Book Review

Buckley Brigade to the Rescue: Campaign Finance Reform

BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM. REPORT OF THE TWENTIETH CENTURY FUND WORKING GROUP ON CAMPAIGN FINANCE LITIGATION, drafted by E. Joshua Rosenkranz. New York, New York: The Century Foundation Press, 1998. Pp. xi; 155.[1]

Reviewed by Phil Neisel

BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM (the Report) was drafted by E. Joshua Rosenkranz, and documents discussions of the Twentieth Century Fund's Working Group on Campaign Finance Litigation (the Working Group or the *Buckley* Brigade). The 13 member Working Group consists of practicing lawyers, legal scholars and strategists with recognized expertise in constitutional law.[2] And although the topic tends toward technical legal arguments, the Working Group peps things up with clear examples. They also endear themselves to the reader by referring to themselves as the "*Buckley* Brigade."

For anyone legally or politically inclined, this report offers a practical and insightful discussion of how to reduce or remove the damaging effects of

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1. TWENTIETH CENTURY FUND WORKING GROUP ON CAMPAIGN FINANCE LITIGATION, *BUCKLEY* STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM, REPORT OF THE TWENTIETH CENTURY FUND WORKING GROUP ON CAMPAIGN FINANCE LITIGATION (1998) [hereinafter WORKING GROUP].

2. WORKING GROUP at 12. The Working Group members are: Vincent Blasi, Corliss Lamont Professor of Civil Liberties, Columbia Law School; John Bonifaz, Executive Director, National Voting Rights Institute; Edward B. Foley, professor of law, Ohio State University; Roland S. Homet, Jr., lawyer and policy analyst; Milton S. Gwirtzman, lawyer; Pamela Karlan, professor of law, University of Virginia; Daniel Ortiz, John Allan Love Professor of Law, University of Virginia; Jamin B. Raskin, professor of law, Washington College of Law, American University; E. Joshua Rosenkranz, Executive Director, Brennan Center for Justice, New York University School of Law; Andrew L. Shapiro, fellow, Center for Internet and Society, Harvard Law School; Roger M. Witten, partner, Wilmer, Cutler & Pickering; Fredric D. Woocher, partner, Strumwasser & Woocher; and David E. Wood, general counsel to the State Public Interest Research Groups and Fund for Public Interest Research [hereinafter Working Group].

Buckley v. Valeo[3] - the 1976 Supreme Court ruling that invalidated the campaign spending cap provisions of the Federal Election Campaign Act of 1971[4] (FECA). The Report also discusses the history of *Buckley*, and why it must be overturned in order to effect meaningful campaign finance reform. But the meat of the Report recommends a strategic plan to overturn *Buckley* that involves attacking the logic of *Buckley*, developing strong governmental interests to justify reform legislation, and cultivating popular support for reform.

I. What's Wrong

The first chapter describes the bleak reality of our current political landscape. Outrageously high campaign expenditures have become the determining success factor in federal elections. In 1996, the total cost of federal elections was in excess of $2 billion dollars (double the previous record). In 1994, the average House incumbent spent $945,000 on their reelection, while Senate incumbents spent about $4.6 million.[5]

Incumbency greatly enhances a politician's fund-raising ability, and thus, their chances of being reelected. Although the Report is stingy on Senate data, the proffered figures on our House of Representatives is scary enough: In 1996, 89% of all House winners outspent their opponents, and no House winner spent less than $100,000; Seventeen house members ran unopposed; 111 House members faced opponents that spent less than $25,000 (incumbents winning all races); another 182 House members faced opponents that had less than half the incumbent's resources (178 or 98% of the incumbents were victorious). All this adds up to a 1996 reelection rate of 95% - lower turnover than that of the politburo in Soviet days.[6]

As a result, politicians devote disturbingly large amounts of their time to fund-raising, when they could be addressing constituent concerns. Further, given the necessity of raising substantial campaign funds, our current campaign system promotes the appearance of corruption. Only 8% of the voter population make any political contribution at all, and almost half of all contributions are made by the richest 10% of our population. In three separate polls, three-quarters of all respondents reported that "[s]pecial interest groups have too much influence over elected officials," and that "[o]ur present system of government is democratic in name only. In fact, special interests run things."[7]

The Working Group laments that this mad dash for money has taken the political process away from the public, and put it into the hands of a moneyed few. The result, they say, is increasing voter cynicism and voter turnout that is at a seventy-year low.[8] Indeed, the polls cited above are a good indication of voter cynicism.

