THE CONTRADICTORY MESSAGES OF REHNQUIST-ROBERTS ERA SPEECH LAW: LIBERTY AND JUSTICE FOR SOME

*David Kairys**

The Supreme Court under Chief Justices Rehnquist and Roberts has been characterized as pro-free speech, based in part on the Court's protection of money as a form of speech in the campaign finance context. Parsing the tangle of free speech decisions for themes and patterns, this Essay highlights inconsistencies in the Court's decisions on free speech issues. Looking beyond the familiar First Amendment rhetoric of self-expression, empowerment of the people, and triumphal American democracy, this Essay reveals stark differences between the Court's treatment of modes of speech available to people of ordinary means, and modes available to corporations and the wealthy. The Court's curtailment of rights related to the former, and expansion of rights related to the latter, skews, corrupts, and undermines the democratic process.

First Amendment principles and doctrines established in the early and subsequent campaign finance cases expanded free speech,[1] leading some to declare the Rehnquist-Roberts era[2] and its approach as pro-free

* Professor of Law, Temple University; Visiting Professor of Law, University of Miami when this Essay was drafted. The subtitle is from my book, WITH LIBERTY AND JUSTICE FOR SOME: A CRITIQUE OF THE CONSERVATIVE SUPREME COURT (1993). I appreciate feedback on early drafts from Erwin Chemerinsky, Steven Shiffrin, and Mark Tushnet; research assistance by Cynthia Morgan, Anthony Perez, Eric Motylinski, and Sean Siperstein; and the work of the *University of Illinois Law Review* editors.

1. Most notably, money is speech, quantity limits on speech are as constitutionally objectionable as complete prohibitions, and corporations have speech rights previously reserved for people. *See* Citizens United v. FEC, 130 S. Ct. 876 (2010); Buckley v. Valeo, 424 U.S. 1 (1976).

2. What I am calling the Rehnquist-Roberts era and approach started 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 fallen 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.

speech.[3] But in the same period, the last three or four decades, those 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 and doctrines that have not been generally applied, leading others to characterize the Rehnquist-Roberts era as anti-free speech.[4] So is the Rehnquist-Roberts era pro- or anti-free speech?

It has been a long time, filled with a lot of speech cases, but speech-enlarging and speech-constricting decisions—and contradictions—abound. A brief review of a few of the leading speech principles and doctrines of the era—four that enlarge speech rights, then five that constrict them[5]—will at least clarify the matter, starting with an extended discussion of what I call the no-quantity-limits-on-speech doctrine, which has been the essential but long-ignored basis for all of the campaign finance cases.

There are discernible themes and patterns in the tangle of speech decisions, principles, and doctrines. Free speech as we know it was established by the Supreme Court in the mid-1930s and maintained (with some notable exceptions) through the mid-1970s as a means of self-expression and empowerment for all people, regardless of wealth, status, or position, and as an essential element of U.S. democracy. The Rehnquist-Roberts era Court has stood this constitutional and cultural understanding on its head—restricting speech rights available to people of ordinary means, while greatly expanding speech rights available to wealthy people, businesses, and corporations.[6]

3. "Leading scholars and practitioners have called the Roberts Court the most pro-First Amendment court in American history. . . . Floyd Abrams, the 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.

4. *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 vs. Free Speech*, N.Y. REV. OF BOOKS (Aug. 19, 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).

5. This analysis does not include every significant principle, doctrine, or case.

6. On the history of free speech in the United States, see generally David Kairys, *Freedom of Speech*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 140–71 (David Kairys ed., 1st ed. 1982) [hereinafter Kairys, *Freedom of Speech* (1982)], *available at* http://ssrn.com/abstract=727903; David Kairys, *Freedom of Speech*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 237–72 (David Kairys ed., 2d ed. 1990) [hereinafter Kairys, *Freedom of Speech* (1990)]; David Kairys, Book Review, 126 U. PENN. L. REV. 930, 943 & n.46 (1978) (reviewing MICHAEL E. TIGAR, LAW AND RISE OF CAPITALISM (1977)) (observing that free speech has been systematically protected and enlarged in

I. 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*[7] 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.[8] The first obstacle was re-

only two periods of our history characterized by mass movements demanding such rights). 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 (with a substantial retrenchment in the 1950s), 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).

I identified these patterns and trends in Rehnquist-Roberts era speech and civil rights law in 1990, during the Rehnquist era. *See* Kairys, *Freedom of Speech* (1990), *supra*, at 262; *see also* David Kairys, *Conservative Legal Thought Revisited*, 91 COLUM. L. REV. 1847 (1991) (reviewing CHARLES FRIED, ORDER AND LAW, ARGUING THE REASON REVOLUTION—A FIRSTHAND ACCOUNT (1991)); DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME: A CRITIQUE OF THE CONSERVATIVE SUPREME COURT 57 (1993) [hereinafter WITH LIBERTY AND JUSTICE FOR SOME].

For my other works on these and related issues, see David Kairys, *Introduction* and *Freedom of Speech*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1–20, 190–215 (David Kairys ed., 3d ed. 1998) [hereinafter Kairys, *Freedom of Speech* (1998)]; David Kairys, Essay, *A Brief History of Race and the Supreme Court*, 79 TEMP. L. REV. 751 (2006); D. Kairys, *Civil Rights*, *in* 3 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 1878 (Neil J. Smelser & Paul B. Baltes eds., 2001); David Kairys, *Introduction*, *Freedom of Speech* (1990), *supra*, at 1; David Kairys, *Race Trilogy*, 67 TEMP. L. REV. 1 (1994); David Kairys, Essay, *Unconscious Racism*, 83 TEMP. L. REV. 857 (2011); David Kairys, *Unexplainable on Grounds Other Than Race*, 45 AM. U. L. REV. 729 (1996); *see also* DAVID KAIRYS, PHILADELPHIA FREEDOM: MEMOIR OF A CIVIL RIGHTS LAWYER (2008) [hereinafter PHILADELPHIA FREEDOM]; David Kairys, *Money Isn't Speech and Corporations Aren't People: The Misguided Theories Behind the Supreme Court's Ruling on Campaign Finance Reform*, SLATE (Jan. 22, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_isnt_speech_and_corporations_arent_people.html.

7. 424 U.S. 1 (1976).

