

# CAMPAIGN FINANCE AFTER MCCAIN-FEINGOLD

WHEN “THE POLS MAKE THE CALLS”: *MCCONNELL*’S THEORY  
OF JUDICIAL DEFERENCE IN THE TWILIGHT OF *BUCKLEY*

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## INTRODUCTION

This Article analyzes the component parts of “judicial deference” as set out in *McConnell v. Federal Election Commission*,<sup>1</sup> and assesses their interrelationship and persuasiveness. Part I locates *McConnell* within the history of struggles over the proper role of courts and legislatures in the constitutional design and oversight of campaign finance controls. It attempts to show how the Court could not settle on a consistent account of its role, or Congress’s, in the application of the rationale in *Buckley v. Valeo*<sup>2</sup> for controlling campaign finance. With the advent of *McConnell*, the Court seeks to construct a way out for itself, built around Congressional “expertise” in striking the required constitutional balance.

Part II more fully evaluates the theory of judicial deference articulated by the *McConnell* Court, with particular reference to the Court’s uses of: 1) history; 2) the notion of legislative “expertise;” 3) appeals to “political realities;” and 4) Congress’s imperative need, in light of those realities, to address actual or predicted circumvention. This construction of deference suffers from an internal conflict that eventually undermines its persuasiveness: it functions as an escape from the rigors of *Buckley*, but at the same time *Buckley*, and more specifically the assumed exclusivity of the corruption rationale, defines its theoretical limits. The Court must ground its justification of defer-

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<sup>1</sup> 540 U.S. 93, 124 S. Ct. 619 (2003).

<sup>2</sup> 424 U.S. 1 (1976) (per curiam).

ence in narrow and highly debatable claims about history, political realities and the nature of legislative expertise as they relate, and only as they relate, to the problem of corruption. The deference theory therefore stands and falls on the nature of these shaky historical and empirical claims. In this light, Part II also attempts to explain the Court's neglect of the legislative history of the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>3</sup>

### I. FROM *BUCKLEY* BACK TO *BURROUGHS*, VIA *MCCONNELL*

The Court's opinion in *McConnell* is effectively tucked between two citations to *Burroughs v. United States*.<sup>4</sup> In 1934, the *Burroughs* Court endorsed a broad reading of congressional authority to "preserve the purity of presidential and vice presidential elections,"<sup>5</sup> concluding that Congress possesses the power to "safeguard" elections "from the improper use of money."<sup>6</sup> The *McConnell* Court, at the beginning of its lengthy opinion, cites this particular portion of the *Burroughs* opinion: "the choice of means to that end [protecting against improper financial activity in elections] presents a question primarily addressed to the judgment of Congress."<sup>7</sup> The *Burroughs* Court had elaborated still more on this theme, as follows:

If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.<sup>8</sup>

The *McConnell* Court's attention to *Burroughs* does not appear to be a mere attachment to florid early twentieth century judicial rhetoric. For with its reference to *Burroughs*, opening and closing its analysis of the congressional role in establishing the constitutional boundaries of campaign finance, the Court unmistakably suggests that it is striking out in a new—or, considering the age of *Burroughs*, a very old—direction. What follows confirms first impressions. An understanding of how significantly *McConnell* alters the relations of the judi-

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<sup>3</sup> Pub. L. No. 107-171, 101, 116 Stat. 81, 82 (codified at 2 U.S.C.A. § 441i(a) (Supp. 2003)).

<sup>4</sup> 290 U.S. 534 (1934).

<sup>5</sup> *Id.* at 544.

<sup>6</sup> *Id.* at 545.

<sup>7</sup> *McConnell*, 124 S. Ct. at 644 (citing *Burroughs*, 290 U.S. at 547).

<sup>8</sup> *Burroughs*, 290 U.S. at 547-48.

cial and legislative branches requires some attention to how these relations were treated, explicitly or implicitly, in *Buckley* and its progeny.

#### A. *Judicial Deference in Buckley and Its Aftermath*

*Buckley* did not simply rest on broad declarations about which campaign finance matters were best left to “congressional determination alone.”<sup>9</sup> Like the *McConnell* Court, the *Buckley* Court did not challenge Congress’s baseline authority to regulate federal elections.<sup>10</sup> And the *Buckley* Court, in its discussion of that authority as it affects the regulation of presidential and vice presidential elections, also cites to *Burroughs*.<sup>11</sup> Yet the manner in which it developed its position was distinctly un*Burroughs*-like. The *Buckley* Court strove to develop a relatively complex constitutional architecture, articulating general principles to guide the courts in the conduct of judicial review.<sup>12</sup> Most centrally, this judicial framework included the acceptance of the constitutional sufficiency of one “compelling interest” asserted by the government, but also the rejection of two others. Working from the anticorruption interest that the court of appeals recognized as “compelling,”<sup>13</sup> the Supreme Court drew a distinction between “contributions” and “expenditures” that conflicted with a congressional scheme of limits on both.<sup>14</sup>

Even as the *Buckley* Court sustained the congressional position and upheld the limits on contributions as consistent with First Amendment guarantees, it did not do so in deference to empirical congres-

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<sup>9</sup> See *id.* at 548 (emphasizing Congress’s particular expertise in selecting the best means to protect federal elections (citing *Stephens v. Binford*, 287 U.S. 251, 272 (1932))).

<sup>10</sup> See *Buckley*, 424 U.S. at 13 (stating that Congress’s constitutional power to regulate federal elections is well established).

<sup>11</sup> See *id.* at 14 (citing *Burroughs* generally as a recognition of Congress’s power to legislate in connection with federal elections).

<sup>12</sup> See *id.* at 14-23 (discussing when financial transactions include elements of speech protected by the First Amendment and when important government interests may justify regulating that speech).

<sup>13</sup> *Id.* at 10 (citing the lower court’s decision, 519 F.2d 817, 841 (D.C. Cir. 1975)).

<sup>14</sup> Noting the costs of modern communication, which rise with the size of the target audience and the number of issues discussed, the Court found that limiting “expenditures” would pose significant restraints on free speech by reducing the “quantity of expression.” *Id.* at 19. On the other hand, restricting “contributions” would only be a slight restraint on free speech since the expression is dependent almost entirely on the act of giving, rather than the quantity of the gift. *Id.* at 20-21.

sional judgment about the practical effects of such controls.<sup>15</sup> The Court arrived at its own conclusions: “There is no indication . . . that [limits on contributions] would have any dramatic adverse effect on the funding of campaigns and political associations.”<sup>16</sup> Similarly, the Court set out its own assessment of the impact of these finance restrictions on challengers.<sup>17</sup> The references the Court does make to congressional judgments are brief and indiscriminately stated, not expanded into a coherent statement of the relative role of the two branches in the construction of constitutional campaign finance controls. For example, over three pages, the Court states that

“Congress could legitimately conclude” that avoidance of the appearance of corruption was critical to public confidence in government;<sup>18</sup> that

“Congress was surely entitled to conclude” that disclosure could not alone address this appearance problem;<sup>19</sup> and that

“Congress was justified” in concluding that prophylactic measures, reaching some contributions not corrupt in purpose or effect, were nonetheless required to guard against corruption.<sup>20</sup>

In the first instance, Congress’s conclusion was judged to be “legitimate,” which is not an expression of judicial deference. In the second instance, Congress is said to be “entitled” to its conclusion about the inadequacy of disclosure in addressing corruption, although the basis on which it is so entitled, and the scope of the entitlement, are unstated. And finally, in stating that Congress was “justified” in the adoption of prophylactic measures, the Court is suggesting that Congress’s position was reasonable—reasonable, that is, as the Court

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<sup>15</sup> The Court endorsed the government’s “primary” interest in preventing corruption, or its appearance, associated with large unregulated political donations. The government had also argued for contribution limits on the basis of “ancillary interests” in the “relative ability of all citizens to affect the outcome of elections” and in limiting “skyrocketing” campaign costs. *Id.* at 25-26. Rejecting the “ancillary interest” in political equality as a basis for limiting independent expenditures, the Court famously repudiated “the concept that Government may restrict the speech of some elements of our society in order to enhance the relative voice of others . . . .” *Id.* at 48-49.

