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*First Amendment — Freedom of Speech —  
Aggregate Contribution Limits — McCutcheon v. FEC*

In *Buckley v. Valeo*,<sup>1</sup> the Supreme Court subjected limits on political contributions to a lower level of constitutional scrutiny than limits on political expenditures.<sup>2</sup> Some believe that the Court will eventually reconsider this foundational distinction between contribution and expenditure limits, thereby threatening the per-candidate contribution limits (or “base” limits) upheld in *Buckley*.<sup>3</sup> Last Term, in *McCutcheon v. FEC*,<sup>4</sup> the Supreme Court held that Congress may not limit the *aggregate* amounts that donors can contribute to candidates and political committees during an election cycle. In his separate concurrence, Justice Thomas argued that Chief Justice Roberts’s plurality opinion framed the First Amendment burden imposed by the aggregate limits in a way that undermines *Buckley*’s characterization of contributions as less expressive and therefore less worthy of protection than expenditures.<sup>5</sup> However, understanding the plurality opinion in light of the unconstitutional conditions doctrine — shades of which can be seen in much of the Roberts Court’s jurisprudence — provides an alternative reading of the plurality opinion that is reconcilable with *Buckley*’s key distinction.

In the 2011–2012 election cycle, Shaun McCutcheon had contributed \$1776 to each of fifteen candidates for federal office and wanted to contribute to twelve additional candidates.<sup>6</sup> McCutcheon also wanted to contribute “enough money to [three national party committees] to bring his total contributions up to \$25,000 each.”<sup>7</sup> Each of these contributions would have been compliant with the base contribution limits restricting the amounts that individuals may give to a particular candidate, party committee, or political action committee (PAC).<sup>8</sup> Making all

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<sup>1</sup> 424 U.S. 1 (1976) (per curiam).

<sup>2</sup> Compare *id.* at 25 (noting that contribution limits “may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms”), with *id.* at 44–45 (holding that expenditure limits must “satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression”).

<sup>3</sup> See RONALD COLLINS & DAVID SKOVER, WHEN MONEY SPEAKS 160 (2014) (“[T]he *Buckley* wall between contributions and expenditures . . . has been breached.”); O’Keefe v. Schmitz, No. 14-C-139, 2014 WL 1795139, at \*12 (E.D. Wis. May 6, 2014); Michael C. Dorf, *Just Shy of Bribery*, JUSTIA (Apr. 7, 2014), <http://verdict.justia.com/2014/04/07/just-shy-bribery> [<http://perma.cc/8E7W-YGJE>].

<sup>4</sup> 134 S. Ct. 1434 (2014).

<sup>5</sup> See *id.* at 1464 (Thomas, J., concurring in the judgment).

<sup>6</sup> See Brief for Appellant Shaun McCutcheon at 11–12, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536), 2013 WL 1927677, at \*11–12.

<sup>7</sup> *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 136 (D.D.C. 2012).

<sup>8</sup> McCutcheon wanted to make similar contributions in the 2013–2014 election cycle. Brief for Appellant Shaun McCutcheon, *supra* note 6, at 12. The base limits for that cycle were \$2600 per election for candidates, \$32,400 per year for national party committees, \$10,000 per year for

of these contributions, however, would have violated the aggregate limits on how much an individual may contribute in total during an election cycle to all federal candidates and to all party and political action committees.<sup>9</sup> *McCutcheon* — joined by the Republican National Committee, which asserted a right to receive contributions of the sort *McCutcheon* wanted to make — brought suit in the U.S. District Court for the District of Columbia claiming that the aggregate limits were unconstitutional under the First Amendment.<sup>10</sup>

A unanimous three-judge panel of the district court granted the FEC's motion to dismiss. Judge Brown<sup>11</sup> assumed that the base limits "[were] valid expressions of the government's anticorruption interest" and asserted that the court could not "ignore the ability of aggregate limits to prevent evasion of the base limits."<sup>12</sup> In particular, the court envisioned a scenario in which a donor might give a massive check to a joint fundraising committee comprising numerous party committees and candidates, each of whom could then legally transfer their share of the check to a single recipient, resulting in an effective contribution far in excess of what could be donated directly.<sup>13</sup> The court therefore concluded that the aggregate limits were justified as an anticircumvention measure, preventing evasion of the concededly constitutional base limits.<sup>14</sup> The plaintiffs, as authorized by law, appealed directly to the Supreme Court, which lacked "discretion to refuse adjudication of the case on its merits."<sup>15</sup>