8. Another obstacle was that even protected speech is not absolute but can be overcome if government has a "compelling interest" and uses the "least restrictive" means, and the limits challenged in *Buckley* were at monetary levels that preserved the system of individual, nonpublic campaign financing. *See*, *e.g.*, Hill v. Colorado, 530 U.S. 703, 725–26 (2000) (upholding a 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, 798–99 (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" (quoting United States v. Albertini, 472 U.S. 675, 689 (1985) (internal quotation marks omitted)). 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* Citizens 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, 1019–20 (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 that actually only took limited political advantages away from wealthy citizens unrelated to any merits); J. Robert Abraham, 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).

moved 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.[9]

Buckley, *Citizens United v. Federal Election Commission*,[10] 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 of speech—with strict scrutiny,[11] 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.[12] "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 . . . .[13]

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."[14]

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 speech in any way may limit its quantity while having little or no impact on the strength, clarity, or

9. 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 Amendment After All*, 94 COLUM. L. REV. 1281 (1994) (arguing that spending limits are content-neutral and therefore should be presumed constitutional); John C. Bonifaz et al., *Challenging* Buckley v. Valeo*: A Legal Strategy*, 33 AKRON L. REV. 39 (1999) (criticizing *Buckley's* absolute protection for an unlimited quantity of expression).

10. 130 S. Ct. 876 (2010).

11. For non-law-trained readers, strict scrutiny is the highest level of review reserved for the most important rights. It requires that the law or action at issue be "narrowly tailored to serve a compelling state interest," and use the "least restrictive means." *Hill*, 530 U.S. at 748; *see supra* note 8.

12. *Hill*, 530 U.S. at 898; *Buckley*, 424 U.S. at 19.

13. 424 U.S. at 14–15, 18. 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. *Id.* at 18–19.

14. *Id.* at 19.

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 are usually available only to 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.[15] 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 no-quantity-limits principle, and despite its centrality to almost four decades of invalidation of campaign financing reforms, 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 theory, reasoning, or precedent.[16] The only precedents the campaign finance decisions cite, or can cite, are each other.[17] Outside of the campaign finance context, decisions regularly allow

15. The role of money in elections, controversial for most of our history, gained widespread criticism since *Buckley* was decided in 1976. 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. *See, e.g.*, Jonathan Bingham, *Democracy or Plutocracy? The Case for a Constitutional Amendment to Overturn* Buckley v. Valeo, 486 ANNALS AM. ACAD. OF POL. & 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*, 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. BOOKS (Jan 24, 2012), http://www.nybooks.com/articles/archives/2012/feb/23/can-we-have-democratic-election/?pagination=false ("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.").

16. *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*, 424 U.S. at 18–19 (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).

17. *See* Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) (invalidating a prohibition on corporate independent campaign expenditures and citing the *Buckley* Court's proposition that a monetary campaign restriction reduces the quantity of expression); *Randall*, 548 U.S. at 241 (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" (quoting *Buckley*, 424 U.S. at 19) (internal quotation marks omitted)); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 615 (1996) (invalidating a provision limiting political party expenditures based on the established *Buckley* principle that

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.[18] Regulations that 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.[19] In these cases and generally,

"independent expenditures . . . 'represent substantial restraints . . . on the quantity and diversity of political speech'" (quoting *Buckley*, 424 U.S. at 19)).

18. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 799 n.7 (1989) (upholding a city's 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 n.23 (1984) ("[W]e shall assume that the ordinance diminishes the total quantity of their speech."); Nat. Labor Relations Bd. v. Nat. Retail Store Empl. Union, 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) ("[W]e 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.'"(quoting Sullivan v. Town of Augusta, 511 F.3d 16, 43 (1st. Cir. 2007)); Foti v. Menlo Park, 146 F.3d 629 (9th Cir. 1998) (upholding restrictions on the size and number of picket signs); Frye v. Dist. 1199, Health Care & Social Servs. Union, 996 F.2d 141, 144–45 (6th Cir. 1993) ("[T]he 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."); City of Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1553 (7th Cir. 1986) ("So long as the amount of speech left open is ample, it is not fatal that the regulation diminishes the total quantity of speech."), *aff'd*, 479 U.S. 1048 (1987); White House Vigil for the ERA Comm. v. Clark, 746 F.2d 1518 (D.C. Cir. 1984); Blasecki v. City of Durham, 456 F.2d 87 (4th Cir. 1972) (upholding a municipal ordinance that prohibited more than fifty people from assembling or congregating at a park); ACLU of Colo. v. City & County of Denver, 569 F. Supp. 2d 1142 (D. Colo. 2008); Sullivan v. City of Augusta, 406 F. Supp. 2d 92, 124 (D. Me. 2005) ("'Some diminution in the overall quantity of speech' may be tolerated when evaluating whether or not there are adequate alternatives." (quoting Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 193–94 (1st Cir. 1996)); Tinsley Media, LLC v. Pickens Cnty., Ga., 203 Fed. Appx. 268, 269–70 (N.D. Ga. 2006); Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers, 735 F. Supp. 745, 748, 752 (M.D. Tenn. 1990) (invalidating an ordinance providing for "no more than one parade permit per month" and restricting groups to less than 250 marchers); Nash v. Texas, 632 F. Supp. 951, 956 n.1 (E.D. Tex. 1986) (invalidating as an unreasonable time, place, and manner restriction a Texas statute making it unlawful to engage in "mass picketing," defined as more than two pickets at any time within fifty feet of any entrance to the premises being picketed or any other picket); Mass. Cannabis Reform Coal. v. Town of Ashland, CA933784, 1995 WL 809933 (Mass. Supp. April 6, 1995) (invalidating a city regulation restricting non-residents to no more than one public park use permit per year). *But see* Comm'n on Indep. Colls. & Univs. v. N.Y. Temp. State Comm'n on Regulation of Lobbying, 534 F. Supp. 489, 493 (N.D.N.Y 1982) (upholding a New York law requiring lobby disclosure if $1000 threshold reached). My research has not revealed any case in which the no-quantity-limits principle used in the campaign finance cases has been applied or mentioned other than in campaign finance cases.

19. 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, for example, Golan v. Holder, 132 S. Ct. 873, 889 (2012) (evaluating a copyright and fair use statute without using heightened scrutiny or mentioning the quantity of speech principle); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997) (declining to apply heightened scrutiny to a law requiring cable compa-

quantity limits on protected speech are characterized as time, place, and manner restrictions or as limits on protected expressive conduct.[20] They are usually allowed, whatever the characterization, if they are content-neutral, narrowly tailored to a significant government interest, and leave available alternative avenues.[21] For example, quantity limits on union picketers are regularly allowed unless the union can show a larger quantity is "necessary to convey its message."[22] This is, at most, 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.[23]

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.[24] But many of the allowed quantity limits are imposed directly on speech, such

nies to devote channels to local broadcasting because the act is content-neutral); *see also* Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 386–88 (1969) (imposing the fairness doctrine on broadcasters not subject to strict scrutiny because of "differences in the characteristics of new media."); *infra* Part II.C.