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3. 424 U.S. 1 (1976) (*per curiam*).
4. FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. § 431 *et seq.* and 26 U.S.C. § 9001 *et seq.* [Internal Revenue Code]).
5. WORKING GROUP, *supra* note 1, at 15.
6. *Id.* at 16.
7. *Id.*
8. *Id.* at 17.

However, the Report implies that campaign finance reform would improve voter participation.[9] This may be giving our electorate too much credit. Because many factors affect turnout, one has to wonder whether voter participation would improve at all after reforms are made. The Working Group understands this concern, and as discussed more fully in chapter 6, they encourage research that may support their assertion. Even without the empirical data, it is hard to imagine that fundraising's influence on our politicians could further democratic goals. And allowing the non-moneyed voice a chance at the democratic microphone is a worthy goal, even if it doesn't significantly improve voter turnout.

Next, the Report launches into a discussion of how much responsibility *Buckley* bears for these problems, and how the current Supreme Court justices might decide the case.[10] At this point the Report's target audience becomes clear - the legal and political communities interested in campaign finance reform.[11] Most of these folks are already familiar with *Buckley* and FECA. But for the campaign finance reform novice, it may be helpful to know a little about the *Buckley* case, and how it affected FECA. So we will fast forward to the next chapter, which has a nice description of these issues.

II. *Buckley*'s Origins

FECA was passed by Congress in 1974 in reaction to shocking revelations about Nixon's fundraising tactics. One wealthy contributor had given Nixon $2 million dollars for his reelection campaign. Another 142 contributions to Nixon exceeded $50,000 each.[12] Congress was in a hurry to pass a statute addressing their concerns, so they rushed FECA through the House and Senate without accumulating much of a congressional record to support the need for reform.[13] FECA attempted to reform the campaign process by creating contribution and spending caps. The contribution caps:

- limited the amount individuals could contribute to a particular candidate to $1,000;
- limited the amount Political Action Committees (PACs) could contribute to a particular candidate to $5,000;
- limited the amount that could be contributed to national committees of political parties - $20,000 per year for individuals and $15,000 per year for PACs; and
- provided an absolute $25,000 cap on the amount any individual could contribute to a candidate, PAC or national party.

FECA's spending caps:

- limited the amount of money a campaign could spend:
- $10 million for presidential primaries and $20 million for the general elections,

9. *Id.*
10. *Id.*
11. WORKING GROUP, *supra* note 1, at 12.
12. *Id.* at 23.
13. *Id.* at 25.

- For Senators, a variable spending cap of 8 cents per person of voting age in their district for primaries and 12 cents for the general election,
- House representatives were limited to $70,000 for a primary election and $70,000 for the general election;
- limited the amount an individual could spend on his own campaign:
- $50,000 for presidential candidates
- $35,000 for Senate candidates
- $25,000 for House candidates; and
- limited the amount that an individual could spend (independently of the campaign or national party) in support of a candidate to $1,000.

FECA also established a system for public funding of presidential campaigns. Candidates that chose to receive such funds would have to voluntarily comply with certain spending caps.[14]

Parties in opposition to FECA were concerned that they might have to comply with the statute in the upcoming 1976 elections. So they sought and obtained from Congress the permission to run a test case through the courts before the law took effect. The result is that the constitutionality of FECA was tried all the way to the Supreme Court on hypothetical assertions, and the statute itself had little in the way of documented findings of fact to protect itself from nullification.

The Supreme Court's 294-page opinion upheld all of FECA's contribution limits. The spending limits, however, were not so lucky. A slim majority of the court afforded spending caps greater First Amendment protection than they had given to contribution caps. The only spending limits to survive *Buckley* were those voluntary limits imposed upon presidential candidates receiving public funds.