<sup>16</sup> *Id.* at 21.

<sup>17</sup> *See id.* at 32-33 (finding that contribution limits would not discriminate against challengers as a class because challengers are often well-known politicians with the ability to accumulate sizable campaign coffers).

<sup>18</sup> *Id.* at 27.

<sup>19</sup> *Id.* at 28.

<sup>20</sup> *Id.* at 30.

has independently judged the matter upon review of the record and examination of political realities.

In any event, the actions of the Court speak for themselves. The Court picked over the Federal Election Campaign Act (FECA) of 1971, as amended,<sup>21</sup> steadfastly invalidating expenditure limitations, which were of considerable significance to Congress’s overall plan for controlling campaign finance. The Court, in fact, acknowledged the meticulous adjustment it made to Congress’s handiwork. Declining to consider a claim that the “overall effect” of the statute was to protect incumbents, the Court noted that it need not consider the “full sweep of the legislation as enacted” because it had stripped the law of key expenditure limitations.<sup>22</sup>

In the aftermath of *Buckley*, the Court did not develop a consistent theory of appropriate judicial intervention or deference to guide its review of congressional campaign finance restrictions. The Court merely attempted, case by case, to determine whether Congress had imposed controls consistent with its sole “compelling interest” in the prevention of the fact or appearance of corruption.<sup>23</sup> In the early 1980s, the Court seemed to accept that Congress could extend regulation of campaign finance to guard against “circumvention,” even where the activities regulated did not present a direct threat, in and of themselves, of corruption or its appearance. In *California Medical Ass’n v. FEC*,<sup>24</sup> the Court articulated that era’s version of the “anticircumvention” theory of today: Congress, it held, could regulate certain activities as “an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*.”<sup>25</sup> On this basis, the Court sustained a limit on contributions to a multi-candidate political committee,<sup>26</sup> to “supplement” Congress’s more immediate concern with contributions made by such committees directly to candidates.<sup>27</sup> Later, in *FEC v. National Right to*

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<sup>21</sup>Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (2002)).

<sup>22</sup>*Buckley*, 424 U.S. at 31 n.33.

<sup>23</sup>*See id.* at 26-27, 45, 53 (1975) (finding a “constitutionally sufficient justification” in the purpose of limiting “the actuality and appearance of corruption resulting from large individual financial contributions”).

<sup>24</sup>453 U.S. 182 (1981).

<sup>25</sup>*Id.* at 199.

<sup>26</sup>*Id.* at 201 (upholding “the \$5,000 limitation on the amount that persons may contribute to multicandidate political committees” contained in 2 U.S.C. § 441a(a)(1)(c)).

<sup>27</sup>*Id.* at 201.

*Work Committee (NRWC)*,<sup>28</sup> the Court sustained Congress's adoption of a "prophylactic" rule that prohibited a membership organization's use of corporate funds to solicit contributions for its political action committee, which was established to make direct contributions to candidates.<sup>29</sup>

Only a few years later, the Court appeared to retreat somewhat from its constitutional blessing of useful enforcement supplements and "bright-line" rules to support Congress's anticorruption mission. In *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*,<sup>30</sup> the Court rejected an appeal by the FEC for a bright-line rule in enforcing the corporate spending prohibition<sup>31</sup> against a nonprofit right-to-life organization that financed the production and distribution of a voting record.<sup>32</sup> The Court was apparently troubled by the facts, most notably the ideological character of the "corporation" that funded its activities on a modest scale with only individual contributions.<sup>33</sup> The Court then designed an exception, dramatically legislative in character, for independent election-related spending by certain types of nonprofit ideological corporations.<sup>34</sup> Congress had made no such distinction. In fact, section 441b of FECA,<sup>35</sup> by its terms, reflects an awareness of the different types of corporations, such as national banks and corporations chartered by act of Congress. Congress did not elect to include any exemption of the kind crafted by the Court in *MCFL*.

The Court was similarly suspicious of the limitation imposed by Congress on independent expenditures in support of publicly funded presidential candidates. In *FEC v. National Conservative PAC*

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<sup>28</sup> 459 U.S. 197 (1982).

<sup>29</sup> *Id.* at 210.

<sup>30</sup> 479 U.S. 238 (1986).

<sup>31</sup> See 2 U.S.C. § 441b (prohibiting corporations from using treasury funds to make expenditures "in connection with" any federal election and requiring that any expenditure for such purpose be financed by voluntary contributions to a separate segregated fund).

<sup>32</sup> *MCFL*, 479 U.S. at 263.

<sup>33</sup> *Id.* at 264 (noting that the organization was "formed for the express purpose of promoting political ideas, and cannot engage in business activities," and that it was the organization's "policy not to accept contributions from" business corporations or labor unions).

<sup>34</sup> *Id.* at 264 n.13 ("Our decision today merely states that a corporation that does not have persons affiliated *financially* must fall outside of § 441b's prohibition on direct expenditures if it also has the other two characteristics possessed by *MCFL* that we discuss in text.").

<sup>35</sup> 2 U.S.C. § 441b.

(*NCPAC*),<sup>36</sup> the Court rejected what it dismissed as “a hypothetical possibility” of quid pro quo corruption<sup>37</sup> associated with independent expenditures by well-connected and well-funded groups with ties to a presidential candidate’s campaign.<sup>38</sup> The Court also affirmed the district court’s rejection of the proffered evidence consisting of public opinion polling data that purported to show that these types of expenditures would compound public cynicism about the role of money in politics—that is, the appearance of corruption.<sup>39</sup>

*MCFL* and *NRWC* could be viewed as a logical extension of the *Buckley* command that the Court take special care to review congressional limits on expenditures. The mid-1990s brought another example of this kind, when the Court considered an enforcement action brought under the party “coordinated spending limitations.”<sup>40</sup> In the first *Colorado Republican* case,<sup>41</sup> the Court concluded that parties could spend without limitation on behalf of their candidates so long as they did so “independently.”<sup>42</sup> None of the parties in the case had offered this theory, and FEC regulations had flatly precluded “independence” of a candidate from his or her own party.<sup>43</sup> Swayed by the fact that the party’s spending occurred prior to the nomination of, or in coordination with, a candidate,<sup>44</sup> the Court found no basis for a potential of “corruption” that would justify the application of limits.<sup>45</sup> Any such suggestion of “corruption,” the Court claimed, was too “attenuated.”<sup>46</sup> The Court was untroubled by any prospect of “circumvention,” through claims of “independence” of the coordinated spending lim-

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<sup>36</sup> 470 U.S. 480 (1985).

<sup>37</sup> The Court defined quid pro quo corruption as “dollars for political favors.” *Id.* at 497; *see also* *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1975) (“To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.”).

<sup>38</sup> *NCPAC*, 470 U.S. at 498.

<sup>39</sup> *Id.* at 499-500.

<sup>40</sup> *See* 2 U.S.C. § 441a(a)(2) (subjecting, ordinarily, a party’s coordinated expenditures to the \$5000 limitation). Coordinated expenditures are defined as “expenditures made . . . in cooperation, consultation, or concert, with, or at, the request or suggestion of, a candidate, his authorized political committees, or their agents.” 2 U.S.C. § 441a(a)(7)(B)(i).