20. The standards for time, place, and manner regulations and for protected expressive conduct are very similar, if not the same. *See* Clark v. Cmty. for Creative Nonviolence, 468 U.S. 288, 293 (1984).

21. 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 (1986) (holding that content-neutral regulations are not subject to strict scrutiny and acceptable as long as they serve a substantial government interest and they "do not unreasonably limit alternative avenues").

22. *Frye*, 146 F.3d at 144–45; *see generally*, *supra* note 18.

23. 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 Coal.* speakers advocated reform of marijuana laws at an event at the Stone Park pavilion in Ashland, Massachusetts held pursuant to a permit. Ashland reacted with a regulation that limited use of the pavilion by "non-resident organizations" to "one time per year." 1995 WL 809933, at *1. The Superior Court found the speech fully protected, the pavilion a public forum, and the regulation a prior restraint on protected speech. *Id.* at *3. The regulation would stand or fall, however, based on whether it was an appropriate "time, place and manner restriction." *Id.* at *2. There is no mention of a no-quantity-limits principle, nor was strict scrutiny applied to this direct quantity limit on protected speech. *Id.* 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." *Id.* 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. *Id.* at *3. The standard applied seems close to intermediate scrutiny, although the often-stated 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.

24. 424 U.S. 1, 17–18 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.

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 beyond. With higher 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, coverage, and reach of the message. Limiting the number of picketers also completely bans some speakers as well as their additional messages. Similar treatment of campaign finance might take the form of limits on the nightly TV ad time allowed in favor of each candidate (a measure that would probably gain wide support among TV viewers). The question would be, as it is in the picketing limits cases, whether the quantity allowed is "ample" or more quantity is "necessary to convey" the message.[25]

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."[26] 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.[27]

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 no-quantity-

25. *See supra* note 19.

26. 424 U.S. at 18 n.17.

27. 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. *Id.* at 19. 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—if not exponential—relationship is between the amount of money donated or spent and influence with the candidate supported.

limits-on-speech doctrine, is to rely on money-as-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.

II. MORE SPEECH DOCTRINES, LESS SPEECH FOR SOME

The principle that quantity limits on speech are constitutionally no different than prohibitions and are subject to strict scrutiny is one of many major innovations the Rehnquist-Roberts era has brought to speech law. This review starts with three that, like the no-quantity-limits principle, enlarge speech rights, then considers five that constrict them.

A. Money Is Speech

Some things and activities epitomize or embody speech and are sometimes referred to as "pure speech"[28]—books, pamphlets, speeches, recently blogs. But money 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. Almost all uses of money express something about the spender, but in that sense, everything we do and say is speech, and the term and concept lose all meaning and significance. Some, but not all, 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.[29]

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[30] 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

28. *See, e.g.*, Watts v. United States, 394 U.S. 705, 707 (1969) (holding that a statute making it criminal to threaten the President is a restriction on pure speech and subject to First Amendment considerations); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (finding a statute criminalizing verbal advocacy, in this case the offensive, threatening, and racist remarks of a KKK activist, a restriction on pure speech subject to First Amendment).

29. United States 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 substantial governmental interest in regulating the nonspeech element can justify); *see also* Texas v. Johnson, 491 U.S. 397, 405–07 (1989) (holding that burning an American flag is protected expressive conduct subject to intermediate scrutiny, which shifts to strict scrutiny if the prohibition is "related to the suppression of expression"); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 296 (1984) (finding sleeping in tents as part of a demonstration to be 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).

30. In *Clark*, demonstrators sleeping in Lafayette 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. 468 U.S. at 296.

manner or mode of speech, or an expressive or speech-facilitating activity, rather than speech itself.[31]

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 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.[32]

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 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.[33] The Court ruled that this is not a public forum (with four justices disagreeing),[34] therefore only rational basis scrutiny was applicable. Solicitation, but not leafleting,[35] 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.[36]

31. 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.

32. *See* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 168 (2002) (finding ordinance requiring door-to-door solicitors to obtain a permit unconstitutional because it was not tailored to serve the village's stated interest); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 685 (1992) (upholding a ban on solicitation in open portions of airport terminal under reasonableness standard); United States v. Kokinda, 497 U.S. 720, 733–34 (1990) (upholding a regulation prohibiting a political group from soliciting on a sidewalk leading to a post office under a reasonableness standard); Riley v. Nat'l Fed'n of the Blind, Inc., 487 U.S. 781, 789 (1988) (finding a solicitation of charitable contributions to be protected speech and a restriction "using percentages to decide the legality of the fundraiser's fee" could not withstand strict scrutiny); Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 797 (1985) ("[S]olicitation is protected speech . . . ."); Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) ("[S]peech does not lose its First Amendment protection because money is spent to project it . . . ."); Republican Party of Minn. v. White, 416 F.3d 738, 764–66 (8th Cir. 2005) (finding canon of judicial conduct prohibiting candidates for judicial office from personally soliciting campaign contributions violated First Amendment); *see generally* Kairys, *Freedom of Speech* (1998), *supra* note 6, at 210. In these cases, persons requesting donations usually assert a right to do so as part of their speech activities, by which they, like requesters of campaign donations, ask other people to donate money to support speech. In both situations, the requested and donated money would seem to be speech under *Buckley* and its progeny, but money is not treated as speech in these cases.

33. *Lee*, 505 U.S. at 678–85.

34. *Id.* at 680.

35. Chief Justice Rehnquist and three other Justices would also have upheld the ban on leafleting. *Id.* at 831 (Rehnquist, C.J., dissenting).

36. *See, e.g.*, Schneider v. State, 308 U.S. 147, 160–61, 165 (1939) (invalidating a permit requirement for speech on public streets, sidewalks, and parks and upholding the right to speak there even if

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.[37]

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.[38]

B. 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 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.[39] This

it inconveniences others and costs some expense to the city, while noting that the right does not include blocking others); Hague v. Cmty. for. Indus. Org., 307 U.S 496, 515 (1939) (holding that the government holds title to streets, sidewalks and parks in trust for the people, who have a right to use them for speech).