So how does *Buckley* affect FECA's effort at campaign finance reform? It leaves a gaping hole in the statute's ability to regulate campaign financing. What remains of FECA allows rich supporters of a candidate to independently spend hundreds of thousands of dollars, if not more, in support of their chosen candidate. It also allows candidates to spend an unlimited amount of their own personal wealth on campaigns.[15] Further, with the $1,000 contribution cap in place for individuals, campaign financing has taken on a labor-intensive character. As noted above, incumbents spend inordinate amounts of their time attending fund-raisers and dinners designed to gather as many $1,000 contributions as possible.[16] The decision in *Buckley* has also chilled state initiatives at campaign finance reform.[17]

Getting back to the end of chapter one, just how might the current Supreme Court justices vote on spending caps today? The Report offers an analysis of this question that is more interesting than illuminating. Essentially, the court falls into two camps – the Thomas camp and the Stevens/Ginsburg camp.

In *Colorado Republican Federal Campaign Committee v. FEC*,[18] decided in 1996, Justices Stevens and Ginsburg joined in a dissenting opinion declaring

14. *Id.* at 24-25.
15. *Id.* at 27.
16. WORKING GROUP, *supra* note 1, at 17.
17. *Id.* at 18.
18. 116 S. Ct. 2309 (1996).

their belief that both campaign contributions *and expenditures* could be constitutionally regulated.[19] In the same opinion, Justice Thomas, not surprisingly, added his opinion that even contribution limits are an impermissible intrusion on First Amendment principles.

The other justices that may line up on Thomas' side are Rhenquist, Scalia and Kennedy. But all three of these Justices have exhibited support for contribution caps in the past (Rhenquist in *Buckley* itself), and it is likely that they would not abandon their previous positions. This leaves Justices Breyer, Souter and O'Connor – all three adhered to the centrist *Buckley* approach in *Colorado Republican.*[20] The Report wisely steers clear of any bold predictions here, but rather concludes a current *Buckley* would be too close to call. What remains a risk, however, is that revisiting *Buckley* could lead to disaster if both spending *and* contribution caps are determined to be unconstitutional violations of free speech.[21]

The Working Group sets out a compelling and pithy argument against judicial nullification of new campaign finance legislation. Inherent in any reform statute is the balancing of two weighty interests – liberty (freedom of speech) and equality (interest in promoting the equal right to participate). Because these are delicate issues, with broad impact on our democracy, these decisions are best left to the people – through state and federal legislatures. Those who regularly oppose campaign finance reform usually cloak themselves with the cape of libertarianism or conservatism, and it should be noted that their shameless pursuit of judicial activism is anything but conservative.[22]

The chances of reform may look bleak at this point, but the *Buckley* Brigade offers some hope to reform advocates. There is much more in the way of data supporting the need for reform today than there was in the 70's. Furthermore, the fact that reform is widely considered necessary is a good indication that FECA's hobbled contribution limits cannot meet the task. But legislatures enacting reforms should learn from the lessons of *Buckley*. Legislation should clearly identify the evils being addressed and the ways in which the statutes remedy those evils. The espoused values should be clearly documented and a strong factual record should be gathered in support of the statute.[23]

III. The Constitutionality of Spending Limits

When the Court revisits the constitutionality of campaign spending limits it will balance the value of protecting speech – or unrestrained campaign spending - against the asserted governmental interests in reform.[24] The Working Group devotes Chapter 3 to arguments that attack the Court's determination that spending limits are restrictions on speech that deserve strict scrutiny.

The *Buckley* Court made two critical judgments with regard to the value of protecting campaign spending that could be attacked. First, they

19. WORKING GROUP, *supra* note 1, at 19.
20. *Id.* at 21.
21. *Id.* at 19.
22. *Id.* at 28.
23. *Id.* at 29.
24. *Id.* at 31.

rejected the notion that campaign spending is more like conduct than speech. Second, they rejected the argument that capping expenditures was merely a "time, place or manner" restriction on speech. The result is that spending caps were subjected to strict scrutiny.

If the *Buckley* Court had seen campaign spending more like conduct, they could have upheld spending limits through using the *O'Brien* test.[25] *O'Brien* dealt with a statute prohibiting the burning of draft cards during the Vietnam War. In *O'Brien*, the Court held the government's substantial interest in preventing the burning of draft cards (the smooth functioning of the draft system) was unrelated to the suppression of free speech.

