

JUDICIAL STANDARDS FOR THE ANTI-CIRCUMVENTION RATIONALE IN CAMPAIGN FINANCE

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INTRODUCTION

Scholars and judges have long observed that circumvention, or the exploitation of loopholes, is endemic to the campaign finance sys-

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tem.¹ As Justices Stevens and O'Connor wrote in their joint opinion in *McConnell v. Federal Election Commission*, “[m]oney, like water, will always find an outlet.”² The history of campaign finance reform shows that regulators and political actors are enmeshed in a long-running cat-and-mouse game, with donors and candidates adapting to new regulations by finding innovative ways to achieve their financing goals. And it is no surprise that the repeated patterns of regulation and circumvention have made an impact on campaign finance jurisprudence as well. The Supreme Court has recognized the existence of an anti-circumvention rationale that can serve as a justification for government regulation of campaign finance.³

By its nature, circumvention is often difficult to detect, and rules against it are hard to enforce. The core of campaign finance regulation is the base contribution limits of the Federal Election Campaign Act (“FECA”), which restrict how much individual donors can contribute to candidates, party committees, and political action committees (“PACs”).⁴ Campaign finance regulations have often targeted efforts to circumvent these base contribution limits through the use of intermediaries or “conduits” to funnel additional money to recipients.⁵ Given the endemic role of circumvention, these regulatory efforts are essential to maintaining the effectiveness of the regulatory system. Yet, the efforts of sophisticated political actors to evade contribution limits pose inevitable difficulties of detection and enforcement. The incentives to maneuver around existing rules are strong, while the targeted behaviors are subtle, and the enforcement powers of the Fed-

1. See, e.g., Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999).

2. *McConnell v. FEC*, 540 U.S. 93, 224 (2003), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

3. *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 456 (2001) (“[A]ll Members of the Court agree that circumvention is a valid theory of corruption.”).

4. 52 U.S.C. § 30116(a)(1) (2014) (formerly codified at 2 U.S.C. § 441a(a)(1)). The limits in § 30116(a)(1) are referred to as “base” limits, when necessary, to distinguish them from other provisions designed to prevent circumvention of those limits. Cf. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014) (plurality opinion) (distinguishing FECA’s base limits from the aggregate contribution limits being evaluated in the case).

5. A prototypical example of conduit corruption is the concern that donations to state and national parties would serve as a means for circumvention the limits on contributions between donors and candidates. See, e.g., *Colorado II*, 533 U.S. at 447 (“Individuals and nonparty groups who have reached the limit of direct contributions to a candidate give to a party with the understanding that the contribution to the party will produce increased party spending for the candidate’s benefit.”).

eral Election Commission (“FEC”) are stymied by gridlock.⁶ Concrete evidence of corrupt exchanges is often weak or nonexistent.

Despite this paucity of evidence, the Court has invoked the risk of circumvention in surprisingly broad ways to justify regulation.⁷ The Court has pointed out that “circumvention is obviously very hard to trace,” and recognized “the practical difficulty of identifying and directly combating circumvention under actual political conditions.”⁸ It has invoked such arguments to uphold restrictions based solely on Congress’s predictive judgment that circumvention is likely to occur, even when concrete evidence is lacking.⁹ And it has invoked such arguments to uphold regulations even when they seem to be redundant with earmarking rules that specifically prohibit the use of intermediaries and conduits to exceed base contribution limits.¹⁰ Although this expansive use of the anti-circumvention rationale was once complemented by a commensurately broad understanding of cor-

6. See Trevor Potter, Opinion, *The Supreme Court Needs to Get Smarter About Politics*, WASH. POST (Oct. 11, 2013), http://www.washingtonpost.com/opinions/the-supreme-court-needs-to-get-smarter-about-politics/2013/10/11/806c9c44-31b7-11e3-8627-c5d7de0a046b_story.html (“[T]he FEC almost never investigates [earmarking violations], and it has been deadlocked and unable to act on most matters for the past five years.”); Ann M. Ravel, Opinion, *How Not to Enforce Campaign Laws*, N.Y. TIMES (Apr. 2, 2014), <http://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html> (“The Federal Election Commission is failing to enforce the nation’s campaign finance laws. I’m in a position to know. I’m the vice chairwoman of the commission.”).

7. See *infra* Section I.A; see also Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 167 (2004) (“In its consideration of the sufficiency of the evidence, the Court does appear to have extended the anticircumvention rationale. The Court repeatedly invoke[d] the reasonableness of Congress’ judgment that a certain practice was likely to emerge as a device for evading a proscribed activity and, thus, could be banned, without requiring much evidence to support Congress’ prediction.”).

8. *Colorado II*, 533 U.S. at 462.

9. *E.g.*, *McConnell v. FEC*, 540 U.S. 93, 164–66 (2003) (upholding a ban in the Bipartisan Campaign Reform Act of 2002 (“BCRA”) on the use of soft money by local parties), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010); see Briffault, *supra* note 7, at 164 (“BCRA’s national and state political party soft money restrictions involve a more attenuated relationship between donors and candidates than in any previous cases.”); Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 50 (2004) (noting and criticizing “the absence of evidence that local parties had been used in the past to circumvent federal contribution limits or to gain access to federal officeholders”); Samuel Issacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance*, 3 ELECTION L.J. 259, 262 (2004) (noting “the repeated invocation throughout *McConnell* of the importance of deferring to congressional judgments, even beyond the boundaries of actual fact finding”).

10. *Colorado II*, 533 U.S. at 462 (“The earmarking provision . . . would reach only the most clumsy attempts to pass contributions through to candidates.”).

ruption, the Court's most recent opinions have dramatically narrowed the scope of the government's interest in combatting corruption, leaving the doctrinal limits of circumvention uncertain.

Thus, the evidentiary standards for evaluating claims of circumvention are a central question for campaign finance jurisprudence. Although the Court has invoked the concept of circumvention repeatedly, neither judges nor scholars have devoted much attention to the question of how the doctrine should be applied by the courts. A number of scholars have examined evidentiary standards in campaign finance generally,¹¹ with particular attention to overbreadth analysis¹²

11. Some articles address the question of evidentiary standards in campaign finance doctrine generally. See Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1774 (2001) [hereinafter Hasen, *Measuring Overbreadth*] (addressing, with empirical research, whether a bright-line test to regulate electioneering speech would be substantially overbroad); Richard L. Hasen, *Rethinking the Constitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 922 (2005) [hereinafter Hasen, *Rethinking*] (arguing that "courts should defer to a legislature's normative decisions about the rationales for campaign finance law, yet should engage in a more skeptical evidentiary examination of means and ends"); Daniel R. Ortiz, *The Empirics of Campaign Finance*, 78 S. CAL. L. REV. 939, 940 (2005) (agreeing with Hasen on the Court's inconsistent use of empirical evidence, but arguing that it is a legitimate way to evade doctrinal obstacles); Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 668 (2004) (arguing that traditional First Amendment narrow tailoring and overbreadth doctrines should be replaced in the campaign finance context with a balancing test explicitly considering four democratic values); David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Laws*, 18 REV. LITIG. 85, 112–13 (1999) ("*Buckley* evidentiary standards . . . require[] a government to demonstrate that its jurisdiction is gripped by corruption of a type that would sustain the specific litigation in question. This is a showing of real or attributable harm"). Hasen and Schultz's articles focus less on the standard of review and more on the empirical evidence required to support specific types of laws. Schultz argues that *Buckley* left open the possibility that independent expenditure restrictions could be upheld with sufficient evidence, while Hasen offers empirical evidence on whether restrictions on campaign speech during a defined electioneering period would be overbroad in fact. See Hasen, *Measuring Overbreadth*, *supra*, at 1774; Schultz, *supra*, at 113. Another set of articles is aimed primarily at evaluating the Court's deference to Congress in *McConnell*. See, e.g., Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127, 144–45 (2004) (arguing that the *McConnell* majority's deference to Congress is inappropriate in the First Amendment context); see also Robert F. Bauer, *When "The Pols Make the Calls": McConnell's Theory of Judicial Deference in the Twilight of Buckley*, 153 U. PA. L. REV. 5, 15–16 (2004) (criticizing *McConnell*); Hasen, *supra* note 9, at 52 (criticizing the *McConnell* majority for lowering evidentiary standards and deferring to Congress); Issacharoff, *supra* note 9, at 264 (criticizing *McConnell*'s deference for abetting legislative incumbent protection); Richard H. Pildes, *The Constitutionalization of Democratic Politics—The Supreme Court 2003 Term*, 118 HARV. L. REV. 29, 130–41 (arguing in support of the *McConnell* approach).

and state ballot measures,¹³ and circumvention occasionally finds its way into these discussions.¹⁴ However, scholarship on evidentiary standards tends to reject the *Buckley* framework altogether, and none of it deals with the anti-circumvention rationale in particular¹⁵—leaving unaddressed how the rationale should work within the bounds of existing doctrine.

This Note defends the Supreme Court's expansive use of the anti-circumvention rationale during its recent pro-regulatory phase, and it proceeds to argue for a lenient approach to evidence. Close examination of the anti-circumvention rationale shows that the lenient approach is consistent with the basic features of campaign finance jurisprudence since *Buckley*. The anti-circumvention rationale has always involved a degree of predictive judgment about the risks of circumvention. That predictive judgment is permitted to outrun concrete evidence in two ways: first, as in *Buckley* itself, it justifies the greater over-inclusiveness inherent in an anti-circumvention measure; second, as in *McConnell*, it justifies anticipating circumvention based on predictions about how regulated actors will respond to new regulation. The validity of the anti-circumvention rationale has not itself been questioned; yet, without these two features, it is unlikely that the doctrine could effectively serve its purpose.

Part I offers a basic definition of circumvention and explains the purpose of the anti-circumvention rationale in terms that distinguish it from corruption. Part II describes the role that anti-circumvention arguments have played in the evolution of campaign finance doctrine, and demonstrate that the Supreme Court has not spoken clearly or consistently about the evidentiary standard that a campaign finance regulation justified on anti-circumvention grounds must meet. Part III

12. Overton and Hasen have written specifically about the evidentiary standards for overbreadth analysis in campaign finance doctrine. Hasen, *Measuring Overbreadth*, *supra* note 11, at 1774–75 (examining the empirical evidence on whether restrictions on campaign speech during a defined electioneering period would be overbroad); Overton, *supra* note 11, at 674–95 (criticizing the use of overbreadth doctrine in campaign finance cases).

13. Hasen and Schultz examine the special evidentiary problems faced by ballot measures. Hasen, *Rethinking*, *supra* note 11, at 885–87; Schultz, *supra* note 11, at 113.

14. See Bauer, *supra* note 11, at 16 (describing the role of circumvention in *McConnell*'s broadly deferential approach and criticizing such deference for failure to combat legislative incumbent protection). The only Supreme Court opinion in a campaign finance case to discuss the concept of circumvention in any detail is Justice Clarence Thomas's opinion in *McConnell*. See *McConnell*, 540 U.S. at 266–72 (Thomas, J., concurring in part and dissenting in part).