<sup>41</sup> *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican I)*, 518 U.S. 604 (1996)

<sup>42</sup> *Id.* at 608.

<sup>43</sup> 11 C.F.R. § 109.32 (2004) (defining “coordinated party expenditure limits”).

<sup>44</sup> *Colorado Republican I*, 518 U.S. at 614.

<sup>45</sup> *Id.* at 616.

<sup>46</sup> *Id.*

its.<sup>47</sup> Neither direct application of the anticorruption rationale, nor the anticircumvention theory advanced by cases like *California Medical Ass'n*, could save the spending limitation at issue in the case.<sup>48</sup>

B. McConnell *Foreshadowed: The Shrink Missouri and Colorado Republican II Cases*

The turn of the century brought about a distinctive turn in the Court's post-*Buckley* jurisprudence—a turn away from *Buckley* and toward a new articulation of the role of the Court and of the legislature. The Court made much of deference to legislative judgments in *Nixon v. Shrink Missouri Government PAC*.<sup>49</sup> In *Shrink Missouri*, the plaintiffs had challenged the limit established by the Missouri legislature for contributions to candidates, which ranged from \$275 to \$1075 according to the office sought.<sup>50</sup> Their complaint was that the state had made no effort to support the limits with evidence of potential corruption or its appearance.<sup>51</sup> Yet the Court, acknowledging that Missouri did not preserve legislative history, decided the case on deference to the legislative judgment about the need for limits and their amounts.<sup>52</sup> The Court returned to the *NCPAC* case, citing it for the proposition that it would not “second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.”<sup>53</sup> While the legislature would presumably have to have some grounds for the imposition of limits, the “quantum” of such evidence “will vary up or down with the novelty and plausibility of the justification raised.”<sup>54</sup> The Court insisted that *Buckley* had not established a minimum requirement of any kind.<sup>55</sup> In the case at hand, the Court concluded, the personal views of a legislator and an assortment of

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<sup>47</sup> *Id.* at 617-18.

<sup>48</sup> *See id.* (declining to find that “a limitation on political parties’ independent expenditures is necessary to combat a substantial danger of corruption of the electoral system”).

<sup>49</sup> 528 U.S. 377 (2000).

<sup>50</sup> *Id.* at 383.

<sup>51</sup> *Id.* at 390-91.

<sup>52</sup> *Id.* at 393-94.

<sup>53</sup> *Id.* at 391 n.5 (citing *NRWC*, 459 U.S. 197, 210 (1982)).

<sup>54</sup> *Id.* at 391.

<sup>55</sup> *Id.* at 397 (“In *Buckley*, we specifically rejected the contention that \$1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate.”).



newspaper articles reflecting allegations of public corruption amply supported the state enactment.<sup>56</sup>

In a concurring opinion, Justice Breyer, joined by Justice Ginsburg, more fully developed the theory of “deference” on which the result rested. In a statement that foreshadowed the *McConnell* majority’s jurisprudence, Justice Breyer suggested that the legislature had a role in establishing the “difficult” balance between “constitutionally protected interests . . . on both sides of the legal equation.”<sup>57</sup> The legislature could claim that role on the basis of its “expertise”: “Where a legislature has significantly greater institutional expertise, as for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments—at least when that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge.”<sup>58</sup>

Breyer did not say more about the source of the expertise, except to state that “the legislature understands the problem—the threat to electoral integrity, the need for democratization—better than do we. We should defer to its political judgment that unlimited spending threatens the integrity of the electoral process.”<sup>59</sup> Justice Breyer suggested that this doctrine was compatible with the Court’s holding in *Buckley*,<sup>60</sup> though this is doubtful. Moreover, it is striking that Breyer would refer to Congress’s recognition of the threat of unlimited “spending,” when it was precisely “spending” limits that the *Buckley* Court had found to require the closest judicial scrutiny.

The question of the viability of *Buckley*’s distinction between contributions and expenditures, in the light of notions of “deference” to Congress, was raised again the following year. The Court upheld the “coordinated” party spending limits against a facial challenge, with Justice Souter once again writing for the majority.<sup>61</sup> The Court rejected the significance of the contribution/expenditure distinction for the resolution of the case, and the manner in which it did so previews the *McConnell* view of the world. The Court in *Colorado Republican II* in-

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<sup>56</sup> *Id.* at 393-94.

<sup>57</sup> *Id.* at 399-400 (Breyer, J., concurring).

<sup>58</sup> *Id.* at 402.

<sup>59</sup> *Id.* at 403-04.

<sup>60</sup> *See id.* at 404-05 (asserting that *Buckley* “might be interpreted as embodying sufficient flexibility for the problem at hand”).

<sup>61</sup> *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 437 (2001) (*Colorado Republican II*).

sisted that the distinction was not formal, but “functional.”<sup>62</sup> Congress was entitled to look behind campaign finance practices to judge their corruptive potential or appearance, or their effect on its ability to enforce the law—to anticipate and address circumvention. Courts had to make room for generally practical approaches to the issues raised by campaign finance: approaches grounded in “political life” and political reality.<sup>63</sup> While not stated specifically, this practicality, even realism, was seen as Congress’s special forte. Presumably this was the source of the expertise justifying judicial deference.<sup>64</sup>

### C. *McConnell and the Triumph of “Deference”*

*McConnell* wove the themes of *Shrink Missouri* and *Colorado Republican II* into a frontally argued theory of deference to the legislative branch in matters of campaign finance regulation. As in *Shrink Missouri*, legislative history plays virtually no role in the Court’s consideration of Congress’s constitutional purposes. In fact, the Court notes that BCRA was enacted with “little” legislative history.<sup>65</sup> The Court does not, therefore, ground its deference to Congress on a showing Congress made in support of enactment. The Court defers more broadly on the basis of the following four features of Congress’s engagement with campaign finance: history, expertise, political realities, and enforcement of the law.

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<sup>62</sup> See *id.* at 438 (“The simplicity of the distinction [between contributing and spending] is qualified by [FECA’s] provision for a functional, not formal, definition of ‘contribution . . . .’”).

<sup>63</sup> See *id.* at 452 n.14 (noting “Congress’s concern with this reality of political life,” that contributors give with an expectation of return).

<sup>64</sup> The Court also placed some emphasis on deference in *FEC v. Beaumont*, 539 U.S. 146 (2003), decided only months before *McConnell*, in which it sustained the constitutionality of the prohibition on corporate contributions as applied to contributions by nonprofit advocacy corporations. Yet this case turned more narrowly on the specific doctrine supporting restrictions on corporate political activity. See *id.* at 155 (“In sum, our cases on campaign finance regulation represent respect for the ‘legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.’” (quoting *NRWC*, 459 U.S. 197, 209-10 (1982))). Moreover, the Court stressed that its holding took into account the *Buckley* distinction between contributions and expenditures. See *id.* at 161-62 (citing *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976) (per curiam)). As explained in this Part, the more broadly gauged doctrine of deference emerging from *Shrink Missouri* and *Colorado Republican II*, and brought to full muster in *McConnell*, operates to dissolve the distinction between the two.

<sup>65</sup> *McConnell*, 124 S. Ct. at 681.