The Supreme Court reversed, with Chief Justice Roberts writing a plurality opinion<sup>16</sup> and Justice Thomas concurring in the judgment. Because *Buckley* upheld aggregate limits in 1976,<sup>17</sup> the plurality sought to justify its reconsideration of that holding.<sup>18</sup> Most importantly, the plurality took issue with *Buckley*'s characterization of aggregate

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state or local party committees, and \$5000 per year for PACs. *See* Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013).

<sup>9</sup> For the 2013–2014 election cycle, the aggregate limits were \$48,600 for federal candidates and \$74,600 for other party and political action committees. Of that \$74,600, only \$48,600 could go to PACs and state or local party committees, as opposed to national party committees. *See* Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. at 8532.

<sup>10</sup> *See McCutcheon*, 893 F. Supp. 2d at 136–37.

<sup>11</sup> Judge Brown was joined by Judges Wilkins and Boasberg.

<sup>12</sup> *McCutcheon*, 893 F. Supp. 2d at 140.

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> *McCutcheon*, 134 S. Ct. at 1444 (plurality opinion) (citing 28 U.S.C. § 1253 (2012)).

<sup>16</sup> Chief Justice Roberts was joined by Justices Scalia, Kennedy, and Alito.

<sup>17</sup> 424 U.S. 1, 38 (1976) (per curiam).

<sup>18</sup> It noted, for instance, that "statutory safeguards against circumvention have been considerably strengthened since *Buckley*." *McCutcheon*, 134 S. Ct. at 1446 (plurality opinion).

limits as a “quite modest restraint upon protected political activity.”<sup>19</sup> Chief Justice Roberts reasoned that “[t]he 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.”<sup>20</sup> The aggregate limits required a donor to “limit the number of candidates he supports, and . . . to choose which of several policy concerns he will advance — clear First Amendment harms.”<sup>21</sup> To say that the donor could support more candidates if he just made smaller contributions to each candidate would “impose a special burden on broader participation in the democratic process.”<sup>22</sup>

With these First Amendment harms in mind, the plurality evaluated the Government’s asserted interests. The plurality emphasized that “Congress may target only a specific type of corruption — ‘*quid pro quo*’ corruption,”<sup>23</sup> defined as a “direct exchange of an official act for money.”<sup>24</sup> While Chief Justice Roberts said that this definition of corruption “has firm roots in *Buckley* itself,”<sup>25</sup> he also drew support from *Citizens United v. FEC*,<sup>26</sup> citing that case for the proposition that “[i]ngratiation and access . . . are not corruption.”<sup>27</sup> In fact, the plurality said that ingratiation and access “embody a central feature of democracy — that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.”<sup>28</sup>

In assessing the fit between the government’s interest and the means it employed, the plurality refused to decide whether strict scrutiny or the less demanding “closely drawn” test was appropriate.<sup>29</sup> It concluded that the aggregate limits failed either way because of the “substantial mismatch” between means and ends.<sup>30</sup> After all, once a

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<sup>19</sup> See *id.* at 1448 (quoting *Buckley*, 424 U.S. at 38).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1448–49. Following Chief Justice Roberts’s example, this comment will henceforth use “candidates” to refer collectively to candidates, party committees, and PACs.

<sup>22</sup> *Id.* at 1449. The Chief Justice previewed this reasoning at oral argument, where he pressed the Solicitor General about his concern that “somebody who is very interested, say, in environmental regulation, and very interested in gun control” has “got to choose” between those two issues in order to comply with the aggregate limits. Transcript of Oral Argument at 29, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-536\\_7148.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-536_7148.pdf) [<http://perma.cc/XJW6-E8UK>].

<sup>23</sup> *McCutcheon*, 134 S. Ct. at 1450 (plurality opinion).

<sup>24</sup> *Id.* at 1441.

<sup>25</sup> *Id.* at 1451.

<sup>26</sup> 130 S. Ct. 876 (2010).

<sup>27</sup> *McCutcheon*, 134 S. Ct. at 1441 (plurality opinion) (quoting *Citizens United*, 130 S. Ct. at 910).

