

FOREWORD

The “Long View”: Toward Restoring the Constitution?

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The Cato Institute’s Center for Constitutional Studies is pleased to publish this 13th volume of the *Cato Supreme Court Review*, an annual critique of the Court’s most important decisions from the term just ended, plus a look at the term ahead—all from a classical Madisonian perspective, grounded in the nation’s first principles, liberty through limited government. We release this volume each year at Cato’s annual Constitution Day conference. And each year in this space I discuss briefly a theme that seemed to emerge from the Court’s term or from the larger setting in which the term unfolded.

The most striking fact about this term, perhaps, is that nearly two-thirds of the Court’s decisions were unanimous, the highest percentage in over six decades, even if that was achieved in several cases through narrow rulings, or if the rulings camouflaged very different rationales. Complementing the Court’s high unanimity rate, only 10 cases were decided 5-4, another low in recent years. On the surface, therefore, it looks like Chief Justice John Roberts is maneuvering the Court to speak as much as possible with one voice, as he had hoped to do, even if the often narrow or fractured opinions that result give less than clear guidance to the 13 federal appellate courts below where some 60,000 cases a year are terminated.

It appears also, or at least it is said, that the 59-year-old Roberts is taking the “long view,” even if it isn’t entirely clear what that means. About to begin its tenth term, and its fifth under the current cast of justices, the Roberts Court seems to be following the course

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foreshadowed by its namesake during his confirmation hearings. “A certain humility should characterize the judicial role,” the soon to be confirmed chief justice told the Senate Judiciary Committee. Liking his role to that of an umpire—neither ignoring nor making the rules of our political life but simply applying them—Roberts made it clear that he stood not for politics but for law, for the idea that judges “are servants of the law, not the other way around.” It was a fitting image for the nonpolitical branch, especially after nearly eight decades, by fits and starts, of seemingly rudderless judicial deference to the political branches on one hand or judicial usurpation on the other, yielding anything but modest demands upon a Court increasingly required to adjudicate our ever expanding public life.

Not all would call the Roberts Court modest or restrained, of course, much less solicitous of the liberty that many of the Roberts majorities believe to be embedded in the constitutional text and structure. Critics on the Left, especially, point to its decisions concerning business, unions, campaign finance, voting, abortion, religion, affirmative action, and more—sometimes reversing established precedent, more often laying a foundation for possible future reversals—and they cry “judicial activism”—as if a change in legal direction were the touchstone of that charge. Yet their complaint, too often reducing law to politics, is not entirely groundless: In fact, in those very confirmation hearings, Roberts himself said that “judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.”

First Principles v. Precedent

Regardless of whether that line was meant to calm committee members apprehensive about change, it brings us to a very old question: Should constitutional cases be decided by constitutional principles—first principles embedded in the document itself—or by established precedents? When the two are one, there is no problem, of course. It requires but a casual acquaintance with our constitutional history, however, to appreciate that many of today’s constitutional precedents are derived from the Constitution by only the most strained reasoning. To illustrate that point most broadly and generically, if James Madison was correct when he wrote in *Federalist* No. 45 that the powers of the new government were “few and defined”—surely, we must presume that he understood the document

for which he, more than any other, was responsible—then there must have been many judicial mistakes over the next two centuries, many unmoored precedents, to have given us today's Leviathan. And of course there were. No one can read Madison's discussions in *Federalist* Nos. 41, 42, and 44 regarding, respectively, the Taxing (General Welfare), Commerce, and Necessary and Proper Clauses and come away thinking that the expansive readings the New Deal Court gave those clauses are correct.

