even though the government had a substantial interest in alleviating social ills of gambling the ban did not directly further that interest); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561-63 (2001) (invalidating restrictions on advertisements of smokeless tobacco products in school areas because even though the government had a substantial interest in preventing underage smoking, the complete ban in certain areas was not a reasonable way to serve that interest).

expression.”\textsuperscript{44} Such speech, though protected, receives only intermediate scrutiny, and the prohibition’s relationship to suppression of expression hinges on its purpose. However, the actual purpose or motive is irrelevant and not a proper avenue of inquiry; the court accepts generally stated possible purposes not related to suppression, even in cases where the actual purpose is clear and squarely aimed at suppression.\textsuperscript{45}

This leaves the doctrine rather uncontained and available for seriously limiting speech rights, since there are always generally stated hypothetical purposes that can be suggested or thought up after the fact. The doctrine has been used by the court selectively to uphold permanent closure of a bookstore based on sexual conduct by some patrons because, the court said, the impact on speech was only “incidental;” uphold a ban on nude dancing; and uphold a conviction for burning a draft card as a protest against the Vietnam War.\textsuperscript{46}

\textsuperscript{44} See Va. v. Hicks, 539 U.S. 113, 123 (2003) (upholding criminal trespass statute after finding that the rule applied to all persons, not just those engaging in speech activity); Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (holding that the First Amendment does not exclude journalists from following generally applicable laws just because of “incidental effects” on the ability to gather news); Arcara v. Cloud Books, Inc., 478 U.S. 697, 704-705 (1986) (upholding closure statute against a bookstore used for prostitution even though the closure would have the incidental effect of interfering with the buildings right to sell books); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298-99 (1984) (upholding regulation banning camping in certain parks which had the incidental effect of limiting speech by protestors wished to sleep in the park); U.S. v. O’Brien, 391 U.S. 367 (1968) (upholding statute prohibiting burning of draft card because the sufficiently important governmental interest justified the incidental limit on speech).

\textsuperscript{45} See O’Brien, 391 U.S. at 387; S. Rep. No. 589, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 747, 89th Cong., 1st Sess. (1965). As quoted in O’Brien, the Senate Armed Services Committee explains: “The Committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy… this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.” 391 U.S. at 387. The House Armed Services Committee stated its belief, as quoted by the Court in O’Brien, that “in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such…acts should be punished.” Id. at 388. See also U.S. v. Miller, 367 F.2d 72, 77 (2nd Cir. 1966) (“It may even be conceded that the [1965] amendment was prompted by widely publicized burnings of draft cards occurring in demonstrations against this country’s Vietnam policy.”). See STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE 81 (1990) (“O’Brien is jailed because the authorities find his manner of expression unpatriotic, threatening, and offensive. When he complains that his freedom of speech has been abridged, the authorities deny that he has spoken.”).

\textsuperscript{46} See Barnes v. Glenside Theater, 501 U.S. 560 (1991) (nude dancing not protected); Arcara v. Cloud Books, 478 U.S. 697 (1986) (upheld city closure of an adult bookstore based on some patrons’ engaging in prostitution and other sexual conduct there, although there was no claim that books in the store were obscene); United States v. O’Brien, 391 U.S. 367 (1968). But see Texas v. Johnson, 491 U.S. 397 (1989) (flag burning protect because an element of the crime was offense of others, which is related to suppression).
The incidental effects doctrine has been expanded in the Rehnquist-Roberts era.\textsuperscript{47} But it has not been seriously applied in the campaign finance cases, although donating and spending money seem to fit the definition and understanding of protected expressive conduct. The \textit{Buckley} court did not dispute the fit, but insisted that the campaign finance limits were aimed at suppression of “the voices of people and interest groups who have money to spend,” while the prohibition of draft card destruction in \textit{O’Brien} was aimed at facilitating the draft.\textsuperscript{48} This ignores the obvious realities: the actual government purpose in \textit{Buckley} was to restrict the role of money in elections without regard any subject or viewpoint expressed or any preferred candidate, party or political perspective; while the actual government purpose in \textit{O’Brien} was to prohibit draft card destruction as an expression of opposition to the draft and the Vietnam War, a clear viewpoint content restriction of the kind we commonly call censorship.\textsuperscript{49}