15. See *infra* note 128 for a description of the evidentiary standards proposed by other scholars and how they involve rejection of the *Buckley* framework.

defends the lenient approach that the Court took to applying the anti-circumvention rationale in its pro-regulatory period, arguing that this approach is consistent with the role that the anti-circumvention rationale plays in the *Buckley* framework.

I.

CIRCUMVENTION AS A DISTINCT CAMPAIGN FINANCE DOCTRINE

A. *Defining the Anti-Circumvention Rationale*

In general, “circumvention” refers to the evasion of an existing law through the exploitation of a loophole.¹⁶ Circumvention has played an especially prominent role in the history of campaign finance,¹⁷ but in principle, preventing circumvention is a government interest that may apply to any area of law.¹⁸ Circumvention is likely to be most prevalent when sophisticated actors, especially repeat players in a regulated area, are confronted with particularly strong incentives to evade the law. Given that the campaign finance realm is dominated by repeat players with strong incentives to gain competitive advantage, it is no surprise circumvention issues play a significant role in the field.¹⁹ The actors regulated by campaign finance, including political candidates, donors, parties, and committees, have to invest substantial resources in order to comply with campaign finance regulations.²⁰ On the other hand, campaign finance laws artificially

16. See Bob Bauer, *Hypotheticals and the Doctrine of Circumvention*, MORE SOFT MONEY HARD LAW (Dec. 16, 2013), <http://www.moresoftmoneyhardlaw.com/2013/12/hypotheticals-and-the-doctrine-of-circumvention/> (“[C]ircumvention is widely understood to mean ‘loopholes.’”).

17. See *McConnell*, 540 U.S. at 165 (majority opinion) (“[Congress has] been taught the hard lesson of circumvention by the entire history of campaign finance regulation”); Issacharoff & Karlan, *supra* note 1, at 1707 (referring to “the central lesson of the post-Watergate experience: political money—that is, the money that individuals and groups wish to spend on persuading voters, candidates, or public officials to support their interests—is a moving target”).

18. See, e.g., Herbert J. Hammond et al., *The Anti-Circumvention Provision of the Digital Millennium Copyright Act*, 8 TEX. WESLEYAN L. REV. 593, 594–95 (2002) (describing the “strong and sweeping anti-circumvention provision” in the Digital Millennium Copyright Act).

19. See Issacharoff & Karlan, *supra* note 1, at 1710–11 (“*Buckley* and its corresponding applications to state campaign regulations have produced a system in which candidates face an unlimited demand for campaign funds (because expenditures generally cannot be capped) but a constricted supply (because there is often a ceiling on the amount each contributor can give). As in all markets in which demand runs high but supply is limited, the value of the good rises. In campaigns, the result is an unceasing preoccupation with fundraising.”).

20. Lindsay Renick Mayer, *Q&A: The Costs of Compliance*, OPEN SECRETS (Apr. 10, 2008), <https://www.opensecrets.org/news/2008/04/qa-the-cost-of-compliance/>.

restrict the “supply” of campaign money without restricting “demand”: they limit how much individual donors can contribute without setting any limit on the total amount that candidates can spend.²¹ This system creates a well-known “hydraulic” effect that greatly increases the difficulty of fundraising and gives political actors a strong incentive to test the limits of the law.²²

There appears to be widespread agreement that there is an “anti-circumvention rationale” in campaign finance, but with little attention to what is meant by circumvention, or to the role it plays in legal doctrine.²³ In a frequently cited passage, Justice Souter’s majority opinion in *Colorado II* asserts that “all Members [of the Court] agree that circumvention is a valid theory of corruption.”²⁴ At first glance, the statement makes the anti-circumvention rationale derivative of the government’s interest in preventing corruption. Indeed, the government’s interest in preventing circumvention must in some way be derivative of its interest in preventing corruption, given the consensus that corruption is the only interest that campaign finance regulation may legitimately serve.²⁵ Yet, in a footnote explaining the statement, Souter distinguishes justifications based on circumvention from justi-

21. See Issacharoff & Karlan, *supra* note 1.

22. See *id.*

23. Both judges and scholars assume that the existence of such a rationale is uncontroversial. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1439 (2014) (plurality opinion) (referring to “the Government’s interest in preventing circumvention”); *McConnell v. FEC*, 540 U.S. 93, 266 (2003) (Thomas, J., concurring in part and dissenting in part) (arguing that the majority committed error “by expanding the anticircumvention rationale beyond reason” and that “exploitation of an anticircumvention concept has a long pedigree, going back at least to *Buckley* itself”), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 458 n.19, 459 n.21 (2001) (twice referring to the “anticircumvention rationale”); see also Briffault, *supra* note 7, at 167 (“In its consideration of the sufficiency of the evidence, the Court does appear to have extended the anticircumvention rationale.”); *id.* at 148 (“[T]he anti-circumvention principle . . . has been a consistent theme in the Court’s campaign finance jurisprudence from *Buckley* down to the Court’s most recent campaign finance decisions.”).

24. *Colorado II*, 533 U.S. at 456.

25. The prevention of corruption and the appearance thereof have been “the only legitimate and compelling government interests thus far identified for restricting campaign finances.” *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985); see also *McCutcheon*, 134 S. Ct. at 1441 (“Any [campaign finance] regulation must . . . target what we have called ‘*quid pro quo*’ corruption or its appearance. . . . Campaign finance restrictions that pursue other objectives . . . impermissibly inject the Government ‘into the debate over who should govern.’” (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011))).

fications based on corruption.²⁶ In *Colorado II*, the government argued that the anti-circumvention measure at stake was “justified by a concern about *quid pro quo* arrangements” in addition to a concern about circumvention.²⁷ But the majority decided it did not need to reach the *quid pro quo* corruption argument “because the evidence supports the long-recognized rationale of combating circumvention of contribution limits,” adding that “[t]he dissent does not take issue with this justification as a theoretical matter.”²⁸

The Court’s distinction between circumvention and corruption suggests that the very idea of an anti-circumvention rationale rests on a thus-far unacknowledged tension: while the anti-circumvention rationale derives from the anti-corruption rationale, it is not reducible to it. We can resolve this tension by identifying the distinct purpose served by anti-circumvention doctrine. Although the anti-circumvention rationale ultimately ties back to the government’s interest in preventing corruption, it makes an alternative form of justification available. When justifying a law on anti-circumvention grounds, the government does not need to make a first-order argument that the targeted practice is corrupting in and of itself. Instead, it can prove that permitting the targeted practice, alone or in combination with other practices, creates an unacceptable risk of undermining the efficacy of the underlying law. Thus, the anti-circumvention doctrine reflects the judgment that in some cases we should accept the costs of granting the government broader reach when the policy behind existing laws will be frustrated unless predictable forms of evasion are also prohibited.

An example may help illustrate the point. Over the years, donors have attempted to find ways to funnel money to candidates in excess of the base contribution limits through the use of intermediaries.²⁹ One such method was challenged in *Colorado II*.³⁰ At the time the case was decided, donors were limited to \$2,000 in contributions to a single candidate in one election cycle.³¹ However, they could give another \$20,000 to a national party committee that also supported the candi-

26. *Colorado II*, 533 U.S. at 456 n.18 (explaining the Court’s reliance on the anti-circumvention rationale as the reason it did not need to reach the issue of *quid pro quo* corruption).

27. *Id.*

28. *Id.*

29. This practice is known as “conduit contributing.” See *McCutcheon*, 134 S. Ct. at 1454 n.9 (discussing “conduit contributions”).

30. *Colorado II*, 533 U.S. 431.

31. *Id.* at 458 (describing the relevant limits under FECA at the time).

date.³² Donors could thus potentially circumvent the base contribution limits by giving “to the party with the tacit understanding that the favored candidate would benefit.”³³ Because *Buckley v. Valeo* established that base contribution limits are a constitutionally acceptable means to combat corruption, regulators (and the Court) could take for granted that exceeding those limits in any way would trigger corruption concerns. Thus, a circumvention argument would instead merely have to show that contributors may be able to use an indirect means to direct money in excess of contribution limits to their favored candidate. Such practices would raise the same concerns about corruption as a large direct contribution to the candidate, explicitly prohibited by law.

The anti-circumvention rationale is not a distinct rationale for regulation in the same sense as the anticorruption or equality rationales, each of which identify a distinct harm that the government may legitimately target.³⁴ Instead of requiring it to show how a specific behavior is itself corrupting (or otherwise harmful), the anti-circumvention rationale permits the government to reach farther than it otherwise could in order to reach harms already recognized by law. In other words, the anti-circumvention rationale is not based on a theory of the first-order government interest, but of how far the government’s enforcement authority may extend in order to achieve that interest.³⁵ Understood in these terms, the clearest statement of the rationale is the Court’s claim in *McConnell* that Congress should have “sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.”³⁶

B. *Problems with the Anti-Circumvention Rationale*

Anti-circumvention arguments derive some of their value from the unsettled nature of campaign finance jurisprudence. All campaign finance decisions take place against a background of entrenched disagreement over the constitutionality and desirability of a robust system

32. *Id.*

33. *Id.*

34. The equality rationale was advanced but rejected in *Buckley*. See *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”).

35. I draw this idea from the only source I am aware of that speaks of circumvention in these terms: Bauer, *supra* note 16 (arguing that circumvention “is a theory of enforcement, of how far the government’s regulatory authority extends”).

36. *McConnell v. FEC*, 540 U.S. 93, 137 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010).

of campaign finance regulation.³⁷ This has resulted in highly politicized doctrine, with lamentable consequences for doctrinal stability and coherence.³⁸ In particular, while the anticorruption rationale involves only one of the many democratic values that motivate campaign finance regulation,³⁹ it is the only rationale the Court has recognized as consistent with the First Amendment.⁴⁰ This has forced debate between advocates and critics of regulation to take place in the form of an argument over the meaning of corruption. There is little evidence that this argument is headed toward a coherent resolution.⁴¹

Against this background of embattled doctrine, the anti-circumvention rationale makes it possible to defend the constitutionality of regulation by tying additional rules to those few whose constitutionality is not in question. As noted above, one of the few fixed points in campaign finance doctrine has been the constitutionality of base con-

37. See, e.g., Renata E.B. Strause & Daniel P. Tokaji, *Between Access and Influence: Building a Record for the Next Court*, 9 DUKE J. CONST. L. & PUB. POL'Y 179, 180 (2014) ("A persistent feature of campaign finance discourse has been disagreement over rationales for regulation.").

38. See, e.g., Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887, 888 (2011) (concluding that the Court's campaign finance jurisprudence is neither "stable, coherent, workable, [nor] closely tied to the text and values of the Constitution"); Hasen, *Rethinking*, *supra* note 11, at 917 ("[T]he search for evidence is often a proxy for the simple value judgments of the Justices on the wisdom of particular campaign finance laws."); Overton, *supra* note 11, at 691 ("The current doctrine's failure to provide guidance allows normative and empirical political assumptions to drive the litigants' arguments and judicial decision-making." (footnote omitted)).