### 1. History

The *McConnell* opinion opens with a review of Congress’s history of amendment over the course of the last century of the federal campaign finance laws.<sup>66</sup> While Congress may now be enacting broad controls on soft money, these actions, as the Court views them, must be seen as incremental steps, resulting in “steady improvement” over a period of years.<sup>67</sup> In this sense, it appears that Congress has earned the measure of deference offered: it has proceeded cautiously and responsibly, systematically fine-tuning the laws to achieve consistent improvement in their effectiveness. Thus the Court states: “We respect Congress’s decision to proceed in incremental steps in the area of campaign finance regulation.”<sup>68</sup>

### 2. Expertise

In matters of campaign finance, members of Congress are considered to have “vastly superior knowledge” on topics such as the role of parties and their relationship with officeholders. The court recognized this expertise by implementing a heightened rather than strict scrutiny standard of review.<sup>69</sup>

### 3. Political Realities

The consideration of “political realities” appears closely related to the expertise attributed to Congress.<sup>70</sup> Members of Congress must be credited, as political experts, with knowing “how things really work.” Yet the Court appears sometimes to offer its own appreciation of “political realities,” separate and apart from that of the expert class of officeholders. In any event, the focus on political realities serves the Court’s purpose in avoiding formalistic distinctions between “contri-

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<sup>66</sup> See *id.* at 643-48 (outlining the history of federal campaign finance reform).

<sup>67</sup> *Id.* at 645.

<sup>68</sup> *Id.* at 669 (citations omitted).

<sup>69</sup> See *id.* at 656 n.39 (“[R]egulations of contributions to candidates, parties, and political committees are subject to less rigorous scrutiny than direct restraints on speech . . .”).

<sup>70</sup> See, e.g., *id.* at 665-66 (stating that Congress has a regulatory interest in “realities of political fundraising” that may “give rise to corruption and the appearance of corruption”); *id.* at 674 (affirming “Congress’ judgment that if a large donation is capable of putting a federal candidate in the debt of the contributor, it poses a threat of corruption or the appearance of corruption”); *id.* at 686 (“Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation.”).

butions” and “expenditures,” for, as the Court in *Colorado Republican II* suggested, the line between the one and the other may blur in practical application or in the cold light of political realities.<sup>71</sup>

#### 4. Enforcing the Law by Addressing and Anticipating Circumvention

The Court sees Congress as entitled to enforce its laws by anticipating and combating different, evolving, and novel means of corruption through appropriate measures. This ground for deference is related to the history of congressional involvement with campaign finance, for Congress has been required to root out all manner of evasion of the law. In fact, following *Colorado Republican II*, the Court wraps this concern with circumvention into the concern with corruption. Citing *Colorado Republican II*, the *McConnell* Court finds that “circumvention is a valid theory of corruption.”<sup>72</sup> Congress may attend to actual corruption and also act on “predictions” of where it might next take place.<sup>73</sup>

These are the component, and in some ways overlapping, parts of the case made by the *McConnell* Court for judicial deference. Taken together, it can be seen how they support a sharp departure from a concern, formal in nature, with the difference between contributions and expenditures. The emphasis on practical politics—on the history and “realities” of political life—enables the Court to conclude that soft money solicitation and spending limits are an appropriate and even necessary means of enforcing contribution limits. Thus “[a]s with direct limits on contributions, [party and candidate soft money] spending and solicitation restrictions have only a marginal impact on political speech.”<sup>74</sup> In this way, contribution and expenditure limits become functionally the same. In this way, also, it can be readily seen that the *McConnell* theory of judicial deference is incompatible with *Buckley*.

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<sup>71</sup> *Colorado Republican II*, 533 U.S. 431, 464 (2001).

<sup>72</sup> *McConnell*, 124 S. Ct. at 661 (quoting *id.*, at 456).

<sup>73</sup> See *id.* at 673 (noting that Congress “made a prediction [in enacting FECA § 323(b)] . . . [h]aving been taught the hard lesson of circumvention by the entire history of campaign finance regulation . . .”).

<sup>74</sup> *Id.* at 658. The Court elsewhere refers to spending and solicitation restrictions as “mechanism[s] adopted to implement the contribution limit . . .” *Id.* at 657. It is fair to say that expenditure limits have been knocked off their once high constitutional perch when, in this context at least, they are mere enforcement “mechanisms.”

II. EVALUATING *McCONNELL* “DEFERENCE”A. *The Problems with Deference in a Buckley Framework*

In evaluating *McConnell* deference, it is helpful in the first instance to identify the kind of deference it is *not* propounding. The Court does not advance the proposition that competing constitutional values in campaign finance derive from the First Amendment, with the Court charged with monitoring traditional free speech concerns while Congress sought to vindicate that aspect of the Amendment concerned with ensuring a more robust democratic dialogue.<sup>75</sup> Nor does the Court offer a highly developed notion of the democratic implications of deference, such as that recently advanced by Richard Hasen.<sup>76</sup> In Hasen’s version, Congress might lay claim to deference to its vision, even a highly contested vision, of the proper balance between equality and other constitutional values.<sup>77</sup> The Court would remain responsible for policing the selection of means to achieve this end—screening, for example, for evidence of legislative self-interest or other illicit motives.<sup>78</sup> As Professor Hasen sees it, this framework would encourage experimentation in the political marketplace. Errors would be corrected by experience, and Congress would take care with the articulation of means and ends with the knowledge that the courts were watching.<sup>79</sup>

The Court in *McConnell* eschews any bold strokes of this kind, and instead seeks to mold its theory of deference *within* the space allowed by *Buckley*. This is a fateful move, leaving the Court with only the anti-corruption rationale to support its assertion of Congressional authority. This rationale compromises Congress’s claim to “deference” in a way that competing theories, like Hasen’s, do not. It does so in two major respects.

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<sup>75</sup> This robust dialogue might consist of a “diversity of views, orderly presentation and intelligent deliberation, enhanced opportunities for the self-expression of individual citizens who lack wealth, and substantial political equality.” Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1070 (1985) (citations omitted). It is fair to say that Professor BeVier does not think much of this “competing values” analysis, but she correctly identifies the line of argument advanced by those who do.

<sup>76</sup> RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW* (2003).

<sup>77</sup> *See id.* at 101-37 (describing campaign finance as a conflict between equality and liberty).

<sup>78</sup> *See id.* at 102 (promoting a theory of contested political equality measures).

<sup>79</sup> *Id.* at 117, 119.

First, the Court's appeal to expertise is placed under serious strain by the narrow reliance on the anticorruption rationale in proclaimed fealty to *Buckley*. By definition, officeholders legislating to avert corruption are addressing their *own* conduct. As *McConnell* notes repeatedly, BCRA as an anticorruption statute is concerned with the actions of officeholders, in relation to donors and to their parties—the same officeholders, that is, who designed the statute. We normally are skeptical of laws designed by those who, seeking to correct their own conduct, engage in a form of “self-checking.” By contrast, in a theory of deference grounded, for example, in legislative articulation of competing theories of equality, we have politicians doing what they are expected to do—expressing a view of democratic participation and governance. While we might be concerned with the possibility of covert motives in the execution of this program, the issue of self-interest does not dramatically dominate the foreground.

The problem is not simply that, in a critique of their own involvement with political money, officeholders may be tempted to rig the game for their own purposes. There is also the fair possibility that, even if they do the best they can, their biases will taint, if not wholly disqualify, the effort. The *McConnell* plaintiffs made this point by noting that Congress provided special allowances for themselves in soft money fundraising that they denied to the parties,<sup>80</sup> and by enacting higher contribution limits and protections against the misfortune of drawing a millionaire opponent.<sup>81</sup> Congress may embark on this legislative venture with the best of intentions, only to produce a statute that hardly escapes the pull of self-interest. In these conditions, an argument based on “expertise” rings hollow, particularly to the ears of political interests and entities adversely affected by the legislative outcome.