\textit{Secondary effects}. The first amendment principle that content-based restrictions on speech are presumptively unconstitutional and trigger strict scrutiny is as old and basic as any.\textsuperscript{50} However, in 1986 the court held that an explicitly content-based restriction is excused from consideration as content-based if its purpose is to accomplish some non-content-based “secondary effect.”\textsuperscript{51} Such restrictions – though explicitly content-based – receive intermediate

\begin{footnotesize}
\textsuperscript{47} It was first articulated in \textit{O’Brien}, then expanded in the Rehnquist-Roberts era. \textit{See} Keith Werhan, \textit{O’Briening of Free Speech Methodology}, 19 \textit{ARIZ. ST. L.J.} 635, 645 (1987) (arguing Warren’s \textit{O’Brien} balancing test as safeguarding “meaningful first amendment protection” by applying the test only to incidental restrictions on speech and categorizing the Court’s increasing reliance outside incidental restrictions as “disheartening”).

\textsuperscript{48} 424 U.S at 17.

\textsuperscript{49} \textit{See supra note 44 for the stated congressional purposes behind the 1965 draft card amendment at issue in \textit{O’Brien}.}

\textsuperscript{50} \textit{E.g.}, Schneider v. New Jersey, 308 U.S. 147, 164 (invalidating complete ban on distribution of pamphlets on public streets without a permit finding “a censorship through license which makes impossible the free an unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees” and is therefore unconstitutional).

\textsuperscript{51} Renton v. Playtime Theaters, 475 U.S. 41, 52 (1986) (upholding zoning ordinance prohibiting adult movie theaters from certain areas under intermediate scrutiny after finding the ordinance was content-neutral because it was aimed at the secondary effects of those theaters in the community and not at the content of the movies themselves). \textit{See also} Erie v. Paps, 529 U.S. 277, 291 (2000) (finding ordinance banning nudity content-neutral and subject to less stringent standards of review because the ordinance was aimed at secondary effects).
scrutiny and, because of their secondary effects, are deemed unrelated to suppression of expression, although they clearly are directly related to suppression of expression. The new doctrine was initially applied in the area of obscenity, but it was soon extended to political speech. And like the incidental effects doctrine, the secondary effects doctrine focuses on generally stated possible purposes rather than real purposes.

The logic of the secondary effects doctrine is baffling. What the court calls secondary effects are possible purposes government might have for imposing a content-based restriction on speech. There is nothing “secondary” about it, and the court has not explained why articulation of after-the-fact, generally stated possible governmental purposes that are not content-based should render a content-based restriction on speech any less content-based or objectionable. The secondary effects doctrine fundamentally undermines the content barrier, which prevents government from deciding which messages are allowed and which forbidden.

The secondary effects doctrine was adopted after Buckley, but campaign finance cases subsequent to adoption of the doctrine ignore it. The doctrine seems applicable, even assuming that money is speech: campaign finance limits are aimed not at the content of speech but at the secondary effects of money on elections.

Reconceived and retooled time, place and manner doctrine. Reasonable time, place and manner restrictions have long limited protected speech when it is incompatible with important government functions or social interests. Prior to the Rehnquist-Roberts era, the doctrine was kept within fairly narrow bounds, since if applied expansively it would swallow the idea and

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52 Boos v. Berry, 485 U.S. 312, 320-21 (1988) (invalidating ban of displays critical of foreign governments from within 500 feet of embassies after finding that the proposed secondary effect was only the impact of the speech on a particular audience and therefore was a content-based regulation).
53 The secondary effects doctrine has been reined in some. See Cincinnati v. Discovery Network, 507 U.S. 410, 430 (1993) (city ordinance prohibiting distribution of commercial handbills on public property could not be justified by concern for any secondary effects).
54 [still researching]
reality of protected free speech.\textsuperscript{55} The intermediate scrutiny standard, as set out above – content-neutrality, narrow tailoring to a significant government interest, and sufficient available alternative avenues – is largely uncontroversial.\textsuperscript{56} But the requirements for application of the doctrine have been significantly relaxed and its speech-prohibitive potential expanded in the Rehnquist-Roberts era.