39. See *Landell v. Sorrell*, 406 F.3d 159, 162 (2d. Cir. 2005) (Calabresi, J., concurring) ("*Buckley*, by fiat, declared the state's explicit recognition and amelioration of wealth distribution problems in the electoral marketplace to be an insufficiently compelling interest to pass constitutional muster. And yet, I submit, it remains at least implicitly behind much campaign finance reform legislation." (citations omitted)); Briffault, *supra* note 38, at 924 (arguing that campaign finance involves balancing political values such as "free speech, political participation, voter information, competitive elections, voter equality, government integrity, and elected official time-protection").

40. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985) (noting that the prevention of corruption and its appearance have been "the only legitimate and compelling government interests thus far identified for restricting campaign finances").

41. See Richard L. Hasen, *Three Wrong Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21, 22 (2014) (arguing that reformers should wait for a new Court to push for expanded rationales for regulation); Strause & Tokaji, *supra* note 37, at 188 ("Debates over the constitutionally permissible and tactically preferable rationales for regulating money in politics rage on, notwithstanding the turn taken by the Roberts Court.").

tribution limits.⁴² Even if we cannot agree on what corruption means, we should be able to agree that donors and candidates should not be able to evade existing laws simply by exploiting legal loopholes.

However, there are some inherent problems with judicial recognition of an anti-circumvention rationale. First, concrete evidence that circumvention is actually taking place is usually hard to come by.⁴³ Often, it consists of little more than an inference from the fact that there are both opportunities and incentives for circumvention. This is because circumvention often consists of independently legal exchanges that are united by some form of collusive agreement between parties, thus adding up to a prohibited result (or the functional equivalent thereof). In the absence of collusive agreements, all we have are legal exchanges. But collusive agreements can take indirect forms, such as “winks and nods,” tacit understandings, and the like.⁴⁴ As a result, apart from egregious cases, it will be difficult in practice to prove specific instances of circumvention by sophisticated actors.⁴⁵

42. *Buckley v. Valeo*, 424 U.S. 1, 35–38 (1976) (upholding the contribution limits of FECA); *see also* *McCutcheon v. FEC*, 134 S. Ct. 1434, 1451 (2014) (plurality opinion) (“[W]e leave the base limits undisturbed.”).

43. This is a frequent complaint in judicial opinions dealing with circumvention. *See, e.g.,* *McCutcheon*, 134 S. Ct. at 1478 (Breyer, J., dissenting) (“[I]n the real world, the methods of achieving circumvention are more subtle and more complex than our stylized [examples] depict.”); *McConnell v. FEC*, 540 U.S. 93, 153 (2003) (referring to “more subtle and dispiriting forms of corruption” and concluding that “such corruption is neither easily detected nor practical to criminalize,” and that “[t]he best means of prevention is to identify and to remove the temptation”), *overruled in part* by *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 462 (2001) (arguing that critics ignore “the practical difficulty of identifying and directly combating circumvention under actual political conditions”); *see also* Trevor Potter, *The Supreme Court Needs to Get Smarter About Politics*, WASH. POST (Oct. 11, 2013), http://www.washingtonpost.com/opinions/the-supreme-court-needs-to-get-smarter-about-politics/2013/10/11/806c9c44-31b7-11e3-8627-c5d7de0a046b_story.html (“In practice, earmarking violations are almost impossible to discover and prove because they take place behind closed doors.”).

44. *See* *McConnell*, 540 U.S. at 153.

45. Justice Breyer’s dissent in *McCutcheon* observed that violations of earmarking rules are extremely difficult to prove: the regulations require showing that a contributor has “knowledge that a substantial portion” of a contribution will be used by a PAC to support a candidate to whom the contributor has already donated. *McCutcheon*, 134 S. Ct. at 1477–78 (quoting 11 C.F.R. § 110.1(h)(2) (2012)) (internal quotation marks omitted). The “knowledge” standard is difficult to meet: the FEC only finds earmarking where there is “clear documented evidence of acts by donors that resulted in their funds being used as contributions.” Aggregate Biennial Contribution Limits, 79 Fed. Reg. 62,361, 62,362 (Oct. 17, 2014). Moreover, the FEC has never clarified what is required to meet the requirement that the earmarked portion of the donation be “substantial.” *See* David Metcalf, *FEC Has Said Little About Earmarking Rule Discussed in McCutcheon*, INSIDE POL. L. (Apr. 4, 2014), <http://www.insidepoliticallaw.com/2014/04/04/fec-has-said-little-about-earmarking-rule-discussed-in-mccutcheon/>. Only

Second, justifying anti-circumvention measures often requires engaging in speculative, counterfactual reasoning. Sometimes this is because the measure being defended is already on the books, meaning that regulators must make inferences about how political actors would likely behave in its absence.⁴⁶ In other cases, it is because anti-circumvention measures are enacted as part of a comprehensive scheme of regulation that goes into effect at a single point in time.⁴⁷ The anti-circumvention measure is meant to address incentives to circumvent created by other parts of the scheme.⁴⁸ Because there is no underlying law yet, there can be no evidence of circumvention—Congress’s assessment must be based on educated guesses and experience. This is a frequent concern because campaign finance regulation has usually been enacted in the form of large, complex regulatory schemes with multiple interrelated provisions.⁴⁹

Third, because the sort of collusive agreement that must be part of an attempt at circumvention is already prohibited by FECA’s earmarking provision,⁵⁰ regulators face potential tailoring problems. The current version of the earmarking provision states that “all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.”⁵¹ The existence of the earmarking provision means that a more narrowly tailored alternative already exists. The question of tailoring is also related to the question of evidentiary standards. For

one out of nine FEC enforcement actions since 2000 actually found a violation of the earmarking rule, and that action involved an unusually clear-cut case in which the contributions were made by relatives of the candidates. *McCutcheon*, 134 S. Ct. at 1477–78 (summarizing findings of FEC cases on earmarking since 2000).

46. See, e.g., *Colorado II*, 533 U.S. at 457 (noting that because of pre-existing regulations banning party independent expenditures, “there is no recent experience with unlimited coordinated spending,” and citing *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (plurality opinion), in which the Supreme Court “not[ed the] difficulty of mustering evidence to support long-enforced statutes”).

47. See *McConnell*, 540 U.S. at 172 (arguing in defense of a provision of BCRA because “the delicate and interconnected regulatory scheme at issue here” meant that the First Amendment burdens were “far outweighed by the need to prevent circumvention of the entire scheme”).

48. E.g., *id.* at 165–66 (“Congress knew that soft-money donors would react to [BCRA § 323(a), the national party soft-money ban] by scrambling to find another way to purchase influence. . . . Preventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important government interest.”).

49. See *id.*

50. 52 U.S.C. § 30116(a)(8) (2014) (formerly codified at 2 U.S.C. § 441a(a)(8)).

51. *Id.*

advocates of regulation, it is precisely the difficulty of detecting subtle evasions of the most narrowly tailored law that justifies broader, bright-line prohibitions. But that judgment depends, once again, on the assumption that evasions are in fact taking place.

These difficulties with applying the anti-circumvention rationale are illustrated by the Court's analysis of the alleged practice of using party committees as conduits in *Colorado II*, discussed above. Under FECA, party expenditures that were coordinated with candidates were considered contributions to the candidate, and subject to FECA's base contribution limits.⁵² The rule was defended by the government as necessary to avoid the use of parties as conduits for circumvention. Noting that its main disagreement with the dissenting Justices was evidentiary, Justice Souter's majority opinion in *Colorado II* analyzed the evidence in the case by asking "whether experience under the present law confirm[ed] a serious threat of abuse" from unlimited coordinated party spending.⁵³

Because limits on coordinated party spending were already in place, the majority had to engage in counterfactual reasoning to determine the likelihood of circumvention of the base limits in the absence of the party coordination rules. It did so by focusing on the incentives of candidates, donors, and parties, looking for evidence that they "test[ed] the limits of the current law" to make inferences about how they would behave in a world without limits on coordinated party spending.⁵⁴ It cited opinion testimony from a Senate candidate, the candidate's financial advisor, and the former executive director of a party committee, as well as a fundraising letter from a congressman, and found that there were tacit understandings between donors and candidates about the benefits those candidates would receive from further contributions directed at parties.⁵⁵ It also highlighted the Democratic Party's practice of "tallying," which was "a system that helps to connect donors to candidates through the accommodation of a party."⁵⁶ Tallying involved the distribution of a party committee's funds to candidates according to a predetermined formula based on a number of factors, including how much the candidates raised for the committee.⁵⁷ The majority concluded that "if contributions to a party were not used as a funnel from donors to candidates, there would be

52. *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 444 (2001) (describing the issue in the case).

53. *Id.* at 457.

54. *Id.*

55. *Id.* at 458.

56. *Id.* at 459.

57. *Id.* at 461.

no reason for using the tallying system the way the witnesses have described it.”⁵⁸

In the eyes of Justice Thomas, writing in dissent for himself and three other Justices, these facts did not add up to evidence of circumvention.⁵⁹ As the dissent pointed out, “[b]oth the initial contribution to the party and the subsequent expenditure by the party on the candidate are currently legal,” and “[e]ach step in the process is permitted, but the combination of those steps, the Court apparently believes, amounts to corruption.”⁶⁰ Proof of circumvention would require showing that the several, independently legal exchanges are overlaid by the single intention of funneling money from donor to candidate in excess of base limits. The initial exchange from donor to committee would have to be accompanied by some explicit or implicit understanding that the money was to be directed to a particular candidate.⁶¹

The majority did not point to any specific instances of deliberate collusion, and it conceded in a footnote that its main evidence, the practice of tallying, was considered by the FEC to be legal.⁶² It also conceded that for circumvention to work, it would have to be accomplished through “something less obvious than dollar-for-dollar pass-throughs,” because these would be prohibited by earmarking provisions already on the books.⁶³ It nonetheless concluded that the possibility of circumvention raised a serious problem. In doing so, it appears to have been guided mainly by a judicial assessment of the incentives driving donors, parties, and candidates.⁶⁴ Granted, the majority’s inferences about those incentives were based on evidence of how parties “tested the limits of the law,” but the majority used its own judgment to fill in the blanks. In fact, it inferred that the existence of the earmarking provision made the problem not better, but worse: it ensured that the circumvention taking place was driven further into the

58. *Id.*

59. *Id.* at 478–79 (Thomas, J., dissenting) (arguing that the tally system was not evidence of circumvention because it “allocated money based on a number of factors . . . [and] the Court does not explain how the tally system could constitute evidence of corruption”).

60. *Id.*

61. *See supra* note 45 (discussing the knowledge requirement for illegal earmarking under current FEC regulations).

