

BETWEEN ACCESS AND INFLUENCE: BUILDING A RECORD FOR THE NEXT COURT

RENATA E. B. STRAUSE* & DANIEL P. TOKAJI**

*This Article considers the evidence that should be collected and developed to support the next generation of reforms before a future Supreme Court. It discusses but ultimately sidesteps theoretical debates over rationales for reform, focusing instead on the practical questions likely to face future policymakers, lawyers, and expert witnesses. Drilling down into the ample evidentiary record in *McConnell v. Federal Election Commission*, we address the types of evidence that should be amassed by supporters of future regulation. This evidentiary record, we suggest, will be essential in both formulating the next generation of campaign finance reform and in defending it in court. We argue that, regardless of whether one favors an anti-corruption or egalitarian rationale for regulation, the evidentiary record should focus on conflicts of interest—in particular, on whether a reasonable legislator would feel pressure to act in way that is different from the preferences of her constituents or the public interest. This is something more than a showing of unequal access, but something less than a showing of actual influence on policymaking. In the near term, our suggestions are designed to help define a research agenda for qualitative and quantitative empirical researchers. In the long term, they offer a roadmap for the legislators shaping and the lawyers defending future regulations before a Supreme Court less reflexively antagonistic to reform than the current one.*

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* Daniel P. Tokaji is the Charles W. Ebersold and Florence Whitcomb Ebersold Professor of Constitutional Law at The Ohio State University, Moritz College of Law.

** Renata E. B. Strause is a graduate of Yale Law School and Oberlin College.

INTRODUCTION

A persistent feature of campaign finance discourse has been disagreement over rationales for regulation. Proponents and opponents of reform have tangled repeatedly with each other, often in caustic terms, over whether there are any good reasons for public financing, disclosure requirements, restrictions on expenditures and contributions. The debate among reform-minded scholars and advocates has been almost as fervent. Particularly unrelenting, no doubt interminably so to some observers, is the longstanding debate over whether regulation should be aimed at preventing corruption or promoting equality.

With the Roberts Court having emphatically rejected egalitarian rationales and having severely constricted the anti-corruption rationale, this debate is now largely academic—not in a bad sense, but in the sense of being mostly of interest to academics. Five justices firmly adhere to a narrow conception of corruption, limited to quid pro quo transactions. To the extent that there has been any lingering doubt about the majority’s narrow conception of corruption, *McCutcheon v. Federal Election Commission*¹ definitively resolved it.² There is no good reason to believe that the five justices in the majority will change their minds. Thus, as long as the current Court sits, we should not expect to see any significant change in the constitutional law surrounding campaign finance regulation. The anti-corruption rationale will remain narrow, and the equality rationale will be off the table. As long as that remains the case, the options available to reform-minded advocates will be extremely limited.

While not denying the importance of theoretical debates over the rationales for regulation, for two reasons we think it is more important to focus attention on the *evidence* that should be amassed to support the next generation of campaign finance reform. First, examination of the effects of money on the political process—including the independent expenditures flooding the system since *Citizens United v. Federal Election Commission*³—will be essential in shaping the next generation of campaign finance reforms and shepherding them through the legislative process. Second, documentation of these effects will be necessary in defending these

1. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

2. *Id.* at 1441 (“Any regulation must instead target what we have called ‘quid pro quo’ corruption or its appearance.”).

3. *Citizens United v. FEC*, 558 U.S. 310 (2010).

reforms in court. Even if the Court's composition shifts, such that there is no longer a majority hostile to campaign finance regulation, the Court is unlikely to give a blank check to legislators in regulating campaign money—nor do we think it should, given concerns regarding free speech and entrenchment. The evidence amassed in support of regulation will therefore be essential not only in crafting legislation, but also in demonstrating that legislation is appropriately tailored.

This article therefore considers the evidence that should be collected and developed to support the next generation of reforms before a future Supreme Court. It discusses but ultimately sidesteps theoretical debates over rationales for reform, focusing instead on the practical questions likely to be faced by future policymakers, lawyers, and expert witnesses. Drilling down into the ample evidentiary record in *McConnell v. Federal Election Commission*,⁴ we address the types of evidence that should be amassed by supporters of future regulation. This evidentiary record, we suggest, will be essential both in formulating the next generation of campaign finance reforms and in defending it in court. The recent plurality and dissenting opinions in *McCutcheon* highlight the pressing need for such evidence with respect to the current federal campaign finance system.

We argue that, regardless of whether one favors an anti-corruption or egalitarian rationale for regulation, the evidentiary record should focus on *conflicts of interest*—in particular, on whether a reasonable legislator would feel pressure to act in a way that is different from the preferences of her constituents or the public interest. This is something more than a showing of unequal access, but something less than a showing of actual influence on policymaking. In the near term, our suggestions are designed to help define a research agenda for qualitative and quantitative empirical researchers. In the long term, they offer a roadmap for legislators and lawyers to shape and defend future regulations before a Supreme Court that is less reflexively antagonistic to reform than the current one.

The article proceeds as follows: Part I discusses the rationales for regulation accepted and rejected by the Supreme Court over time, focusing especially on the shifting anti-corruption rationale. Part II canvasses the academic debate over the justifications for regulation, including current and prior iterations of the equality versus anti-

4. *McConnell v. FEC*, 540 U.S. 93 (2003).

corruption debate. We draw from this debate the lesson that, regardless of one's underlying conception of the values properly served by reform, reformers should focus on conflicts of interest in amassing an evidentiary record. Part III traces this notion through a close examination of the evidentiary record developed in support of the Bipartisan Campaign Reform Act of 2002 (BCRA) for *McConnell v. Federal Election Commission*. Part V sketches the sort of evidence that ought to be developed for the next Court, focusing on how independent expenditures create conflicts of interest in the legislative process.

I. THE SHIFTING ANTI-CORRUPTION RATIONALE

We start by canvassing the rationales for regulation that have been accepted and rejected by the Supreme Court. On a superficial level, the Court has been consistent in accepting the prevention of corruption and appearance of corruption as rationales that justify regulation, while rejecting the promotion of equality. In reality, the anti-corruption rationale has been an accordion in the Court's hands, starting off narrow, then broadening in cases like *Austin v. Michigan Chamber of Commerce*⁵ and *McConnell*, only to contract again in the hands of the Roberts Court.

The story of modern campaign finance doctrine begins with 1976's *Buckley v. Valeo*.⁶ In reviewing the 1974 Amendments to the Federal Election Campaign Act (FECA),⁷ the Supreme Court set the constitutional parameters for the regulation of money in politics. First, contributions and expenditures differ in the degree of First Amendment protection they enjoy.⁸ Second, restrictions on either must be justified in terms of anti-corruption, not equality.⁹

5. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

6. *Buckley v. Valeo*, 424 U.S. 1 (1976).

7. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2 U.S.C.).

8. *See Buckley*, 424 U.S. at 23 (“[A]lthough the Act’s contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.”). At the risk of oversimplification, the distinction between contributions and expenditures is essentially this: a contribution is money given to a candidate or party or political action committee; an expenditure is money directly spent on advertising or staff time or for any other political good, in order to benefit a candidate, party, or political action.

9. *See id.* at 54 (“The ancillary interest in equalizing the relative financial resources of candidates competing for elective office . . . is clearly not sufficient to justify the provision’s infringement of fundamental First Amendment rights.”).

The reasoning behind *Buckley*'s contribution-expenditure distinction was twofold. First, the Court concluded that there was a difference between the First Amendment interests implicated by contributions and those implicated by expenditures. While contribution limitations impose "only a marginal restriction upon the contributor's ability to engage in free communication,"¹⁰ restrictions on expenditures "impose direct and substantial restraints on the quantity of political speech."¹¹ A contribution to a candidate or group generally expresses support for the recipient, but neither conveys the contributor's reasons nor equates the amount given with any quantity of speech.¹² The "primary First Amendment concern" raised by restricting contributions is therefore not the contributor's free speech rights but rather her freedom of association.¹³ To be constitutional, such a restriction need only be justified by an important governmental interest and closely drawn to avoid unnecessary interference with the contributor's associational rights.¹⁴ The Court later clarified that this is something less than strict scrutiny.¹⁵ By contrast, direct expenditures on campaign communications—whether by a candidate, an individual, or an interest group—fund the "[d]iscussion of public issues and debate on the qualifications of candidates [that] are integral to the operation" of our system of government.¹⁶ Limitations on expenditures restrict that discussion by reducing "the number of issues . . . , the depth of their exploration, and the size of the audience reached."¹⁷ Thus, they face more exacting scrutiny.¹⁸

The second reason for *Buckley*'s distinction between contributions and expenditures concerned the government's interest in regulation. The Court found that the contribution limits, but not expenditure limits, could be justified by an interest in preventing corruption and its appearance. Three interests were offered to justify the FECA amendments' restriction on contributions: prevention of corruption and the appearance of corruption; equalization of citizens' relative ability to influence electoral outcomes; and curbing the increasing

10. *Id.* at 20.

11. *Id.* at 28.

12. *Id.* at 21.

13. *Id.* at 24.

14. *Id.* at 25 (citations omitted).

15. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

16. *Buckley*, 424 U.S. at 14.

17. *Id.* at 19.

18. See *Shrink Mo.*, 528 U.S. at 386 (discussing the standards of review used in *Buckley*).

costs of political campaigns.¹⁹ The *Buckley* Court found the threat of actual or apparent corruption sufficient to justify contribution limits, obviating the need to address the other two interests.²⁰

The Court engaged in a more extensive discussion of the interests supporting regulation in connection with the FECA amendments' expenditure restrictions.²¹ After construing the statutory language of the \$1,000 expenditure cap to avoid vagueness problems—in what would come to be known as the “magic words” test for express advocacy²²—*Buckley* rejected the argument that the expenditure limits could be justified as a means to “maximize[e] the effectiveness of the less intrusive contribution limitations.”²³ It also held the anti-corruption interest inadequate to support expenditure limits. The Court found that expenditures made “totally independently of the candidate and his campaign”²⁴ gave rise to “substantially diminished potential for abuse”;²⁵ the lack of coordination eliminated the possibility of a quid pro quo.

After rejecting anti-circumvention and anti-corruption as interests that could support expenditure limits, the *Buckley* Court turned to what it called “the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.”²⁶ The government characterized this as an interest in democratizing federal elections by lessening the “disproportionate advantage, the distorting effect, of wealthy special interest groups.”²⁷ The Court rejected this rationale in emphatic and sweeping terms, labelling it “wholly foreign to the First Amendment” to limit the speech of some to enhance the relative voice of others.²⁸

19. *Buckley*, 424 U.S. at 25–26.

20. *Id.* at 26–27.

21. The Amendment set a \$1,000 annual ceiling on expenditures “relative to a clearly-identified candidate” for individuals and groups other than parties with candidates on the ballot, their campaigns, and political parties. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 §608(a)–(e) (codified as amended in scattered sections of 2 U.S.C.).

22. *Buckley*, 424 U.S. at 44 n.52.

23. *Id.* at 44.

24. *Id.* at 47.

25. *Id.*

26. *Id.* at 48.