The court has used the doctrine to uphold a city’s geographic prohibition of adult theaters that covered 94 percent of the city and left a remaining 6 percent that was unavailable or unusable for that purpose – for which the doctrine might be renamed no time, no place, no manner.\textsuperscript{57} The court also upheld a prohibition of leafleting at a fairground and a prohibition of sleeping in Lafayette Park in Washington as a protest of treatment of homeless people.\textsuperscript{58}

The court’s broadening of allowable time, place and manner restrictions has also provided the lower courts a basis for limiting and marginalizing first-amendment protected demonstrations. Courts have upheld the now regular isolation of demonstrations to specified areas away from the events, activities or places that are the focus of the demonstrations – leaving them out of sight, out of hearing, and out of mind.\textsuperscript{59}

\textsuperscript{55} See Brown v. Louisiana, 383 U.S. 131 (1966) (silent sit-in in a segregated public library protected and not prohibitable as a time, place and manner regulation).

\textsuperscript{56} There has been controversy over whether the last element is a least restrictive means standard. See Clark v. Community for Creative Nonviolence, 468 U.S. 288, 315 (1984) (Marshall and Brennan, dissenting, favoring the least restrictive means standard); Cornelius v. NAACP, 473 U.S. 788, 818 (Blackmun and Brennan, dissenting).

\textsuperscript{57} See Renton v. Playtime Theaters, 475 U.S. 41 (1986). Justice Rehnquist’s opinion for the court said the theaters “must fend for themselves in the real estate market,” although the court of appeals found that no usable place was available for sale or lease. Id. at 54-55.


\textsuperscript{59} See, e.g., Citizens for Peace v. City of Colorado Springs, 477 F.3d 1212, 1220 (10th Cir. 2007) (upheld isolation of demonstrators protesting a NATO meeting in a hotel to an area over 300 yards from the hotel); Black Tea Society v. City of Boston, 378 F.3d 8 (1st Cir. 2004) (upheld keeping protestors at the 2004 Democratic National Convention to an area that was out of sight and out of hearing of those attending the convention); ACLU v. Denver, 569 F. Supp. 2d 1142, 1175 (D. Colo. 2008) (upheld a “Public/Demonstration Zone” at the 2008 Democratic Convention; narrow tailoring does not require limiting security measures to any specific known threats). See generally Timothy Zick, \textit{Speech and Spatial Tactics}, 84 \textit{Texas L. Rev.} 581, 606 (2006) (“there has been a remarkable recent rise in the
Despite the expansion of the doctrine, the court has found it inapplicable in the campaign finance cases, distinguishing campaign finance limits as restrictive of speech, rather than a manner or mode of speech. But the other time, place and manner restrictions are imposed on protected speech, as Buckley recognized, and campaign finance limits are imposed on protected speech only if one accepts that money is speech, rather than a manner of or activity that facilitates speech.\(^{60}\)

**Offensive speech.** One of the hallmarks of speech law before the Rehnquist-Roberts era was the principle that speech may not be banned or limited because it is offensive.\(^ {61}\) The Rehnquist-Roberts era has been mixed on this principle, about which there seems to be a difference of opinion among the conservative justices.\(^ {62}\) The principle has at least faded: a ban on nude dancing has been upheld, the definition of obscenity has been expanded and left to local community mores, and offensive speech by students is considerably less protected than it was.\(^ {63}\)

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\(^{60}\) 424 U.S. 17-18. The court’s other offered distinctions are addressed supra, [ ].

\(^{61}\) See Cohen v. California, 403 U.S. 15, 20 (1971) (finding conviction of defendant who wore a jacket with an expletive written on it could not be justified by mere theory that the word was likely to cause a violent reaction); Tinker v. Des Moines Indep. Sch. Dist., 373 U.S. 503, 509 (1969) (“undifferentiated fear” is insufficient to overcome free speech even under the diminished protection accorded students); Brandenburg v. Ohio, 395 U.S. 444, 449-49 (1969) (invalidating statute criminalizing offensive and possibly threatening speech).

\(^{62}\) See Snyder v. Phelps, 131 S. Ct. 1207, 1218 (2011) (finding offensive signs held by fundamentalist church members as part of an anti-homosexual demonstration at serviceman’s funeral to be protected by the First Amendment); Texas v. Johnson, 491 U.S. 397, 405-06 (1989) (finding burning American flag to be expressive conduct within protection of First Amendment). In Snyder, Justice Alito was a lone dissenter; in Johnson, Justice Scalia voted with the majority. Both cases involved protestors who were isolated, marginal, and ineffectual, and by their tactics had little chance of gaining support. The dissenters in Snyder also agreed to police demands that they be out of sight and hearing of the soldier’s funeral they protested.