62. *Colorado II*, 533 U.S. at 459 n.22 (majority opinion) (“The dissent may be correct that the FEC considers tallying legal . . .”).

63. *Id.* at 460 n.23 (“Any such dollar-for-dollar pass-through would presumably be too obvious to escape the special provision on earmarking. But the example illustrates the undeniable inducement to more subtle circumvention.” (citations omitted)).

64. *Id.* at 460 (“If suddenly every dollar of spending could be coordinated with the candidate, the inducement to circumvent would almost certainly intensify.”).

darkness, making it even more subtle and difficult to detect.⁶⁵ The majority concluded that the need to prevent more sophisticated circumvention justified a less precisely tailored rule than the earmarking provision.⁶⁶

Colorado II highlights the difficulties courts and litigants encounter when analyzing anti-circumvention claims—and the independent (and sometimes tenuous) reasoning judges must engage in to evaluate them. These difficulties are not resolved, but reproduced in subsequent opinions such as *McConnell* and *McCutcheon*, as Part II demonstrates. The Court has never clearly addressed the doctrinal difficulties associated with the anti-circumvention rationale, and has in fact compounded them through the instability of its jurisprudence.

II.

THE UNCERTAINTY OF THE SUPREME COURT'S ANTI-CIRCUMVENTION DOCTRINE

This Part shows that the contours of the Supreme Court's anti-circumvention doctrine remain uncertain into the present. The Court's jurisprudence can be demarcated into three different phases. The first phase, starting with *Buckley* and continuing until *Nixon v. Shrink Missouri Government PAC* in 2000,⁶⁷ establishes that preventing circumvention is a legitimate government interest, but it tells us little about the nature and strength of the evidence required to sustain a circumvention argument. The second phase consists of the cases up to and including *McConnell*, in which the Court steadily shifted toward more deferential review. Although the Court addressed evidentiary standards in greater detail during this second phase, its decisions failed to set clear boundaries to the anti-circumvention rationale. Finally, the third phase began with the appointments of Chief Justice John Roberts and Justice Samuel Alito in 2005 and 2006, respectively, and extends to the present. In this phase, the Court has turned to deregulation, narrowing the scope of the corruption rationale and casting doubt on previously deferential holdings. Considered together, these precedents show that the Court has not spoken clearly or consistently about evidentiary standards for circumvention.

65. *Id.* at 460 n.23.

66. *Id.* at 462 (“To treat the earmarking provision as the outer limit of acceptable tailoring would disarm any serious effort to limit the corrosive effects of . . . ‘understandings’ regarding what donors give what amounts to the party . . .”).

67. *Cf.* Hasen, *supra* note 9, at 31 (observing that “[t]he Supreme Court’s recent decision in *McConnell v. Federal Election Commission* marks the culmination of an effort begun in 2000 to shift the Court’s campaign finance jurisprudence” (footnotes omitted)).

A. *Buckley and the Introduction of the Circumvention Rationale*

Circumvention arguments have been essential to campaign finance jurisprudence since *Buckley v. Valeo*, the first and most important of the Court's modern campaign finance cases.⁶⁸ However, although *Buckley* (and immediately subsequent cases) identified the government's interest in anti-circumvention as a valid rationale for regulation, the Court failed to elaborate on how that interest should be evaluated.

Buckley reviewed the constitutionality of several provisions of FECA, most importantly the Act's restrictions on political expenditures and contributions by candidates, parties, and independent organizations.⁶⁹ The *Buckley* Court held that the First Amendment required a distinction between the constitutional standard applicable to contributions, which are direct donations to a candidate or group for the purpose of political campaigning, and expenditures, or the money actually spent by a candidate on his campaign or by a group on political advocacy. The Court found that, whereas contribution limits entailed only a "marginal restriction" on political speech, limits on overall expenditures "necessarily reduced the quantity of expression" and thus imposed a more severe First Amendment burden.⁷⁰ While it employed strict scrutiny to strike down limits on candidate expenditures, the Court ruled that restrictions on contributions to candidates were constitutional so long as they were "closely drawn" to serve a sufficiently strong government interest.⁷¹ Because the different standards of review for contributions and expenditures effectively dictated the outcomes, *Buckley* on its own tells us little about the nature and strength of the evidence required to sustain anti-circumvention measures, especially when these are meant to protect contribution limits.⁷²

Early post-*Buckley* cases failed to provide further clarification, although they also show that the Court did not interpret circumvention as merely redundant with corruption: the Court believed that the anti-circumvention rationale could be used to justify an expansion of Congress's regulatory reach beyond that which could be justified by cor-

68. 424 U.S. 1 (1976).

69. *Id.*

70. *Id.* at 19–20, 23.

71. The "closely drawn" standard is an intermediate standard for the constitutionally sufficient tailoring between means and ends, more lenient than the requirement of narrow tailoring applicable to expenditure limits. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88 (2000) (quoting *Buckley*, 424 U.S. at 25).

72. See *id.* at 386 ("Precision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley per curiam* opinion.").

ruption alone.⁷³ By way of example, in *California Medical Ass'n v. FEC*, the Court explicitly employed the anti-circumvention rationale as a basis for upholding campaign finance regulation.⁷⁴ Noting that Congress “enacted [the statute in question] in part to prevent the circumvention of the very limitations on contributions that this Court upheld in *Buckley*,” and that in the absence of the statute, the base contribution limits could be “easily evaded,” the Court held that the statute was “an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions.”⁷⁵ The Court’s subsequent cases in this period served mainly to reinforce the contribution/expenditure distinction, and therefore do little to clarify the standard of review for anti-circumvention measures passed as contribution limits.⁷⁶

B. *The Period of Deference*

In a series of cases beginning with *Nixon v. Shrink Missouri Government PAC* in 2000 and culminating with *McConnell v. FEC*, the Supreme Court moved steadily in a pro-regulatory direction characterized by greater deference to legislatures.⁷⁷ In these cases, the Court gave further guidance as to the standard of review it would apply to campaign finance laws, including the degree of empirical evidence required to uphold a measure’s constitutionality. It also applied the anti-circumvention rationale extensively to uphold legislation, giving more explicit consideration to the nature of the evidence required to sustain a measure on anti-circumvention grounds. However, the decisions of

73. Some scholars have denied this, arguing that the circumvention rationale cannot justify any laws that could not be justified directly under the corruption rationale. See James Bopp, Jr. et al., *Contribution Limits After McCutcheon v. FEC*, 49 VAL. U. L. REV. 361, 366–67 (2015). For further discussion, see *infra* Section II.B.

74. *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 198–99 (1981) (holding that limits on contributions to multicandidate political committees were constitutional because they prevented circumvention of the base and aggregate contribution limits).

75. *Id.* at 197–99.

76. See *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604, 608 (1996) (plurality opinion) (striking down limits on independent expenditures by parties); *FEC v. Ma. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (holding an expenditure limit unconstitutional as applied to a non-profit corporation); *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 500–01 (1985) (striking down expenditure limits on funds spent in support of candidates receiving public financing).

77. See Hasen, *supra* note 9, at 31 (“The Supreme Court’s recent decision in *McConnell v. Federal Election Commission* marks the culmination of an effort begun in 2000 to shift the Court’s campaign finance jurisprudence The new jurisprudence, while purporting to apply the same anticorruption standard, does so with a new and extensive deference to legislative judgments.”).

this phase left the outer reaches of permissible regulation uncertain, and failed to set clear boundaries to the anti-circumvention rationale.

In *Shrink Missouri*, the Court began its turn toward a pro-regulatory stance by setting a generous lower bound for the evidence of corruption needed to uphold contribution limits.⁷⁸ *Shrink Missouri* upheld the constitutionality of Missouri's contribution limits for state elections, which were challenged for being insufficiently supported by evidence of actual corruption and for setting an unacceptably low dollar limit on contributions.⁷⁹ The Court interpreted *Buckley* as holding that a contribution limit need only be "closely drawn to match a sufficiently important interest."⁸⁰ The Court also introduced a sliding evidentiary burden for contribution limits, saying that "[t]he quantum of 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."⁸¹ At the lower bound, evidence of corruption could not be "merely conjectural."⁸² Thus, the Court set a lenient evidentiary standard for evaluating contribution limits in general.

In *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*, the Court made its first effort to explicitly define the evidentiary standard for the circumvention rationale.⁸³ *Colorado II* involved a challenge to restrictions on expenditures by political parties made in connection with congressional campaigns, which the Court held to be "coordinated" expenditures, treated as functionally equivalent to contributions.⁸⁴ The Court rejected the argument that limits on a party's ability to make coordinated expenditures were per se unconstitutional, holding that parties were just as susceptible to being used as vehicles for corruption as other entities similarly regulated.⁸⁵ However, in addition to the need to reinforce direct

78. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000). In addition to its holding on evidentiary standards, the Court also set generous standards on tailoring and the government interest. The Court rejected a challenge to the contribution limit's tailoring, deferring to the legislature on the question of the appropriate level for a contribution limit. The Court also interpreted the corruption interest broadly, as including the "broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 389.

79. *Id.*

80. *Id.* at 387–88.

81. *Id.* at 391.

82. *Id.* at 392.

83. *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 456–57 (2001) (examining whether evidence supported FECA's party expenditure provision under the standard for contribution limits).

84. *Id.* at 447.

85. *Id.* at 464.

contribution limits on parties, the Court identified another kind of corruption risk: the risk of parties serving as a “conduit” for avoiding the contribution limits to individual candidates.⁸⁶ A contributor who had reached his limit for contributions to an individual candidate could evade the base contribution limit by giving to a candidate’s party with the understanding that money would be spent in support of the preferred candidate.

Opponents of the regulation argued that existing anti-earmarking provisions already foreclosed this type of circumvention.⁸⁷ In response, Justice Souter’s majority opinion invoked a broader understanding of the circumvention risk, noting “the practical difficulty of identifying and directly combating circumvention under actual political conditions.”⁸⁸ The Court concluded that the “earmarking provision . . . would reach only the most clumsy attempts to pass contributions through to candidates,” and observed that in its more complicated and subtle forms, “circumvention is obviously very hard to trace.”⁸⁹

Colorado II illustrates the leniency of the Court’s evidentiary standard for circumvention claims. The Court did find that the government’s claim of a risk of circumvention was backed by some concrete evidence, including evidence that circumvention was already occurring under the existing laws and would become more prevalent if restrictions were lifted.⁹⁰ However, the Court went even further and found that the regulatory reach of Congress extended further than was

86. *Id.* at 447 (“The Government argues that if coordinated spending were unlimited, circumvention would increase . . . an increased opportunity for coordinated spending would aggravate the use of a party to funnel money to a candidate from individuals and nonparty groups, who would thus bypass the contribution limits that *Buckley* upheld.”).

87. *See* 52 U.S.C. § 30116(a)(8) (2014) (formerly codified at 2 U.S.C. § 441a(a)(8)).