37. This phrasing, like some others in this piece, is drawn from my earlier works in this field. *See supra* note 6.

38. The significance of constitutionally protected unfettered money in elections 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 U.S. society and culture as well as U.S. law over the period of more than thirty-five years.

39. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 947 (2010) (Stevens J., concurring in part and dissenting in part) ("Not only has 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 . . . ." (internal quotation marks omitted) (quoting FEC v. Beaumont, 539 U.S. 146, 161 (2003)); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985)

longstanding near consensus was overturned in 2010 by *Citizens United v. Federal Election Commission*.[40]

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 *Citizens United*,[41] 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 (political action committees, commonly known as PACs). Corporations also have the same commercial speech rights as other businesses.[42] There is no good social, economic, or constitutional reason not to keep corporate managers' wielding of corporate treasuries to the business arena and out of the electoral arena.

C. 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.[43] Previously, commercial speech was viewed as outside of the self-expressive, individual-empowering, and democratic purposes of free speech, and as an eco-

("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.").

40. 130 S. Ct. 876 (2010).

41. *Id.* at 886.

42. Some corporations are nonprofit and so small as to resemble voluntary associations, and the laws or courts have sometimes exempted them from campaign restrictions.

43. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–62 (1976) (invalidating a statutory ban on the advertisement of prescription drug prices because even speech that does "no more than propose a commercial transaction" is afforded First Amendment protection (quoting Pittsburg Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385, (1973) (internal citations omitted)); Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (invalidating law that prohibited publications from encouraging abortion after finding that "speech is not stripped of First Amendment protection" merely because it is paid commercial advertisement). For an earlier case rejecting protection, see Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (upholding code prohibiting distribution in the streets of commercial and business advertising leaflets); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1084–87 (3d ed. 2006); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 813 (1999) (the Court is "beginning to detach the First Amendment from democracy and to graft it onto property"); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 38, 40 (1979) (recognition of commercial speech criticized as a "misuse of the first amendment" and "resurrection" of economic due process and the *Lochner* era).

nomic activity subject to reasonable regulation. In the Rehnquist-Roberts era, commercial speech has been protected mostly based on the rights of listeners to hear it rather than the rights of commercial speakers to say it, although listeners' rights have not fared well in other areas of speech law.[44] More-or-less intermediate scrutiny, and in the most recent case, strict 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; and a ban on pharmacies' and pharmaceutical manufacturers' revealing prescriber-identifying information on drug use for marketing purposes.[45] Commercial speech has become a significant instrument for judicial intervention to invalidate a range of reforms.[46]

44. *See Va. State Bd. of Pharmacy*, 425 U.S. at 757 ("If there is a right to advertise, there is a reciprocal right to receive the advertising . . . ."). The interest that individuals and society have in speech being received, in addition to the interest of a speaker to speak, is presented and potentially significant in all speech claims. It was first recognized as a "right" or as bolstering the First Amendment claim of a speaker in the 1940s in door-to-door canvasing and union organizing cases. *See* Thomas v. Collins, 323 U.S. 516, 534 (1945) ("[R]ight fully and freely to . . . be informed . . . ."); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (holding that the First Amendment "necessarily protects the right to receive" in the context of door-to-door canvasing); *see also* Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972) ("It is now well established that the Constitution protects the right to receive information and ideas. This freedom [of speech and press] . . . necessarily protects the right to receive . . . ." (citations omitted) (internal quotation marks omitted)); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (recognizing a "right to receive information and ideas"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (declaring "right to receive publications" a fundamental right). In the Rehnquist-Roberts era, the right to receive is most prominent in commercial speech and campaign finance cases. *See Citizens United*, 130 S. Ct. at 898–99; Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980) (invalidating a regulation that banned promotional advertisements by a utility company even though the government had a legitimate interest in conservation which was furthered by the ban). It has not fared well in other areas. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 766 (1978) (Brennan and Marshall, dissenting, criticized the majority for "fail[ing] to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive").

45. 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); Greater New Orleans Broad. Ass'n, Inc. 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 the social ills of gambling, the ban did not directly further that interest); Sorrell v. IMS Health, 131 S. Ct. 2653 (2011) (applying strict scrutiny for the first time to invalidate Vermont's prohibition of revelation for marketing purposes of prescriber-identifying information by pharmaceutical companies and pharmacies).

46. *See generally* TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2012) (criticizing the enlargement of commercial speech and the speech rights of corporations and warning they will have a broad and detrimental effect); Symposium, Nike v. Kasky *and the Modern Commercial Speech Doctrine*, 54 CASE W. RES. L. REV. 965, 986 (2004) (discussing legal implications of the California Supreme Court's decision in *Kasky v. Nike* that speech made by a corporation only to promote a better opinion of the business as a good corporate citizen was commercial speech).

D. 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 expression."[47] Such speech, though protected, receives only intermediate scrutiny, and the prohibition's relationship to suppression of expression hinges on its purpose. The actual purpose or motive, however, 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.[48]

This leaves the doctrine rather uncontained and available for seriously limiting speech rights, since there are always generally stated hypothetical purposes unrelated to suppression 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"; to uphold a ban on nude dancing; and to uphold a conviction for burning a draft card as a protest against the Vietnam War.[49]

47. *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 701, 707 (1986) (upholding closure statute against a bookstore used for prostitution even though the closure would have the incidental effect of interfering with the right to sell books); Virginia 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); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298–99 (1984) (upholding a regulation banning camping in certain parks that had the incidental effect of limiting speech by protestors who wished to sleep in the park); United States v. O'Brien, 391 U.S. 367 (1968) (upholding statute prohibiting burning of draft cards because the sufficiently important governmental interest justified the incidental limit on speech).

48. *See O'Brien*, 391 U.S. at 377; S. REP. NO. 89-589 (1965); H.R. REP. NO. 89-747 (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 (quoting S. REP. NO. 89-589 (1965) (internal quotation marks omitted)). 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; (quoting H.R. REP No. 89-747 (1965)); *see also* United States v. Miller, 367 F.2d 72, 77 (2d 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.").