\(^{63}\) See, e.g., Morse v. Frederick, 551 U.S. 393, 396 (2007) (finding no violation of First Amendment rights when school principal confiscated banner she believed to be promoting drug use because “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings”); Erie v. Pap’s, 529 U.S. 277, 291 (2000) (upholding prohibition of nudity in public places because regulation justified by secondary effects doctrine); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988) (finding principals decision to cut articles from school newspaper because the articles infringed on other students’ privacy rights valid under the First Amendment); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683-84 (1986) (upholding sanctions imposed on student for using offensive speech during school assembly); Miller v. Calif., 413 U.S. 15, 23 (1973) (upholding
Public forum doctrine and privately owned public forums. Before the Rehnquist-Roberts era, first amendment law straightforwardly established a right protected by strict scrutiny to engage in speech activities on open, public streets, sidewalks, and parks.\textsuperscript{64} This has been replaced by a new, complex overlay of rules – the public forum doctrine – that must be satisfied as a pre-condition to vindication of speech rights or application of strict scrutiny. Initially, the court said that “the character of the property”\textsuperscript{65} determines whether it is a public forum, and public streets sidewalks and parks were recognized as “quintessential” public forums.\textsuperscript{66} As the doctrine developed, public facilities were divided into three categories: public forum, limited public forum, and nonpublic forum, with subcategories, such as “traditional” and “designated” forums, and complicated multiple-part rules.\textsuperscript{67} In one of the recent cases, this yielded a ruling that a public, open sidewalk leading to a post office was not a public forum, with the explanation that “the mere physical characteristics of the property cannot dictate forum analysis.”\textsuperscript{68} The public forum doctrine has also been used, as discussed above, to reject protection of speech statute criminalizing the mailing of unsolicited sexually explicit material finding obscene material unprotected by the First Amendment); Brown v. Entertainment Merchants, 131 S. Ct. 2729, 2738-39 (2011) (invalidating restrictions and labeling requirements for violent video games because state did not prove compelling interest for the content-based restrictions or that the restrictions were narrowly tailored). See also note [87], infra. [internet cases?]\textsuperscript{64} See Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (invalidating ordinance prohibiting picketing within 150 feet of schools, except for labor dispute picketing, because “any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wise-open”) (internal quotation marks omitted); Lloyd Corp. v. Tanner, 407 U.S. 551, 569-70 (1972) (finding private mall’s restriction on handbill distribution valid under First Amendment because private entity not required to provide forum for speech exercise); Flower v. United States, 407 U.S. 198 (1972) (reversing conviction of person who distributed leaflets on public property outside military base); Edwards v. South Carolina, 372 U.S. 229, 235-36 (1963) (reversing breach of the peace convictions of African-American protestors marching peacefully on public sidewalks because the arrests and convictions violated First Amendment); Schneider v. New Jersey, 308 U.S. 147, 164-65 (1939) (invalidating complete prohibitions on the distribution of handbills in three different states but allowing restrictions on time, place, and manner). See generally THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 298-307 (1970). This was always subject to time, place and manner restrictions.\textsuperscript{65} See PerryEduc. Assoc. v. Perry Local Educators Assoc., 460 U.S. 37, 44 (1983).\textsuperscript{66} Id. at 45.\textsuperscript{67} See, e.g., Krishna v. Lee, 505 U.S. 672, 678-79 (1992) (discussing the “forum based approach” for determining the constitutionality of government speech restrictions).\textsuperscript{68} United Sates v. Kokinda, 497 U.S. 720, 727 (1990).
activities in the open, public areas of New York’s teeming air terminals outside of the gates and security areas.\textsuperscript{69}

In the cases denying public forum status, the court has emphasized that speech was not the “principle purpose” of the public facilities at issue.\textsuperscript{70} This is true enough, but speech is rarely the principle purpose of any public facility, including streets, sidewalks and parks, the principle purpose of which is to get people from one place to another and to provide an environment for repose or play. The point is that, unlike many places in the world, our public spaces are generally open and available for speech, assembly, and association, including expression of views that are unpopular or critical of government – not because that is the purpose of our public spaces, but because we have made a constitutional, social and cultural commitment to freedom of speech.\textsuperscript{71}