Second, there is the problem that by grounding deference in the *Buckley* framework, the Court must find a way to expand the conception of “corruption” or its appearance to accommodate the comprehensive range of actions that Congress might consider necessary. BCRA is not concerned with vote-buying, or any of the more coarse and familiar forms of “sale of office,” but rather corruption that “is

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<sup>80</sup> National parties, for example, cannot raise soft money for election-related charities, while officeholders can within specially designed limits but without public disclosure requirements. Compare 2 U.S.C. § 441i(d) (denying national parties the ability to raise soft money for election-related charities), with 2 U.S.C. § 441i(e)(4) (permitting officeholders to raise soft money for election-related charities).

<sup>81</sup> *McConnell*, 124 S. Ct. at 669; see also U.S.C. §§ 441a(a)(1), 441a(a)(3), 441a(i).

neither easily detected nor practical to criminalize,” or that is “subtle but equally dispiriting.”<sup>82</sup> A form of “corruption” that is both “subtle” and not “easily detected” presents an elusive target for regulation. It presents the still more immediate question of who, and with what degree of authority, might determine its presence or occurrence. The Court seeks to solve the problem by an appeal to Congress’s expertise—its experience with political reality, demonstrated over time.

Congress, in effect, earns its right to deference by showing that over many years, in a “steady improvement” of the election laws, it has displayed a resolute, carefully targeted concern with the corruption problem.<sup>83</sup> This is the source of its expertise, but more importantly, it is also the basis for any reassurance that Congress can rise above the lure or trap of self-interestedness.<sup>84</sup>

This means that the Court’s case for deference rests on its persuasiveness, that is, on the power of its presentation of “realities” and “history.” Yet the *McConnell* Court’s history of Congressional intervention in campaign finance is superficial and incomplete. The Court offers up a sort of heroic “official history” as Congress would have written it. A more probing examination reveals a different history than the one presented by the Court—one characterized by partisan motivations and political self-interest rather than simply “steady improvement” in the attack on corruption.<sup>85</sup> Moreover, the “political realities” within which Congress is operating include a structure of political competition, barely considered by the Court, that is heavily weighted in the interests of, and shaped by, the individual candidate—particularly the incumbent candidate.

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<sup>82</sup> *McConnell*, 124 S. Ct. at 666.

<sup>83</sup> See *id.* at 643-45 (discussing the history of the election laws and characterizing it as Congress’s “steady improvement of the national election laws”).

<sup>84</sup> The Court gives only summary attention to the dissent’s critique of Title I of BCRA as a statute that “look[s] very much like an incumbency protection plan.” *Id.* at 753 (Kennedy, J., dissenting). The majority replies simply that any concern about Congress’s self-interest “is taken into account by the applicable level of scrutiny.” *Id.* at 684 n.72 (majority opinion). According to the Court, Congress is held in check by having to show “concrete evidence” of corruption, or its appearance, arising from “a particular type of financial transaction,” and by having to adopt means “closely drawn” to solve the problem. *Id.* Of course, the Court’s reassurances are negligible, undermined by its decision to “defer” broadly to congressional choices. The Court’s analysis reflects few demands on Congress for “concrete evidence,” in large measure because it chooses to defer to the legislature’s “conclusions” and “predictions” about the existence of corruption and the means of dealing with it. *Id.* at 672.

<sup>85</sup> *Id.* at 645.

The nature of this unofficial history and reality bears some attention because it illuminates the weakness of the foundation on which the Court seeks to establish its theory of deference. This is not to say that a theory of deference is not imaginable or sustainable, but that the Court's attempt to construct one in *McConnell*, in an awkward relationship to *Buckley*, does not succeed. It does not succeed because a theory of deference tied to *Buckley* is doomed from the start. The Court is seeking to escape the imagined rigors of *Buckley* through a theory of deference, but by insisting on operating within the *Buckley* paradigm of the danger of corruption, it builds the theory on a theoretical foundation that cannot support it. In short, the history of campaign finance reform is by no means a straightforward history of a "resolute" concern with corruption, and that history does not support the claims made by *McConnell* for congressional "expertise."

In its analysis of "history" and "political realities," the Court's refusal to consider the history of the very enactment under review, BCRA, underscores the problems with its theory of judicial deference. The Court minimizes interest in the legislative history of BCRA itself, declaring that there is "little" of it.<sup>86</sup> Yet there is more legislative history than the Court is willing to admit, spanning weeks of debate in the Senate and an intense day and night of debate in the House, and it is hard to see how a theory of deference that takes history seriously would overlook it.<sup>87</sup> Even if Congress had established the historical record claimed for it by the Court, there is always a question of whether legislators have proven faithful to that record in *this* instance. While it cannot be known why the Court would ignore the history of the enactment before it, there is a basis for the question of whether the majority knew that it was unhelpful to its cause: that it would not support "deference" on the basis of Congress's attention to the dangers of corruption under the *Buckley* framework.

### B. *The Unofficial History*

As noted above, the Court views the history of campaign finance reform as one of "steady improvement" in the law achieved by congressional concern with ever-evolving corruption threatened by the role of money in politics.<sup>88</sup> The changes made are appropriately

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<sup>86</sup> *Id.* at 681.

<sup>87</sup> See *infra* notes 127-139 and accompanying text (discussing the legislative history of BCRA).

<sup>88</sup> See *supra* text accompanying note 83; *McConnell*, 124 S. Ct. at 634.



"cautious" and incremental, as Congress proceeds deliberately to adjust regulation with some precision to the fulfillment of its anticorruption goals.<sup>89</sup>

On its face, this might seem like a fairly simplified, if not glorified, version of how legislation of any kind is made. It is all the more questionable as an account of Congress's engagement with campaign finance reform. Rather than illustrating a Congress objectively pursuing the cleansing of political life, campaign finance reform history reveals a series of highly partisan disputes over the control of political resources. The "Congress" enacting reforms typically does so from distinct partisan or self-interested perspectives.<sup>90</sup> We need not judge one or the other side harshly to accept the highly politicized character of reform legislation over the last century.

Reform history opens with a decisive change in the country's politics, when the "mass democracy" centered on parties gave way to increasingly expensive, candidate-centered appeals to voters that required intensive fundraising and expenditures.<sup>91</sup> With the enactment of the Seventeenth Amendment, relocating the election of Senators from state legislatures to popular choice at the polls, the stresses occasioned by the change in the structure of political competition became ever more acute.<sup>92</sup> Parties traded accusations over fundraising practices, and President Theodore Roosevelt's celebrated support for the corporate spending prohibition, the Tillman Act,<sup>93</sup> followed accusations directed against substantial corporate support for his own presidential campaign.<sup>94</sup> As Robert Mutch has shown, partisanship influ-

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<sup>89</sup> *McConnell*, 124 S. Ct. at 645 (citing *NRWC*, 459 U.S. 197, 209 (1982)).

<sup>90</sup> It is important not to limit the consideration of self-interest to "partisanship," since in an age of weak parties, individual legislators might exhibit self-interest on some occasions by supporting measures beneficial to parties, and on others, by enactments helpful to incumbents as a class.

<sup>91</sup> See, e.g., MICHAEL E. MCGERR, *THE DECLINE OF POPULAR POLITICS: THE AMERICAN NORTH 1865-1928* (1988) (outlining the change in the country's political process).

<sup>92</sup> See Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997). Bybee notes how "proponents [of the Seventeenth Amendment] had perhaps overlooked that statewide races conducted to the electorate rather than to the legislature would prove far more expensive . . . and the need for money could only encourage the influence of corporations and political machines." *Id.* at 541.

<sup>93</sup> Pub. L. No. 59-36, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441b (1988)).