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* at 1445–46. The “closely drawn” test asks whether “the State demonstrate[d] a sufficiently important interest and employ[ed] means closely drawn to avoid unnecessary abridgment of associational freedoms.” *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam).

<sup>30</sup> *McCutcheon*, 134 S. Ct. at 1446 (plurality opinion).

contributor reached the aggregate limits, even contributions within the base limits were prohibited — and Congress apparently did not believe that such contributions “create a cognizable risk of corruption.”<sup>31</sup>

The plurality also challenged the district court’s finding that the aggregate limits prevent circumvention of the base limits, arguing that the various scenarios imagining what could happen without the aggregate limits were each “sufficiently implausible that the Government ha[d] not carried its burden of demonstrating that the aggregate limits further its anticircumvention interest.”<sup>32</sup> For instance, the plurality dismissed the district court’s hypothetical about a donor giving a big check to a joint fundraising committee whose constituent members would legally transfer their base limit-compliant shares to the same individual candidate.<sup>33</sup> The plurality said that this scenario “relies on illegal earmarking” — on a donor who would “telegraph his desire to support one candidate” and on the coordinated willingness of all the recipients to facilitate that wish.<sup>34</sup> Thus, finding the aggregate limits insufficiently related to their purported end, the plurality concluded that they violated the First Amendment.

Justice Thomas concurred in the judgment, explaining that he would subject the aggregate limits to strict scrutiny, “which they would surely fail.”<sup>35</sup> He criticized, as he had before,<sup>36</sup> *Buckley*’s distinction between contributions and expenditures.<sup>37</sup> Justice Thomas scolded the plurality for “purporting not to overrule *Buckley*, [while] continu[ing] to chip away at its footings.”<sup>38</sup> More specifically, he said that, in order to explain why aggregate limits create “a special burden on broader participation,”<sup>39</sup> the plurality had to assume that *all* contribution limits — just like expenditure limits — impose “a direct restraint on [donors’] political communication.”<sup>40</sup> By contrast, *Buckley* had minimized the expressiveness of contributions, asserting that contribution limits “permit[] the symbolic expression of support” without “infring[ing] the contributor’s freedom to discuss candidates and issues.”<sup>41</sup>

Justice Breyer’s dissent<sup>42</sup> disputed the plurality’s two key premises: that corruption must be defined as quid pro quo, and that the aggre-

<sup>31</sup> *Id.* at 1452.

<sup>32</sup> *Id.* at 1453.

<sup>33</sup> See *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 140 (D.D.C. 2012).

<sup>34</sup> *McCutcheon*, 134 S. Ct. at 1455 (plurality opinion).

<sup>35</sup> *Id.* at 1464 (Thomas, J., concurring in the judgment).

<sup>36</sup> See, e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 412–13 (2000) (Thomas, J., dissenting).

<sup>37</sup> See *McCutcheon*, 134 S. Ct. at 1462–63 (Thomas, J., concurring in the judgment).

<sup>38</sup> *Id.* at 1464.

<sup>39</sup> *Id.* (quoting plurality opinion).

<sup>40</sup> *Id.*

<sup>41</sup> *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam), quoted in *McCutcheon*, 134 S. Ct. at 1464 (Thomas, J., concurring in the judgment).

<sup>42</sup> Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.

gate limits do not serve the government's interest in fighting corruption. On the first point, Justice Breyer argued that the government has a constitutionally grounded "interest in maintaining the integrity of our public governmental institutions."<sup>43</sup> Corruption, according to Justice Breyer, involves the breakdown of "the constitutionally necessary 'chain of communication' between the people and their representatives."<sup>44</sup> The plurality's narrower definition of corruption, Justice Breyer argued, is "flatly inconsistent" with *McConnell v. FEC*,<sup>45</sup> which referred to the risk of "undue influence" — a subtler perversion of an official's decisionmaking process.<sup>46</sup> Justice Breyer then offered several circumvention scenarios that the aggregate limits could effectively prevent.<sup>47</sup> Though he recognized that such circumvention is technically illegal, he emphasized the usefulness of aggregate limits as a prophylactic measure given the difficulty of proving that a donor, candidate, or committee *knew* they were circumventing the base limits.<sup>48</sup>