That commitment is also evident in the pre-Rehnquist-Roberts era cases protecting limited speech rights in some privately owned public places. In the 1960s and early 1970s, the court protected limited speech rights in privately owned public shopping malls, where people gather in modern times much as they once did at centralized inner-city markets and gathering places.\textsuperscript{72} Those cases were reversed in the Rehnquist-Roberts era.\textsuperscript{73}

\textsuperscript{69} See Int’l. Society for Krishna Consciousness v. Lee, 505 U.S. 672, 679 (1992) (finding airport terminal not a public forum because it is not property that has as “a principal purpose…the free exchange of ideas’ and upholding restrictions on solicitation under reasonableness standard); Lee v. Int’l. Society for Krishna Consciousness, 505 U.S. 830, 831 (1992) (invalidating ban on leafleting in airport terminals).

\textsuperscript{70} See Krishna, 505 U.S. at 683 (finding principal purpose of airport terminal is not to promote speech activities and therefore that restrictions on distribution and solicitation in airports need only satisfy reasonableness standard).

\textsuperscript{71} In one of the early, formative public forum cases, before the doctrine had a name (and before I knew it was coming), I represented Dr. Benjamin Spock on his claim to exercise speech rights on the open, public areas of a military base that were indistinguishable from typical cities and towns. See Greer v. Spock, 424 U.S. 828 (1976); Philadelphia Freedom, supra note [ ], at 226-41.

\textsuperscript{72} Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308, 320-21 (1968) (finding mere fact that privately owned shopping center was open to the public could not justify complete prohibition of speech activity on the property, but that the speech could be subject to reasonable regulations); Lloyd v. Tanner, 407 U.S. 551, 569-570 (1972) (finding private mall’s restriction on handbill distribution valid under First Amendment because private entity not required to provide forum for speech exercise). The first case, in 1946, protected speech rights in a company town. Marsh v. Ala., 326 U.S. 501, 508 (1946) (invalidating company-owned town’s statute which
REHNQUIST-ROBERTS ERA SPEECH LAW

So is the Rehnquist-Roberts era pro- or anti-free speech? It has been a long time filled with a lot of speech decisions, but speech-enlarging and speech constricting decisions and contradictions abound. It is significant that the court in the Rehnquist-Roberts era established the money-is-speech and no-quantity-limits doctrines, but also did not apply either other than to limits on campaign finance; and that the court expanded the incidental effects doctrine and established the secondary effects doctrine, but also did not apply either to campaign finance limits. The bevy of new speech principles and doctrines, the revamped old ones, and the inconsistency and selectivity of application, justification and interpretation complicates and frustrates any effort to figure out what might be going on. Perhaps the most that can be said is that there is no basis to characterize the Rehnquist-Roberts era as generally pro- or anti-free speech, or to so characterize any justice with demonstrable consistency, although such characterizations of both have been common in scholarship and popular commentary about free speech.74

Rehnquist-Roberts era speech law seems an incoherent tangle of rules, doctrines, distinctions, and results that lacks cohesive principles or themes. Functionally, it provides an

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73 See Hudgens v. NLRB, 424 U.S. 507, 520 (1976) (holding that a private mall may restrict content based restrictions on speech as is not held to same high standard of review as a state actor would be in the same circumstances).

easy basis for vindicating or rejecting any plausible speech claim. But some significant patterns and trends also stand out, if one is open to them.\textsuperscript{75}

Often what you find depends on where you look and what you look for. Analyses aimed at spotting periods characterized by a general expansion or contraction of a right can easily miss patterns of simultaneous expansion and contraction and serious contradictions across the range and history\textsuperscript{76} of a body of law.\textsuperscript{77} Comparisons of picketing cases to other picketing cases, or campaign finance cases to other campaign finance cases, have significance. But for present purposes it is more fruitful to look across the range of speech cases and issues, to focus on the context and social meaning of the speech claimed to be protected as well as legal reasoning, and to be open to, if not expect, change rather than consistency or synthesis as social and political contexts and justices change over time.\textsuperscript{78}

There is an overarching innovation or theme that characterizes much of the era’s legal reasoning in speech decisions – what I have called the “purpose doctrine.”\textsuperscript{79} Sometimes

\textsuperscript{75} I identified these patterns and trends in 1990. See David Kairys, The Politics of Law, A Progressive Critique 262 (2d ed. 1990); David Kairys, With Liberty and Justice for Some, A Critique of the Conservative Supreme Court 57 (1993). See also note 74, infra.