27. Brief for the Att’y Gen. and the FEC at 23, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 171459 at *23.

28. *Buckley*, 424 U.S. at 48–49.

The consequence of *Buckley* was that individual contribution limits could be justified on anti-corruption grounds, while limits on individual expenditures could not be justified by this or any other interest. Less clear in *Buckley*'s wake was precisely what was meant by an anti-corruption interest and whether an understanding of corruption that went beyond quid pro quo might suffice to uphold regulations on expenditures. It is within that doctrinal space that the Supreme Court's accordion expanded and contracted in subsequent years.

The most notable expansion of the anti-corruption rationale was Justice Thurgood Marshall's 1990 opinion for the Court in *Austin v. Michigan Chamber of Commerce*.²⁹ In that case, the Court upheld a Michigan law prohibiting corporations from using general treasury funds to make independent expenditures in support of or in opposition to candidates for state office.³⁰ While purporting to rely on an anti-corruption rationale, *Austin*'s version of that rationale was quite different from the one articulated in *Buckley*. The justification embraced in *Austin* was not the avoidance of quid pro quo corruption or its appearance, but rather the prevention of a "different type of corruption in the political arena,"³¹ namely "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."³² Rejecting the characterization of the Michigan law in Justice Kennedy's dissenting opinion—that the law was aimed at "equaliz[ing] the relative influence of speakers on elections,"³³—the Court found instead that the law ensured that "expenditures reflect actual public support for the political ideas espoused by corporations."³⁴ Notwithstanding this disclaimer, some scholars (including one of the authors) have understood *Austin* as implicitly embracing an egalitarian rationale for campaign spending restrictions.³⁵

29. 494 U.S. 652 (1990).

30. *Id.* at 654 (citing Michigan Campaign Finance Act, MICH. COMP. LAWS §169.251, sec. 51(1) (1979)).

31. *Austin*, 494 U.S. at 660.

32. *Id.*

33. *Id.* at 705 (Kennedy, J., dissenting).

34. *Id.* at 660.

35. Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARL. & POL. L. 381 (2011).

A decade after *Austin*, the Court again considered and upheld a state law restricting campaign money, this time in the form of individual contribution limits passed by the Missouri Legislature.³⁶ The Court's decision in *Nixon v. Shrink Missouri Government PAC*³⁷ clarified the level of scrutiny applicable to low contribution limits, including the quantum of evidence necessary to uphold them.³⁸ Its main relevance here is in the Court's explication of what counts as corruption. According to the *Shrink Missouri* Court, corruption is "not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."³⁹ *Shrink Missouri* made clear that "in addition to 'quid pro quo' arrangements,"⁴⁰ the anti-corruption interest encompassed "improper influence" and "opportunities for abuse" and was sufficiently compelling for Congress to "address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery."⁴¹ Beyond the governmental interest in preventing actual corruption, *Shrink Missouri* also breathed new life into *Buckley*'s interest in preventing the appearance of corruption, warning: "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."⁴²

The Court further refined this expansive view of corruption in its decision in *McConnell v. Federal Elections Commission*,⁴³ which upheld most of Congress's revamping of federal campaign finance law, embodied in the Bipartisan Campaign Reform Act of 2002 (BCRA).⁴⁴ We address the evidentiary record before the *McConnell* Court in detail below,⁴⁵ but for present purposes, the critical point is its broad conception of the anti-corruption rationale. The *McConnell* plaintiffs argued that, "without concrete evidence of an instance in which a federal officeholder . . . actually switched a vote . . . Congress

36. MO. ANN. STAT. § 130.032.1(1) (West 2008), *repealed by* S.B. 1038, 2008 Leg., (Mo. 2008)).

37. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

38. *See id.* at 384 (discussing the Eighth Circuit's reversal of the District Court's summary judgment ruling).

39. *Id.* at 389.

40. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1976)).

41. *Id.*

42. *Id.* at 390.

43. *McConnell v. FEC*, 540 U.S. 93 (2003).

44. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

45. *See* section IV *infra*.

has not shown that there exists real or apparent corruption.”⁴⁶ The Court responded on both the facts and the law, noting that the “evidence connects soft money to manipulations of the legislative calendar” in the form of congressional failure to act,⁴⁷ and that Court precedent “firmly established that Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption.”⁴⁸ The corruption Congress could aim at was not as narrow as the *quid pro quo* the plaintiffs described, but instead encompassed “undue influence on an office holder’s judgment, and the appearance of such influence.”⁴⁹ The evidence that large donors enjoyed special access and influence was therefore sufficient to justify BCRA’s ban on soft money. Justice Kennedy dissented, arguing that the anticorruption rationale articulated in *Buckley* could only support Congress’s power to regulate “federal candidates’ and officeholders’ receipt of quids, whether or not the candidate or officeholder corruptly received them.”⁵⁰

The arrival of the Roberts Court provided a majority for Justice Kennedy’s narrower reading—what the *McConnell* majority called a “crabbed view”⁵¹ of the anti-corruption rationale.⁵² While *Citizens United* is probably best known for its recognition of corporate speech rights, this aspect of the ruling was really nothing new. The truly significant change in law wrought by *Citizens United* was its redefinition of the anti-corruption rationale. In striking down BCRA’s ban on corporate electioneering communications,⁵³ *Citizens United* explicitly overruled *Austin*’s holding that anti-distortion was a form of corruption that could support restrictions on corporate expenditures.⁵⁴ The Court viewed the corruption-as-antidistortion rationale as antithetical to the principle that government has no interest “in equalizing the relative ability of individuals and groups to influence

46. *McConnell*, 540 U.S. at 149.

47. *Id.* at 150.

48. *Id.*

49. *Id.* (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)).

50. *Id.* at 294 (Kennedy, J., dissenting).

51. *Id.* at 152.

52. *Citizens United v. FEC*, 558 U.S. 310 (2010). Chief Justice Rehnquist, who voted with the majority in *Austin* passed away in 2005 and was replaced by Chief Justice Roberts and Justice O’Connor, a co-author of the majority opinion as to Titles I and II in *McConnell* retired in 2006 and was replaced by Justice Alito.

53. Bipartisan Campaign Reform Act of 2002 § 203, 2 U.S.C.A. § 441b (West 2014).

54. *Citizens United*, 558 U.S. at 350.

the outcome of elections.”⁵⁵ According to the *Citizens United* majority, the only interest that could justify restrictions on campaign money was the prevention of quid pro quo corruption or its appearance.⁵⁶ As Justice Kennedy’s opinion for the Court put it: “That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy.”⁵⁷ *Citizens United* thus narrowed the definition of corruption, rejecting the broader understanding embraced in *Shrink Missouri* and *McConnell* and purporting to settle the debate once and for all.

If any doubt remained about the Roberts Court’s approach to campaign finance law in the wake of *Citizens United*, it was laid to rest in *McCutcheon v. Federal Election Commission*.⁵⁸ The Court struck down aggregate caps on contributions—limits on how much an individual could give to *all* federal candidates and political committees combined.⁵⁹ Aggregate limits were first established in FECA and were upheld in *Buckley*.⁶⁰ Chief Justice Roberts’s opinion for the *McCutcheon* plurality doubled down on *Citizens United*’s narrow understanding of corruption: “[W]hile preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—‘quid pro quo’ corruption.” *McCutcheon* thus makes it unmistakably clear that corruption means the quid pro quo exchange of money for political favors. It made no difference that the law reviewed in *McCutcheon* restricted contributions, which are formally subject to a lower level of scrutiny than expenditure restrictions. Thus, contribution limits may be justified before the Roberts Court if they are closely drawn to prevent the reality or appearance of quid pro quo corruption. Disparities of access and influence are simply beside the point.

II. THE ACADEMIC DEBATE

Debates over the constitutionally permissible and tactically preferable rationales for regulating money in politics rage on, notwithstanding the turn taken by the Roberts Court. The debate is

55. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)).

56. *Id.* at 359.

57. *Id.* at 360.

58. 134 S. Ct. 1434 (2014).

59. *Id.* at 1442.

60. *Buckley*, 424 U.S. at 38.

particularly active among supporters of reform. The current incarnation centers around a conception of corruption put forward by Professor Lawrence Lessig in his 2011 book *Republic Lost* and the historical research by Professor Zephyr Teachout.⁶¹ Professor Lessig advances an argument based on “dependence corruption,” which he claims is mandated by an originalist view of the Constitution. Professor Richard Hasen has criticized Lessig’s proposed rationale, particularly his contention that dependence corruption is distinct from equality. As vigorous as the current debate has been, it is hardly the first time that reform-friendly scholars have debated the relative merits of anti-corruption and equality as rationales for reform. In this Part, we summarize the current debate as well as its earlier incarnation in the scholarship of Professors Daniel Lowenstein, Bruce Cain, and David Strauss almost two decades ago. We take no side in the recurrent debate over whether reformers should couch their arguments in terms of preventing corruption or promoting equality. Our goal, instead, is to examine these rationales with an eye toward developing the evidence that might support them before a future Court less hostile to regulation than the current one.

A. Is Dependence Corruption Really Equality?

Professors Lessig and Teachout are the leading exponents of a broader anti-corruption rationale in the current debate. Teachout excavates a free-standing anti-corruption principle embedded in the Constitution’s history and text which, like federalism or the separation of powers principle, should be given independent weight in constitutional contests.⁶² Her review of the Constitution’s text and the debates surrounding its creation produce evidence that the Framers were “centrally focused on corruption,”⁶³ and that they commonly understood corruption in terms reaching beyond the narrow crime of bribery to the “self-serving use of public power for private ends.”⁶⁴ Teachout criticizes the Court’s case law on corruption in the political process as chaotic—undecided among five different conceptions of the problem—and argues that it should instead be “tethered to both the past and the present as an evolving standard,”⁶⁵ much like the understanding of “cruel and unusual punishment” for Eighth

61. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

62. *Id.* at 373 n.156.

63. *Id.* at 373.

64. *Id.* at 373–74.

65. *Id.* at 411.

Amendment purposes.

Building on Teachout’s work, Lessig proposes a “new” conception of corruption, which he characterizes as “the state of an institution or an individual that has developed a dependence different from a, or the, dependence intended or desired.”⁶⁶ We say “new,” quotation marks and all, because central to Lessig’s legal argument is that the understanding of corruption he proposes is not new at all, but rather that which the Framers understood and imbued in constitutional text and structure. Rather than the ordinary meaning of corruption, in which bad-acting individuals engage in a quid pro quo, or even an aggregation of instances of quid pro quo corruption, dependence corruption means an institution has been drawn away from its intended course.⁶⁷ In the case of Congress, the Framers’ intended course was a dependence “upon the People alone,” enforced by biennial elections in the House, by restrictions on executive appointments, and by blocking foreign gifts to government officials, among other provisions.⁶⁸ Although he describes numerous ways in which Congress might be “dependence-corrupt,”⁶⁹ the deviation from Congress’s intended dependence of greatest concern to Lessig is the importance of “the funders.”⁷⁰ In order to run for office—or, perhaps more precisely, in order to *compete*—a candidate must first receive the support of the small percentage of Americans who contribute money to political campaigns, in what Lessig calls the “funding election.”⁷¹

For Lessig, corruption inheres in representatives’ dependence upon funders not because of a contemporary moral judgment about the propriety of a private financing system or the aggregations of wealth,⁷² but because the Framers’ judgment in favor of the exclusivity of “the People.” Dependence on the funders is “corrupt” because it conflicts with the dependence on the People alone contemplated by

66. Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61, 65 (2013).