But what is the Court to do now, after nearly eight decades of cascading decisions that have left us a body of "constitutional law" only occasionally derived from the Constitution itself? For practical reasons at least the Court can hardly overrule the Social Security Act, for example. Yet few were more surprised when the Court upheld that act than many of its supporters. As Massachusetts Rep. Allen T. Treadway had said two years earlier, in 1935, "The Federal Government has no express or inherent power under the Constitution to set up such a scheme." And in the Senate that same year, here is Louisiana's Huey Long, shortly before his untimely death: "Everyone doubts the constitutionality of the bill. Even the proponents of the bill doubt it." The Court's subsequent pronouncements notwithstanding, the same can be said for countless other schemes Congress has created over the years, including some pre-dating the constitutional revolution that followed Franklin Roosevelt's infamous 1937 Court-packing threat. Based on constitutional principles authorizing only a limited federal government, and later amendments aimed at limiting state power as well, those schemes are all *ultra vires*.

To be sure, on occasion the Court can check power and even reverse course with only limited repercussions. In 1995, for example, the Court held the 1990 Gun-Free Schools Act unconstitutional, as it did five years later with the Violence Against Women Act—finding in both cases that Congress had exceeded its authority under its commerce power. But in both cases also the actions addressed by the acts were already prohibited under the police power of the states, so there was little change on the ground. One could make a similar point about the Court's 2012 ruling that Congress's power to regulate interstate commerce did not enable it, pursuant to the Affordable Care Act, to mandate that individuals buy insurance so that they might then be regulated under the Commerce Clause. Never had the commerce power—with or without the Necessary and

Proper Clause—been used to *compel* commerce, so again the decision never really changed things on the ground. In each of those cases it was the modern, boundless reading of the commerce power that was reversed. Rejecting 58 years of Commerce Clause precedent, Chief Justice William Rehnquist said in the 1995 decision, “We start with first principles. The Constitution creates a Federal Government of enumerated powers.”

On the rights side, reversals grounded in first principles—both liberty and equality—are more common and often more clearly reversals of precedents. Most famously, of course, and notwithstanding the possibility of repercussions, when the Court decided *Brown v. Board of Education* in 1954 it reversed the separate-but-equal precedent and the practical course it had sanctioned in 1896 in *Plessy v. Ferguson*. *Brown’s* unfortunate “psychological” opinion aside, one can safely say that as a matter of law the equal protection *principle* trumped *Plessy’s* 58-year-old *precedent*. Similarly, in 1965 the Court reversed what amounted to precedent—its fairly well-established deference to state police power—when it ruled that Connecticut’s prohibition on the sale and use of contraceptives was unconstitutional. And in 2003 the Court reversed a clear precedent—its own ruling barely 17 years earlier—when it found a Texas statute criminalizing same-sex sodomy to be unconstitutional.

But looming between the arguably mistaken precedents that, as a practical matter, are impossible to reverse except through legislation—like *Helvering v. Davis*, upholding the Social Security Act—and those that the Court alone can more easily fix, we find a wide variety of cases where principle and precedent part company and it is not always clear, both tactically and strategically, what the Court should do, much less what the “long view” calls for. In fact, what exactly *is* the object of this long view?

The Long View?

Let’s note first that although Chief Justice Roberts may indeed be taking the long view, the talk about it does not come from him but from those of us who follow the Court’s business. Thus, many on the Left have answered the question just posed in narrow political terms, expressing their fear that the Roberts Court will continue to undermine campaign finance limits, economic and environmental regulations, civil and consumer rights, and more. They discern a clear

political agenda in the Roberts Court's decisions. No one can doubt, of course, that in a particular case a justice's legal analysis might be influenced by his political views—and opinions occasionally give evidence of that. But in the main, I submit, a justice's opinion on any given case is driven far more by his understanding of the Constitution, the laws enacted under it, and the decisions rendered pursuant to that law. Still, that is more likely true of dissents and concurrences than of opinions for the Court, for the simple reason that it takes at least five justices to speak for the Court, and those five (or more) may have different views on those three sources of law. In such cases, the final opinion must be acceptable enough to all, even if not fully acceptable to any, which means that the Court's opinion may not accurately reflect "the law."