Although rejected by the Court, it is possible to view spending limits as similar to the prohibition in *O'Brien*. Spending limits do not affect an individual's ability to speak on an issue, nor do they discriminate against particular viewpoints. The government also has a strong interest in opening the democratic arena to all Americans, without regard to financial assets. The Working Group, however, considers this argument a non-starter because spending is so interwoven with speech in today's media that it is unlikely the Court would conclude campaign spending is "conduct with only incidental effects on speech."[26]

The *Buckley* Court also rejected the argument that spending limits are merely time, place or manner restrictions on speech. The Working Group here proposes an interesting similarity between spending limits and the regulation of decibels (a classic time, place or manner restriction.) But the main problem they identify with the analogy is that time, place or manner restrictions are required to be content neutral. Indeed, the political content of the speech would determine whether or not spending caps were applicable.[27]

After proposing and destroying the above arguments, the Working Group suggests hijacking the *Buckley* Court's logic for subjecting contribution caps to intermediate scrutiny.[28] Generally, the Court applied intermediate scrutiny to contribution limits because they felt their impact on speech was not as great limits on spending.

The first reason the Court gave was that the size of a contribution translated "only roughly" into a message. This can also be said of campaign expenditures, considering that in federal races 50% or more of all funds are spent on fund-raising. With this in mind, the "next dollar is as likely to be spent on raising the dollar after that as it is on raising consciousness."[29]

Another reason the *Buckley* Court afforded contribution caps intermediate scrutiny was that contributions were "speech by proxy." The Working Group links the "speech by proxy" argument to spending by pointing out that the more one spends on a campaign message, the more likely one is to employ all manner of image consultants and policy advisers to shape the message. In this way, the more money spent on a campaign, the less those expenditures relate directly to the views of the candidate.

The *Buckley* Brigade offers an additional argument that may compel the Court to see spending limits more like contribution limits. The *Buckley* Court

25. United States v. O'Brien, 391 U.S. 367 (1968).
26. WORKING GROUP, *supra* note 1, at 34.
27. *Id.* at 39.
28. *Id.* at 40.
29. *Id.* at 41.

felt strongly that spending limits necessarily decreased the number of issues discussed, the depth of discussion and the size of the audience reached. The Working Group points out that while this may be true theoretically, in practice "[t]here is only a finite number of 'read my lips' and Willie Horton commercials one can absorb before running out of depth and breadth and diversity of expression."[30] The reality is that the highest levels of campaign spending often serve to numb the populace with trite campaign slogans and shallow issues, and drown out opposition instead of fostering free speech. Because the marginal effect of campaign expenditures on valuable speech would appear to decrease as more is spent, the Court may be able to justify spending limits at some level.[31]

All of the above arguments have some promise, given the blurry distinction between contributions and expenditures. An excellent example of the Court's weariness in maintaining the distinction is contained in *Colorado Republican.*[32] In that case, the Court had quite a time determining whether a political party's outlays were expenditures or contributions to their candidates. The risk remains, however, that eliminating the distinction could lead to the unconstitutionality of contribution caps.[33]

IV. Governmental Interests

Even if the Supreme Court retains strict scrutiny for campaign spending limits, it is still possible to present compelling governmental interests that outweigh the free speech concerns (assuming the Court also finds the legislation narrowly tailored to fit the interests asserted). Chapter 4 of the Report assesses the strengths and weaknesses of various interests the government may put forth in favor of spending limits. The Working Group considers the most promising interests to be reducing corruption (or the appearance of corruption), enhancing the candidate pool, preserving the candidate's time and restoring public confidence in the political system.[34]

V. Reduction of Quid Pro Quo Corruption

In *Buckley*, the Court accepted the governmental interest of reducing corruption. However, the Court decided that spending limits were not necessary, in addition to contribution caps, to achieve the desired end. The Working Group thinks this argument is worth revisiting because factual support for the Court's analysis in *Buckley* was not well developed.[35] The Report analyzes the risk of corruption created by unlimited spending by campaigns, political parties and individuals.

30. *Id.* at 43.
31. *Id.*
32. 116 S. Ct. 2309 (1996).
33. WORKING GROUP, *supra* note 1, at 45.
34. *Id.* at 49.
35. *Id.* at 48.