67. LAWRENCE LESSIG, *REPUBLIC LOST* 226, 231 (2011).

68. *Id.* at 129–31. See also Brief Amicus Curiae of Professor Lawrence Lessig in Support of Appellee, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (No. 12-536), 2013 WL 3874388.

69. See Lawrence Lessig, *What an Originalist Would Understand “Corruption” to Mean*, 102 CAL. L. REV. 1, 15–19 (2014) (discussing a hypothetical “federalism primary” in which a state senate would choose the candidates for the general election for the state assembly—and therefore also the congressional candidates—and the *White Primary Cases* and *United States v. Classic*).

70. Lessig, *Reply to Hasen*, *supra* note 66, at 232–33.

71. LESSIG, *REPUBLIC LOST*, *supra* note 67, at 3–4.

72. See *id.* at 11.

the Framers.⁷³ That conflict of interest, Lessig argues, is the disease. The symptoms appear in the way that the improper dependence of representatives on funders “qualifies the democracy” by producing “a subtle, understated, perhaps camouflaged *bending* to keep the funders in the money elections happy.”⁷⁴ Lessig argues that dependence corruption is an alteration to the original design of a particular ecosystem of influence. It is thus distinct not only from equality but also from corruption-as-bribery.

Professor Hasen takes issue with Lessig’s dependence corruption rationale, particularly the claim that it is really distinct from the equality-based rationale rejected in *Citizens United*.⁷⁵ Hasen views dependence corruption as ultimately animated by a concern for inequality, as was the anti-distortion rationale of *Austin*.⁷⁶ Dependence corruption “seeks to justify campaign finance laws on grounds that the laws distribute power fairly and correct a distortion present in an unregulated (or less regulated) system.”⁷⁷ The distortion is the outsized influence of “the funders” over legislative outcomes relative to any popular support for their objectives.⁷⁸ Lessig rejects the equality characterization, but Hasen finds further proof in Lessig’s central reform proposal: a voucher system.⁷⁹ Legislators would still be dependent upon a subset of “the People,” namely those citizens whose vouchers they received, but because the unequal distribution of wealth is no longer a factor, the resulting skew is no longer a problem.⁸⁰

B. Equality, Corruption, and Conflicts of Interest

Perhaps everything that seems new really is old. A previous incarnation of the debate over the relationship between corruption and equality took place on the pages of the University of Chicago

73. *Id.* at 3.

74. *Id.* at 4.

75. Hasen and other scholars have also questioned Lessig’s originalist interpretation, although that angle of the debate is beyond our purposes here. See Richard L. Hasen, *Is “Dependence Corruption” Distinct From a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig*, 12 *ELECTION L. J.* 305 (2013); Seth Barrett Tillman, *Why Professor Lessig’s “Dependence Corruption” Is Not a Founding-Era Concept*, 13 *ELECTION L. J.* 336 (2014).

76. See, e.g., Richard L. Hasen, *Fixing Washington*, 126 *HARV. L. REV.* 550, 572 (2012).

77. Hasen, *supra* note 75, at 311.

78. *Id.*

79. *Id.*

80. *Id.*

Legal Forum in 1995. In that round, Professors David Strauss and Bruce Cain took up the equality charge, responding to Professor Daniel Lowenstein’s thoughtful meditations on corruption published a few years earlier.⁸¹

Professor Lowenstein’s approach bears more than a passing resemblance to the argument that Lessig has more recently made, albeit to a much broader audience. Lowenstein viewed corruption as an “essentially contested concept” in need of an intermediate theory of politics to explain the desired, uncorrupted baseline.⁸² Lowenstein sought to reconcile a legislative process “tainted with corruption” with the recognition that both legislators and lobbyists “by and large, are not corrupt.”⁸³ Where Lessig found an originalist answer, seeing the problem as a deviation from the Framers’ intended dependence, Lowenstein saw the problem functionally—as a conflict of interest.⁸⁴

Taking on the perception of some campaign finance reformers that campaign contributions buy influence with elected officials, Lowenstein observed that the empirical research on the claim was mixed, though in part by taking a too-narrow view of the legislative process.⁸⁵ The lack of hard empirical evidence did not, for Lowenstein, support the conclusion by many analysts that “concern over contributions may be minimized” because of the complexity of intertwined interests influencing legislative behavior.⁸⁶ The problem was not that campaign contributions were obviously the dominant force, nor was it that they were one insignificant wave in a sea of competing pressures, but that their presence created a conflict of interest for the recipient legislator. The conflict for legislators “exists when the consequences of a decision made in the course of a relationship of trust are likely to have an effect, not implicit in the trust relationship, on . . . the decisionmaker’s self-interest.”⁸⁷ The relationship of trust, for Lowenstein, was “ethically significant,”⁸⁸ similar to a fiduciary relationship, and policing the conflicts requires

81. See Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784 (1985); Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989).

82. Lowenstein, *Political Bribery*, *supra* note 81, at 851.

83. Lowenstein, *On Campaign Finance Reform*, *supra* note 81, at 335.

84. See Daniel P. Tokaji, *Lowenstein Contra Lowenstein: Conflicts of Interest in Election Administration*, 9 ELECTION L.J. 421 (2010).

85. Lowenstein, *On Campaign Finance Reform*, *supra* note 81, at 322–23.

86. *Id.* at 323.

87. *Id.*

88. *Id.* at 323 n.100.

looking to their effect on the average person, not one unusually susceptible to or resistant to acting in self-interest.⁸⁹

Lowenstein's conflict of interest conception recognized that it would be impossible to isolate campaign contributions as the reason a legislator's position moves on a particular issue. An issue arises against the backdrop of a complex array of considerations, including party platforms, the merits of the issue, constituency concerns, and the legislator's knowledge of past contributions and expectations of future contributions. This background forms a legislator's initial predisposition, which may be modified by any kind of new information, but even the way the new information is processed by the legislator is influenced by the original predisposition.⁹⁰ A contribution may provide this new information and it "may or may not affect the legislator's ultimate actions, but setting aside the most flagrant cases, no one can be sure, perhaps not even the legislator in question."⁹¹ For this reason, Lowenstein argued the best way to understand the contribution's effect on the legislative process was as a "taint"; like a drop of food coloring in a bowl of clear water, the contribution is "intermingled . . . in a way that cannot be isolated."⁹²

Importantly, it is the comingling and not the change to the external appearance that represents the conflict for Lowenstein. He drew a distinction between a conflict of interest and an appearance of impropriety, finding a focus on appearances to be misleading: "It suggests that there is an underlying reality that is either proper or not proper, and if we could only look behind a locked door or, perhaps, into the legislator's head, we would know."⁹³ For a conflict of interest approach, it does not matter that there was almost certainly never a moment behind a closed door when the legislator decided whether or not to succumb to the wishes of her donors; the problem is that the outcome results from an actual, tainted process.⁹⁴ Thus, the rationale for campaign finance regulation is best conceived as addressing the reality of conflicts of interest rather than the appearance of corruption.

89. *Id.* at 324.

90. *Id.* at 324–25.

91. *Id.* at 325.

92. *Id.*

93. *Id.* at 326.

94. *Id.*

Like Professor Lessig in the current debate, Professor Lowenstein was met with the argument that his anti-corruption argument was really grounded in egalitarian concerns. For Professor Cain, preventing conflicts of interest was a “defensible basis [for campaign finance regulation] for those who equate representation with legal trusteeship or those who find ethical formulations of democracy persuasive,”⁹⁵ but offered no assistance to those who see democracy as defined procedurally.⁹⁶ Under the latter approach, the greatest concerns are that individuals have sufficient information to make informed choices;⁹⁷ that the choices reflect autonomous, un-coerced preferences;⁹⁸ and that democratic structures are concerned with equity of participation, influence, and outcome.⁹⁹ Regulation of campaign money may affect any or all of these concerns, but the kinds of proposals aimed at limiting the corrupting influence of large or improperly-sourced contributions are primarily rooted in a desire to enhance equality.

Professor Strauss questioned the conventional treatment of corruption and inequality as distinct problems.¹⁰⁰ He offered as a thought experiment a world in which everyone has an exactly equal opportunity to contribute to a legislator and, in exchange, receive some desired legislative action.¹⁰¹ Without equality as a concern, the exchange loses its corrupt flavor. In fact, he proposed, there may be ways in which responsiveness to campaign contributions (in the hypothetical world of perfect equality) may be *more* democratic than the ways representatives respond to voters, specifically in the ability to express intensity and to disaggregate a legislator’s many positions for approval or disapproval.¹⁰² Strauss ultimately concludes that equality is the core concern of campaign finance reform efforts and likely the one easiest to justify,¹⁰³ although not without its own problems as a rationale, particularly whether the political system can

95. Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 122.

96. *Id.*

97. *Id.* at 126.

98. *Id.* at 123.

99. *Id.* at 135–38.

100. David A. Strauss, *What Is The Goal Of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 142.

101. *Id.* at 143–44; see also David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1373–75 (1994).

102. Strauss, *Goal of Campaign Finance Reform*, *supra* note 100, at 144–45.

103. *Id.* at 158.

be trusted with it and whether it is ultimately worth the cost.¹⁰⁴ Strauss's argument bears a strong resemblance to that which Hasen has recently advanced. Both contend that a broad anti-corruption rationale is rooted in a theory of political equality.¹⁰⁵

Our goal in this Part has been to summarize the academic debate over anti-corruption and equality rationales in its present and previous incarnations. We do not take a position on whether the ultimate goal of regulation is best conceived of as promoting equality or preventing corruption. In fact, we think that what unifies these approaches to reform is more important than what separates them. Whether one favors the anti-corruption or equality rationale, conflicts of interest are a serious problem. From an anti-corruption standpoint, conflicts of interest taint the political process, potentially diverting legislators from their responsibility to serve their constituents' interests or the public interest. From an egalitarian standpoint, conflicts of interest are a problem because they contravene the basic principle that all citizens should have equal influence on politics, regardless of wealth. Thus, while not denying that something meaningful is at stake in the theoretical debate over which rationale to develop and argue before a future Supreme Court, we think a far more important question asks what type of evidence should be developed to document conflicts of interest arising from the existing system of campaign finance. It is to this question that we now turn, focusing on the types of evidence developed in past cases—most notably, *McConnell v. Federal Election Commission*, which included the most extensive record in any case to date.

III. THE PREVIOUS RECORD: *MCCONNELL*

Any good theory of politics should ultimately confront on-the-ground reality. We do not know whether a future Supreme Court, more sympathetic to reform than the current one, will prefer an equality-based rationale to an anti-corruption rationale for campaign finance reform. We do know, however, that reformers will have the burden of developing a factual record for both legislation and litigation. Evidence regarding conflicts of interest in our current system will be vital to shaping appropriate regulations and shepherding them through the legislative process. And ultimately, that

104. *Id.* at 158–59; see also Strauss, *Corruption*, *supra* note 101, at 1383–88.