Let's assume, however, that we can speak meaningfully of the Roberts Court's having an "agenda" and take up the question of what that agenda might be, what its "long view" is. Unless we are prepared to say that Roberts's confirmation statements were disingenuous or, at best, naive aspirations, then the narrow political objectives that some attribute to him must be dismissed. Consistent with that, and taking Roberts at his word as outlined above, securing the Court's reputation as the nonpolitical branch in an increasingly politicized and polarized nation must surely rank high on his list of objectives, as evidenced by his press for unanimity, even if, given that polarization, not all will agree with given decisions. For unanimity signals to a deeply divided people that despite the polarization beyond the Court, at least one branch of government, the nonpolitical branch, can agree about what the law is—shades of the Marshall Court, seeking to cement the new federal government against the political storms of its day.

But that "institutional" objective, that effort to assure a skeptical public that law can be discerned and applied in a nonpartisan way, is itself, of course, a *political* goal, albeit a broad nonpartisan one. Still, there are critics who contend that Chief Justice Roberts is employing unanimity more cunningly, in service of narrower political ends. Several have pointed, for example, to his 2009 narrowly written unanimous opinion in *Northwest Austin v. Holder*, upholding (while raising questions about) a key section of the Voting Rights Act of 1965, which served four years later, in *Shelby County v. Holder*, as a precedent for undermining that provision—a 5-4 decision with Roberts again

writing for the Court. I'll reserve judgment on whether that was all part of a grand plan. It needs to be said, however, that this larger effort to encourage unanimity should surely not count as the Court's *main* objective. For the Court needs to say not simply what the law is; it needs also to get it right when it so says. Its main job, that is, should be to state the *correct*, not just the agreed upon, reading and application of the law, even if that means that not all of the justices may agree with a decision doing that.

To see this dilemma played out, let's look first at one of the more important unanimous decisions the Court decided this term, *NLRB v. Noel Canning*.

NLRB v. Noel Canning

In a ringing unanimous decision below in *Noel Canning*, Judge David Sentelle went to the heart of the matter, writing an opinion for the U.S. Court of Appeals for the D.C. Circuit on the question of whether President Obama's three "recess" appointments to the National Labor Relations Board—which he made on January 4, 2012, when the Senate was in pro forma session—were constitutional. They were not, Sentelle ruled, doubtless influencing the two other circuit courts that later reached the same result. Not only was the Senate in session when the appointments were made, but the vacancies the president filled did not "happen" when the Senate was not in session. Thus, the president violated both the background separation of powers principle implicit in the requirement that upper-level executive branch appointments be made "by and with the Advice and Consent of the Senate," and the exception afforded by the Recess Appointments Clause: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of the next Session."

Noel Canning should have been an easy case for the Supreme Court to affirm—in fact, with an opinion pretty much along the lines of Sentelle's. After all, the constitutional text concerning how appointments are *normally* to be made is clear: "by and with of the Advice and Consent of the Senate." And the text of the exception, the Recess Appointments Clause, presents little if any ambiguity as well. It concerns only "Vacancies that may *happen* during the Recess of the Senate," when the Senate is not there to advise and consent, not those that happen when the Senate *is* in session; and it refers not to *a* recess

of the Senate—to the several “intra-session” recesses that may occur *within* either of the one-year sessions that take place between congressional elections—but to *the* recess of the Senate, the single “inter-session” break that occurs between those two one-year sessions. And all this as determined not by the president, as President Obama purported to do, but by the chambers themselves, as the Constitution provides. Finally, since the Court had never been called upon to rule on the question, it found before it a straightforward constitutional question unencumbered by any judicial precedent.

But there were *historical* precedents—mostly recent departures from the constitutional text, culminating finally in Obama’s going a step too far—and those precedents served to keep the Court’s majority from reaching a principled decision. True, the Court held unanimously that Obama’s appointments to the board were unconstitutional because here the Senate was in *pro forma* session—it falls to Congress to say when it is in session, not to the president. But Justice Stephen Breyer, writing for himself and Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, gave everything else to the administration. All but ignoring the purpose of the Senate’s advice and consent role—to serve as a check on executive power—Breyer focused instead on the purpose of the recess appointments power—to fill offices when the Senate is out and thus unable to advise and consent—reading out of the clause the requirement that the vacancy “happen” during the recess. If a vacancy is still open when the Senate goes out of session, even if it arose when the Senate was *in* session and could have given its consent, that’s good enough. And Breyer temporized in spades when it came to the definition of “*the* recess.” It doesn’t matter, he ruled, whether a recess is between or within sessions as long as it’s long enough to be a “recess.” And how long is long enough? Looking to history again, three days is too short, but ten days is “normally” enough to constitute a recess, he concluded.