<sup>94</sup> See ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS AND THE COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 1-4* (1988) (outlining the evolution of campaign finance law in the twentieth century). Mutch has produced the only comprehensive

enced both the shape and success of most of the subsequent “improvements” debated by the Congress,<sup>95</sup> such as the original Federal Corrupt Practices Act (FCPA).<sup>96</sup>

Yet the legislative jockeying over the Tillman Act and the FCPA does not capture the full partisan flavor of the early wrangling over campaign finance reform. Congress, acting pursuant to its constitutional authority to judge the returns of its Members,<sup>97</sup> entertained and acted through the investigative process on allegations of campaign finance violations.<sup>98</sup> Louise Overacker, writing about this process, welcomed whatever measure of enforcement it afforded, but lamented the “tendency” of many cases to “become . . . more and more ill-disguised attempts to make political capital. Composed as they are of partisans operating in the heat of a campaign, it would be stranger if it were otherwise.”<sup>99</sup> She noted that the Senate, in enforcing primary spending limits, simply adopted “whatever standards it chooses to apply at the particular time and for the particular candidate”—an example of “special legislation with a vengeance.”<sup>100</sup> These investigations produced reports of their findings and conclusions that are replete with evidence of partisan conflict.<sup>101</sup> In some instances, such as the celebrated challenge to the 1918 Senate election of Truman New-

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treatment of the history of campaign finance reform, and any student of this period is fortunate to be able to consult his work.

<sup>95</sup> Democrats, particularly Southern Democrats, resisted the restoration of regulation to primary campaigns previously invalidated by the Supreme Court in *Newberry v. United States*, 256 U.S. 232 (1921), but were actively concerned with the superior sources of Republican financing. They were open to spending limits and pre-election reporting. Republicans advocated regulation of primaries, and sought to maneuver the Democrats into public embarrassment on disclosure issues. See MUTCH, *supra* note 94, at 8-16.

<sup>96</sup> Federal Corrupt Practices Act of 1925, 43 Stat. 1070 (1925).

<sup>97</sup> See U.S. CONST. art. I, § 5, cl. 1 (“Each house shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .”).

<sup>98</sup> The FCPA did not establish an independent civil enforcement mechanism and the law did not in any event reach primaries in the wake of *Newberry*. For a general review of the enforcement “cases” heard by the Senate, see ANNE M. BUTLER & WENDY WOLFF, GPO, UNITED STATES SENATE ELECTION, EXPULSION AND CENSURE CASES 1793-1990 (1995).

<sup>99</sup> LOUISE OVERACKER, MONEY IN ELECTIONS 286 (1932).

<sup>100</sup> *Id.* at 284.

<sup>101</sup> See, e.g., REPORT OF THE SPECIAL COMMITTEE, INVESTIGATION OF PRESIDENTIAL, VICE-PRESIDENTIAL, AND SENATORIAL CAMPAIGN EXPENDITURES, REP. NO. 79-101, at 83-84 (1945) (noting the sharply divergent views between the majority and minority over the treatment of the union spending, with the minority decrying “the problem of labor unions in partisan politics,” while the majority defends their right to participate in the “free discussion of political questions”).

berry, the candidate's fortunes rose and fell with changes in party control of the Senate.<sup>102</sup>

This partisan coloration persisted throughout the balance of twentieth-century reform. The 1940 Hatch Act,<sup>103</sup> limiting political activities involving federal government workers, was designed by Republicans and anti-New Deal Democrats to undermine President Roosevelt's campaign for nomination to a third term.<sup>104</sup> Congress was careful in this statute to exempt from coverage state government workers "who were still an important source of congressional campaign funds."<sup>105</sup> President Roosevelt vetoed the bill, but Congress, overriding the veto, enacted the restrictions into the law. A presidential veto, subsequently overridden by Congress, also followed enactment of the Smith-Connally Act<sup>106</sup> in 1943 which added a prohibition on labor election-related spending to the 1907 Tillman Act.<sup>107</sup>

Reforms later in the century follow the same pattern,<sup>108</sup> with the possible exception of the 1974 amendments to the Federal Election

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<sup>102</sup> Newberry's seat, the "control" seat in a closely divided Senate, was bitterly contested along party lines over excessive expenditures on Newberry's behalf. Republicans reported in Newberry's favor to the Senate, over Democratic objections, and the Republican-controlled Senate seated him. When the 1922 election reduced the Republican majority, shifting functional control to Democrats and "independent" or "radical" Republicans, it became clear that the Democrats would seek again to remove him, and likely succeed. Newberry then resigned in the face of the inevitable. *See generally* SPENCER ERVIN, HENRY FORD VS. TRUMAN H. NEWBERRY: THE FAMOUS SENATE ELECTION CONTEST (1935). Ervin strongly criticizes the process by which Newberry was driven from the Senate, but his account, while partial in this fashion, is rich in detail about the politics of the case.

<sup>103</sup> *See* Act of July 19, 1940, Pub. L. No. 76-753, § 4, 54 Stat. 767, 767 (codified as amended at 5 U.S.C. § 1502 (1982)), (amending Hatch Act, Hatch Act, Pub. L. No. 76-252, 53 Stat. 1147 (1939) (codified as amended at 5 U.S.C. §§ 1501-1503, 7324-7327 (1982 & Supp. III 1985); 18 U.S.C. §§ 594, 595, 598, 600, 601, 604, 605 (1982))).

<sup>104</sup> MUTCH, *supra* note 94, at 32-33.

<sup>105</sup> *Id.* at 34.

<sup>106</sup> Smith-Connally Act, §9, 57 Stat. 167-68 (1943) (terminated 1946).

<sup>107</sup> *See* MUTCH, *supra* note 94, at 154. Republicans and Southern Democrats sought to work around the hostile territory of the Labor Committee, which would normally have considered this legislation. The bill was assigned instead to Military Affairs, which held no hearings, but "assigned it to a specially appointed subcommittee consisting entirely of Republicans and Southern Democrats." *Id.* at 153-54. The bill was then moved into typescript, without prior distribution, to the floor where "virtually no one in the chamber knew what was being debated." *Id.* at 154.

<sup>108</sup> Mutch notes how even the *New York Times* expressed concern over the Democrats' sudden embrace of public financing in 1971, in the aftermath of the 1968 presidential election that left the party in deep debt with limited prospects for raising money. *Id.* at 121. Moreover, the 1971 law placed specific limits on spending for broadcast media, inspired by Democratic resentment of President Nixon's purportedly unprecedented use of Madison Avenue advertising techniques as related in a best

Campaign Act of 1971,<sup>109</sup> which was enacted in the shadow of Watergate.<sup>110</sup> It should be apparent that the actual history of the war on “corruption” does not correspond very neatly with the pristine account of the *McConnell* Court.

### C. *The “Political Realities”*

The *McConnell* Court also offered a view of the relevant “political realities” centered on the corruptive potential, effect and appearance of money in the political process.<sup>111</sup> Its examples included “manipulations of the legislative calendar” that are claimed to have resulted in “Congress’ failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation.”<sup>112</sup> Yet the Court chose a very partial view of the realities bearing on any evaluation of campaign finance reform. Other prominent realities, treated cursorily by the Court, involve the efforts of elected officials to protect themselves politically (in a period of sharply increasing campaign costs and weak political parties) and doing so successfully (reflected in incumbent reelection rates). In short, these are the realities of the contemporary political marketplace. Some would say that these realities have been well established, much better established than the sweeping generalizations the Court justified in the name of “common sense.”<sup>113</sup> As a result, these realities provide a background to the enactment of BCRA much different than the one highlighted by the Court.

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seller entitled *The Selling of the President 1968*. JOE MCGINNIS, *THE SELLING OF THE PRESIDENT 1968* (1969). Thus, House Subcommittee Chairman Torbert MacDonald opened hearings on the law by describing its purpose as one of ending “abuse of the broadcasting media by candidates for public office” through “saturation” communications campaigns that sold them like “soap, razor blades, or soft drinks.” *Bills to Regulate the Use of Communications Media by Candidates for Elective Public Office: Hearings on H.R. 8627, H.R. 8628 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong. 1 (1971) (statement of Representative Torbert H. MacDonald, Chairman, House Subcomm. on Communications and Power).