49. *See* Barnes v. Glenside Theater, Inc., 501 U.S. 560, 571–72 (1991) (holding that nude dancing is not protected); *Arcara*, 478 U.S. at 707 (upholding 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); *O'Brien*, 391 U.S. at 385–86. *But see* Texas v. Johnson, 491 U.S. 397, 420 (1989) (holding that flag burning is protected 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.[50] 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 *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 *O'Brien* was aimed at facilitating the draft.[51] This ignores the obvious realities: the actual government purpose in *Buckley* was to restrict the role of money in elections without regard to any subject or viewpoint expressed or any preferred candidate, party, or political perspective; while the actual government purpose in *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.[52]

E. 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.[53] In 1986, however, 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."[54] Such restrictions—though explicitly content-based—receive intermediate 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.[55] And like the incidental effects doctrine, the secondary effects

50. It was first articulated in *O'Brien*, then expanded in the Rehnquist-Roberts era. *See* Keith Werhan, *The* O'Brien*ing of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635, 645 (1987) (arguing Warren's 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 on *O'Brien* beyond incidental restrictions as "disheartening").

51. Buckley v. Valeo, 424 U.S. 1, 17 (1976).

52. See *supra* note 43 for the stated congressional purposes behind the 1965 draft card amendment at issue in *O'Brien*.

53. *E.g.*, Schneider v. New Jersey, 308 U.S. 147, 164 (1939) (invalidating complete ban on distribution of pamphlets on public streets without a permit, finding "a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees" and is therefore unconstitutional).

54. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47, 54–55 (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); *see also* City of Erie v. Pap's A.M., 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).

55. Boos v. Barry, 485 U.S. 312, 320–21 (1988) (invalidating a 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).

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 the government from deciding which messages are allowed and which are forbidden.[56]

The secondary effects doctrine was adopted after *Buckley*, but campaign finance cases subsequent to adoption of the doctrine ignore it.[57] 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.[58]

F. Time, Place, and Manner Restrictions

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 reality of protected free speech.[59] 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.[60] But the require-

56. The secondary effects doctrine has been reined in some. *See* Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 430–31 (1993) (holding that a city ordinance prohibiting distribution of commercial handbills on public property could not be justified by concern for any secondary effects).

57. For example, many of the campaign finance cases discuss the danger of corruption as a legitimate governmental interest for limiting money in elections, but they do not consider or mention it as a secondary effect that might justify the limits. *See, e.g.*, Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2826–27 (2011) (finding matching funds provision of Arizona's campaign finance laws to be a substantial burden on speech unjustified by anticorruption interests); Randall v. Sorrell, 548 U.S. 230, 262–63 (2006) (disregarding secondary effects doctrine and reversing Second Circuit's finding that Vermont's interest in preventing corruption of election officials justified the state's election contribution limits).

58. Similarly, the Court's recent invalidation of a Vermont ban on revelation of prescriber-identifying information because it was content based ignored the secondary effects of protecting medical privacy and the integrity of the health system. Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) (applying strict scrutiny for the first time to invalidate a prohibition of revelation for marketing purposes of prescriber-identifying information by pharmaceutical companies and pharmacies).

59. *See* Brown v. Louisiana, 383 U.S. 131, 142–43 (1966) (holding that a silent sit-in in a segregated public library is protected and not prohibitable as a time, place, and manner regulation).

60. There has been controversy over whether the last element is a least-restrictive-means standard. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 315 (1984) (Marshall, J. dissenting) (showing support for the least restrictive means standard); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 818 (Blackmun, J. dissenting).

ments 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 ninety-four percent of the city and left a remaining six percent that was unavailable or unusable for that purpose—for which the doctrine might be renamed no time, no place, no manner.[61] 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 the treatment of homeless people.[62]

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.[63]

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

61. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46–47 (1986). Justice Rehnquist's opinion for the Court said that 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.

62. *See* Clark, 468 U.S. at 298–99 (upholding content-neutral regulation banning camping in certain parks, including protestors who wanted to sleep in the park); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981) (upholding content-neutral rule prohibiting distribution of any merchandise on fair grounds).

63. *See, e.g.*, Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212, 1220 (10th Cir. 2007) (upholding isolation of demonstrators protesting a NATO meeting in a hotel to an area over 300 yards from the hotel); Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 15 (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. City and County of Denver, 569 F. Supp. 2d 1142, 1175 (D. Colo. 2008) (upholding 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, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 606 (2006) ("[T]here has been a remarkable recent rise in the government's resort to spatial tactics to control and discipline expression, particularly expression that agitates, threatens, disturbs, or carries a message of political protest."); *Free Speech Under Fire: The ACLU Challenge to "Protest Zones,"* AMERICAN CIVIL LIBERTIES UNION (Sept. 23, 2003), http://www.aclu.org/free-speech/free-speech-under-fire-aclu-challenge-protest-zones. There has also been growing government surveillance and infiltration of people and groups that engage in protected dissent, which is not new to the Rehnquist-Roberts era. *See* Laird v. Tatum, 408 U.S. 1, 15–16 (1972) (finding plaintiff's claim against U.S. Army for unlawful surveillance of lawful citizen political activity non-justiciable); Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Group*, 46 ARIZ. L. REV. 621, 621–26 (2004) (detailing incidents of police infiltration in protest groups as recent as 2002); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 37–38 (2011) (identifying a history of government infiltration of various political groups for the purpose of disrupting the activities of those groups as far back as the Vietnam War). *But see* Pledge of Resistance v. We the People 200, Inc., 665 F. Supp. 414, 419 (E.D. Pa. 1987) (enjoining authorities at the celebration of the 200th anniversary of the Constitution in Philadelphia from isolating dissidents away from the public celebration, and raising questions about surveillance and police infiltration of dissenting groups; disclosure: I was lead counsel for the plaintiffs).

imposed on protected speech only if one accepts that money is speech, rather than a manner of, or an activity that facilitates, speech.[64]

G. 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.[65] The Rehnquist-Roberts era has been mixed on this principle, about which there seems to be a difference of opinion among the conservative Justices.[66] 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; the FCC's ban of uttering on the radio, with a warning to listeners, what humorist and satirist George Carlin called the "Seven Filthy Words" was upheld; and offensive speech by students is considerably less protected than it was.[67]

64. Buckley v. Valeo, 424 U.S. 1, 17–18 (1976). The Court offered other distinctions that are addressed *supra* note 24.

65. *See* Cohen v. California, 403 U.S. 15, 26 (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. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (holding "undifferentiated fear" is insufficient to overcome free speech even under the diminished protection accorded students); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (invalidating a statute criminalizing offensive and possibly threatening speech).

66. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1218 (2011) (finding offensive signs held by fundamentalist church members as part of an antihomosexual demonstration near 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, 131 S. Ct. at 1222 (Alito, J. dissenting); in *Johnson*, Justice Scalia voted with the majority, 491 U.S. at 398. Both cases involved protestors who were isolated, marginal, and ineffectual, and by their tactics had little chance of gaining support. *See Snyder*, 131 S. Ct. at 1220; *Johnson*, 491 U.S. at 399. The protesters in *Snyder* also agreed to police demands that they be out of sight and hearing of the soldier's funeral they protested. *Snyder*, 131 S. Ct. at 1213. *See also* United States v. Alvarez, 132 S. Ct. 2537 (2012). Justices Roberts and Kennedy join the majority's striking down of the Stolen Valor Act, which punished certain false and offensive speech. *Id.*

67. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 396–97 (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"); City of Erie v. Pap's A. M., 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 principal's 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, 685 (1986) (upholding sanctions imposed on student for using offensive speech during school assembly); FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding an FCC sanction of radio broadcaster for playing, after a warning to the listeners, popular comedian George Carlin's famous twelve-minute monologue on the seven words you can't say on the radio, a political critique of the FCC's censure policy in Carlin's unique style); Miller v. California, 413 U.S. 15, 23 (1973) (upholding statute criminalizing the mailing of unsolicited sexually explicit material finding obscene material unprotected by the First Amendment); s*ee also infra* note 88. A restriction on the sale of violent video games to minors was struck down, with Justice Alito dissenting. Brown v. Entm't Merchs. Ass'n, 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).

H. 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.[68] This has been replaced by a new, complex overlay of rules—the public forum doctrine—that must be satisfied as a precondition to vindication of speech rights or application of strict scrutiny. Initially, the Court said that "the character of the property"[69] determines whether it is a public forum, and public streets, sidewalks, and parks were recognized as "quintessential" public forums.[70] 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.[71] In one of the recent cases, this yielded a ruling that an open, public 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."[72] The public forum doctrine has also been used, as discussed above, to reject protection of speech activities in the open, public areas of New York's teeming air terminals outside of the gates and security areas.[73]

In the cases denying public forum status, the Court has emphasized that speech was not the "principal purpose" of the public facilities at issue.[74] This is true enough, but speech is rarely the principal purpose of any public facility, including streets, sidewalks, and parks, the principal

68. *See* Police Dep't of Chic. 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 wide-open" (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)) (internal quotation marks omitted)); Flower v. United States, 407 U.S. 197, 198–99 (1972) (per curiam) (reversing conviction of person for distributing leaflets on a sidewalk in an open, town-like area of a 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 the 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 speech right on open public streets, sidewalks, and parks was always subject to time, place, and manner restrictions.

69. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

70. *Id.* at 44–45.

71. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992) (discussing the "forum based approach" for determining the constitutionality of government speech restrictions (quoting Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800 (1985)) (internal quotation marks omitted)).

72. United States v. Kokinda, 497 U.S. 720, 727 (1990).

73. *See Lee*, 505 U.S. at 679–80 (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).

74. *See id.* 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).

purpose of which is to get people from one place to another and to provide areas for repose, appreciation of nature, 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.[75]

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 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.[76] Those cases were reversed in the Rehnquist-Roberts era.[77]

III. REHNQUIST-ROBERTS ERA SPEECH LAW

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 to anything other than 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 complicate and frustrate any effort to figure out what might be going on. 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 have been common in scholarship and popular commentary about free speech.[78]

75. 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 6, at 226–41.

76. Amalgamated Food Emps. Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 320–21 (1968) (protecting speech in a private shopping center because it is "the functional equivalent of [a] business district"). The first case recognizing speech rights on private property protected speech rights in a company town in 1946. *See* Marsh v. Alabama, 326 U.S. 501, 508 (1946) (invalidating company-owned town's statute which criminalized distribution of religious literature in business block of town). Malls and the people who go to them are not, as the city markets of earlier times, accessible from public streets and sidewalks.

77. *See* Hudgens v. Nat'l Relations Bd., 424 U.S. 507, 520–21 (1976) (holding that a private mall may impose content-based restrictions on speech), *overturning* Amalgamated Food Emps. Union, 391 U.S. at 308 (private mall cannot exclude picketing workers at a store within the mall); *see also* Lloyd Corp., LTD. v. Tanner, 407 U.S. 551 (1972) (private mall could exclude antiwar protestors).

78. *See supra* note 22 for articles categorizing the Roberts Court as either pro- or anti-free-speech; *see also* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010) (describing Justice Kennedy's majority opinion in *Citizens United* as an articulation of a "robust vision of free speech"); Eugene Volokh, *Where the Justices Are Unpredictable*, N.Y. TIMES, Oct. 30, 2000, at A23 (categorizing Justice Breyer as anti-free speech and Justices Kennedy, Thomas, and Souter as pro-free speech). Ilyo Shapiro, of the Cato Institute, has asserted that Kennedy is the

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 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.[79]

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[80] of a body of law.[81] 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 the 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.[82]

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."[83] Sometimes explicitly, sometimes in the form of various principles or doctrines, the Rehnquist-Roberts era Court established a new requirement or precondition for vindication of most civil rights.[84] 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.

"most pro-free speech justice [sic]." Peter Bozzo, *Protests, Privacy, and the First Amendment*, HARV. POLIT. REV., May 28, 2011, http://hpronline.org/united-states/protests-privacy-and-the-first-amendment.

79. I identified these patterns and trends in 1990. *See supra* note 6.

80. On the history of free speech, see *supra* note 6.

81. 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 supra* note 6.

82. 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 in legal reasoning, and searching for any plausible distinction that might preserve them, often in the face of obvious change.

83. *See* WITH LIBERTY AND JUSTICE FOR SOME, *supra* note 6, at 183–88. *See generally supra* note 6.

84. *See generally* WITH LIBERTY AND JUSTICE FOR SOME, *supra* note 6, at 183–88. *See also supra* note 6. The purpose doctrine has also been adopted in some criminal law rules. *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (holding failure to preserve evidence that could prove innocence or guilt does not violate due process "[u]nless a criminal defendant can show bad faith on the part of the police"). Justice Blackmun repudiated the purpose doctrine in dissent: "The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial." *Id.* at 61 (Blackmun, J. dissenting). 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 and waiver.