That was all too much for Justice Antonin Scalia, who read from the bench, no less, his “furious concurrence,” as Adam Liptak of the *New York Times* put it. Joined by the chief justice and Justices Clarence Thomas and Samuel Alito, Scalia took the gloves off. Like Judge Sentele in the court below, he would have held the recess appointments power to its structural and textual moorings, limiting its exercise to filling vacancies that *happen* during *the* recess of the Senate—“that

is, the intermission between two formal legislative sessions." Sounding uncharacteristically like a judicial "activist," in truth he issued a clarion call not for rudderless activism but for judicial engagement with principle, text, structure, and precedent. "The majority's insistence on deferring to the Executive's untenably broad interpretation of the [recess appointments] power," he charged, "is in clear conflict with our precedent and forebodes a diminution of this Court's role in controversies involving the separation of powers and the structure of government." And with the errant Justice Kennedy repeatedly in his "cites," Scalia added, "[s]o convinced were the Framers that liberty of the person adheres in structure that at first they did not consider a Bill of Rights necessary."

That quote is from Kennedy's 1998 concurrence in *Clinton v. City of New York*, where he also wrote, responding there to Justice Breyer, that "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers"—precisely the principle at stake here. And Kennedy added: "Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty." By contrast, Breyer's main rationale for so limited a ruling in *Noel Canning* had the clear ring of restraint and deference: "We have not previously interpreted the [Recess Appointments] Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromise and working arrangements that the elected branches of Government themselves have reached." But as Justice Scalia showed, far from "working arrangements," those ambiguous "late-arising" historical practices, which President Obama stretched to the breaking point, spoke of anything but "compromise." Yet here, Kennedy joined Breyer's deference, the same Kennedy who in *Clinton* had written that "our role is in no way 'lessened' because it might be said that 'the two political branches are adjusting their own powers between themselves.'"

So why did Kennedy not see the parallels here, where his vote would likely have made the difference between a constitutionally principled resolution of the case, protecting liberty, and a resolution that leaves a muddy prospect, difficult to police, while compromising the Senate's advice and consent role? Or, more likely, is it that he did see the parallels, but thought it more important, perhaps, for the Court to speak with one voice on this question? If so, does that rationale help to explain why he, as the senior most justice among

the majority, assigned the opinion on this politically charged case to Breyer, perhaps to make the loss more palatable to supporters of the president? We can only speculate here, of course. But if it was a concern for unanimity that animated either Kennedy or Roberts (or both), then this admittedly broad *political* objective, as noted above, trumped the unambiguous text of the Constitution—leaving us to wonder in what way or sense this decision serves the “long view.” Assume that it was Kennedy’s vote that was in the balance: Had he joined Scalia’s opinion, making it the opinion of the Court, and had the Court’s four liberals then dissented, the separation of powers principle and the liberty it secures—a connection Kennedy has frequently recognized—would have been protected in this context, far better than under the decision the Court rendered, where both remain essentially unprotected. If the long view entails preserving or, better, restoring constitutional principles, as surely it must for both Kennedy and Roberts, would not the Scalia opinion have better served that end than this dubiously grounded unanimous decision? Apart from the limited holding the Court reached—that it falls to Congress to say when it is in session—it is hard to see what unanimity gained here, but easy to see what the Constitution lost, and to see also the opportunity missed.

Burwell v. Hobby Lobby

The Constitution fared somewhat better in another decision that drew much attention this term—more attention, perhaps, than any other—*Burwell v. Hobby Lobby*. Although not a constitutional but an as-applied challenge to a Department of Health and Human Services (HHS) regulation issued pursuant to the Affordable Care Act (ACA), *Hobby Lobby* was immersed in and replete with constitutional issues and implications. Yet here too the decision left us asking why the Court could not have done a better job of restoring constitutional principles.