88. *Colorado II*, 533 U.S. at 462.

89. *Id.*

90. The Court inferred from experience under existing laws that the threat of circumvention was real, because actors in the system continued to “test the limits of the current law” despite years of enforcement. *Id.* at 457. It also reasoned that the suspension of limits on coordinated party expenditures would serve as a positive inducement to further circumvention, predicting that it might result in more extensive use of parties as conduits in order to reduce the burden on individual candidates. *Id.* at 460 (“If suddenly every dollar of spending could be coordinated with the candidate, the inducement to circumvent would almost certainly intensify. Indeed, if a candidate could be assured that donations through a party could result in funds passed through to him . . . a candidate enjoying the patronage of affluent contributors would have a strong incentive not merely to direct donors to his party, but to promote circumvention as a step toward reducing the number of donors requiring time-consuming cultivation.”). The Court was able to point to an evidentiary record with several examples showing that parties were already being used as conduits under existing law. *See id.* at 458–59.

necessary to address the harms demonstrated by concrete evidence. By rejecting the claim that the challenged limits were insufficiently tailored to the harm because earmarking regulations already in place addressed them more directly, the Court held that Congress could reach further than already-existing earmarking regulations.⁹¹

Finally, in *McConnell v. FEC*, the Supreme Court built on *Colorado II* by making a broader and more explicit case for a deferential approach to campaign finance laws.⁹² *McConnell* evaluated the constitutionality of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), the first major effort at reforming the campaign finance system since FECA and *Buckley*.⁹³ BCRA reflected a belief that the system erected by earlier reform efforts had been eroded by the exploitation of “loopholes” that needed to be closed in order to restore the system’s integrity.⁹⁴ BCRA closed one of the biggest of these loopholes by effectively banning the use of soft money by national party committees.⁹⁵ In evaluating the constitutionality of the soft money ban, the Court said that it would show “proper deference to Congress’ ability to weigh competing interests in an area in which it enjoys particular expertise.”⁹⁶ The Court justified this deferential approach on four different, albeit related, grounds: (1) it commended the political process virtues Congress exemplified in passing BCRA, including its incrementalism and extensive fact-finding; (2) it recognized Congress’s “vastly superior knowledge” of the political process; (3) it emphasized the importance of considering “political realities,” both when exercising its own judgment and when deferring to congressional expertise; and (4) it recognized that the purposes of cam-

91. The Court’s decision to uphold the law was based in part on inferences from the evidence about the nature of the system of exchange between parties and candidates, such as the existence of tallying. *Id.* at 461. But it was also based on a belief in the legitimacy of regulation aimed at the corrupting effects of unarticulated “understandings” that were likely to be difficult to detect and punish. *Id.* at 462.

92. *McConnell v. FEC*, 540 U.S. 93, 137, 158 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010).

93. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

94. *McConnell*, 540 U.S. at 129–30 (“[T]he twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble.”).

95. *Id.* at 133. Soft money is money not subject to FECA’s source and quantity limits, as opposed to hard money, which is and can be collected and spent by federal candidates themselves. Soft money was used by state parties to fund election activities that benefited both state and federal candidates, such as get-out-the-vote efforts or joint mailers, appearances, and ads. In the lead-up to BCRA, soft money had become a major part of the campaign finance system and accounted for forty-two percent of total party funds spent in the 2000 elections. *See id.* at 124.

96. *Id.* at 137.

campaign finance law could only be fulfilled if Congress had the authority to act flexibly to support existing regulations with measures intended to address circumvention.⁹⁷

McConnell relied in part on evidence that Congress was responding to an increasing exploitation of loopholes in existing laws.⁹⁸ But, as in *Colorado II*, the Court also offered an expansive interpretation of Congress's authority under the anti-circumvention rationale, saying that its more lenient standard of review "provides Congress with sufficient room to *anticipate* and respond to concerns about circumvention of regulations designed to protect the integrity of the political process."⁹⁹ In passing BCRA, "Congress both drew a conclusion and made a prediction," and the Court found that both types of congressional judgment were entitled to deference.¹⁰⁰ Congress's authority to act in an anticipatory, predictive fashion was justified by the fact that "candidates, donors, and parties test the limits of the current law."¹⁰¹ Moreover, even where there is no direct evidence of abuse under existing law, Congress is permitted to draw lessons from the reality of a long cycle of regulation and circumvention: it has "been taught the hard lesson of circumvention by the entire history of campaign finance regulation."¹⁰² The Court explicitly relied on this broadened, anticipatory theory of circumvention when it upheld the soft money ban as it pertained to local parties, despite the absence of evidence that local parties had been used as conduits to circumvent federal contribution limits.¹⁰³

In sum, *Colorado II* and *McConnell* show the Court finding sufficient evidence to uphold campaign finance regulations on an anti-circumvention rationale. In both cases, the Court accepted anticipatory circumvention arguments based on a generalized awareness of the risk of circumvention rather than direct evidence of past harm. Both the direct evidence and anticipatory approaches involve the use of political judgment, although *McConnell* goes a step farther by making an explicit case for deference to congressional judgments.

97. This summary borrows from Bauer, *supra* note 11, at 15–16.

98. *McConnell*, 540 U.S. at 146 ("The evidence in the record shows that candidates and donors alike have in fact exploited the soft-money loophole.").

99. *Id.* at 137 (emphasis added); *see also id.* at 144 ("[The Government's] interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits.").

100. *Id.* at 164–65.

101. *Id.* at 174–75 (citing *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 457 (2001)).

102. *Id.* at 165.

103. *See* Hasen, *supra* note 9, at 50.

C. Roberts Court Retrenchment

Although *McConnell* set the groundwork for a strongly pro-regulatory approach to campaign finance regulation, the decision was riven by sharp disagreements between the pro-regulatory and deregulatory wings of the Court, causing commentators to question its stability from the outset.¹⁰⁴ Indeed, after the appointments of Chief Justice John Roberts in 2005 and Justice Samuel Alito in 2006, the Court reversed direction and began limiting the scope of campaign finance laws.¹⁰⁵ Critically, *Citizens United* and *McCutcheon* sharply limited the scope of the government's anticorruption interest.¹⁰⁶ This destabilizes the Court's earlier, more deferential jurisprudence, because it is no longer clear how strong the case for upholding major reforms like BCRA will be in the absence of a governmental mandate to target broader forms of corruption, including undue influence. By the same token, the narrowed definition of corruption also puts greater pressure on the anti-circumvention rationale.

Cases from the Court's deferential period relied heavily on a broadened concept of corruption, in addition to circumvention arguments. Citing language from *Colorado II*, the *McConnell* Court interpreted corruption to go beyond quid pro quo or cash-for-votes arrangements to include "undue influence on an officeholder's judgment."¹⁰⁷ Despite the absence in the record of a single instance in which a federal officeholder switched a vote in return for contributions,¹⁰⁸ the Court pointed to evidence of manipulations of the legislative calendar and, more importantly, to the broader evidence that donations were being exchanged for access to officials—including, most colorfully, the Democratic Congressional Campaign Committee's list of prices suggesting sale of access to private retreats with

104. See Briffault, *supra* note 7, at 176 ("The long-term significance of *McConnell* is . . . uncertain and ultimately hostage to future changes in the composition of the Court.").

105. See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 587 (2011) ("[T]he Court abruptly changed course when Chief Justice Roberts and Justice Alito replaced Chief Justice Rehnquist and Justice O'Connor.").

106. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion) ("Any regulation must . . . target what we have called 'quid pro quo' corruption or its appearance."); *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption.").

107. *McConnell*, 540 U.S. at 143 (citing *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 441 (2001)).

108. BeVier, *supra* note 11, at 136 ("The record produced at the district court was voluminous, but it revealed not one single instance of a legislator's vote being influenced by soft-money contributions.").

high-level party members, and even a night in the Lincoln Bedroom.¹⁰⁹ This broad interpretation of corruption led the Court to grant Congress extensive authority to directly regulate corruption as well as anticipate potential circumvention.¹¹⁰

The Roberts Court put an end to this approach. After some early cases that suggested its deregulatory intentions,¹¹¹ the Roberts Court decided *Citizens United*, which rejected the broader “undue influence” theory employed in *McConnell* and found that “ingratiation and access . . . are not corruption.”¹¹² Instead, it defined corruption solely in terms of the quid pro quo corruption of candidates or officeholders, that is, the direct exchange of dollars for political favors.¹¹³ Because essentially all campaign finance regulation relies on the anti-corruption interest, the Court’s substantial narrowing of that interest has potentially far-reaching consequences, including for anti-circumvention doctrine.¹¹⁴ The broader the definition of corruption, the easier it is to defend regulation on the grounds that it serves the anticorruption interest directly, or to make such arguments in the alternative even when invoking the anti-circumvention rationale. The narrower the definition of corruption, the more the Court must directly confront the question whether anti-circumvention arguments alone are sufficient to justify the regulations.

In *McCutcheon*, the Court applied extensive scrutiny to the government’s asserted anti-circumvention interest for the first time.¹¹⁵ Although circumvention arguments can have strong pro-regulatory implications when combined with an expansive corruption rationale, *McCutcheon v. FEC* shows that such arguments may be hard to sustain without the undue influence theory of corruption. Under FECA,

109. *McConnell*, 540 U.S. at 149–51.

110. *Id.*

111. In *Randall v. Sorrell*, the Court found Vermont’s contribution limits unconstitutionally low because they prevented challengers from accumulating sufficient resources to make elections competitive. 548 U.S. 230, 262 (2006). In *Davis v. FEC*, the Court struck down a provision of BCRA that raised the contribution limits on House candidates when they faced wealthy self-financed opponents. 554 U.S. 724, 740 (2008). In *FEC v. Wis. Right to Life, Inc.*, the Court substantially narrowed the scope of BCRA’s prohibition on electioneering speech by corporations and unions by interpreting that prohibition to apply only to speech that was the functional equivalent of express advocacy, interpreting functional equivalence very narrowly. 551 U.S. 449, 482 (2007). See Hasen, *supra* note 105, at 587–88.

112. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010).

113. *Id.* at 360.

114. See Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 244 (2010) (“[I]f extended to its logical extremes, *Citizens United* undercuts the constitutionality of much campaign finance regulation.”).

115. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014) (plurality opinion).

individual donors could contribute a maximum amount of \$5,200 to any single federal candidate, and \$123,200 in the aggregate across all federal candidates and committees.¹¹⁶ *McCutcheon* considered the constitutionality of FECA's aggregate contribution limits on First Amendment grounds. In defense, the government raised both a circumvention argument and an argument grounded directly in the anticorruption interest.¹¹⁷ At oral argument, the government argued that large aggregate contributions had an inherently corrupting influence.¹¹⁸ Its theory was that a rich contributor's ability to give numerous individual contributions that severally complied with the base contribution limit, but added up to over \$3.6 million in the aggregate,¹¹⁹ could create a significant sense of gratitude and indebtedness, and hence posed a direct risk of corruption or the appearance thereof.¹²⁰ This theory ran headlong into the Court's reiterated commitment to the view that "[i]ngratiation and access . . . are not corruption,"¹²¹ now bolstered with the affirmative claim that such access to legislators was indeed a "central feature of our democracy."¹²² The Court reasoned that the gratitude resulting from financial support distributed widely across a party lacked the individualized relationship between contributor and candidate required for a risk of quid pro quo corruption.¹²³ As a result, the justification for aggregate limits came to rest primarily on the argument that they prevented circumvention of

116. 52 U.S.C. § 30116(a)(3) (2014) (formerly codified at 2 U.S.C. § 441a(a)(3)).

117. *McCutcheon*, 134 S. Ct. at 1452.

118. Transcript of Oral Argument at 27, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536) ("Aggregate limits combat corruption both by blocking circumvention of individual contribution limits and, equally fundamentally, by serving as a bulwark against a campaign finance system dominated by massive individual contributions in which the dangers of quid pro quo corruption would be obvious and inherent and the corrosive appearance of corruption would be overwhelming."). When pressed on the accuracy of the anti-circumvention argument, the Solicitor General quickly shifted back to the more general corruption argument. *See id.* at 29 ("[R]estricting transfers would have a bearing on the circumvention problems. . . . But there is a more fundamental problem here. . . . [T]he very fact of delivering [a \$3.6 million dollar] check creates the inherent opportunity for quid pro quo corruption."); *see also id.* at 49 ("[C]ircumvention is not the only problem. . . . [T]he solicitation and receipt of these very large checks is a problem, a direct corruption problem.").

119. This is based on the assumption that a contributor gives up to the limit to all House and Senate candidates in a given year, and all state and national party committees. Brief for the Appellee at 37, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536).

120. *Id.* at 32–33.

121. *McCutcheon*, 134 S. Ct. at 1441 (citing *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)).

122. *Id.* at 1462 ("Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.").

123. *Id.* at 1450–51.

base limits, and the Court proceeded to scrutinize that argument closely.

The Court's heightened scrutiny of circumvention claims in *McCutcheon* exemplifies the ongoing uncertainties in the Court's circumvention doctrine. On one hand, the Court purports to apply the evidentiary standard set out by *Colorado II*: "whether experience under the present law confirms a serious threat of abuse."¹²⁴ On the other hand, the Court found the existence of the earmarking provision to be sufficient to obviate the need for additional anti-circumvention measures.¹²⁵ The plurality argued that earmarking regulations made the circumvention scenarios proposed by the Government outright illegal, or sufficiently difficult under existing rules as to make them highly implausible.¹²⁶ In doing so, the plurality came to the opposite conclusion from the one that the Court articulated in *Colorado II*, while purporting to apply the same evidentiary standard.¹²⁷ Had the Court applied the *McCutcheon* plurality's reasoning in *Colorado II* or *McConnell*, the Court may not have been able to uphold *any* measures under an anti-circumvention rationale, given that the earmarking provision was in force when those cases were decided. *McCutcheon*'s approach to earmarking regulations shows the tensions that have emerged within the Court's jurisprudence on evidentiary standards for circumvention, and thus illustrates the importance of identifying a coherent standard that is consistent with the *Buckley* framework.

III.

JUDICIAL STANDARDS FOR ANTI-CIRCUMVENTION DOCTRINE

This Part argues in defense of the expansive approach to the anti-circumvention rationale that the Court adopted in cases such as *Colo-*

124. *Id.* at 1457 (quoting *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 457 (2001)).

125. In *McCutcheon*, the government's theories of how base contribution limits could be circumvented in the absence of aggregate limits involved routing contributions through a large number of intermediaries, typically political action committees. Brief for the Appellee, *supra* note 119, at 35–39.

126. *See McCutcheon*, 134 S. Ct. at 1456 (calling the scenarios envisioned by the district court "either illegal under current campaign finance laws or divorced from reality"); *see also id.* at 1453 (calling the government's scenarios "sufficiently implausible" that it failed to carry its burden of proof).

127. By contrast, Justice Breyer's dissent observed that violations of earmarking rules are extremely difficult to prove, echoing the *Colorado II* Court. *McCutcheon*, 134 S. Ct. at 1477 (Breyer, J., dissenting).

rado II and *McConnell*.¹²⁸ Substantively, these cases uphold anti-circumvention measures based on Congress's predictive judgments about the likelihood of circumvention, rather than concrete evidence that corrupt exchanges were actually taking place. This approach is justified because the underlying purpose of the anti-circumvention rationale means that supportive arguments will often outrun concrete evidence of the harm the measures are meant to prevent. Instead, support for an anti-circumvention measure comes from reasonable inferences about how political actors are likely to behave in the absence of the measure, guided by—but never fully reducible to—concrete evidence of incentives for evasion. When it comes to making such predictive judgments about political behavior, judges have no special advantage over legislators and may in fact be worse off, which indicates that judicial deference to legislative judgments is typically appropriate. Critical opposition to deference is usually motivated by concerns about legislative self-dealing, but such concerns do not enhance the likelihood that judges will be able to engage in meaningful empirical scrutiny of legislative justifications. Instead, concerns about legislative self-dealing are best addressed through review of the political process rather than heightened scrutiny of the empirical evidence.

A. *The Validity of Anticipatory Circumvention Arguments*

The expansive use of the anti-circumvention rationale, exemplified by *Colorado II* and *McConnell*, has been subjected to harsh criticism by scholars. In both of these cases, the Court accepted the validity of anti-circumvention measures based on Congress's predictive judgments about future risks of circumvention. Critics have argued that accepting such arguments in lieu of concrete evidence of harm amounts to an abdication of the Court's responsibility to carefully scrutinize campaign finance laws for First Amendment

128. The analysis herein goes beyond existing treatments of evidentiary standards in several ways. Some scholarship offers comprehensive proposals for reshaping campaign finance jurisprudence. For example, Spencer Overton has argued that judges should evaluate campaign finance laws using a balancing test that would weigh four different democratic values. See Overton, *supra* note 11, at 664. Richard Hasen, alternatively, has proposed that judges defer to legislatures' normative decisions about the appropriate rationales but engage in a more skeptical review of means-ends fit. See Hasen, *Rethinking*, *supra* note 11, at 922. Both proposals thus leave open the question of what evidentiary standard would be appropriate for a doctrine in which *Buckley*'s restrictive interpretation of the government interest and use of the contribution/expenditure distinction remain intact. In contrast, this Note stays within the bounds of the existing *Buckley* framework and asks which approach would be most consistent with its fundamental assumptions.

problems.¹²⁹ For example, Richard Hasen argues that the *McConnell* Court went too far in upholding the soft-money restrictions on *local* parties, when concrete evidence that these parties were being used for circumvention was totally absent.¹³⁰ Critics thus reject the *McConnell* Court's decision to give Congress "sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process."¹³¹

This Section argues that "anticipatory" circumvention arguments are in fact well grounded in campaign finance doctrine since *Buckley*, relying on concrete evidence of specific harm in a way that is more restrictive than precedent requires. The anti-circumvention rationale has always involved a degree of predictive judgment about the risk of circumvention. That predictive judgment is permitted to outrun concrete evidence in two ways: first, as in *Buckley* itself, it justifies the greater overinclusiveness inherent in an anti-circumvention measure; second, as in *McConnell*, it justifies anticipating circumvention based on predictions about how regulated actors will respond to new regulation. It is hard to imagine how an anti-circumvention rationale could be effective at all without these two features.

Explaining the validity of anticipatory circumvention arguments requires a return to the underlying purpose of the anti-circumvention rationale. As Part I argued, the anti-circumvention rationale reflects a judgment about the permissible reach of the government's enforcement power: namely, that an unusually high risk of easy evasion justifies giving the government broader authority than it might otherwise have. When a court upholds a measure on anti-circumvention grounds, it decides that we should accept the cost of granting the government broader reach when the policy behind existing laws will be frustrated unless predictable forms of evasion are also prohibited.

In *Buckley*, the Court used anti-circumvention arguments to uphold base contribution limits, concluding that the ease of evading bribery laws justified a broader prohibition.¹³² *Buckley* considered and rejected the argument that contribution limits were not sufficiently tai-

129. See, e.g., Hasen, *supra* note 9, at 50 (citing *McConnell v. FEC*, 540 U.S. 93, 355 n. 3 (2003) (Rehnquist, C.J., dissenting)) (criticizing the Court's decision to uphold BCRA's soft money ban on local parties because of the "absence of evidence that *local* parties had been used in federal officeholders" and noting the Chief Justice's agreement in his *McConnell* dissent).

130. See *id.*

131. *McConnell v. FEC*, 540 U.S. 93, 128 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010).

132. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

lored because bribery laws were a less restrictive alternative.¹³³ The Court's per curiam opinion pointed out that bribery laws "deal with only the most blatant and specific attempts of those with money to influence governmental action."¹³⁴ If, as some argue, contribution limits are themselves an anti-circumvention measure against exchanges akin to bribery, then the bribery laws themselves will always offer a more narrowly tailored alternative to the contribution limits that support them.¹³⁵ If an anti-circumvention measure is deemed to be necessary, this reflects a judgment that the most narrowly tailored law would be inadequate to deal with the harm on its own. The justification for backing up a more narrowly tailored law with a broader one aimed at preventing its circumvention is the inference that, because of the ease of evasion or strong incentive to do so, the underlying law will not sufficiently deter and punish the targeted behavior.

Therefore, it is part of the premise of an anti-circumvention argument that the targeted behavior is difficult to detect and punish using more narrowly tailored alternatives. Given that, it would be anomalous to then demand that the scope of such measures be tightly fitted to the scope of concrete evidence of the harm. Empirical evidence will rarely confirm the full extent of the harm that would occur in the absence of the measure in question. In *Buckley* itself, the Court upheld contribution limits to prevent corrupting exchanges while admitting that "the scope of such pernicious practices can never be reliably ascertained."¹³⁶ Despite this, the Court decided that "Congress could legitimately conclude that" these contribution limits were necessary to avoid the appearance of corruption.¹³⁷ Similarly, the Court argued that the difficulty of distinguishing corrupting contributions from innocuous ones justified eliminating the "opportunity for abuse" altogether.¹³⁸

Anti-circumvention measures thus are justified by reasonable inferences about how political actors will behave, including predictive judgments about how they would behave under an alternative set of laws. When laws are already in place, evaluating a circumvention risk involves counterfactual reasoning about likely behavior in a world in

133. *Id.* at 28.

134. *Id.*

135. See *McConnell*, 540 U.S. at 266–72 (Thomas, J., concurring in part and dissenting in part); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1458 (2014) (plurality opinion) ("It is worth keeping in mind that the base limits themselves are a prophylactic measure.").

136. *Buckley*, 424 U.S. at 27.

137. *Id.* at 27.