VI. Campaigns

The idea here is that having to raise unlimited funds makes candidates beholden to cash constituencies. An all out funding race puts candidates in the position of having to go beyond the natural pool of funds that would be available to them from constituencies that happened to agree with their platform. To illustrate their point, the Brigade uses a slightly suspect analogy to a heroin addict – the first few fixes after payday come out of personal funds, but after those funds are exhausted, "dealing, prostitution, shoplifting, burglary, [and] robbery" will be employed to keep up the habit. Although the analogy is overstated, there is something to this argument. Even if candidates do not become overtly beholden to their contributors, it seems plain that politicians understand from where their contributions come. Bills that trample on the interests of purse strings do not seem likely to succeed, and in this way, our political system is corrupted.

The Working Group concludes that spending limits would reduce the chance that politicians would compromise themselves for contributions, or feel constrained by the fundraising implications of political choices.[36] This sounds reasonable. It deserves a sentence's notice, however, that spending caps may only reduce the candidate's numerical exposure to such opportunities. Assuming such corruption exists (which is easy to do despite the lack of proof), the corrupting nature of a $10,000 contribution may be enhanced when it becomes a portion of a finite campaign fund.

VII. Personal Wealth

It is hard to make the argument that allowing a candidate to spend his or her own wealth will corrupt that politician. But there are a couple of good points made by the Working Group that need to be considered. First, it is popular for wealthy candidates to "loan" their campaign money to be repaid through contributions. These loans put the self-funder at risk of corruption because contributors are literally putting money back into his or her pocket.

Furthermore, self-funders can create an unhealthy fundraising environment for their opponents. The Working Group offers an excellent example: California Senator Diane Feinstein probably would not have felt compelled to raise $14 million for her election campaign had she not opposed Michael Huffington, who spent $28 million of his own money.

VIII. Independent Expenditure Caps

Rightfully, the Brigade saves most of its ire for the *Buckley* court's contention that independent expenditures don't create political obligations. To illustrate their point, the Brigade offers the insightful example of Sam and Suzie Spender. Both Sam and Suzie want to influence their local politician. So Sam

36. *Id.* at 54.

contributes $1,001 to the politician and the contribution is accepted. Both Sam and the politician are now felons under FECA because the *Buckley* court decided it was reasonable to assume Sam had created a political debt.

Suzie, on the other hand, legally purchases $1 million worth of television advertising for the politician, echoing the politician's own ad campaign.[37] It seems too plain to discuss that Suzie's ads had more impact on politics than Sam's lousy $1,001 contribution.

The *Buckley* Court concluded that the lack of coordination between Suzie and the politician undermined the value of the contribution *and made it less corrupting*. Even if Suzie's efforts are not as helpful to the politician because of the total lack of coordination, the discounted value of such ads is still significant. More troubling to the Brigade, however, is the Court's assertion that the absence of coordination makes Suzie's expenditure less corrupting. The Brigade says the Court's view on corruption "depicts reality about as accurately as a crayoned stick figure."[38] Now, it might be better to leave the vinegar in the cupboard until after the Court upholds spending limits, but they have a point. Even if Suzie's ads are worth only 50% of cash-in-hand, it is hard to imagine a world where $500,000 wouldn't have an impact on a politician's decision making.

However, it is also well taken that the Brigade regards FECA's independent spending limit of $1,000 as "absurdly low."[39] Hopefully, though, statutes with a stronger factual record than FECA's might support spending limits at some reasonable level.

IX. Enhancing the Candidate Pool

This interest was not argued in *Buckley*. Recently, many of our top politicians have left public office because they can't "stomach the groveling." The Report lists Sam Nunn, Bill Bradley and Dick Cheney among the casualties.[40] Incumbents, say the Working Group, capitalize on fund-raising weariness by using their preferred position to accumulate a prohibitively large campaign fund to scare off opponents. If we are losing our top politicians because fundraising is so unpleasant, enhancing the candidate pool would seem to be a logical governmental interest. But is the interest compelling?

Bill Bradley's recent entrance into the 2000 presidential race casts some doubt on his inability to stomach detestable fundraising. Indeed, after enduring the Clinton scandal over this past year, it comes to mind that there are other concerns candidates may have about political life other than fundraising. The factual basis for this governmental interest seems a little too thin at this point. The Working Group perceives this lack of factual support, and calls for help in gathering data on this and other topics that may support governmental interests in chapter six.