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,"[85] with racial animus or the motivation to racially discriminate.[86] The law of establishment of religion also incorporates a purpose requirement, excusing what would otherwise be an establishment of religion if there is a "plausible secular purpose."[87] The law of free exercise of religion incorporates the purpose doctrine nonexplicitly with the adoption of the purpose-based "incidental effects" test and rejection of the traditional strict scrutiny protection of religion.[88]

Rehnquist-Roberts era speech law incorporates the purpose doctrine in whole or in part in many of the areas just discussed: incidental effects, secondary effects, public forum (and 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 suggest—into how the tangle has been applied and used

85. 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 supra* note 6. Justice Rehnquist put it this way in a gender discrimination case: discriminatory purpose "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Adm'n v. Feeney, 442 U.S. 256, 279 (1979).

86. 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 supra* note 6. This pattern can also be seen in the cases on gender discrimination. *Compare* Geduldig v. Aiello, 417 U.S. 484, 497 (1974) (rejecting an equal protection challenge as gender discrimination to a state's health insurance program that excluded pregnancy), and Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274 (1993) (holding discrimination against pregnant women is not gender discrimination), *with* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982) (holding that a state nursing college for women is unconstitutional gender discrimination).

87. Mueller v. Allen, 463 U.S. 388, 394–95 (1983) ("[A] plausible secular purpose . . . discerned from the face of the statute" is enough); *see also, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000) (holding government loan of materials to religious schools not establishment of religion because neutral and there is a secular legislative purpose).

88. *See, e.g.*, Emp't. Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

with a focus on context and social meaning—reveals more significant patterns and themes.

The areas of First Amendment law in which the Court in the Rehnquist-Roberts era greatly expanded and enhanced the scope and strength of speech rights are those available to very wealthy people, corporations, and businesses. Unlimited spending on electoral campaigns by extremely wealthy individuals and corporations is now, for example, a constitutionally required feature of U.S. elections, regardless of the impact on the issues addressed, tenor, or results of elections.

The areas of First Amendment law in which the Court in the Rehnquist-Roberts era curtailed 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—the usual means of communication in recent times, along with the internet and social media[89]—and the Court has rejected their claims to public access to the mass media.[90] They are left with speech rights based on means of communication that were current in the 1930s, when free speech as we know it was first established: assembling, leafleting, speaking, demonstrating, and picketing 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.[91]

In the post-World War II, largely suburbanized context, this is mostly possible these days at transit terminals and shopping malls (in addition

89. The internet and social media have, of course, yielded new forms and methods for communication. They are often heralded—like television, radio, and telephones before them—as revolutionary means for empowering ordinary people with instant and free mass communication. They have made it easier to talk (and text), but it is still hard to gain a mass audience. Further, like the earlier innovations, these new media exist in a market economy in which whatever means of communication become prominent and feasible will be bought and sold. This has thoroughly developed with, for example, television, and it is already well underway with the internet and social media. *See* Michelle Sherman, *The Anatomy of a Trial With Social Media and the Internet*, J. INTERNET L., May 2011, at 1 ("Social media is connection. It is communication, a rather unlimited form of it with people speaking to a large audience."); John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 467 ("Social media's inexorable spread across state, national, and even international boundaries, along with the Internet's transformative effect on how people conduct business, is changing traditional notions of jurisdiction.").

90. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating "right to reply" law). The Court treats the mass media like lone leafleters in danger of being excluded from the marketplace of ideas, although the mass media have become the marketplace of ideas. *See* Kairys, *Freedom of Speech* (1998), *supra* note 6, at 208–09; Kairys, *Freedom of Speech* (1990), *supra* note 6, at 264.

91. Leafleting, picketing, and demonstrating can "display displeasure," but they were already somewhat outdated means of communication by the 1970s; and in the current social, technological, and cultural context, they are seldom effective for conveying a substantive message, posing a serious challenge, or reaching like-minded people. (Nonviolent civil disobedience beyond the protections of free speech retains more significance.) They do not provide serious or meaningful entre to that "dialogue on the issues of the day that the First Amendment is so often heralded as promoting and guaranteeing." They can be meaningful on occasion, and they are all people who "must rely on the Constitution for a means of communication and organizing" have—but their effectiveness and significance are regularly exaggerated. *See* Kairys, *Freedom of Speech* (1982), *supra* note 6, at 163–67 (even in the more liberal periods, speech law "has frozen the scope and nature of our speech rights at levels appropriate to the 1920s and 1930s, when specific audiences, like factory workers, were geographically centered, and speaking, gathering, and distributing literature in public places were the primary means of communication"); *supra* note 6.

to dispersed public streets, sidewalks, and parks). These areas and facilities have largely replaced the town square and inner-city marketplace as places where a large and varied array of people can be contacted and can exchange views without large expenditures of money. But the Rehnquist-Roberts era Court substantially diminished if not eliminated those already limited places and activities available for speech by people of ordinary means, and allowed the government to isolate and marginalize them and their messages.

Rehnquist-Roberts era speech law is not generally pro- or anti-free speech, but, more specifically, there are three major themes or patterns:[92] (1) enlargement of the speech rights available to wealthy people, businesses, corporations, and otherwise favored people or institutions;[93] (2) restriction of the speech rights available to people of ordinary means,[94] workers and unions,[95] government employees,[96] students,[97] and otherwise disfavored people or institutions,[98] and of the basic democratic rights of

92. *See generally supra* note 5. This Essay does not cover all the relevant doctrines or decisions from the Rehnquist-Roberts era or address all possible counter examples or exceptions.

93. *See supra* Parts I, II.A–C; *see also* Bush v. Gore, 531 U.S. 98, 109–10 (2000) (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). This was 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 (May 19, 2001), http://jurist.law.pitt.edu/forum/forum new23.HTM.

94. *See supra* Part II.D–H.

95. Nat'l Labor Relations Board v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980) (upholding a prohibition of clearly protected, truthful speech urging a boycott, which would usually be overturned, because it was related to labor union activity); *see supra* Part II.D–H; *supra* note 19; *see also* Knox v. Serv. Emp. Int'l Unions Local 1000, 132 S. Ct. 227 (2012) (limiting dues-based funding of political speech by government employee union). No similar speech limits have been imposed on corporations.

96. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006) (finding speech by assistant district attorney in internal memo written pursuant to official duties not to be under protection of First Amendment); Waters v. Churchill, 511 U.S. 661 (1994) (ruling, in plurality, that a nurse could be fired for her speech if public hospital employer was reasonable); Connick v. Myers, 461 U.S. 138 (1983) (holding that an internal memo questioning office policies is not protected). The pre-Rehnquist-Roberts era decisions were substantially more protective of the speech rights of government employees. *See* Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (protecting a teacher's letter to the editor in a newspaper that was critical of school officials).