Without doubt, the answer rests in substantial part with the question before the Court, which emerges from the tall grasses of modern “constitutional law.” It was whether the Religious Freedom Restoration Act (RFRA) protected Hobby Lobby, a closely held for-profit corporation founded and owned by a deeply religious family, from having to provide its female employees, pursuant to an HHS mandate, with health insurance that included coverage for 20 contraceptive

services, the four at issue being arguably abortifacients, at no cost to the employees. Writing for the Court, Justice Alito, joined by the chief justice and Justices Scalia, Kennedy, and Thomas, held that the HHS contraceptive mandate violated RFRA. Thus, the Court upheld the religious liberty of Hobby Lobby's owners.

Let's begin with first principles. In a free society of the kind implicit in the Constitution following the Civil War Amendments, employers, regardless of their organizational form, would be at liberty to offer group health insurance of whatever kind to their employees. But as detailed in Professor Richard Epstein's extensive discussion of *Hobby Lobby* later in this volume, a vast body of law of various kinds has accumulated over the years, covering everything from markets to employment, insurance, health care, drug policy, and more, much of it inconsistent with that original free-market vision. Of particular relevance here, in 1990, in *Employment Division v. Smith*, Justice Scalia ruled for the Court that the Free Exercise Clause of the First Amendment did not prohibit the state of Oregon from denying unemployment benefits to plaintiff Smith, a Native American, after he was fired by a private drug rehabilitation organization because he ingested peyote, a controlled substance, for sacramental purposes at a ceremony of his Native American Church. Thus, a person's religious beliefs and practices, Scalia held, will not excuse him from compliance with an otherwise "valid and neutral law of general applicability"—here, the federal Controlled Substances Act.

The principle Scalia articulated would pose only a small range of problems in a world in which such laws were limited to policing common law matters like torts, crimes, contracts, and remedies, and to providing a limited range of public goods, properly defined. But today, when government regulates vast areas of life—not only to protect such common law rights but in pursuit of manifold public and political ends—it's another matter. Thus, recognizing the implications for religious liberty of the *Smith* decision, religious organizations of every stripe rushed to Congress for relief, which they got in 1993 in the form of RFRA, a broad statute that carves out a religious exception from the *Smith* ruling. It was under RFRA that Hobby Lobby's owners sought relief: Not only did the ACA require them to offer health insurance to their employees, but the HHS mandate, at issue in the litigation, specified coverage that violated the owners' deeply held religious beliefs.

It was fairly easy for Alito to dismiss the government's first objection—that a for-profit corporation could not come under RFRA's protection. Nothing in the statute precluded corporate "persons" from coverage. Besides, the rights of the corporation, at bottom, are simply the rights of the owners who pursue their interests through the corporate form. And Alito noted also that HHS's concession "that a nonprofit corporation can be a 'person' within the meaning of RFRA effectively dispatches any argument that the term 'person' as used in RFRA does not reach the closely held corporations" here.

With the question of coverage settled, Alito turned to RFRA's three requirements. First, did the contraceptive mandate substantially burden the owners' exercise of religion? Here too there was little difficulty demonstrating that it did. By facilitating the performance by their employees of acts the employers considered immoral according to their religious tenets, the HHS mandate clearly burdened the employers' exercise of religion, leaving them unable to conduct their business consistent with their religious beliefs. Moreover, if the company refused to comply with the mandate or to provide health insurance altogether, it would face huge, continuing fines, thus putting the owners to a choice of either following their faith or likely going out of business.