The immediate commentary on *McCutcheon* has focused on how the Court narrowly defined the government's permissible objective: fighting quid pro quo corruption.<sup>49</sup> But understanding the other side of the coin — the First Amendment burden the Court perceived — may provide further insight.<sup>50</sup> While Justice Thomas read the plurality as agreeing with him that, contra *Buckley*, contribution limits directly restrict political expression, the plurality's definition of the First Amendment burden caused by the aggregate limits was less clear-cut. Viewing *McCutcheon* in light of the unconstitutional conditions doctrine — which is undergoing something of a renaissance in the Roberts Court<sup>51</sup> — helps clarify the burden the plurality perceived. Focusing on this aspect of the plurality opinion sheds light on the decision's

<sup>43</sup> *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

<sup>44</sup> *Id.*

<sup>45</sup> 540 U.S. 93 (2003), *overruled in part* by *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>46</sup> *McCutcheon*, 134 S. Ct. at 1470 (Breyer, J., dissenting) (citing *McConnell*, 540 U.S. at 150 (majority opinion of Stevens, J., and O'Connor, J.)).

<sup>47</sup> Among others, he cited the scenario envisioned by the district court: a joint fundraising committee whose members could legally transfer to a single candidate their shares of a massive contribution. *See id.* at 1473–74.

<sup>48</sup> *See id.* at 1477–78.

<sup>49</sup> *See, e.g.*, Burt Neuborne, *Symposium: Welcome to Oligarchs United*, SCOTUSBLOG (Apr. 3, 2014, 11:17 AM), <http://www.scotusblog.com/2014/04/symposium-welcome-to-oligarchs-united> [<http://perma.cc/ZP82-RZSC>]; Zephyr Teachout, *What John Roberts Doesn't Get About Corruption*, POLITICO (Apr. 14, 2014), <http://www.politico.com/magazine/story/2014/04/what-john-roberts-doesnt-get-about-corruption-105683.html> [<http://perma.cc/EHL7-QJXF>].

<sup>50</sup> Though the severity of the burden is not formally part of campaign finance doctrine, the Court clearly considers it relevant. *See Citizens United*, 130 S. Ct. at 914 (noting that although "[d]isclaimer and disclosure requirements may burden the ability to speak," they "do not prevent anyone from speaking" (quoting *McConnell*, 540 U.S. at 201) (internal quotation marks omitted)).

<sup>51</sup> *See* LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE* 281 (2014) (claiming that attention to unconstitutional conditions "could emerge as a defining feature of the Roberts Court").

implications for *Buckley*'s continued vitality, and suggests that Justice Thomas may have prematurely declared victory.

The unconstitutional conditions doctrine “holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right.”<sup>52</sup> For instance, the Supreme Court has invalidated the offer of a state tax benefit to veterans who sign a loyalty oath<sup>53</sup> and the offer of federal funding to noncommercial broadcasters who refrain from editorializing.<sup>54</sup> The Court’s application of this doctrine has been criticized as inconsistent.<sup>55</sup> The circumstances under which the government offers conditional benefits are abundant and varied, and the circumstances under which the Court has found a violation have been unpredictable.<sup>56</sup> But the doctrine has allowed for the recognition and remediation of forced choices that were not always thought to be constitutionally cognizable,<sup>57</sup> and it “serves to alert courts” to these “constitutionally troublesome burdens.”<sup>58</sup>

The *McCutcheon* plurality opinion — read through the lens of the unconstitutional conditions doctrine — reflected this expansive understanding of potentially unconstitutional burdens. The aggregate contribution limits did not directly restrict, on pain of legal sanction, the amount a contributor could give to any particular candidate or the number of candidates he could support.<sup>59</sup> A contributor worried about the aggregate limits could always choose to give less to each recipient and still achieve “the expressive value of a contribution.”<sup>60</sup> But, in a key passage of his opinion, Chief Justice Roberts explained why forc-

<sup>52</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

<sup>53</sup> See *Speiser v. Randall*, 357 U.S. 513 (1958).

<sup>54</sup> See *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

<sup>55</sup> See, e.g., Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 480 (2012) (noting that the doctrine is “considered a sort of Gordian knot”); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 996 (1995) (suggesting that this “doctrinal disarray” may be insoluble (quoting Sullivan, *supra* note 52, at 1417) (internal quotation marks omitted)).