105. See, e.g., Hasen, *supra* note 76.

evidence will be vital in defending those reforms in court. This creates a challenge for proponents of reform, including social scientists and lawyers, given the uncertainty about which rationales will be acceptable to the next Court.

To determine what evidence should be developed for future legislation and litigation, we look back. Without question, the most expansive evidentiary record created to date in a campaign finance case is the one developed in *McConnell v. Federal Election Commission*.¹⁰⁶ The Supreme Court considered a consolidated case made up of eleven separate lawsuits filed by a total of seventy-seven plaintiffs, who had, along with the government and dozens of defendant-intervenors, produced more than forty-one boxes of evidentiary submissions containing the testimony and declarations of over 200 witnesses and 100,000 pages of material.¹⁰⁷ A three-judge district court heard from twenty-four attorneys during nine hours of oral arguments and read 1,676 pages of briefing by the parties alone.¹⁰⁸ Its complex ruling—which spanned four opinions, including a per curiam on some sections of the law and an additional opinion by each judge—required more than 774 pages, more than one-third of which were dedicated to findings of fact.¹⁰⁹ Here, we examine how the Supreme Court used those factual findings to support some of its key legal conclusions, drilling down to the specific pieces of evidence relied on by the district court. A careful examination of the *McConnell* record—both what it included and what it did not—is helpful in considering what evidence should be developed for the next generation of reforms. We categorize this evidence by subject, with the primary factual findings on which the Court rested in italics, followed by a description of the evidence supporting each finding.

106. Justice Breyer's dissent in the recent *McCutcheon* decision reiterates this point, reviewing some of the evidence produced in *McConnell* to support his broader view of corruption. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1469–70 (2014) (Breyer, J., dissenting).

107. *McConnell v. FEC*, 251 F.Supp.2d 176, 208–09 (D.C. Cir. 2003) (per curiam).

108. *Id.*

109. Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L. J. 147, 147 n.2, 166 n.131 (2004).

1. *Soft-money contributions to national party committees give rise to corruption or the appearance of corruption.*¹¹⁰

The Court's ultimate conclusion that BCRA's soft-money regulations were justified on anti-corruption grounds began with the understanding that "contributions to a federal candidate's party in aid of that candidate's campaign threaten to create—no less than would a direct contribution to the candidate—a sense of obligation."¹¹¹ The Court followed a multi-step path to get from that baseline, established in *Buckley*,¹¹² to its upholding of BCRA's soft-money ban. First, the Supreme Court found that the candidates, donors, and national party committees had made use of the "soft-money loophole"¹¹³ to funnel money raised outside of FECA's source and amount restrictions through the national parties for the benefit of particular campaigns. The Supreme Court relied on the district court's findings. Those findings were in turn based on testimony from major donors, lobbyists, party officials, and Members of Congress, as well as evidence of the national party committees' fundraising activities. Those activities included keeping tallies of the money raised by individual officeholders, distributing lists of party donors to officeholders, and the use of joint fundraising committees.

The *McConnell* findings rested on multiple types of evidence. Member testimony, for example, included both general statements about the practice of raising soft money¹¹⁴ as well as specific testimony relaying Members' own experiences raising money.¹¹⁵ The evidence

110. *McConnell v. FEC*, 540 U.S. 93, 144–54 (2003). For each of the items discussed in this section, we have provided a citation to the pages in *McConnell* where the Court's conclusions and factual discussions appear. We omit further citations to the Supreme Court decision within each subsection and include citations to the opinions of the District Court judges.

111. *Id.* at 144.

112. *See Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (upholding FECA's limitation on party contributions as a means of preventing circumvention of the \$1,000 candidate contribution limit).

113. Although "a literal reading of FECA's definition of 'contribution'" would have required mixed federal/non-federal activities such as generic party advertising and get-out-the-vote drives to be funded with hard money, a series of FEC decisions in the late 1970s allowed political parties to use a mix of hard and soft money. *McConnell*, 540 U.S. at 123 n.7. Another ruling by the FEC in 1995 further expanded the available uses of soft money by parties to fund advertisements mentioning the name of a federal candidate, "so long as they did not expressly advocate the candidate's election or defeat." *Id.* at 124.

114. *See, e.g., McConnell v. FEC*, 251 F.Supp.2d 176, 471 (2003) (Kollar-Kotelly, J.) (quoting Declaration of Senator John McCain, "Soft money is often raised directly by federal candidates and officeholders, and the largest amounts are often raised by the President, Vice President and Congressional party leaders.").

115. *See, e.g., id.* (quoting Declaration of former Senator Paul Simon, "While I was in Congress, the DCCC [Democratic Congressional Campaign Committee] and the DSCC

also included admissions in declarations by congressional party committee officials that their committees “ask Members of Congress to raise funds in specified amounts or to devote specified periods of time to fundraising.”¹¹⁶ Corroborating documentary evidence was also important, including solicitations from party committees linking the potential donations to the re-election efforts of particular officeholders as well as letters from donors indicating which Member should get credit for donations to the party.¹¹⁷ There was also evidence disputing assertions by plaintiffs that they did not use federal officials to solicit major donors¹¹⁸ and, in the case of Senator McConnell, that he was not aware of the donation history of individuals with whom he met.¹¹⁹

Another key finding was that soft-money donors often gave to party committees not for ideological association and expression, but rather because they were “seeking influence, or avoiding retaliation.”¹²⁰ On this point the Court relied on the testimony of Robert Rozen, a lobbyist and partner at the firm of Washington Council Ernst & Young who had experience organizing fundraisers for federal candidates and advising clients on political contributions.¹²¹ Rozen testified to the motivations of donors:

They give soft money because they believe that’s what helps establish better contacts with members of Congress and gets doors opened when they want to meet with Members. There is no question that money creates the relationships. Companies with interest before particular committees need to have access to the

[Democratic Senatorial Campaign Committee] would ask Members to make phone calls seeking contributions to the party. They would assign me a list of names, people I had not known previously, and I would just go down the list. I am certain they did this because they found it more effective to have Members make calls.”).

116. *Id.*

117. *Id.* at 473 (citing, e.g., a letter soliciting donation to the National Republican Senatorial Committee (NRSC) signed by Senator McConnell; letter from Republican National Committee [RNC] contributor stating that “Congressman Scott McInnis deserve [sic] most of the recruitment credit.”).

118. *See id.* at 474 (contrasting a statement by the RNC Finance Director that it was “‘exceedingly rare’ for the RNC to rely on federal officeholders for personal or telephonic solicitations of major donors” with a letter from the RNC Chairman to Senators asking to use their names for a membership recruitment package and with handwritten notes divvying up lists of donors among Members to call for solicitations).

119. *See id.* at 486–87 (comparing testimony of Senator McConnell with letter sent to a contributor thanking him for a donation and specifically noting the handwritten addendum: “As you may recall, any contributions to my ’02 campaign will count against your \$25,000 annual hard money limit in ’02 + not ’99. Hope you can help.”).

120. *McConnell v. FEC*, 540 U.S. 96, 148 (2003).

121. *See id.* at 147–48; *McConnell*, 251 F.Supp.2d at 472 n.46, 492–93 (Kollar-Kotelly, J.).

chairman of that committee, make donations, and go to events where the chairman will be. Even if the chairman is not the type of Member who will tie the contribution and the legislative goals together, donors can't be sure so they want to play it safe and make soft money contributions. The large contributions enable them to establish relationships, and that increases the chances they'll be successful with their public policy agenda. Compared to the amounts that companies spend as a whole, large political contributions are worthwhile because of the potential benefit to the company's bottom line.¹²²

The Court also found probative Rozen's testimony as to the response soft money donations elicited from Members of Congress:

You are doing a favor for somebody by making a large [soft money] donation and they appreciate it. Ordinarily, people feel inclined to reciprocate favors. Do a bigger favor for someone—that is, write a larger check—and they feel even more compelled to reciprocate. In my experience, overt words are rarely exchanged about contributions, but people do have understandings.¹²³

According to this testimony, a sense of obligation was borne out of the need to keep the financial well from running dry. As Rozen further testified: "Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. . . . When you don't pay the piper that finances your campaigns, you will never get any more money from that piper."¹²⁴ Other current and former Members' testimony described, in general terms, the reasons donors gave large amounts to political parties.¹²⁵

The Supreme Court found it "[p]articularly telling" that a majority of top soft-money donors "gave substantial sums to *both* major national parties,"¹²⁶ showing that many donors' motivations were to secure access and influence.¹²⁷ It rejected the Plaintiffs' contention that defendants were obligated to produce "concrete evidence of an

122. *McConnell*, 251 F.Supp.2d at 492-93 (Kollar-Kotelly, J.).

123. *McConnell*, 540 U.S. at 147 (citing *McConnell*, 251 F.Supp.2d at 493 (Kollar-Kotelly, J.)).

124. *Id.* at 149 (quoting Declaration of former Senator Alan Simpson).

125. *McConnell*, 251 F.Supp.2d at 490 (Kollar-Kotelly, J.) (quoting testimony by former Senators Rudman, Bumpers, Wirth, Brock, and Boren).

126. *McConnell*, 540 U.S. at 148.

127. The Court relied on findings from Judge Kollar-Kotelly, who in turn relied on a report from Defendants' expert Thomas Mann, corroborated by the testimony of a major corporate donor and internal documents produced by Eli Lilly & Co. showing concern that the company's donations were lopsided to the Republican Party. *McConnell*, F.Supp.2d at 508-10 (Kollar-Kotelly, J.).

instance in which a federal officeholder has actually switched a vote (or, presumably, evidence of a specific instance where the public believes a vote was switched).”¹²⁸ It was sufficient that the Defendants introduced evidence of campaign contributions leading to access and influence. For example, the Court compared the “deeply disturbing examples’ of corruption” in *Buckley*,¹²⁹ to the “similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations.”¹³⁰ The Court focused particularly on the “menu of opportunities for access”¹³¹ described in detail by Judge Kollar-Kotelly of the *McConnell* district court. Her findings cited to handwritten notes by party leaders, promising to facilitate meetings and to pass on policy-related correspondence from donors to Members of the House and Senate;¹³² she also cited to extensive details on party committee donor benefit programs which provided increasing levels of access to federal officeholders with higher donations.¹³³

Perhaps the most specific evidence on the influence arising from soft money came from two members of the U.S. Senate. The Court relied on testimony by former Senator Paul Simon, corroborated by testimony by then-current Senator Russ Feingold, of a “good example of [large contributors seeking legislative favors in exchange for their contributions] which stands out . . . because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session”:

Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had contributed \$1.4 million in the last 2 year cycle to incumbent Members of Congress and almost \$1 million in soft money to the political parties. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to the special interests. One of my senior colleagues got up and said, ‘I’m tired of Paul always talking about special interests; we’ve got to pay

128. *McConnell*, 540 U.S. at 149.