It was on RFRA's next two requirements, however, that the Court fell short. In drafting RFRA, Congress had incorporated the judicial methodology that the New Deal Court invented in 1938 in (in)famous Footnote Four of its *Carolene Products* decision. In that case the Court had asked not what long had been the first question, whether the statute at issue was authorized under the doctrine of enumerated powers: congressional authority was simply assumed since that bedrock constitutional principle had died a year earlier. Rather, the Court asked whether the statute implicated a "fundamental" or a "nonfundamental" right. If the former, the statute would survive "strict scrutiny" only if the "interest" of the government was "compelling" and the means the government employed were "narrowly tailored" to serve it. If the latter, a "rational basis" for the statute was sufficient for its survival. Needless to say, the potential for all manner of judicial value judgments and mischief was unleashed, and it ensued.

In 1993, therefore, determining religious liberty to be a "fundamental right," Congress imported that methodology into RFRA,

requiring that if government were to burden religious liberty it must have a “compelling interest” for doing so, and it must do it by the “least restrictive means.” For his part, Alito, having determined that the contraceptive mandate substantially burdened the religious liberty of Hobby Lobby’s owners, did not of course ask the fundamental *constitutional* question—whether the ACA, pursuant to which the HHS contraceptive mandate was promulgated, was constitutionally authorized—for that was partly “settled” two years earlier when the Court rewrote the ACA’s individual mandate to uphold it under Congress’s taxing power. But neither did he ask the basic *statutory* question—whether the government had a compelling interest “in guaranteeing cost-free access to the four challenged contraceptive methods.” Instead, he simply assumed *arguendo* that the government’s interest was compelling and then proceeded straight to the final RFRA step, concluding that the mandate failed the statutory test because there were other, less restrictive means by which the government could accomplish its interest, such as itself taking on the costs of contraceptive services, or by extending the accommodation that HHS had already established for *nonprofit* organizations with religious objections.

There are several problems with the Court’s having elided the compelling interest test, as Epstein discusses in his essay in this volume. But the core of the matter is that the government’s “interest” must be defined with particularity regarding the person whose religious liberty is at stake such that that interest outweighs the individual’s interest in religious liberty. And the government did not do that—nor did Alito, in the end, require it to. This is not a case in which the employer is *preventing* the employee from obtaining contraceptive services, which are readily available in the market or, for indigent employees (if any), from various social services. Given that ready availability, why is the government’s interest in providing women with free contraceptive services so compelling that it must force employers with religious objections to provide and pay for the services?

Had Alito pressed that issue, he would not have had to go to the final step, of course. But having assumed that the government had a compelling interest that justified restricting religious liberty, his finding that the contraceptive mandate violated RFRA because there were less restrictive means available put the Court in something of a dilemma only a few days later. It arose when Wheaton College,

a nonprofit organization with religious objections, came before the Court seeking an interim order allowing it to refuse to offer contraceptive coverage without filling out a required form that also gave notice of its position to its health insurer or third party administrator, which the college believed would implicate it in facilitating the provision of such coverage. The Court granted the order, holding that one of the less restrictive means it had found available only days earlier was *not* a less restrictive means here. That apparent back-tracking could have been avoided if the Court, in *Hobby Lobby*, had weighed in on RFRA's compelling-interest requirement. (This "accommodation" had never been offered to Hobby Lobby and the other for-profit enterprises challenging the contraceptive mandate, so it is unknown whether some or all of these plaintiffs share Wheaton College's objection to the form-filing.)

Here too, then, it is unclear what this decision says about our larger theme—what it says about the "long view." Although religious liberty was protected in *these* circumstances—a limit that Kennedy's concurrence seemed to emphasize—the Court could certainly have put its decision on firmer ground. To be sure, the decision advances liberty marginally by employing *part* of RFRA's response to the unfortunate *Smith* decision. (And it might have gone the other way.) But look how far into the tall grasses of modern "constitutional law" this case was from the start, as noted earlier. *Smith*, for its part, began uncritically with the Controlled Substances Act, which had been "law" for decades, notwithstanding that the commerce power that "authorized" the act was originally written not to interfere with but to facilitate interstate commerce, even in substances disapproved of by some, and notwithstanding that the Fourteenth Amendment empowers Congress and the courts to block states from exercising their police powers in ways that interfere with private transactions that injure no one. Yet when Congress sought to check *Smith's* deference to "valid and neutral law[s] of general applicability," it did so simply by carving out a single "exception"—for religious liberty—an exception to the general idea that government may rule as it will.