<sup>56</sup> See Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 69 (2013) (arguing that unconstitutional conditions problems arise whenever “the state effectively offers people a package deal with upsides and downsides involving constitutional entitlements,” which is to say that “[u]nconstitutional conditions questions are everywhere”); see also TRIBE & MATZ, *supra* note 51, at 256.

<sup>57</sup> See Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1316 (2013) (“[C]ourts have frequently used or gestured to a very different conception of penalty in ‘unconstitutional conditions’ cases.”).

<sup>58</sup> Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 605 (1990) (arguing nevertheless that this reminder is unnecessary).

<sup>59</sup> See Brief for the Appellee at 20, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536), 2013 WL 3773847, at \*20.

<sup>60</sup> *Id.*

ing this choice imposed a serious First Amendment burden: “To 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.”<sup>61</sup> The “special burden” lay in making the donor choose between broader and deeper participation: a donor eager to support many candidates could contribute a pittance to each, or could donate larger amounts to a select group, but could not give the base-limit maximum to all of them.<sup>62</sup>

In view of this forced choice, the aggregate limits could be seen as pressuring donors to make smaller contributions, rather than to reduce the number of recipients. In other words, for donors wishing to contribute to many candidates, the aggregate limits could have been characterized as a de facto imposition of lower base limits. But that position would have required a direct confrontation with *Buckley* by implying that the current base limits may not be substantially lowered.<sup>63</sup> Instead, the plurality focused on the pressure a donor would feel to narrow the breadth, not the depth, of his contributions: in the plurality’s words, the “special burden” was on “broader participation.”<sup>64</sup> And, if the base limits *may* constitutionally be lowered from their current levels, a donor’s ability to contribute the maximum under the base limits looks like a government benefit that can be adjusted up or down. Then the issue in *McCutcheon* starts to resemble an unconstitutional conditions problem: the desire to access a discretionary benefit (larger individual donations) pressured donors to give up a constitutional right (broader participation).<sup>65</sup>

Reading *McCutcheon* as an unconstitutional conditions case challenges Justice Thomas’s conclusion that the plurality undermined *Buckley*<sup>66</sup> — specifically, that case’s assumption that contribution limits do not directly restrict political expression. In his concurrence, Justice 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 partic-

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<sup>61</sup> *McCutcheon*, 134 S. Ct. at 1449 (plurality opinion).

<sup>62</sup> See Brief for Appellant Shaun McCutcheon, *supra* note 6, at 28 (“Aggregate limits thus force people to choose between engaging in constitutionally protected association and expression up to the legal base limit with certain candidates and parties, and retaining the right to associate with, and express support for, other candidates and parties.”).

<sup>63</sup> At this time, it is clear only that per-candidate limits between \$200 and \$400 are too low. See *Randall v. Sorrell*, 548 U.S. 230, 238, 262 (2006).

<sup>64</sup> *McCutcheon*, 134 S. Ct. at 1449 (plurality opinion).

<sup>65</sup> To be sure, this is not a classic formulation. As Professors Adam B. Cox and Adam M. Samaha note: “The possibility that the absence of regulation might be treated as a condition for the relinquishment of other interests or rights has . . . gone unnoticed.” Cox & Samaha, *supra* note 56, at 76.

<sup>66</sup> See *McCutcheon*, 134 S. Ct. at 1464 (Thomas, J., concurring in the judgment).

ipation in the democratic process.”<sup>67</sup> Justice Thomas thus suggested that the plurality’s logic erased *Buckley*’s distinction between contribution and expenditure limits, for both impose serious burdens on political participation.<sup>68</sup> Justice Thomas seems to subscribe to the alternative reading noted above: that the aggregate limits de facto lowered the base limits, “limiting the amount of money a person may give to a candidate.”<sup>69</sup> But the plurality squarely focused on the number of candidates a donor may support, not the amounts he may give to each candidate.<sup>70</sup> Perhaps recognizing that most donors would contribute the base-limit maximum to at least some of their favored candidates,<sup>71</sup> the plurality identified not a de facto lowering of the base limits, but a de facto restriction on the number of candidates a donor may support.<sup>72</sup>

Still, *McCutcheon* may yet contain the seeds of *Buckley*’s demise. Professor Richard Hasen suggests that *McCutcheon* could ultimately threaten the base limits because it allows Congress to address only quid pro quo corruption.<sup>73</sup> That may be so, but *McCutcheon*’s understanding of First Amendment burdens likely will not contribute to a decision invalidating the base limits. The base limits do not leverage a gratuitous government benefit in order to discourage exercise of a constitutional right: there has never *been* a constitutional right to give unlimited sums directly to candidates. The burden imposed by the base limits requires no unconstitutional conditions-like logic to appreciate fully. The only question is whether that burden is justified by sufficiently strong government interests.<sup>74</sup>

<sup>67</sup> *Id.* (quoting plurality opinion).