129. *Id.* at 150.

130. *Id.* (citing 251 F.Supp.2d at 492–506).

131. *Id.* at 151.

132. *McConnell*, 251 F.Supp.2d at 500–01 (Kollar-Kotelly, J.).

133. *Id.* at 502–08.

attention to who is buttering our bread.’ . . . This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. I do not think there is any question that this is the reason it passed.¹³⁴

In addition to Senator Simon’s specific recollection, the Court cited less specific testimony from Senators John McCain and Alan Simpson connecting soft-money contributions by the pharmaceutical industry, trial lawyers associations, and tobacco companies to “manipulations of the legislative calendar.”¹³⁵

It bears emphasis that the evidence of soft money’s actual influence on congressional action was rather thin. There was little if any evidence tying specific soft-money donations to specific legislative decisions. There was, however, abundant evidence that big soft-money contributions created conflicts of interest for legislators. The record showed that reasonable legislators would feel pressure to act in a particular way—even if they did not actually admit that their votes had been or would be influenced.

2. State and local parties’ election activities create a significant risk of actual and apparent corruption, as well as the risk of circumvention.

In addition to banning soft money contributions to national party committees, BCRA required that state and local parties use only hard money to fund federal election activity.¹³⁶ An amendment to BCRA, sponsored by and named for Senator Carl Levin, carved out an exception allowing state and local party committees to pay for certain federal election activities with a prescribed ratio of hard money and soft money raised subject to a \$10,000 annual per-person cap.¹³⁷ Taken together, the Court found that Congress had designed the provisions

134. *Id.* at 852 (Leon, J.); *id.* at 482 (Kollar-Kotelly, J.).

135. *McConnell*, 540 U.S. at 150–51.

136. Bipartisan Campaign Reform Act of 2002, 2 U.S.C.A. § 441i(b)(1) (West 2003) *invalidated by* *McConnell v. FEC*, 540 U.S. 93 (2003). The term “federal election activity” includes four categories of activities: (1) voter registration within 120 days before a federal election; (2) voter identification, GOTV, and other generic campaign activity conducted in connection with an election in which a candidate for federal office appears on the ballot; (3) any public communication that promotes, supports, attacks, or opposes a clearly identified candidate for federal office; and (4) the employment of a state party committee employee who spends more than 25 percent of her time working on federal election activities. § 431(20)(A)(i)–(iv). “Federal election activity” specifically does not include public communications and grassroots materials that refer solely to nonfederal candidates, contributions to nonfederal candidates, and state and local conventions. § 431(20)(B).

137. § 441i(b)(2). *See also* *McConnell*, 540 U.S. at 162–64 (discussing the Levin Amendment).

to “construct[] a coherent scheme of campaign finance regulation” and, in particular, to prevent “wholesale evasion” of the ban on soft money to national parties.¹³⁸

The first step in the Court’s analysis of the regulation of state and local parties was its consideration of the governmental interest it advanced. The Court found that Congress “both drew a conclusion”¹³⁹ and “made a prediction” through its restrictions on soft money.¹⁴⁰ The conclusion was that state and local parties “function as an alternative avenue for precisely the same corrupting forces”¹⁴¹ present in soft money contributions to national parties. The prediction was that, once the flow of soft money to national parties stopped, state and local parties would become the next outlet through which soft money would creep into federal elections.¹⁴² Restrictions on state and local parties served the same governmental interest in preventing corruption as limits on national parties.¹⁴³

In assessing the asserted anti-corruption interest, the Court cited the testimony of former Senator Warren B. Rudman that “much of what state and local parties do helps to elect federal candidates,”¹⁴⁴ and that state parties would become the conduit for soft money in federal elections without new restrictions.¹⁴⁵ The Court also found relevant federal candidates’ solicitation of donations to state parties from those who had hit their limits for giving directly to the campaign.¹⁴⁶ It cited testimony by the RNC’s Chief Counsel that the national party commonly redirected maxed contributors to state parties, as well as a letter from Congressman Wayne Allard soliciting a contribution for the Colorado Republican Party as a means of “further help[ing his] campaign,” and expert testimony about cooperation among state and local parties.¹⁴⁷ According to the Court,

138. *McConnell*, 540 U.S. at 161.

139. *Id.* at 164.

140. *Id.* at 165.

141. *Id.*

142. *Id.*

143. *Id.* at 164–66.

144. *McConnell*, 540 U.S. at 164 n.59 (quoting *McConnell*, 251 F.Supp.2d at 467 (Kollar-Kotelly, J.)).

145. *Id.* It is interesting to note that although Senator Rudman had left the Senate ten years before testifying in *McConnell*, the Court clearly gave weight to both the descriptive and predictive elements of his testimony.

146. *Id.* at 164.

147. *Id.* at 164 n.60 (quoting *McConnell*, 251 F.Supp.2d at 479, and *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 458 (2001)). The citations were only examples chosen from many available in the district court record. *See also McConnell*, 251 F.Supp.2d at

there was “at least as much evidence as there was in *Buckley* that . . . donations [made to state committees by federally maxed donors and solicited by candidates and parties] have been made with the intent—and in at least some cases the effect—of gaining influence over federal officeholders.”¹⁴⁸

The evidence supporting restrictions on soft money to state and local parties appears sparse because the *McConnell* Court implicitly relied on its previous conclusion that soft-money contributions to *national* parties have a corrupting influence. There was virtually no evidence for Congress’s prediction that state parties would become the new conduits for soft money absent further regulation. Instead, the Court said that it owes “substantial deference to the predictive judgments of Congress’s . . . particularly when, as here, those predictions are firmly rooted in relevant history and common sense,”¹⁴⁹ and concluded preventing the circumvention of FECA “clearly qualifies as an important governmental interest.”¹⁵⁰ It gives no indication what “relevant history” or “common sense” Congress could rely on to support its anti-circumvention rationale beyond the “entire history of campaign finance regulation.”¹⁵¹

On the question of tailoring, the Plaintiffs made three arguments for why the restrictions on state and local parties were not closely drawn to the asserted governmental interest. First, they argued that the restriction was overbroad in its sweep of state and local party work that might influence a federal election. The Court disagreed with regard to each category of “federal election activity,”¹⁵² noting that “[c]ommon sense dictates, and it was ‘undisputed’ below that a party’s efforts to register voters sympathetic to that party directly assist the party’s candidates for federal office.”¹⁵³ The Court also observed that federal candidates “reap substantial rewards”¹⁵⁴ from any efforts to turn co-partisans out to vote, even if federal candidates

478–80 (citing to testimony of party officials and donors, documents showing solicitations from incumbent Members of Congress for soft money donations to state parties).

148. *Id.* at 164–65. The evidence cited by the *McConnell* Court included examples from the 1998 Senate Government Affairs Committee report in which donations to state Democratic committees were exchanged for access to and influence with federal officials. *Id.* at 165 n. 61.

149. *Id.* at 165 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)).

150. *Id.* at 165–66.

151. *Id.* at 165.

152. *See* Bipartisan Campaign Reform Act of 2002, 2 U.S.C.A. § 431(20)(A)(i)–(iv) (West 2003) *invalidated by* *McConnell v. FEC*, 540 U.S. 93 (2003); *see also supra* note 136.

153. *McConnell*, 540 U.S. at 167 (citing 251 F.Supp.2d at 460).

154. *Id.* at 167–68.

are not mentioned at either the registration or get-out-the-vote (GOTV) stage.¹⁵⁵ It cited an expert report regarding the effect of generic campaign activity on federal candidates, the testimony by representatives of the national congressional party committees that they had transferred money to state and local parties for registration and GOTV efforts that had a “significant effect on the election of federal candidates,”¹⁵⁶ and a letter from the California Democratic Party thanking a contributor and noting that the state party’s voter registration and GOTV efforts would help in federal elections.¹⁵⁷

The Plaintiffs’ second attack on the state and local party restrictions was that the Levin Amendment’s restrictions placed an unconstitutional burden on association among party committees.¹⁵⁸ The Court rejected the claim, finding the restrictions to be “justifiable anticircumvention measures”¹⁵⁹ designed to protect a “delicate and interconnected regulatory scheme.”¹⁶⁰ Here, as with other anti-circumvention measures, there was little evidence specific to BCRA. Instead, the *McConnell* Court cited the record in *Buckley*, specifically the “intricate scheme” of American Milk Producers, Inc. to break up a \$2 million donation to the Nixon campaign into hundreds of small contributions, as proof that donors could “readily circumvent” the \$10,000 limit on contributions to a state committee’s Levin account.¹⁶¹

Finally, the *McConnell* plaintiffs contended that the restrictions on state and local party committees would “prevent them from engaging in effective advocacy.”¹⁶² The Court found the parties’ claims on this

155. Here the Court is addressing the first two categories of “federal election activity”—voter registration and voter mobilization, specifically identification, get-out-the-vote, and other generic party activities. See § 431(20)(A)(i)–(ii).

156. *McConnell*, 540 U.S. at 168 (citing *McConnell*, 251 F.Supp.2d at 459–61).

157. *Id.* at 168 (citing *McConnell*, 251 F.Supp.2d at 459). As for public communications by state and local parties, the Court referenced its subsequent discussion of the direct effect on a federal election of an advertisement that promotes or attacks a clearly identified candidate for that election, saying that the “record on this score could scarcely be more abundant.” *Id.* at 170. The final category, governing funds used to pay the salary of a state party employee who spends more than 25 percent of her time on work in connection with a federal election, went essentially unchallenged by the Plaintiffs, who failed to supply the Court with a reason to strike down the provision. *Id.* at 171.

158. *Id.* at 171. The Levin Amendment prohibited (1) transfer of Levin funds (money subject to the annual \$10,000-per-person cap, but no other source or amount restrictions) among state parties; (2) transfers of hard money to fund the portion of expenditures made under the Amendment that must be made with hard dollars; and (3) joint fundraising of Levin funds by state parties. *Id.* (discussing the Levin amendment, 26 U.S.C.A. § 323(b) (West 2014)).

159. *Id.*

160. *Id.* at 172.

161. *Id.* at 171–72 & nn.65–66.

162. *Id.* at 173.

point “speculative and not based on any analysis.”¹⁶³ The evidence consisted mostly of testimony by officials from California’s Democratic and Republican Parties discussing the impact they predicted BCRA would have on their organizations’ fundraising efforts.¹⁶⁴ Here again, the evidence from both sides was rather sparse, and the Court gave the benefit of the doubt to those defending Congress’ judgment.

3. Non-profit organizations could be used to circumvent the other soft-money prohibitions.

In addition to limiting donations to party committees, BCRA also restricted donations to and solicitations for non-profit organizations that make expenditures in connection with federal elections.¹⁶⁵ The Government defended these restrictions as anti-circumvention measures, designed to prevent the parties from “mobiliz[ing] their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax-exempt organizations that conduct activities benefitting their candidates.”¹⁶⁶ The Court saw an overbreadth problem with a flat ban on party donations to non-profits and construed the provision to allow parties to give hard dollars they had raised subject to BCRA’s limitations,¹⁶⁷ but otherwise upheld the provision on the anti-circumvention rationale.