Think about that: government first, liberty second, as an "exception" to the general rule—an "accommodation," as the *Hobby Lobby* Court styled it. Where did such an idea come from? It came, obviously, from the Progressive Era, which slowly reversed our Founding first principles, then instituted that reversal during the constitutional

revolution of 1937-1938. The reversal began years before, with property rights and economic liberty: the right to use property as one wished unless someone had a demonstrably valid objection was replaced by permit regimes, zoning and the like; so too, economic liberty came increasingly under regulatory restraints and licensing regimes. After *Carolene Products'* Footnote Four reduced the protection of such "nonfundamental rights" through the toothless rational basis test, a surfeit of legislation poured forth—federal, state, and local. And then, with the demise of the nondelegation doctrine in 1943, the modern administrative state blossomed—today's executive state—resulting in ever-widening incursions on individual liberty—and selective efforts by the Court to "accommodate" such liberties when they concerned "fundamental" rights. But with our increasing dependence on the "entitlements" provided by the executive state—free contraceptives, for example—those seeking relief from the ever-expanding social obligations entailed by that state, such as religious objectors, have had to plead for "accommodations"—at least if they were still free to do so. What could be next, an accommodation for speech?

McCutcheon v. FEC

Well yes. Although the Court has held that political speech is "the primary object of First Amendment protection" and "the lifeblood of a self-governing people," Congress, aided over the years by numerous uneven judicial decisions, has imposed a vast array of restrictions on the campaign contributions and expenditures that for most Americans are the essence of political speech. Beginning with the Federal Election Campaign Act of 1971 (FECA) and running through the Bipartisan Campaign Reform Act of 2002 (BCRA), this amazingly complex body of law—mimicked also in many state laws—has become so far-reaching that the most innocent of acts, like joining with one's neighbors to put up yard signs, can put one on the wrong side of the *criminal* law, no less, if one fails to register with officials before doing so.

And so we come to one of this term's more important free speech decisions, *McCutcheon v. FEC*. Here it was not restrictions on yard sign activity but on campaign contributions in the ordinary sense that led Shaun McCutcheon to sue the Federal Election Commission. Under FECA as amended by BCRA, *base* limits restrict how much money a donor may contribute to any particular candidate or committee while *aggregate* limits restrict how much he may give in total

to all candidates or committees. In the 2011–2012 election cycle McCutcheon contributed \$1,776 to each of 16 different federal candidates—well within the base limits applicable for each; and he contributed also to several noncandidate political committees, again in compliance with the base limits applicable for each. But since those contributions brought him up against the aggregate limits in the two categories, he was unable to contribute to *additional* candidates or committees—as he wished to do, and do in future as well—even though each of his contributions was within the base limits. Thus, the effect of the aggregate limits was to restrict how *many* candidates and committees he could support.

However complex this body of law is in its entirety, the issues at the core of this case were quite simple. Holding the aggregate limits unconstitutional under the First Amendment, Chief Justice Roberts wrote for himself and Justices Scalia, Kennedy, and Alito. Justice Thomas concurred in the judgment, but wrote separately. Writing for the plurality, Roberts began with the seminal 1976 case of *Buckley v. Valeo*, a challenge to FECA as amended in 1974. There the Court distinguished expenditure and contribution limits, “based on the degree to which each encroaches upon protected First Amendment interests.” Applying “exacting scrutiny,” the *Buckley* Court found FECA’s expenditure limits unconstitutional because they reduced the quantity of expression. But under a lesser but still “rigorous standard of review,” contribution limits were upheld because they impose a lesser restraint on political speech. They “permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe the contributor’s freedom to discuss candidates and issues,” the *Buckley* Court said. And as *Buckley* and later Courts have held, the sole legitimate purpose of any such limits is to limit quid pro quo corruption and its appearance—political contributions for political favors.