<sup>68</sup> This was a declaration of victory; Justice Thomas found the distinction between contributions and expenditures meaningless. *See id.* (“Contributions and expenditures are simply ‘two sides of the same First Amendment coin’ . . . .” (quoting *Buckley v. Valeo*, 424 U.S. 1, 241 (1976) (Burger, C.J., concurring in part and dissenting in part))).

<sup>69</sup> *Id.*

<sup>70</sup> As did *McCutcheon* himself. *See* Brief for Appellant Shaun McCutcheon, *supra* note 6, at 20 (“Unlike base contribution limits, which limit *the extent* to which an individual may associate herself with a single candidate or political party committee, aggregate contribution limits preclude a person from associating with, expressing support for, or attempting to assist *too many* candidates, parties, or political committees.”). This focus made sense given the fact that *McCutcheon* did not *want* to donate more than the symbolically significant \$1776 to each candidate. *See id.* at 11–12.

<sup>71</sup> *See* Brief on the Merits for Appellant Republican National Committee at 9, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536), 2013 WL 1923314, at \*9 (“[W]hile *base* limits restrict how *much* one may contribute to *particular* candidates, political parties, or PACs, *aggregate* limits restrict how *many* such entities one may support at the *full*-base-limit amount . . . .”).

<sup>72</sup> *See McCutcheon*, 134 S. Ct. at 1448 (plurality opinion) (“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.”).

<sup>73</sup> *See* Richard L. Hasen, *Die Another Day*, SLATE (Apr. 2, 2014, 1:13 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/04/the\\_subtle\\_awfulness\\_of\\_the\\_mccutcheon\\_v\\_fec\\_campaign\\_finance\\_decision\\_the.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/the_subtle_awfulness_of_the_mccutcheon_v_fec_campaign_finance_decision_the.html) [<http://perma.cc/FFS5-MCN5>].

<sup>74</sup> Still, unconstitutional conditions reasoning may be applicable in other campaign finance cases. For instance, barring federal contractors from making campaign contributions could be



Despite its potentially limited implications for future cases, the unconstitutional conditions reading of *McCutcheon* accords with earlier Roberts Court campaign finance decisions containing shades of that doctrine.<sup>75</sup> The Court has made clear that free speech rights are burdened when the government uses indirect leverage or pressure — rather than explicit legal sanction — to encourage their abandonment. In *Davis v. FEC*,<sup>76</sup> the Court struck down a law that relaxed contribution limits for the opponents of self-financed candidates, explaining that the provision gave only “two choices” to a candidate who wanted to exercise the right to make unlimited personal expenditures: limit his spending or face a better-funded opponent.<sup>77</sup> Then, in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*,<sup>78</sup> the Court struck down a law that granted matching public funds to opponents of privately financed candidates whose spending (and supportive independent spending) exceeded a certain amount.<sup>79</sup> As in *Davis*, the First Amendment burden was “inherent in the choice” to either reduce constitutionally protected expenditures or cause one’s opponents to receive more funding.<sup>80</sup> The Court’s understanding of First Amendment burdens in *Davis* and *Bennett* — focusing on incentives and pressures, not direct sanctions<sup>81</sup> — evoked the unconstitutional conditions doctrine.<sup>82</sup>

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understood as an unconstitutional condition: requiring the relinquishment of a constitutional right (making political contributions) in order to receive a governmental benefit (federal contracts). See Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1078–79 (2014) (discussing *Wagner v. FEC*, 901 F. Supp. 2d 101 (D.D.C. 2012), *vacated*, 717 F.3d 1007 (D.C. Cir. 2013)). Of course, raising an unconstitutional conditions issue will not lead inexorably to invalidating campaign finance regulations. See, e.g., *Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, No. 13-5008, 2014 WL 3824225, at \*4 (D.C. Cir. Aug. 5, 2014) (upholding restrictions on segregated funds — political action committees connected to a parent corporation — because the choice to form a segregated fund is “purely voluntary”).