138. *Id.* at 30.

which the anti-circumvention measure is absent. When new laws are being proposed and have yet to take effect, anti-circumvention measures involve inferences based on the broader history of reform. Because campaign finance laws are typically passed as part of comprehensive regulatory schemes with multiple, interrelated parts, regulated actors' behavior will likely be changed by a proposed reform in ways that may give rise to predictable new risks of circumvention. In such situations, we will usually have little more to go on than predictive judgments about how political actors would respond to changes in the regulatory environment. To forbid such inferences would dramatically curtail the anti-circumvention rationale in a way that is inconsistent with the way the rationale was used in *Buckley* itself.

The valid role of predictive judgments in anti-circumvention arguments lends support to the reasoning of *Colorado II*, where the Court first articulated its approach to circumvention in detail.¹³⁹ The breadth of the Court's reasoning has been subjected to criticism because of the way its conclusions reached beyond concrete evidence of circumvention, but the reasoning is analogous to that which the Court used in *Buckley* to uphold contribution limits. To illustrate the possibility of circumvention, the *Colorado II* Court used a hypothetical example that it acknowledged would already be prohibited by existing earmarking regulations.¹⁴⁰ Yet, the case of earmarking regulations seems straightforwardly analogous to that of bribery laws. In both cases, a more narrowly tailored alternative to the anti-circumvention measure already exists. However, the difficulty of detecting and punishing the prohibited behavior justifies setting a more enforceable hurdle to evasion. The weakness of this approach is that the only source of guidance for this form of reasoning is the Court's own judgment about how political actors are likely to behave under an alternate system of laws.

B. *In Defense of Judicial Deference on Anti-Circumvention Claims*

One of the most controversial features of *McConnell* was its explicit reliance on deference to congressional judgments about the need for particular forms of campaign finance regulation, including the need to anticipate and prevent circumvention.¹⁴¹ This Section argues

139. *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 456–57 (2001).

140. *See id.* at 460 n.23.

141. For criticisms of *McConnell*'s deferential approach, *see McConnell v. FEC*, 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part and dissenting in part) (arguing

in defense of the Court's deference and responds to the major objections to deference. Because circumvention arguments involve complex and often counterfactual predictive judgments about how political actors are likely to respond to new restrictions, courts are not well-placed to second-guess congressional findings. Courts have also failed to develop a clear and stable jurisprudence that could provide guidance to legislatures, and they are not acting pursuant to any clear constitutional guidance in terms of text or fundamental values. Given the democratic interests at stake, these are reasons to defer to the branch that has stronger institutional capacity and democratic legitimacy.

1. *In Defense of Deference*

Judicial deference to congressional judgments about circumvention risks is appropriate in part because of the predictive reasoning that supports those judgments.¹⁴² As Section III.A argued, the validity of a circumvention argument is likely to turn on difficult counterfactual judgments that depend less on clear-cut empirical evidence than on inferences about the likely behavior of political actors.¹⁴³ The history of campaign finance shows that the effects of new regulation are extremely difficult to predict, even for scholars dedicated to studying

that BCRA was primarily an incumbent-protection scheme), *overruled in part* by *Citizens United v. FEC*, 558 U.S. 310 (2010); *see also id.* at 306 (Kennedy, J., concurring in part and dissenting in part) (arguing that BCRA “look[s] very much like an incumbency protection plan”); Bauer, *supra* note 11, at 30 (“If there is a case for deference to the legislature on matters of campaign finance, it is not found in *McConnell*.”); Bruce Cain, *Reasoning to Desired Outcomes: Making Sense of McConnell v. FEC*, 3 *ELECTION L.J.* 217, 218 (2004) (“Like Justices Kennedy and Scalia, I am skeptical . . . of the true Congressional motive.”); Charles J. Cooper & Derek L. Shaffer, *What Congress “Shall Make” the Court Will Take: How McConnell v. FEC Betrays the First Amendment in Upholding Incumbency Protection Under the Banner of “Campaign Finance Reform,”* 3 *ELECTION L.J.* 223, 227 (2004) (“Title II [of BCRA, banning corporate and union electioneering communications] is . . . a spectacular exemplar of politicians pursuing the very self-interest in federal office that supposedly justified the law.”); Hasen, *supra* note 9, at 60 (“[I]n their embrace of legislative deference, [the *McConnell* majority has] abdicated their responsibility to carefully balance competing constitutional concerns and to police legislative enacted campaign finance regulations for self-interest.”).

142. *See* Pildes, *supra* note 11, at 137 (“[C]ourts lack an empirical anchor on which they can base conventional means-ends scrutiny, and . . . they also cannot credibly predict the likely effects on political competition of a law like BCRA. . . . [Critics of judicial deference] seek to preserve the illusion of a form of judicial review that in all likelihood cannot realistically be given substantive effect in this context.”). Critics like Hasen acknowledge that, in practice, “the search for evidence is often a proxy for the simple value judgments of the Justices on the wisdom of particular campaign finance laws.” Hasen, *Rethinking*, *supra* note 11, at 917.

143. *See supra* Section III.A.

political behavior.¹⁴⁴ Courts can certainly scrutinize the reasoning legislatures use to arrive at their predictions about circumvention, but they are not likely to have superior knowledge of the incentives or opportunities facing political actors, and in fact there is good reason to think that their judgment may be worse than the legislature's.¹⁴⁵ Political experience is likely to be an important ingredient in determining the opportunities and incentives facing political actors, but none of the current members of the Supreme Court have ever run for elective office.¹⁴⁶ On the other hand, all members of Congress have experience with political campaigns by virtue of their positions as elected officials.

Other indicia of comparative institutional competence also point in favor of legislatures. There is broad—perhaps universal—agreement among scholars that campaign finance doctrine in general, and the review of evidence in particular, is unstable, shifting, incoherent, and highly politicized, as discussed in Part II.¹⁴⁷ The case for aggres-

144. See Issacharoff, *supra* note 9, at 259 (“Twenty-five years after *Buckley v. Valeo*, the Court’s confidence that it can predict how the latest regulatory endeavor will play out is dramatically shaken. . . . Only those weak in history and firm in self-assured prognostication would venture how the new regulatory environment [after BCRA] will direct the flow of campaign funds.”); Issacharoff & Karlan, *supra* note 1, at 1705 (“Electoral reform is a graveyard of well-intentioned plans gone awry.”); Pildes, *supra* note 11, at 136–37 (“Experts have had widely varying predictions about [BCRA’s] likely cumulative effects. . . . That these predictions now turn out to have been wrong, or substantially overstated, reveals the difficulty of accurate prediction about BCRA’s effects. . . . If immediate short-term effects have been inaccurately projected, long-term effects are even more uncertain.”); Pildes, *supra* note 11, at 136–37 (“[T]hrough social science cannot definitively establish the empirical effects of campaign contributions on political behavior, that does not mean that there are no such effects.”).

145. Accord Briffault, *supra* note 38, at 924 (“Campaign finance jurisprudence entails practical empirical judgments that elected officials are clearly better equipped to make.”).

146. See *id.* (“Today we have a Court in which not a single justice ever ran for or held elective office.”). Historically, Justices with political experience have been particularly deferential to Congress, possibly indicating either agreement with Congress’s judgments or an understanding of Congress’s better position. See *id.* (“[S]ome of the justices most deferential to campaign finance laws were either justices who had once held elective office themselves, like Justice O’Connor, a co-author of *McConnell*, or who had been involved in managing an election campaign, like Justice White, the only dissenter from *Buckley*’s invalidation of spending limits.”).

147. *Id.* (“The [contribution/expenditure] distinction . . . relies heavily on a concept of ‘corruption’ that is indeterminate in meaning and has been marked by sharp swings in judicial interpretation. As a result, the doctrinal development in this area has produced a body of campaign finance law that even most members of the Court, as individual Justices, reject.”); Overton, *supra* note 11, at 691 (“The current doctrine’s failure to provide guidance allows normative and empirical assumptions to drive the litigants’ arguments and judicial decisionmaking.”).

sive policing of campaign finance by the courts is weakened when the body of doctrine the Court has developed to do the job is largely bereft of the basic doctrinal virtues of stability and coherence that make judicial oversight valuable. As Samuel Issacharoff has written, “the Court has proven not particularly successful at managing its increasingly regulatory role in campaign finance law.”¹⁴⁸ The resultant lack of clear doctrinal guidance also has a chilling effect on legislation because the law fails to give notice of how courts will apply the Constitution, and thereby inhibits Congress’s ability to act under its constitutionally granted authority to regulate federal elections.¹⁴⁹

Courts are becoming mired in an area where deeply contested political values are at stake. Campaign finance necessarily brings into play a wide array of competing values that inform our understanding of how a sound democratic system should operate.¹⁵⁰ Yet, the shifts in campaign finance jurisprudence have dramatically narrowed the values that can be served by legislation. For example, the norm of voter equality is deeply embedded in our political values as well as our constitutional law: the one person, one vote doctrine¹⁵¹ and the law of vote dilution¹⁵² are both geared toward ensuring equal opportunity of influence. Yet, the Court has completely barred concerns about voter equality from campaign finance.¹⁵³ The decision to exclude equality concerns reflects a tradeoff between fundamental political values that are equally grounded in the Constitution, in the absence of any clear constitutional guidance about how such tradeoffs are to be made.

2. *Criticisms of Judicial Deference*

In general, our constitutional system is underpinned by a default principle of judicial restraint because of the legislature’s superior grounding in democratic legitimacy.¹⁵⁴ Judicial intervention is only

148. Issacharoff, *supra* note 9, at 260.

149. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

150. *See supra* note 39 and accompanying text.

151. *See Reynolds v. Sims*, 377 U.S. 533 (1964) (applying the “one person, one vote” doctrine to state legislative apportionment).

152. *White v. Regester*, 412 U.S. 755 (1973) (holding that vote dilution is a violation of the Constitution).

153. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”).

154. Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 71 (“It is a fixed point of American constitutionalism that judicial review is an exceptional event.

appropriate where some affirmative warrant exists. Critics of judicial deference in campaign finance point primarily to two reasons why courts should take a hard look at such legislation: first, the risk of legislative self-entrenchment; second, the courts' responsibility to protect First Amendment rights to political speech.