<sup>109</sup> Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-56 (2003))).

<sup>110</sup> The vote on the 1974 amendments was still strongly affected by partisan divisions. A motion to recommit in the House, though defeated, received considerable Republican support with the vote of 243-164. The margin widened considerably on final passage, 355-48, but this vote was held in the extraordinary environment of the day before President Nixon’s resignation from office. H.R. 16090, 93d Cong., 120 CONG. REC. 27512-13 (1974) (enacted).

<sup>111</sup> *McConnell*, 124 S. Ct. 624, 665 (2003).

<sup>112</sup> *Id.* at 664.

<sup>113</sup> *Id.* at 665.

A fair assessment of those realities would have to include reference to the generally increased cost of campaigning, not merely the “explosion” in the amount of soft money. As Alan Ware pointed out twenty years ago, one of the main effects of this increased cost over time has been to diminish the role of parties relative to that of the individual candidate raising money and directing her own political fortunes.<sup>114</sup> These developments have entailed high incumbent reelection rates, beginning in the 1960s and rising steadily over the years,<sup>115</sup> along with a stark decline over time in party identification.<sup>116</sup>

The significance of incumbency and incumbency politics, in what may be fairly called a post-party age, gave rise in the last decade to a robust, nationwide term limits movement predicated on the notion that incumbents had a stranglehold on political competition.<sup>117</sup> The Court was well familiar with these “realities,” having been called upon to adjudicate the constitutionality of the nationwide drive toward congressional term limits in *Thornton*.<sup>118</sup> The Court also had experience with the increasingly sophisticated management of political competition for the House, accomplished through computer-aided gerrymandering<sup>119</sup> and limiting the range of competitive races.

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<sup>114</sup> ALAN WARE, *THE BREAKDOWN OF DEMOCRATIC PARTY ORGANIZATION, 1940-1980*, at 175-76 (1985).

<sup>115</sup> *Id.* at 146-47.

<sup>116</sup> See THOMAS E. PATTERSON, *THE VANISHING VOTER: PUBLIC INVOLVEMENT IN AN AGE OF UNCERTAINTY* 24-25 (2002) (detailing the decline of party-centered politics and the rise of candidate, rather than party, identification within the electorate).

<sup>117</sup> See, e.g., JOHN FUND & JAMES COYNE, *CLEANING HOUSE: AMERICA'S CAMPAIGN FOR TERM LIMITS*, at xix (1992) (examining the tradition of term limits and concluding that they can be a method of “reviving political competition and making legislatures more responsive to and representative of the people”); GEORGE F. WILL, *RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY*, at xix (1992) (tracing the history of term limits movements and arguing in favor of term limits).

<sup>118</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). It bears mention that Justice Stevens, joint author with Justice O'Connor of *McConnell*, wrote the majority decision in *Thornton* holding state imposed Congressional term limits unconstitutional. Unlike his opinion in *McConnell*, Justice Stevens decided *Thornton* on broad constitutional principles with no mention of the “political realities” shaping states' adoption of term limits. Cf. *Colorado Republican II*, 533 U.S. at 451-452, 452 n.14 (stating that the Court had “long recognized Congress's concern with [the] reality of political life” that “[p]arties are . . . necessarily the instruments of some contributors whose object is . . . to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors”).

<sup>119</sup> See *Easley v. Cromartie*, 532 U.S. 234, 237 (2001) (evaluating the methodology behind the creation of an irregularly shaped majority-black district in North Carolina); *Shaw v. Reno*, 509 U.S. 630, 635-36 (1993) (examining two unusually shaped, majority-black districts in North Carolina); see generally *Vieth v. Jubelirer*, 158 L. Ed. 2d 546

In an opinion devoted to an explication of political reality, this reality, bearing directly on the Court's theory of deference, merited as much emphasis as the "subtle" effects of money on the legislative process. While the theory of "deference" is specifically conditioned on sensitivity to such "constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge,"<sup>120</sup> *McConnell* fails altogether to seriously consider what Samuel Issacharoff and Richard Pildes refer to as this "background structure of partisan competition."<sup>121</sup> The Court in *McConnell*, merely nodding in the direction of these issues, chose to emphasize one aspect of political reality—the standing concern with fundraising—to the exclusion of a more integrated assessment of the operation of the political market.

This is another way in which the commitment to *Buckley*'s anticorruption rationale framework limits the Court's field of vision, eventually undermining the credibility of its appeal to "deference." The focus on corruption draws the Court's attention away from a more extensive inquiry into the political market. Narrowing the Court's focus, it also screens from the Court's view other aspects of political reality that would justify judicial supervision of the regulation of politics. Issacharoff and Pildes call for courts to assess campaign finance reform "intensively to ensure they do not further entrench bipartisan political lockups."<sup>122</sup> Yet it is difficult to see how courts could discharge this responsibility under a corruption-centered theory of deference like the one constructed in *McConnell*.

#### D. *The Court's Treatment of BCRA's Legislative History*

The Court in *McConnell* offers the surprising observation that there is "little legislative history regarding BCRA generally."<sup>123</sup> To the extent that this statement is correct, it would provoke concerns about

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(2004) (considering a claim of partisan gerrymandering and finding it nonjusticiable); MARK MONMONIER, BUSHMANDERS AND BULLWINKLES: HOW POLITICIANS MANIPULATE ELECTRONIC MAPS AND CENSUS DATA TO WIN ELECTIONS (2001) (examining the ways in which district boundaries "can serve or disadvantage political parties, incumbents, and racial or ethnic groups").

<sup>120</sup> *Shrink Missouri*, 528 U.S. at 402.

<sup>121</sup> Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648, 670 (1998). Pildes and Issacharoff place their emphasis on examination of political "realities" in lieu of "mechanical legal formalisms" to address the partisan lockup of the political process. *Id.* at 652, 660.

<sup>122</sup> *Id.* at 689.

<sup>123</sup> *McConnell*, 124 S. Ct. at 681. See also *supra* text accompanying note 86 (noting the *McConnell* Court's dismissive approach to the legislative history of BCRA).

any theory of deference, which should include some reasonable expectation that elected officials would declare and explain their purposes. There is, however, significant BCRA legislative history, but the Court pays it little attention, citing legislative history on relatively modest issues of statutory interpretation.<sup>124</sup> The Court resolutely avoids any larger-scale engagement with the legislative history in the assessment of what the *Buckley* Court referred to as the “full sweep of the legislation as enacted.”<sup>125</sup>

Justice Scalia in his dissent brings out some of what the majority overlooks. Namely, Justice Scalia provides considerable commentary from the House and Senate floors about the personal disdain for “attack ads” behind members’ support for the Title II “electioneering communications.”<sup>126</sup> The Court’s disregard for Congress’s debate on BCRA goes further still, ranging over Title I and the statute as a whole. The legislative history that the majority derides as “little” includes extensive debate about the enactment of protections against millionaire spending, or increased “hard money” limits, and about the purposes to serve the interests, or address the anxieties, of incumbents. In addressing the Millionaire’s Amendment, Senator McCain, one of the two key sponsors of the bill and a supporter of the amendment, was blunt in describing the motives of his colleagues:

So [the Millionaire’s Amendment] addresses, *in all candor*, a concern that virtually any nonmillionaire Member of this body has, and that is that they wake up some morning and pick up the paper and find out that some multi-millionaire is going to run for their seat, and that person intends to invest 3, 5, 8, 10, now up to \$70 million of their own money in order to win.<sup>127</sup>

Expressing skepticism, both the Democratic Leader and the ranking Democratic Member of the Rules Committee noted that the plain effect of the measure was “incumbent protection.”<sup>128</sup> The measure passed comfortably, with the support of the bill’s sponsors and on a

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<sup>124</sup> See, e.g., *id.* at 684 n.71 (citing Senator Feingold’s statement regarding the ability of federal candidates to appear in the advertisements of state candidates for the purpose of endorsing them).