The evidence cited by the Court in upholding the non-profit restrictions supported two subsidiary factual findings: that activities of non-profit organizations benefited federal candidates, and that party committees solicited and donated money for these non-profits to

163. *Id.* (quoting *McConnell v. FEC*, 251 F.Supp.2d 176, 524 (2003)).

164. In the district court, Judge Kollar-Kotelly specifically noted that the state party officials acknowledged they had not analyzed how the parties might change their fundraising operations to adapt to BCRA or how much of the non-federal money previously donated to the national parties would be redirected their way, and that the parties’ expert Prof. Raymond La Raja concluded in his dissertation (discussed in his cross examination and included as an exhibit thereto) that parties would adapt to new soft money restrictions, and that new rules would not particularly hamper parties already similarly constrained under state law. *McConnell*, 251 F.Supp.2d at 524 (Kollar-Kotelly, J.).

165. Bipartisan Campaign Reform Act of 2002, 2 U.S.C.A. § 441i(d) (West 2003), *invalidated* by *McConnell v. FEC*, 540 U.S. 93 (2003). The ban included organizations established under § 501(c) of the Internal Revenue Code as well as § 527 organizations “other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office.” *Id.*

166. *McConnell*, 540 U.S. at 175.

167. *Id.* at 180.

support their federal electioneering. On the first, the Court offered the activities of the NAACP's National Voter Fund and of NARAL in the run-up to the 2000 election as examples.¹⁶⁸ These groups' efforts included direct mailings and phone calls responsible for "increased turnout (over 1996 numbers) among target groups"¹⁶⁹ in the case of the NAACP and "mobiliz[ing] 2.1 million pro-choice voters"¹⁷⁰ by NARAL, as shown by evidence cited in an expert report and a declaration by a NARAL official.

The Court's second finding, that parties solicited money to support the federal election activities of non-profits, reinforced the first finding. It also provided the factual ground for the Court's legal conclusion that "Congress' concerns about circumvention are not merely hypothetical."¹⁷¹ Here, the Court gave a brief descriptive account of how parties aided in providing revenues to non-profits before BCRA, taken from conclusions of both the majority and minority in the 1998 Senate Report¹⁷² as well as findings of fact made in the district court.¹⁷³

Although not discussed in depth by the Supreme Court, the district court judges' findings with regard to party relationships with non-profits were extensive and relied on a considerable range of evidence.¹⁷⁴ For example, Judge Kollar-Kotelly relied on declarations by two large Democratic donors describing their conversations with party committees about which non-profits could make effective use of their donations.¹⁷⁵ One of the donors testified "that the national Democratic Party played an important role in his decision to donate soft money to 'certain interest groups that were running effective ads in the effort to elect Vice President Gore, such as NARAL. The assumption was that the funds would be used for television ads or some other activity that would make a difference in the Presidential

168. *Id.* at 175 n.68.

169. *McConnell*, 251 F.Supp.2d at 522.

170. *Id.*

171. *McConnell*, 540 U.S. at 176.

172. *Id.* (citing S. REP. NO. 105-167 at 4013 (1998)) ("[I]n addition to direct contributions from the RNC to nonprofit groups, the senior leadership of the RNC helped to raise funds for many of the coalition's nonprofit organizations . . ."); *id.* (citing S. Rep. No. 105-167 at 5983 (1998) (Minority Views)) ("Tax-exempt 'issue advocacy' groups and other conduits were systematically used to circumvent the federal campaign finance laws.")

173. *Id.* at 176, 179.

174. See *McConnell*, 251 F.Supp.2d at 517-20 (Kollar-Kotelly, J.); *id.* at 848-50 (Leon, J.).

175. Judge Leon cited one of the declarations, along with a statement in the congressional record by Senator John Glenn. *Id.* at 848.

election.”¹⁷⁶ With regard to Republican Party committees, both Judges Kollar-Kotelly and Leon cited documents showing donations made directly by the party.¹⁷⁷ Although the letters accompanying the donations indicated the money was given in “recognition” of “efforts to educate and inform the American public,”¹⁷⁸ the district court judges also cited a statement by then-National Republican Senatorial Committee (NRSC) Chairman Phil Gramm to the *Washington Post* that one of the donations was made “because [the NRSC] knew the funds would be used on behalf of several specific Republican candidates for the Senate,”¹⁷⁹ painting the donations in more of a federal election-oriented light.

Also significant was the rise of what the Supreme Court called “politician 527 groups.”¹⁸⁰ Similar to leadership PACs, these groups were created by individual Members of Congress and caucuses seeking to increase their influence within the legislature and parties.¹⁸¹ The key difference, however, is that unlike leadership PACs, politician 527s were not subject to FECA’s source and amount limitations and so were able to raise “substantial sums of soft money from corporate interests, as well as from the national parties themselves.”¹⁸² The district court findings on this point were primarily supported by citations to a report by Public Citizen, an advocacy organization that had lobbied in support of BCRA’s passage.¹⁸³ Both district court judges also relied on corroborating testimony by a major donor who stated that he gave \$500,000 to “Daschle Democrats,” a 527 organization that ran broadcast ads in South Dakota supporting Senator Tom Daschle,¹⁸⁴ but the primary source for describing the flow of money through Member-centered 527s was the Public Citizen

176. *Id.* at 517 (Kollar-Kotelly, J.).

177. *Id.* at 517–18.

178. *Id.* (quoting Letter to Nat’l Right to Life from the Republican Nat’l State Elections Comm., Oct. 18, 1996, with enclosed \$500k donation; three letters to Americans for Tax Reform from the Republican Nat’l State Elections Comm., dated in October 1996, accompanying three donations totaling \$3.6M from party committees).

179. *Id.* at 518.

180. *McConnell*, 540 U.S. at 176.

181. *See generally McConnell*, 251 F.Supp.2d at 519–20 (Kollar-Kotelly, J.); *id.* at 849–50 (Leon, J.)

182. *McConnell*, 540 U.S. at 176.

183. *McConnell*, 251 F.Supp.2d at 519–20 (Kollar-Kotelly, J.); *id.* at 849–50 (Leon, J.) (citing PUB. CITIZEN. CONG. WATCH, CONGRESSIONAL LEADERS’ SOFT MONEY ACCOUNTS SHOW NEED FOR CAMPAIGN FINANCE REFORM BILLS 10–11 (2002), available at http://www.citizen.org/documents/527_march212002.PDF).

184. *Id.* at 519 (Kollar-Kotelly, J.); *id.* at 850 (Leon, J.).

report.

4. *The ban on corporate and labor electioneering communications was neither overbroad nor underinclusive.*¹⁸⁵

The *McConnell* Plaintiffs did not challenge the government's interest in banning electioneering communications funded from corporate and union treasuries—the challenge that would later prove successful in *Citizens United*. Instead, they asserted this corporate and union electioneering ban was both overbroad and underinclusive. The Supreme Court recognized that there was a dispute in the district court over what percentage of “genuine” issue advertisements would fall subject to the electioneering ban¹⁸⁶—a “battle of the experts” waged over the analysis and conclusions in the *Buying Time* studies produced by the Brennan Center for Justice in 1998 and 2000.¹⁸⁷ These controversial studies concluded that the vast majority of ads aired during the ban's thirty- and sixty-day “blackout periods” had an electioneering purpose. The Court relied on the Annenberg Report,¹⁸⁸ the separate expert report by Krasno & Sorauf analyzing the same data as the *Buying Time* studies utilized, and the factual findings of Judges Kollar-Kotelly and Leon.

In determining that the electioneering communications ban was not overbroad, Judge Kollar-Kotelly had found that most candidate-centered issue advocacy is concentrated in the weeks surrounding federal elections,¹⁸⁹ and cited an expert report analyzing scripts of issue advertisements.¹⁹⁰ She found that “advertisements naming federal candidates, targeted to their electorate, and aired in the period before the election, influence voters,”¹⁹¹ citing testimony from political consultants, admissions by the National Association of Builders, and her own analysis of sixteen advertisements.¹⁹² Judge Leon likewise

185. *McConnell*, 540 U.S. at 203–09.

186. *Id.* at 206.

187. For access to these studies, see *Buying Time Homepage*, BRENNAN CTR. FOR JUSTICE, <http://www.brennancenter.org/analysis/buying-time> (last updated June 1, 2013).

188. KATHLEEN HALL JAMIESON, ANNENBERG PUB. POL'Y CTR., *ISSUE ADVERTISING IN THE 1999-2000 ELECTION CYCLE* (2001), available at http://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/2001_19992000issueadvocacy2.pdf.

189. *McConnell*, 251 F.Supp.2d at 573 (Kollar-Kotelly, J.).

190. *Id.* at 561–63.

191. *Id.* at 573.

192. *Id.* at 573–75. Of the twenty-one advertisements proffered by the *McConnell* Plaintiffs to demonstrate overbreadth, Judge Kollar-Kotelly found that nine would not have been affected by BCRA; four mentioned federal candidates in the context of discussing a past vote

relied on his own reading of scripts of advertisements,¹⁹³ as well as expert testimony and statements by the RNC political director.¹⁹⁴ He cited the *Buying Time* study for the percentage of advertisements that lacked the “magic words” but nonetheless focused on influencing candidate elections.¹⁹⁵

As to the Plaintiffs’ claim that the electioneering communications provision was underinclusive because it left print and internet communications unregulated, the Supreme Court found that the “records developed in . . . litigation and by the Senate Committee adequately explain the reasons for this legislative choice,” specifically that “corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections[.]” The Court found especially persuasive a six-volume 1998 report by the Senate Committee on Governmental Affairs summarizing its “extensive investigation into the campaign practices of the 1996 elections.”¹⁹⁶ In addition, the Court cited Judge Kollar-Kotelly’s finding that the provision was properly tailored by addressing only those forms of communication Congress found to be problematic.¹⁹⁷ In reaching that conclusion, she relied on expert testimony regarding the prevalence of broadcast communications,¹⁹⁸ as confirmed by testimony from witnesses involved in making the relevant advertisements, such as the

and were found not to be probative of BCRA’s overreach; and that the remaining eight could not demonstrate overbreadth, even assuming it could be ascertained that they were truly not intended to affect a federal election. *Id.* Judge Kollar-Kotelly also examined an additional forty-three advertisements, identified by her and by the Defendants as appearing in either the Plaintiff’s briefs or in testimony and excluded twelve for lack of information about their air dates; another thirteen because they did not mention a candidate for federal office; one by the ACLU because it was “clearly designed simply to provide the corporation standing to challenge BCRA” (per testimony and documents provided by the ACLU’s legislative director); and another by the AFL-CIO as not probative. *Id.* at 575–76. With regard to the remaining advertisements, Judge Kollar-Kotelly did not attempt to determine if their “true purpose was to affect an election,” but rather concluded that the evidence provided was not sufficient to render the electioneering provision overbroad and noted that “[i]f Plaintiffs were correct, that BCRA would have such an indelible effect on their ability to advertise about issues of importance to their organization, I would have expected a more robust showing[.]” *Id.* at 578.