Concerns about legislative self-entrenchment derive from political process theory, a tradition of thought rooted in footnote four of *United States v. Carolene Products Co.*¹⁵⁵ and John Hart Ely's *Democracy and Distrust*.¹⁵⁶ Political process theory holds that the legitimacy of judicial review is based on the courts' unique role in protecting the political process.¹⁵⁷ The integrity of the political process is threatened when legislators act to undermine the procedural protections that ensure electoral accountability, thereby changing the ground rules of politics so as to "entrench" themselves in power. In such circumstances, courts may be the only institutions capable of checking the legislature and preventing it from undermining the integrity of the political process. Concerns about legislative self-entrenchment were a major source of criticism of *McConnell*, and dissenting Justices and scholarly critics argued that the majority's deference to congressional judgments was inappropriate in an area where Congress is engaged in self-regulation.¹⁵⁸ Critics argued that BCRA was above all a scheme to protect incumbent members of Congress from challengers, meaning that the Court should have taken an especially skeptical approach to review.¹⁵⁹

The judicial invalidation of an Act of Congress, and to a lesser extent the invalidation on constitutional grounds of state legislation or the acts of federal and state executive officials, is disfavored, a route to be taken only when it is 'unavoidable.'" (quoting *Specter Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

155. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

156. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980) (arguing that judicial review is appropriate where it reinforces the processes of representative democracy, including by preventing existing holders of power from entrenching the status quo); see also Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 *YALE L.J.* 1329, 1332 (2005) ("In *Democracy and Distrust*, Ely presented an argument, rooted in footnote four of *Carolene Products* and exemplified by the Warren Court, for 'a participation-oriented, representation-reinforcing approach to judicial review.' . . . Ely relied on the second and third prongs of *Carolene Products* to argue that courts should intervene when the political process—his italics—is undeserving of trust or judicial deference" (footnotes omitted) (quoting ELY, *supra*, at 87)).

157. See Pildes, *supra* note 11, at 42–44 ("The justification for judicial review itself entails, in this area, that courts address structural problems and enforce structural values concerning the democratic order as a whole.").

158. See *supra* note 141 and accompanying text.

159. See *supra* note 141 and accompanying text.

However, scrutinizing laws for the problem of legislative self-entrenchment is not incompatible with deference to congressional judgments on the narrower evidentiary question of circumvention. Courts can and should address concerns about legislative self-dealing through scrutiny of the political process itself. In fact, where rigorous empirical scrutiny by courts is implausible, political process review provides an alternative way for the Court to hold Congress accountable.¹⁶⁰ Political process review is a venerable approach to judicial scrutiny in other areas of constitutional law,¹⁶¹ and has figured in the Court's analysis of election law cases in particular.¹⁶² To take the example of BCRA, there is substantial evidence that the law would fare well under a political process analysis given the extent of bipartisan support, Congress's apparent reluctance to act, support from outside of Congress, and the degree of public discussion and scrutiny of the legislation.¹⁶³ Even scholars who express concerns about *McConnell*'s deferential approach to BCRA often imply that their concerns stem from the specific faults of the *McConnell* majority's analysis rather than a broader rejection of political process review as a potential solution.¹⁶⁴ Critics fault the *McConnell* majority for failing to explicitly

160. See Bertrall L. Ross II, *The State as Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2099–2105 (2015) (arguing that courts are competent to engage in retail-level assessments of the operation of politics, and that doing so is consistent with the judicial role); see also Pildes, *supra* note 11, at 137 (arguing that, given the inherent difficulties in evaluating the empirical basis for campaign finance arguments, “courts can do little but rely on process-based assessments to judge the risk of impermissible self-entrenchment”). For a skeptical account of the viability of political process review, see Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843; see also Hasen, *supra* note 9, at 63 (“[P]roof of [an incumbent-protection] motive is often absent, suggesting the means-ends test as a second best solution.”).

161. See Ross, *supra* note 160, at 2102–03 (describing the role of political process review in equal protection jurisprudence).

162. See Issacharoff, *supra* note 9, at 263 (arguing that political process review played a critical role in *Bush v. Gore*, 531 U.S. 98 (2000), and *Shaw v. Reno*, 509 U.S. 630 (1993), proving that “the Court has within its arsenal analytic approaches to process distortions that have commanded decisive majorities in historic cases”).

163. See Briffault, *supra* note 38, at 925–29 (describing evidence that campaign finance laws are rarely motivated by desires for partisan or incumbent entrenchment); Pildes, *supra* note 11, at 138 (“[Many] political scientists and academic experts on election financing . . . with no self-interest in incumbent protection[] were central figures in pressing the case for BCRA. Far from being anxious to protect itself through passage of such a law, Congress manifested little desire to act.” (footnotes omitted)); see also Pildes, *supra* note 11, at 139 (“[BCRA] embodies as visible and fully debated a legislative and public process as American politics currently produces.”).

164. See Bauer, *supra* note 11, at 17 (“In evaluating *McConnell* deference, it is helpful . . . to identify the kind of deference it is *not* propounding. . . . [The Court does not] offer a highly developed notion of the democratic implications of deference.”);

address concerns about legislative self-dealing; future courts can do this by scrutinizing laws for their partisan- or incumbent-entrenching effects.

Moreover, when it comes to anti-circumvention measures in particular, deference to congressional judgments about circumvention risks is not as problematic as deference to Congress's determinations about what constitutes corruption in the first place. Whereas deference on the underlying question of corruption would effectively authorize Congress to determine the appropriate balance between competing regulatory and First Amendment values, deference on the narrower question of whether a practice poses a circumvention risk leaves power in the Court's hands to determine that balance. Circumvention measures should be derivative of the balance set by the Court, rather than changing it.

The other major criticism of judicial deference is that it amounts to an abdication of the responsibility to carefully scrutinize restrictions on political speech.¹⁶⁵ On this view, because of the core First Amendment concerns at stake, courts must impose stringent evidentiary requirements on the government before upholding any campaign finance restrictions. Section III.A shows that this approach would require eliminating the anti-circumvention rationale as it has functioned in campaign finance jurisprudence up to this point, because of the role of predictive judgment in assessing circumvention risks. But the critics also ignore the way that *Buckley* defined the bounds of First Amendment review in the campaign finance context. When the *Buckley* Court set a lower standard for the review of contribution limits than for expenditure limits, it decided on a way to settle the boundaries between two equally valid but competing frames for campaign finance law: the room needed by the political branches to effectively regulate the political process, and the special solicitude for political speech required by

see also id. at 30 (“If there is a case for deference to the legislature on matters of campaign finance, it is not found in *McConnell*.”); Hasen, *supra* note 9, at 33 (“The Court . . . has . . . failed to meaningfully balance or closely examine new campaign finance laws for self-dealing. Indeed, in *McConnell*, the Court in the joint majority opinion appears to abdicate its role in this regard” (footnotes omitted)); Hasen, *supra* note 9, at 34 (“Thus far, the Court has given only lip service to the requirement that it balance competing interests and police campaign finance measures for legislative self-dealing. Had the Court engaged in such balancing and policing in *McConnell*, it might have articulated a more coherent and subtle explanation for upholding . . . the major provisions of BCRA.”); Issacharoff, *supra* note 9, at 263–64 (arguing that, although political process analysis is a viable approach to review of campaign finance laws, the *McConnell* Court fails to apply it).

165. *See, e.g.*, BeVier, *supra* note 11, at 144–45 (arguing that the *McConnell* majority's deference to Congress is inappropriate because of the First Amendment context).

the First Amendment.¹⁶⁶ *Buckley* settled this boundary by deciding that the judicial scrutiny required by the First Amendment should be apportioned according to the contribution/expenditure distinction.¹⁶⁷

The *Buckley* framework has inspired widespread dissatisfaction, but it has remained remarkably stable over time.¹⁶⁸ This likely reflects the inevitably unsatisfying nature of the compromises that must be struck in campaign finance. Although scholars have amply documented *Buckley*'s logical inconsistencies,¹⁶⁹ some such inconsistencies seem inevitable given that "[c]ampaign finance law is a compromise in terms of both law and democratic values," and can do no more than seek a pragmatic balance between those values.¹⁷⁰ In the absence of a comprehensive overhaul of campaign finance jurisprudence, the contribution/expenditure distinction remains the authoritative settlement of the question of how First Amendment concerns should be addressed within the campaign finance system. Because anti-circumvention measures are clearly linked to base contribution limits and a lower standard of scrutiny, they have a well-defined place in *Buckley*'s framework.

166. See Issacharoff, *supra* note 9, at 260–61 (“The difficulty comes with drawing the line between the inherently expressive quality of participation in the political process and the need to permit coherent regulation of the political process.”); Kang, *supra* note 114, at 247 (“Campaign finance law is a compromise in terms of both law and democratic values. . . . It expresses tension between unease about government restriction of speech on one hand and concern about the influence of economic power on the other hand. . . . [C]ampaign finance law as a whole, over the course of many cases, arguably sought pragmatic balance between these legal and democratic values.”); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 45 (2012) (“The decision in *Buckley* that expenditure limits could not be constitutionally justified by the government interest in preventing corruption, while permitting regulation of contributions, was as much a pragmatic judgment as anything else. The Court balanced countervailing free speech and equality interests in campaign finance law by allowing regulation of contributions and disallowing expenditures, despite their similarities in terms of the relevant considerations.”).

167. See Briffault, *supra* note 38, at 905 (“The contribution/expenditure distinction is not irrational. Indeed, it can be seen as a plausible compromise that recognizes the First Amendment value of campaign money while still enabling governments to address some of the most problematic features of the private-money-based campaign finance system.”).

168. See Marc E. Elias & Jonathan S. Berkon, *After McCutcheon*, 127 HARV. L. REV. FORUM 373, 373 (2014) (“Observers have long predicted that *Buckley* would fall, but the decision looks stronger today than it has in years.”).

169. See, e.g., Briffault, *supra* note 38, at 892–925 (comprehensively documenting the inconsistencies in campaign finance doctrine).

170. See Kang, *supra* note 114, at 247; Kang, *supra* note 166.

CONCLUSION

The anti-circumvention rationale has thus far received little attention from scholars and has rarely been discussed by the Supreme Court, despite its recurring role in campaign finance jurisprudence. This Note has aimed to help remedy this inattention by clarifying the evidentiary standards appropriate to evaluating campaign finance laws defended on anti-circumvention grounds. There are several different approaches that courts may take, but the one that is most consistent with the *Buckley* framework is a lenient standard of review, in line with cases such as *Colorado II* and *McConnell*. The optimal approach includes deference to congressional political judgments about the likelihood of future circumvention, but complements it with careful scrutiny of the legislative process for signs of self-dealing. This standard is justified by the anticipatory nature of circumvention arguments, and by the fact that the purpose of anti-circumvention measures is to target precisely those behaviors that are most likely to elude the grasp of more narrowly tailored laws. The anti-circumvention rationale thus understood is deeply rooted in campaign finance jurisprudence because of the role it has played in justifying base contribution limits, which remain the foundation of the regulatory system.

The argument of this Note stays within the bounds of the framework created by *Buckley*, which scholars and reform advocates on both sides of the political spectrum have long wished to escape. Nonetheless, the awkward compromise reflected in *Buckley*'s categorical distinction remains surprisingly stable for the time being; and in the near future, circumvention is bound to play a more important role within the confines of existing doctrine. As the anticorruption interest narrows, the weight that anti-circumvention doctrine must bear increases. Only time will tell whether prior reform efforts such as BCRA can be supported by that weight, given the Court's increasingly skeptical approach to the review of campaign finance laws.