\textsuperscript{76} The court first recognized freedom of speech as we know it in the mid-1930s, and the only two periods of our history characterized by systematic protection and expansion of speech rights that empower all and promote democracy were the 1930s and the 1960s, both characterized by successful, sustained mass movements demanding such rights (the labor movement in the 1930s and the civil rights, anti-Vietnam War and women’s movements in the 1960s). See David Kairys, Freedom of Speech, a chapter of The Politics of Law, A Progressive Critique 140-71 (D. Kairys, ed., 1st ed. 1982), http://ssrn.com/abstract=727903. See also David Kairys, Book Review, 126 U. Penn. L. Rev. 930, 943, 943 n. 46 (1978) (free speech systematically protected and enlarged in only two periods of our history characterized by mass movements demanding such rights).

\textsuperscript{77} Using the same approach on race and equality, instead of comparing the latest affirmative action decision to other affirmative action decisions, I’ve looked across the range of post-Brown era decisions on racial equality for consistency and inconsistency in principles, rules, results, reasoning and approaches. See [ ]

\textsuperscript{78} This is important to teaching as well, as law students quickly learn the habit of separating law from history or context, seeking consistency and synthesis, and searching for any plausible distinction that might preserve them, often in the face of obvious change.

explicitly, sometimes in the form of various principles or doctrines, the Rehnquist-Roberts era court has established a new requirement or pre-condition for vindication of most civil rights. In addition to proving a violation of a right, a plaintiff must also show that the government purposely violated the right – that the government acted with animus or the specific motivation to violate the right. This presents a significant, often insurmountable barrier to vindication of the rights and liberties of Americans.

The purpose doctrine is explicit in the area of equality. A plaintiff alleging unconstitutional racial discrimination must prove that it was done “purposely,” with racial animus or the motivation to racially discriminate. The law of establishment of religion has also incorporated an explicit purpose requirement, and looks to actual purposes, unlike some of the purpose rules considered here. The law of free exercise of religion has incorporated the purpose doctrine non-explicitly with the adoption of the purpose-based “incidental effects” test and rejection of the traditional strict scrutiny protection of religion.

Rehnquist-Roberts era speech law has incorporated the purpose doctrine in whole or in part in many of the areas just discussed: incidental effects, secondary effects, public forum (and

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80 See generally WITH LIBERTY AND JUSTICE FOR SOME, supra note [ ], at 183-88; note [ ], supra. One area in which the doctrine has not been applied is privacy, although there the court has created a series of rights limiting rules that focus on the mental state of the privacy claimant, particularly the requirement of an unrealistic “expectation of privacy” and a broad conception of consent.

81 Although the requirement is often characterized as “intentional” discrimination, the court does not apply the usual understanding of intentional conduct, which includes intending the reasonable consequences of one’s acts. For example, repeated conduct that causes the same discriminatory effect may be intentional but does not show the required purpose. See authorities in note [ ], infra.

82 This has led to what I have described as a “dual system” of equal protection rules: the court has been insensitive and oblivious to proof and inferences of racial purpose when minorities raise equality claims, even in cases that resemble traditional discrimination or segregation; but hypersensitive to proof and inferences of racial purpose when whites raise reverse discrimination claims. See [my works]. This pattern can also be seen in the cases on gender discrimination. See Ledbetter and Miss. Col.


privately owned public forum), and revamped time, place and manner rules. This empowers governments at all levels to limit protected speech without having to worry about judicial intervention unless government officials also reveal an inappropriate purpose, and revelation of such an actual purpose still might not be enough because the court has held that generally stated, possible benign purposes often suffice. This deprives “protected” of significant meaning.

This purpose doctrine analysis identifies and holds up for assessment an important theme and pattern in Rehnquist-Roberts era legal reasoning in speech cases. However, it helps explain or categorize some of the legal reasoning tangle, rather than untangling it. Further inquiry along the lines I have suggested – into how the tangle has been applied and used with a focus on context and social meaning – reveals more significant themes.