193. *Id.* at 826–27 (Leon, J.).

194. *Id.* at 826.

195. *Id.* Judge Leon expressed reservations about the 1998 version but found *Buying Time 2000* sound and persuasive.

196. *McConnell*, 540 U.S. at 129.

197. *McConnell*, 251 F.Supp.2d at 569 (Kollar-Kotelly, J.). The Court also cited to Judge Leon’s findings as to whether the provision was underinclusive, e.g. *McConnell*, 540 U.S. 93, 148–50, but Judge Leon simply agreed with the findings of Judge Kollar-Kotelly. *Id.* at 799 (Leon, J.).

198. *Id.* at 569–70 (Kollar-Kotelly, J.).

AFL-CIO President’s Special Assistant for Public Affairs and other political consultants.¹⁹⁹

What lessons can be drawn from this review of the *McConnell* record? A close examination reveals scant evidence that either soft money or electioneering communications altered actions by Members of Congress. In other words, the evidence of actual influence was very thin. There was some evidence that soft money helped secure—and was intended to help secure—access to Members of Congress. But the record demonstrated something more than mere access. Taken as a whole, the *McConnell* record showed that soft money would cause a reasonable legislator to feel pressure to act in a particular way. It documented rampant conflicts of interest arising from soft money—specifically, between legislators’ incentive to serve big soft-money donors on the one hand, and their obligation to serve the interest of their constituents and the public on the other. While much of the evidence was ostensibly directed at showing that BCRA’s restrictions were appropriately tailored, it also helped show the existence of an important governmental interest beyond quid pro quo corruption.

Justice Breyer emphasized this point in his *McCutcheon* dissent, highlighting the ample evidence of “privileged access to and the pernicious influence upon elected representatives” documented in the *McConnell* record.²⁰⁰ This record painted a vivid picture of a Congress besieged by conflicts of interest. That was the forest that the *McConnell* Court saw through the trees of the voluminous record compiled in the district court. Of course, evidence of disparate access and influence is irrelevant to the Roberts Court, given its narrow definition of corruption as quid pro quo. Such evidence is, however, relevant to four justices on the current Court—and may someday be relevant to the majority of a future Court. We now turn to the development of a record for such a court.

IV. A RECORD FOR THE NEXT COURT

As any good lawyer knows, telling a good story is more important to success in a courtroom than mastery of legal doctrine. In *McConnell*, BCRA’s supporters were able to tell a persuasive story of a campaign finance system rife with conflicts of interest. That story remains central to the debate over campaign finance regulation, even

199. *Id.* at 570–73.

200. *McConnell*, 134 S. Ct. 1434, 1469 (2014) (Breyer, J. dissenting in part).

though it is irrelevant to five justices on the current Court. Justice Breyer's *McCutcheon* dissent underlines the importance of attending to the political realities of money's impact on the legislative process. At the same time, his dissent implicitly highlights a more subtle point. The evidence cited by Justice Breyer is more than a decade old. The ecology of money and influence that existed before BCRA is not the same ecology that exists today. Some of the same problems may still exist, to be sure, but the *McConnell* record tells us little or nothing about the current reality. Justice Breyer's dissent thus suggests the need to update that record to document the realities of the current system of campaign finance.

Any future reforms to the campaign finance landscape will demand a record-building effort at least equal to that engaged in for the *McConnell* litigation. In particular, a thorough evidentiary record will be critical in shaping the next generation of campaign financing reforms and defending them in court. We appreciate the intellectual energy devoted to articulating a rationale beyond quid pro quo for a future Court to use and agree with Professor Hasen's call for scholars to "do more work defining and defending governmental interests that justify reasonable . . . campaign finance regulations."²⁰¹ But defining these interests is not the same as developing a record to document problems in the current system. Regardless of whether a future Supreme Court is more inclined to adopt a rationale founded in anti-corruption (a la Lowenstein, Teachout, and Lessig have argued²⁰²) or equality (a la Strauss, Cain, and Hasen²⁰³), it will need an updated evidentiary record to shape and defend the next generation of reform. Even if a future Court is less hostile to reform than the current one, as we hope it will be, that Court is unlikely to rubber-stamp restrictions on campaign expenditures or contributions. Rather, it will demand documentation of both the reasons for regulation and its tailoring.

It would be far better if the development of this record began well in advance of litigation being filed and even before legislation is proposed. At the front end, crafting the next generation of reforms will require empirical research, qualitative as well as quantitative, about the harms to be addressed and the likely consequences of the proposed change. Rather than deciding on a preferred theory of

201. Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21, 33 (2014).

202. See *supra* notes 61–74 and accompanying text.

203. See *supra* notes 75–105 and accompanying text.

regulation and designing a legislative approach to fit that theory, policymakers should tailor reforms to the problems that are documented by empirical researchers. This information will also be essential at the back end, in demonstrating that regulations address real-life problems and are appropriately drawn.

Academics and advocates would therefore be well-advised to begin developing their evidentiary record now, rather than waiting until a more reform-friendly Court is in place. The story that we believe future reformers should try to tell—both for legislative bodies and for courts—is one of pervasive conflicts of interest. That is something more than mere access but less than actual influence. We first explain why this should be regarded as an urgent priority. Next we explain why research should focus on conflicts of interest in election law, regardless of whether one favors an equality or anti-corruption rationale for regulation. Finally, we sketch out what types of evidence a record for the next Court might consist of.

A. Why Worry about the Record Now?

A robust and thorough record of the role of money in our political process matters at the legislative stage and at the litigation stage, as the story of BCRA demonstrates. Although the legislative record directly relating to BCRA was thin, the law was drafted in the wake of an extensive investigation by the Senate Government Affairs Committee (Thompson Committee).²⁰⁴ The Committee's inquiry included three months of hearings and resulted in a published report totaling more than 9,000 pages. Both the *McConnell* district court and Supreme Court cited repeatedly to the Thompson Committee's findings, including for inquiries into the purpose of BCRA, enacted four years after the investigation was complete.

Following the Thompson Committee report, legislation that would eventually become BCRA was debated in three different Congresses, across five years, before the final version passed both chambers in early 2002. During those debates, Members of Congress spoke on the record about the role that soft money played in elections and in influencing the legislative process, with varying degrees of specificity. In addition to committee testimony given as BCRA moved through the legislative process, Congress also relied on studies by the

204. The Thompson Committee report was issued to the United States Senate as S. REP. NO. 105-167 (1998), available at <http://www.gpo.gov/fdsys/pkg/CRPT-105srpt167/pdf/CRPT-105srpt167-pt6.pdf>.

Annenberg Center and by the Brennan Center for Justice about the nature of so-called “sham issue ads.”²⁰⁵

The story of BCRA spans multiple investigations by congressional Committees, large-scale studies by advocacy and academic organizations, and lengthy statements by Members of Congress that, perhaps because of the subject matter of the debates and legislation, the courts treated as testimony about hard facts in the real world of politics, rather than simply statements of legislative purpose or information about predictive judgments by the legislature.

The first lesson from this history is that much of the burden for amassing the next record will have to be borne by academics and advocates. It appears unlikely, given the polarization of Congress and the widely-noted weakness of the FEC, that neither will develop a robust record on their own. For the next wave of changes to the campaign finance system, the burden of producing the information needed to legislate should be assumed to be on groups outside of Congress. Undoubtedly any new campaign finance regulation Congress crafts will soon thereafter be reviewed by the Supreme Court, which will be faced with the task of reviewing the evidence amassed in the legislation’s favor. The strength of the evidence required will depend in part on which side of the divide the legislation falls. As Professor Hasen has pointed out, *Citizens United* “shows the Court’s apparent strategy: keep the evidentiary standard on proving corruption low and the definition of corruption loose” for contribution limitations “but keep the evidentiary standard impossibly high and the definition of corruption extremely narrow when it comes to considering the constitutionality of spending limitations.”²⁰⁶ Hasen argues that this “evidentiary stacking-the-deck” allows the Court to avoid confronting the more challenging question of whether expenditure limits might in fact pass strict scrutiny with a broader conception of corruption.²⁰⁷ Policymakers and litigators should be prepared to meet the formidable evidentiary burdens growing out of almost four decades of constitutional precedent.

The second lesson is that persuading the next Court to adopt a new rationale for regulation will require a substantial body of evidence. As the Court stated in *Shrink Missouri*, the “quantum of

205. See *supra* notes 187–188 and accompanying text.

206. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 617 (2011); see also Briffault, *supra* note 109, at 165–66.

207. Hasen, *supra* note 206, at 617.

empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”²⁰⁸ Accordingly, legislation that seeks to combat quid pro quo corruption or its appearance will not bear a heavy burden. But if it seeks to advance a new rationale for regulation, advocates of reform can expect to face an especially heavy evidentiary burden. That is true whether they ground their arguments in dependence corruption, equality, or both. It is obvious that an egalitarian rationale will bear a heavy burden. Advocates will have to produce evidence of inequality to overcome the Court’s precedent since *Buckley* finding the concept “wholly foreign to the First Amendment.” Yet the burden on those who favor a dependence corruption rationale is not much lighter. Despite Professor Lessig’s argument that it is demanded by an originalist view of the Constitution, its debut will have to be grounded on something more than theory and history. It will require a substantial body of evidence that dependence corruption is really a problem.

The third lesson to be drawn from past litigation is the wide variety of evidence considered by the Court. That includes qualitative empirical research, as well as quantitative work. Important to nearly all points were on-the-record statements by key players in the political process. These included not only Members of Congress and party officials, but also political consultants and campaign operatives, as well as large individual donors and PAC and corporate heads. Also crucial was the documentary evidence—some of which would only come through discovery (internal memos and emails, hand-written notes from Members of Congress thanking donors) but many were publicly available and, in the age of the internet, their contemporary corollaries may be readily obtainable today. *McConnell* also highlights the importance of social science research, and even of research done by organizations with a particular agenda, provided that work is methodologically sound.

A strong record is essential both to document the interests served by legislation, and to show that it is appropriately tailored. Too often, the tailoring prong is glossed over in academic discussions of campaign finance,²⁰⁹ yet it is critical to the Court’s evaluation of regulation.²¹⁰ For all of the evidence the Court sifted through in

208. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000).

209. *See, e.g.*, Lessig, *supra* note 66, at 69 n.33.

210. *McConnell*, 540 U.S. at 166–74 (indicating that once the Court accepts the undue

McConnell to determine whether particular provisions were tailored appropriately, much of it was amassed in the course of litigation. We think that evidence of appropriate tailoring should be a part of the discussion from the beginning, not simply gathered in support of arguments made to the courts. Up front examination of the problems that exist in the real world is likely to be more persuasive to a court than post hoc studies, which may appear ginned up to reach a desired result. While the *McConnell* Court gave considerable deference to Congress's "predictive judgments,"²¹¹ it is less likely to defer to such judgments about the interests served by regulation or its tailoring. This article has deliberately eschewed discussion of the contours that future reforms should take, because we believe that those should be firmly rooted in evidence of the problems created by the flow of money into politics.