97. *See* Morse v. Frederick, 551 U.S. 393, 396–97 (2007) (finding no violation of First Amendment rights when school principal punished student for display of a sign at an event across the street from the school that the principal viewed as drug related); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988) (upholding a principal's decision to cut articles from school newspaper because the articles infringed on other students' privacy rights); Bethel Sch. Dist. v. Fraser, 478 U.S 675 (1986) (upholding sanctions imposed on student for using offensive speech during school assembly). *But see* Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503, 514 (1969) (finding that absent facts showing disturbances likely from students wearing armbands to protest the Vietnam War, regulations prohibiting those armbands were invalid under First Amendment).

98. *See supra* Part II.D–G; *see also Garcetti*, 547 U.S. 410; Retail Store Employees Union, Local 1001, 447 U.S. 607 (upholding a prohibition of protected, truthful speech urging a boycott because the speakers and speech related to labor union activity, although boycotts by others are protected); FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding FCC sanction of radio broadcaster for playing, after a warning to the listeners, popular comedian George Carlin's famous twelve-minute monologue on the seven words you can't say on the radio, a political critique of the FCC's censure policy in Carlin's unique style); *Morse*, 551 U.S. at 393. In *Safeco*, the Court selectively diminished the speech rights of

every American to vote and participate as equals in the electoral and political processes;[99] and (3) free-speech barriers to public access to the media[100] and to electoral, economic, and social reforms aimed at improving the lot and lives of Americans.[101] There are at least apparent exceptions.[102] Other considerations or circumstances have sometimes conflict-

organized labor although labor cases and the labor movement played a vital role in the establishment of free speech as we know it. 447 U.S. 607. On the history of free speech and the role of the labor movement, see Kairys, *Freedom of Speech* (1982), *supra* note 6, at 140–71.

99. *See* Crawford v. Marion Co. Election Bd., 553 U.S. 181 (2008) (upholding a facially challenged voter photo identification requirement, with deference to state laws restricting voting, based on the state interest in deterring voter fraud, although there was no evidence of voter fraud); Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (finding political gerrymandering claims nonjusticiable); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997) (upholding antifusion laws, which prohibited candidates from appearing on ballot under more than one party because the laws did not restrict parties' ability to endorse and vote for the candidate of their choosing); Burdick v. Takushi, 504 U.S 428, 441–42 (1992) (upholding prohibition of write-in voting as reasonably burdening First Amendment rights); Shaw v. Reno, 509 U.S. 630 (1993) (overturning as discriminatory against whites Voting Rights Act requirement to create some majority-black House districts, after North Carolina districting had assured that no member of the delegation was black since Reconstruction); Presley v. Etowah Cnty. Comm'n, 502 U.S. 491 (1992) (upholding an Alabama county's removing all the powers from the office of county commissioner after two African Americans were elected as commissioners for the first time from districts required under the Voting Rights Act). Nevertheless, the Court applied a heightened and expansive version of voting rights to benefit George W. Bush in the contested 2000 election that, the Court said explicitly, would not have precedential force or benefit anyone else denied the same rights. Bush v. Gore, 531 U.S. 98, 109–10 (2010) (holding that Florida's disparate methods of counting votes violated voting rights under the First and Fourteenth Amendments and awarding the 2000 election to George W. Bush). Contrary to conventional wisdom, *Bush v. Gore* is not an unfortunate exception, but an unusually transparent example of the pattern of speech and voting cases over the last few decades.

100. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (upholding exclusion of a third party candidate from a debate although he had obtained the 2000 signatures required to be listed on the ballot); Miami Herald Pub'g Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating "right to reply" law).

101. *See supra* Parts I, II.A–C; *see also* Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) (applying strict scrutiny for the first time to invalidate Vermont's prohibition of revelation for marketing purposes of prescriber-identifying information by pharmaceutical companies and pharmacies); Shaw v. Reno, 509 U.S. 630, 644–45 (1993); Florida Star v. B.J.F., 491 U.S. 524, 532 (1989) (holding that imposing damages on newspaper for publishing name of rape victim violated First Amendment). See *supra* note 41 and accompanying text for a discussion of Supreme Court cases invalidating government regulations that served important environmental and social concerns.

102. Watchtower Bible & Tract Soc'y of New York Inc. v. Village of Stratton, 536 U.S. 150 (2002), may be seen as an exception that expanded the speech rights of people of ordinary means. The Court ruled that door-to-door canvassers cannot be required to obtain a non-content-based permit, 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 the canvassers are strangers who approach homes. This decision can seem like accommodating and enlarging speech rights available to people of ordinary means. However, door-to-door canvasing actually requires significant organization, many workers, considerable training and supervision, and more than ordinary means; and it is a favorite and consistent activity of the Democrats and Republicans at election seasons and often throughout the year (as well as a variety of funded campaigns, religions, and movements). It seldom is, or can be, used to any significant extent by unorganized and unfunded people of ordinary means. I was for many years counsel for a group that canvassed door-to-door on environmental and other issues and I litigated their free speech claims. *See* Pa. Pub Interest Coal. v. York Twp., 569 F. Supp. 1398 (M.D. Pa. 1983) (invalidating ordinance prohibiting door-to-door canvassing after 6:00 P.M.).

ed or presented higher priorities,[103] but these three themes or patterns generally characterize Rehnquist-Roberts era speech law.

The familiar First Amendment rhetoric of self-expression, empowerment of the people, and triumphal U.S. 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 is democratic and 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."[104] The Court did not explain how domination of the public debate leading up to elections by a very small group of our wealthiest keeps "the people [in] control," and 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 and sanctity of each person, not each dollar. Freedom of speech in the Rehnquist-Roberts era no longer has much to do with democracy, or with empowerment or self-expression of the American people, except for the very wealthy and for corporations claiming humanity. This is what we now call freedom of speech.

103. See Knox v. Serv. Emp. Int'l Union, Local 1000, 132 S. Ct. 2227 (2012). The Court expanded the speech-based limits on union funding of political speech from nonmembers who disagree with the message. This enlarges the speech rights of government employees, who are also generally people of ordinary means, but it comes in the context of their challenge against their union. The Court subjects unions to far more limits in this regard than other groups, limits that may be extended to private sector employees and their unions. *See generally* Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800 (2012).

104. Buckley v. Valeo, 424 U.S. 1, 56–57 (1976).