The areas of first amendment law in which the court in the Rehnquist-Roberts era has contracted or retrenched speech rights are those most available to and availing for speech by people of ordinary means. They can’t afford air time on electronic mass media, and the court has denied their claims to public access to the mass media. 85 They assemble, leaflet, speak, demonstrate, and picket in public places to air grievances, to reach out and gather support, and to try to gain a spot on the local or national news. In the post-World War II, largely suburbanized context, this occurs mostly these days at transit terminals, shopping malls, and public streets, sidewalks and parks. 86 These dispersed areas and facilities have largely replaced the town square and inner-city marketplace as places where people congregate and can exchange views without large expenditures of money. But the court has substantially limited if not eliminated both the

85 See Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) (invalidated right to reply law). The court treats the mass media like a lone leaflet in danger of being excluded from the marketplace of ideas, although the mass media have become the marketplace of ideas.
86 [fn on impact of internet and social media; commercial]
places and activities available for speech by people of ordinary means, and allowed the government to isolate and marginalize them and their messages.

The areas of first amendment law in which the court has greatly expanded and enhanced the scope and strength of speech rights in the Rehnquist-Roberts era are those available to very wealthy people, corporations, and businesses. Unlimited spending on electoral campaigns by extremely wealthy individuals and corporations is now a constitutionally required feature of American elections, regardless of the impact on the issues addressed, tenor, or results of elections. This means that, for example, in the Republican primaries leading up to the 2012 presidential election, government could not prohibit or limit the drenching of the mass media with unrelenting personal, unprincipled, and often misleading, baseless or false attacks by anyone willing and rich enough to pay for them.

Rehnquist-Roberts era speech law is not generally pro- or anti-free speech, but there are three major themes or patterns: 87 (1) enlargement of the speech rights available to wealthy people, businesses, and the preferred form of doing business, corporations, and to otherwise favored people or institutions; 88 (2) restriction of the speech rights available to people of ordinary means, 89 students, 90 and various dissenters and otherwise disfavored people or

87 See generally [fn on my works]. This essay does not cover all the relevant doctrines or decisions from the Rehnquist-Roberts era or address all possible counter examples or exceptions.
88 See Quantity limits on speech, Money is speech, Corporations are people, Commercial speech, all supra; Bush v. Gore, 531 U.S. 98, 109-10 (2000) (effectively awarding Bush the presidency after stopping Florida recount of ballots and finding there was insufficient time for Florida to establish standards for a new recount, based on a first and fourteenth amendments voting rights theory the majority did not and has not since the decision extended to others; see David Kairys, Bush v. Gore Blues, JURIST, at http://jurist.law.pitt.edu/forum/forumnew23.HTM (May 2001), http://ssrn.com/abstract=726444).
89 See Incidental effects, Secondary effects, Time, place and manner, Offensive speech, and Public forum and privately owned public forum, all supra. Watchtower Bible and Tract Soc’y of New York v. Village of Stratton, 536 U.S. 150 (2002) may be seen as inconsistent with or an exception to this theme. The court ruled that door-to-door canvassers cannot be required to obtain a permit unrelated to the content of their messages, although they trespass on the private property surrounding homes, approach the front doors, and knock or ring the doorbells with the request that the residents open the doors and engage in conversation there or invite them in for that purpose. Previously, non-content based permits or registration was seen as allowable because of the canvassers are strangers who approach homes. This decision can seem like accommodating and enlarging speech rights available to people of
institutions,\textsuperscript{91} and of the basic democratic rights of every American to vote and participate as equals in the electoral and political processes;\textsuperscript{92} and (3) free-speech barriers to public access to the media\textsuperscript{93} and to electoral, economic and social reforms.\textsuperscript{94}
The familiar first amendment rhetoric of self-expression, empowerment of the American people, and triumphant American democracy still lingers, though sometimes strangely, in Rehnquist-Roberts era speech law. The *Buckley* court invalidated campaign finance limits because “the people . . . must retain control,” and suggested that unlimited money will not affect the results of elections because the amounts of money spent on each candidate “normally vary with the size and intensity of the candidate’s support.”⁹⁵ Freedom of speech in the Rehnquist-Roberts era no longer has much to do with democracy or empowerment or self-expression of the American people, except for the very wealthy and corporations claiming humanity. This is what we now call freedom of speech.

⁹⁵ 424 U.S. at 57. The money spent on each candidate will, of course, vary with candidates’ attractiveness to very wealthy people and corporations. This skews, corrupts, and undermines the democratic process, which is supposed to be based on the value of each person, not each dollar.