As for the constitutionality of aggregate limits, the *Buckley* Court noted that the parties had not separately addressed that issue at length, and Roberts added here that, in its 139-page opinion, the Court had devoted only one paragraph of three sentences to the question, finding that, although the aggregate limits do limit the *number* of candidates and committees an individual may support, this “quite modest restraint” serves to prevent evasion of the base contribution limitation.

For his part, Roberts then set about showing how arguments for the aggregate limits, rooted in the corruption prevention rationale for the base limits, do not in fact prevent corruption, but do invade First Amendment speech rights. Not only are the circumvention arguments even less persuasive today than they were in 1976—because statutory and regulatory safeguards have been considerably strengthened since then—but the circumvention scenarios the government and the dissent imagine are both speculative and highly improbable. Circumvention aside, however, the argument for aggregate limits based on corruption prevention is not credible on its face, Roberts argued. Under the current base limits, an individual may give the maximum allowed under those limits to each of up to nine candidates before he reaches the aggregate limit. If there is no corruption in that, because he has kept to the base limits for each candidate, how would giving the same base limit contribution to the tenth candidate constitute corruption? Or as Roberts put it succinctly: “The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.”

McCutcheon was thus an important if modest advance for individual liberty—modest, because here too the Court stopped short, despite requests to do more. As Roberts wrote, “[t]he parties and *amici curiae* spend significant energy debating whether the line that *Buckley* drew between contributions and expenditures should remain the law.” Notwithstanding that debate, he saw no need here to revisit that distinction “and the corollary distinction in the applicable standards of review.” Why? Because, though the *Buckley* Court had found the corruption prevention rationale “sufficiently important” to justify contribution limits, later Courts have found it satisfied a higher “compelling” standard, so “the interest would satisfy even strict scrutiny.” Moreover, because here “we find a substantial mismatch between the Government’s stated objective and the means selected to achieve it, the aggregate limits fail even under the [less demanding] ‘closely drawn’ test. We therefore need not parse the differences between the two standards in this case.”

For Thomas, however, “[c]ontributions and expenditures are simply ‘two sides of the same First Amendment coin,’ and our efforts to distinguish the two have produced mere ‘word games’ rather than any cognizable principle of constitutional law.” The original “proxy speech” argument, for example—contributions deserve a

lesser standard of review because they involve speech by someone other than the contributor—has been rejected by the Court itself, like other “discarded rationales” Thomas listed but the Court ignored. Indeed, he pointed to “*Buckley’s* last remaining reason for devaluing political contributions relative to expenditures”—that a contribution limit involves “little direct restraint” on an individual’s political communication since it permits the “symbolic expression of support evidenced by the contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.”

As Thomas then demonstrated, that proposition cannot be squared with a key premise in the plurality’s opinion. For the government here has made essentially the same argument that the *Buckley* Court made for limiting contributions—an individual facing the aggregate limits can still contribute less money to more people. That is no answer, said the plurality: “[t]o require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process.” But that “same logic also defeats the reasoning from *Buckley* on which the plurality purports to rely,” Thomas wrote. “Under the plurality’s analysis, limiting the amount of money a person may give to a candidate *does* impose a direct restraint on his political communication; if it did not, the aggregate limits at issue here would not create ‘a special burden on broader participation in the democratic process.’”

We are left, then, with the same question that arose earlier. Here too we have a marginal gain, but, as Thomas concluded, a missed opportunity as well. Did the continuing emotional reaction to *Citizens United* play any part in the course Roberts chose? Perhaps, but more likely, I expect, it was Roberts’s “modesty” and his preference for deciding only what is absolutely necessary that informed his approach to a case like this, and to others too.

There are, however, at least two problems with that approach. First, as a practical matter, the Court does not always or even often get an opportunity to correct later what it missed correcting in the case before it. To paraphrase John Maynard Keynes, in the long run the Court changes—which is to say that missed opportunities can become lost opportunities. And second, to the extent that the Court puts forth a better but still not accurate reading of the law, and of the Constitution in particular, the rule of law still suffers. It is no answer to say, “I’ll seize the day, tomorrow.”