B. Why Focus on Conflicts of Interests?

We think that academics and advocates seeking to lay the groundwork for the next generation of reform should focus their attention on conflicts of interest arising from money in politics. As our title indicates, this is something more than a showing of mere access, but less than actual influence. Thus, for example, evidence that those making independent expenditures enjoy disproportionate access would not be enough. On the other hand, supporters of reform would not be required to show that independent expenditures actually changed anyone's vote. They would, however, be required to show conflicts of interest—that a reasonable legislator would feel pressure to act in way that is different from the preferences of her constituents and the public interest.

We think that the evidentiary record should focus on conflicts of interest, regardless of whether one is more inclined toward a dependence corruption or egalitarian theory of reform. As Professor Lowenstein noted, a conflict of interest can exist regardless of whether there is a moment behind closed doors—or simply inside a legislator's own head—in which the decision is made to succumb to the wishes of a donor.²¹² Because it does not require inquiry into the hidden moment of potentially improper decision-making, evidence of

influence anti-corruption rationale at the beginning, every other provision is examined for tailoring questions).

211. *Id.* at 165.

212. See Lowenstein, *On Campaign Finance Reform*, *supra* note 83, at 326.

conflict of interest will likely be easier to amass. The evidence is both more likely to be out in the open and less likely to require admitting to any bad intent by contributors or weakness by legislators.

Again, we do not deny that there are significant differences between dependence corruption and egalitarian theories of campaign finance regulation. Nor do we deny that there may be some differences at the margins of what sort of evidence proponents of these views might try to develop. But we do not think it necessary to become enmeshed in—or, worse still, consumed by—this theoretical argument at the evidence-gathering stage. In fact, we think that this conflict can easily and productively be sidestepped. The search for conflicts of interest is necessarily an objective one: it asks whether a particular incarnation of campaign money (be it in the form of contributions to a candidate or to a leadership PAC, or direct spending through another entity) would cause a reasonable legislator to feel pressure to act in way that is different from the preferences of her constituents and the public interest. The inquiry centers around examining the effects of campaign spending, rather than the purpose behind that spending. It also avoids the problem inherent in trying to measure the actual effects of spending and donations. A conflicts of interest approach does not require one to believe that money “corrupts” the legislative process or that it results in policymaking that departs from some theoretically “pure” baseline.²¹³ The question, again, is whether it creates an incentive for legislators to act in a way that is different from the preferences of their constituents or the public interest. It may also suggest reforms that respect First Amendment concerns while still mitigating harms to the democratic process that might result from the current ecology of campaign finance regulation. For example, a legislative body concerned with conflicts of interest may consider changing internal rules to include disclosure and walling-off rules such as those used by law firms or the requirements of corporate directors.²¹⁴

213. By contrast, a search for evidence that fits within an equality rationale framework, for example, first requires setting an “equal” baseline. Evidence developed to fit an “undue influence” or other corruption-based rationale necessitates an “uncorrupted” baseline.

214. See, e.g., Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL’Y REV. 217, 231–33 (2010) (suggesting a system of “legislative recusal” for winning candidates whose campaigns have benefited from especially large expenditures, enforceable not by the judiciary but as an ethic required of legislators by the voters). See also, Eugene Mazo, *The Disappearance of Corruption and the New Path Forward in Campaign Finance*, 9 DUKE J. CONST. L. & PUB. POL’Y. (forthcoming 2014).

But conflicts of interest cannot merely be assumed. They must actually be proven. In the next section, we consider the types of evidence that those seeking to document conflicts of interest arising from campaign money might look to.

C. What Should the Evidence Look Like?

If the extensive *McConnell* record shows anything, it is that Congress and the courts will need information from a plethora of sources in order to reach the kinds of legal conclusions that the academics debating over the best rationale would have them make. Taking guidance from both the academic literature in Part III and our canvass of the *McConnell* record in Part IV, we offer the following suggestions of what evidence might be developed by researchers.

Member statements: The Court's consideration of the *McConnell* record shows that testimony by current and former Members of Congress is important for both their general descriptions of the role of money in politics and for specific examples of their own experiences. An update of *McConnell's* record, to document conflicts of interest in the current system, is now in order. Qualitative researchers should interview current and recently retired or defeated Members about what effect, if any, non-party independent spending has on the legislative process. For example, research focused on illuminating conflicts of interest might ask how aware Members are of non-party independent spenders active in their own races; whether they have ever received threats of oppositional spending or promises of favorable spending (either direct or implied) in connection with particular legislative action; whether independent spending is considered as a factor in deciding on various legislative actions such as introducing bills, making statements or asking questions in committees, or expressing support more or less publicly for a particular issue.

It is important, however, that researchers do not limit their universe of interview subjects to Members of Congress favorable to campaign finance reform efforts. As Bob Bauer has written, the "acknowledged experts" in campaign finance debates are those "politicians who are convinced that money accounts for certain legislative behavior, and who have solutions to offer."²¹⁵ Regardless of

215. Bob Bauer, *What To Do About The Court: Two Views*, MORE SOFT MONEY HARD LAW (Oct. 15, 2013), <http://www.moresoftmoneyhardlaw.com/2013/10/what-to-do-about-the-court-two-views/>.

whether one agrees with this assessment to date, it should serve as a note of caution to avoid the bias that can come with looking for evidence to fit a pre-determined rationale or regulatory proposal. Even for reform-minded scholars, the goal of research should be an accurate description of the political world as it is, not simply as it is assumed to be.

Statements by other political actors: In addition to Member statements, the *McConnell* record reveals the importance of interviews with candidates, campaign consultants, and donors. To this group, we would also add congressional staff. Members' staff—both from campaigns and from official offices—can provide more detailed information about the ongoing relationships with and lobbying efforts by individuals and organizations engaged in independent spending. Staff might also be asked about the timing of fundraisers to coincide with legislative action—for example, where a committee holds a hearing on a particular subject and a Member of that committee holds a fundraiser with stakeholders shortly before or after the hearing, how might internal office practices such as Member briefing and staff assignments either separate or elide the hearing and fundraiser? Researchers might also inquire as to whether campaigns are aware of the identities of contributors to supportive non-party independent spending organizations and whether information of such “soft money” contributions to outside groups is passed on to the candidate or Member. Interviews with donors and consultants for independent spending groups might follow along the same lines, asking whether they discuss legislative agendas with Members in the context of fundraisers, whether they receive notes of thanks from Members for their contributions to outside groups, and the outside group and donor perspective of Member perception of their efforts.

Empirical research: On the empirical front, future legislators and courts concerned with conflicts of interest would benefit from analysis of the timing of legislative decisions and public statements and fundraising materials of independent spending groups, as well as survey research of Members of Congress. For example, research might ask whether there is ever a correlation between independent spending targeted at a Member and legislative action taken by that Member, such as signing on to a bill as a co-sponsor or proposing an amendment in committee. Similarly, surveys might also examine whether independent spending activated a Member's constituents and caused them to contact their representative's office or campaign,

perhaps indicating where constituent support or opposition played a mediating role between the outside group and the Member's legislative decision.

One type of evidence that was especially persuasive to the courts in *McConnell* was documentary evidence of fundraising practices such as solicitation letters, thank you letters, and fundraising “menus” describing the events with Members of Congress available at certain levels of giving. Without the help of discovery rules available to litigants, academic researchers may have difficulty amassing similar documentary evidence. However, to the extent that such information is available publicly, it should be retained and cataloged for possible analysis. Potential research questions might include whether independent spending groups advertise access to Members of Congress to their donors, how outside groups describe their impact on the legislative process, and whether Members indicate—either through direct appreciation or other public statements—knowledge of efforts by independent spending organizations' efforts and agendas.

Additionally, scholars studying Congress should look to the work of Professor Lynda W. Powell on the influence of money in state legislatures for models of survey research on this topic.²¹⁶ Her extensive survey of state legislators investigated the extent to which campaign contributions influence the legislative process, looking beyond the usual measure of money-for-votes to a far richer conception of legislative output. Professor. Powell's investigation considered both institutional features such as term limits and size, as well as members' individual decisions about how much time to spend fundraising. To the extent that similar research can be done about Congress and ask about not only direct contributions but outside spending as well—especially in its look beyond the final roll call votes to myriad of other points at which money might influence the legislative process and focus on the experience of legislators themselves—it would provide an important contribution to the courts' understanding of the world of campaign finance. However, the responsibility for producing rigorous research here does not fall solely on the shoulders of academics—Members of Congress must be willing to participate. Leadership of both parties should encourage their

216. E.g. LYNDIA W. POWELL, THE INFLUENCE OF CAMPAIGN CONTRIBUTIONS IN STATE LEGISLATURES (2013); Lynda W. Powell, *The Influence of Campaign Contributions on the Legislative Process*, 9 DUKE J. CONST. L. & PUB. POL'Y. 75 (2014).

rank-and-file to respond to academic surveys. Organizations such as the American Political Science Association should develop relationships with congressional Member and staff organizations willing to assist researchers.

Press reports: Finally, the *McConnell* record and Professor Lowenstein's work should serve as reminders of the important role of journalists in building a record to inform legislative and litigation efforts, as well as the academic debates over rationales for regulation. Lowenstein noted that press reports of linking legislative actions on matters of interest to contributors and contributions are often belittled as anecdotal and unimportant, but because conflicts of interest are not about looking for a "smoking gun," the press accounts can offer useful descriptions of the "complexity and the ambiguities in the process."²¹⁷ As an example, Lowenstein offers articles in the *Wall Street Journal* by Brooks Jackson and Jeffrey Birnbaum about efforts by Rep. Bob Matsui to repeal a tax provision favored by public utility companies.²¹⁸ The articles include statements by both Matsui and lobbyists for the utility companies about how the companies used money (in the form of contributions and now-illegal honoraria) to influence legislators, as well as details about a Member who had co-sponsored the bill and then had his name removed from the legislation after receiving the money.²¹⁹ It may be that reporters are in the best position to discover and describe the "complexity and ambiguities" that give rise to conflicts of interest in the first place, and researchers should look to journalists' investigative work for starting points to dig deeper into the political process as it is, not as a theoretician might imagine it to be.

CONCLUSION

Development of an evidentiary record supporting the next generation of campaign finance reforms should begin now. Important as the academic debate over theories of reform may be, it should not forestall qualitative and quantitative empirical research on our current system. In fact, there is common ground that conflicts of interest are problematic, among those on both the dependence corruption and equality sides of the theoretical debate. We therefore argue that the primary focus of such research should be on

217. Lowenstein, *On Campaign Finance Reform*, *supra* note 81, at 333–34.

218. *Id.* at 330–33.

219. *Id.*

documenting conflicts of interest arising from the flow of campaign money into our system—something more than a showing of access, but less than actual influence. Such research will be essential both in crafting appropriate legislation and in defending it in court. To be clear, we are under no illusions about the current Supreme Court, a majority of whose members are hostile to campaign finance regulation. No quantum of evidence will persuade them to change their minds. But the current Court will not sit forever. Academics, advocates, policymakers, and lawyers should not wait until a more sympathetic Court is in place before beginning the essential work of documenting conflicts of interest in our current system of campaign finance.