<sup>125</sup> *Buckley*, 424 U.S. at 31 n.33.

<sup>126</sup> *McConnell*, 124 S. Ct. at 727-28 (Scalia, J., dissenting); see also Brief for Appellants The National Rifle Association, et al., at 50 app. *McConnell v. FEC* (no. 02-1675) (quoting from BCRA’s legislative history).

<sup>127</sup> 147 CONG. REC. S2540 (daily ed. Mar. 20, 2001) (statement of Sen. McCain) (emphasis added).

<sup>128</sup> 147 CONG. REC. S2542 (daily ed. Mar. 20, 2001) (statement of Sen. Dodd); 147 CONG. REC. S2542, 2544 (daily ed. Mar. 20, 2001) (statement of Sen. Daschle).

bipartisan basis. Similar expressions of incumbents' attention to their own welfare surfaced with the introduction of a successful amendment to increase the contribution limits for candidates. The sponsors cited many of the same considerations they found persuasive for banning "attack ads," such as the dangers of "independent groups totally taking over."<sup>129</sup> Their argument also included an appeal to the advantage, associated with increased limits, of reducing the "incessant need for fundraising."<sup>130</sup>

Not all of these concerns, such as the demands for "incessant fundraising," were constitutionally suspect as a basis for supporting congressional action. Yet a reading of the legislative history reveals that once the original bill was presented to the floor, it became the subject of adjustment in substantial part on the basis of self-interest. A number of members became uneasy over the spectacle of the Senate taking up a reform bill, only to immediately amend it to provide more fundraising potential and flexibility for themselves.<sup>131</sup>

These comments are all the more notable when considered in the light of the Senate's and House's varied and inconclusive efforts at articulating a generally shared view of what the bill was designed to accomplish. Different members argued at different times that the bill would provide for "equality" in the political process,<sup>132</sup> help to reduce the total amount of money in the political process,<sup>133</sup> reduce the fundraising demands on federal officials,<sup>134</sup> and limit negative campaigning.<sup>135</sup> Both Democratic and Republican members rejected any suggestion that the bill was required to address actually corrupt conduct,

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<sup>129</sup> 147 CONG. REC. S3006 (daily ed. Mar. 28, 2001) (statement of Sen. Thompson).

<sup>130</sup> 147 CONG. REC. S3012 (daily ed. Mar. 28, 2001) (statement of Sen. Feinstein).

<sup>131</sup> *See, e.g.*, 147 CONG. REC. S2463 (daily ed. Mar. 19, 2001) (statement of Sen. Levin) ("So the first amendment that comes before the Senate is an amendment which is written in a way to eliminate any limit.").

<sup>132</sup> 148 CONG. REC. H342 (daily ed. Feb. 13, 2002) (statement of Rep. Lewis).

<sup>133</sup> *See* 147 CONG. REC. S2932 (daily ed. Mar. 27, 2001) (statement of Sen. Dodd) ("[A]ll of these amendment[s] are just opening up more spigots, allowing more money to flow into a process that is already nauseatingly awash in too much money.").

<sup>134</sup> *See* 147 CONG. REC. S3012 (daily ed. Mar. 28, 2001) (statement of Sen. Feinstein) (arguing that the amendment would "reduce the incessant need for fundraising").

<sup>135</sup> *See, e.g.*, 147 CONG. REC. S2692 (daily ed. Mar. 22, 2001) (statement of Sen. Wyden) (introducing an amendment to limit negative campaigning).



because they agreed that they were not responsible for any.<sup>136</sup> In fact, Senator Feingold advised his colleagues that they were required to cite corruption, regardless of whether it existed, to satisfy the demands of the *Buckley* Court.<sup>137</sup> The diversity of views and rationales was such that, after Senator Specter introduced an amendment with a “findings” section, in order “to provide a factual basis to uphold the constitutionality of the statute,”<sup>138</sup> he subsequently was compelled to withdraw it when agreement proved impossible.<sup>139</sup>

The Court’s disinclination to delve into this legislative history is evident. When reviewing the justification for BCRA, the Court devotes most of its discussion to the expert testimony presented in the proceedings below, and to the findings of the members of the three-judge court who did not agree among themselves on key issues.<sup>140</sup> To the extent that Congress’s formal intention is cited, reference is made to the Report of the Governmental Affairs Committee on its investigation of presidential campaign practices,<sup>141</sup> which was issued three years before and not mentioned at all on the floor of the Senate during the first week of debate on BCRA.

Congress’s varied and sometimes confused record of its purposes, not to mention the evidence of self-interestedness that was the topic of candid discussion on the floor, may not have been sufficient to doom the constitutional character of its enactment. Still, the Court seemed sufficiently uncomfortable with this history to minimize its significance and sidestep any serious discussion of the issues it raised, while still holding to the proposition that Congress’s will in this matter merited respect. This is a troubling feature of a decision committed to a notion of judicial deference. The difficulty follows from the Court’s construction of a theory of deference on the basis of historical and

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<sup>136</sup> 147 CONG. REC. S2936 (daily ed. Mar. 27, 2001) (statement of Sen. Wellstone); see 147 CONG. REC. S2438 (daily ed. Mar. 19, 2001) (statement of Sen. McConnell) (commending the lack of unsubstantiated charges of corruption).

<sup>137</sup> See 147 CONG. REC. S2444 (daily ed. Mar. 19, 2001) (statement of Sen. Feingold). The corruption standard also was subjected to some creative interpretation, such as the claim that perceptions of corruption were created somehow by the constitutional right of millionaires to finance their own campaigns without limitation. 147 CONG. REC. S2538 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine).

<sup>138</sup> 147 CONG. REC. S3118 (daily ed. Mar. 29, 2001) (statement of Sen. Specter).

<sup>139</sup> 147 CONG. REC. S3120 (daily ed. Mar. 29, 2001) (statement of Sen. Specter).

<sup>140</sup> See *McConnell*, 124 S. Ct. at 649-653 (reviewing the history and purposes of BCRA).

<sup>141</sup> *Id.* at 652-54 (citing SENATE COMM. ON GOVERNMENTAL AFFAIRS, INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS, S. REP. NO. 105-167, 105th Cong. (1998)).

empirical claims that do not withstand close scrutiny. The history, “political realities,” and legislative expertise cited by the Court as grounds for deference could not benefit from close scrutiny of the actual process by which BCRA was considered and enacted. So the Court set that legislative history aside.

#### CONCLUSION

If there is a case for deference to the legislature on matters of campaign finance, it is not found in *McConnell*. The version it offers lacks coherence and persuasiveness. This article has located the fault in the Court’s conflicted treatment of *Buckley*—its desire to escape *Buckley*’s limitations through a theory of deference, and the deleterious effects on that theory of a continued, albeit weakened, commitment to the *Buckley* framework. *Buckley* has long haunted campaign finance reform, but in its strong version, it drew some manageable and relatively clear lines. In its compromised form today, it cannot hold its place as a meaningful framework for campaign finance regulation. The doctrine of deference articulated by the Court will not help the Court navigate around *Buckley*. In fact, *McConnell* “deference” is not the solution, but rather an illustration of the continuing problem with *Buckley* jurisprudence in its twilight.