<sup>75</sup> The Roberts Court generally has been enthusiastic about the unconstitutional conditions doctrine and related principles. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013) (conditions on land-use permits); *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (conditions on federal development funding); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (opinion of Roberts, C.J.) (conditions on federal Medicaid funding).

<sup>76</sup> 554 U.S. 724 (2008).

<sup>77</sup> *Id.* at 740.

<sup>78</sup> 131 S. Ct. 2806 (2011).

<sup>79</sup> See *id.* at 2813.

<sup>80</sup> *Id.* at 2823.

<sup>81</sup> Contrast the lower court’s opinion in *Davis*, asserting that the law “does not limit in any way the use of a candidate’s personal wealth in his run for office.” *Davis v. FEC*, 501 F. Supp. 2d 22, 29 (D.D.C. 2007) (emphasis added).

<sup>82</sup> The unconstitutional conditions aspect of campaign finance reform had been noticed even before *Davis* and *Bennett*. See, e.g., John Copeland Nagle, *Voluntary Campaign Finance Reform*, 85 MINN. L. REV. 1809, 1819 (2001). It was also remarked upon after *Bennett*. See *The Supreme Court, 2010 Term — Leading Cases*, 125 HARV. L. REV. 172, 209–11 (2011).

Situating *McCutcheon* — not to mention *Davis* and *Bennett* — within the unconstitutional conditions doctrine illuminates the Roberts Court’s sensitivity to the pressures and choices that result from the interaction of government benefits and burdens, broadly construed.<sup>83</sup> The Court — though not explicitly, and perhaps not consciously — seems to be “expanding the frame” in the way Professors Adam Cox and Adam Samaha envision<sup>84</sup>; it is employing the concepts and principles of the unconstitutional conditions doctrine in cases not involving overt deals tied to discretionary welfare-state funding.<sup>85</sup> This “conceptual inclusiveness”<sup>86</sup> in defining problematic burdens can also be seen in *Burwell v. Hobby Lobby Stores, Inc.*,<sup>87</sup> where the majority framed the issue as whether the government could put the owners of closely held corporations “to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.”<sup>88</sup> It may be that the “difficult choice” language employed in *Hobby Lobby* and *McCutcheon* is simply a rhetorical device designed to rebut those who would say that the state action at issue imposes no constitutionally (or, in *Hobby Lobby*, statutorily) cognizable burden. But the unconstitutional conditions reading of *McCutcheon* suggests that more than rhetorical posturing is at play: precisely identifying *what* is being burdened by *what* sort of pressure clarifies the doctrinal implications of the plurality opinion. Understanding *McCutcheon* as an unconstitutional conditions case highlights that the plurality was squarely focused on the breadth of contributions and did not speak to the constitutional status of “deep” participation.

<sup>83</sup> See TRIBE & MATZ, *supra* note 51, at 281 (discussing the Roberts Court’s “new insights” on “the knotty problem of government bribery”).

<sup>84</sup> See Cox & Samaha, *supra* note 56, at 69–70.

<sup>85</sup> See *id.* at 72; see also TRIBE & MATZ, *supra* note 51, at 256 (noting that plea bargains can be construed as an unconstitutional conditions issue).

<sup>86</sup> Cox & Samaha, *supra* note 56, at 78.

<sup>87</sup> 134 S. Ct. 2751 (2014) (holding that it violates the Religious Freedom Restoration Act to require closely held for-profit corporations to cover certain forms of contraception in their employer-provided health insurance plans over their religious objections).

<sup>88</sup> *Id.* at 2767; see Kent Greenfield, *Hobby Lobby Symposium: Hobby Lobby, “Unconstitutional Conditions,” and Corporate Law Mistakes*, SCOTUSBLOG (June 30, 2014, 9:07 PM), <http://www.scotusblog.com/2014/06/hobby-lobby-symposium-hobby-lobby-unconstitutional-conditions-and-corporate-law-mistakes> [<http://perma.cc/4G3K-A4MY>].