37. *Id.* at 55.
38. *Id.* at 57.
39. WORKING GROUP, *supra* note 1, at 60.
40. *Id.* at 61.

X. Preserving Candidate's Time

Another interest not argued in *Buckley* is the government's interest in preserving the candidate's time. A few examples put things in perspective here: In 1996, the average winning Senate campaign cost $3.6 million – this means that the typical Senator raised on average over $11,500 every week for six years. In some races, the figure went as high as $6,000 per day, on average. Even the President complains that he "can't focus on a thing but the next fund-raiser."[41]

But if candidates were freed from the frenzy of fundraising, how much of the extra time would they spend on constituent issues? Given that serving in Congress was never meant to be a full time job anyway, it seems hard to tell. Although the Report does call for data collection on several issues, it does not seem to question the fact that, freed of their fundraising albatross, politicians may go golfing or take more naps. In the grand scheme though, it is still a worthy goal to eliminate this wasteful diversion of human resources. But without some evidence that the politician would divert more time to politics, saving the candidate's time may just be a version of enhancing the candidate pool, discussed above.

The Working Group believes this interest has promise because the Court has not considered it yet. But this interest seems controversial for the government to argue, because fund-raising takes so much time precisely because *Buckley* eliminated spending caps while upholding contribution limits.[42] (A conservative panel of judges may find that the sensible solution to this problem is to do away with those pesky contribution limits altogether.)

The next governmental interest discussed in the Report is restoring public confidence in our democracy. This is definitely a worthy interest the Court has entertained in past cases.[43] But in the context of campaign finance reform, it is difficult to imagine a way reform would restore faith in our democracy and not be an independent governmental interest (i.e., like reducing corruption, enhancing the candidate pool or preserving candidate time).

The Report then goes on to discuss other, less promising governmental interests that could be argued to support reform. One of those interests, the equalization of voices, has been addressed by the *Buckley* Court and flatly rejected.[44] One of the Working Group members, Ed Foley, thinks that the Report gives up on the equalization interest too quickly. In his comment to the Report, Mr. Foley states his opinion that the equalization interest will prevail as a valid governmental interest supporting campaign finance reform.[45]

XI. What and How to Overturn?

How should the Brigade attempt to fell the *Buckley* tree? Should they try to topple the precedent all at once or should they patiently chip away until

41. *Id.* at 63.
42. *Id.* at 63.
43. *Id.* at 66.
44. *Id.* at 67-71.
45. WORKING GROUP, *supra* note 1, at 143.

nothing remains? The Working Group addresses this important strategic decision in Chapter 5.

Several examples are given where the Court has toppled previous decisions in one swoop. Recent examples include: *Agostini v. Felton*,[46] (reversing a 12 year-old decision by construing the Establishment Clause to allow publicly funded special education teachers to teach on the property of religious parochial schools), *Adarand Constructors, Inc. v. Pena*,[47] (reversing their 5 year-old decision in *Metro Broadcasting Inc. v. FCC*[48] to subject affirmative action initiatives to intermediate scrutiny); and *Payne v. Tennessee*[49] (allowing juries to hear victim impact statements and reversing a position reiterated only two years earlier).

The point to be taken from these and other cases is that the Court can and will overturn constitutional precedent when given a good reason to do so. The Brigade thinks *Buckley* is a prime candidate for such a reversal. First, the way *Buckley* was rushed through the courts prevented both sides from developing a litigated factual record. Further, FECA was put on trial before it even went into effect, so all the arguments were necessarily theoretical. Twenty-plus years of experience under the hobbled FECA have provided more than enough reasons why campaign finance must progress beyond *Buckley*. Also promising is the Court's unhappiness with the contribution/spending distinction revealed in *Colorado Republican*.

Nevertheless, it will probably be more palatable for the Court to reverse *Buckley* little by little. In *Brown v. Board of Education*[50] the Court overturned a controversial precedent only after providing numerous opinions that whittled "separate but equal" down to almost nothing. The Court could also narrow *Buckley* out of existence by upholding roomier spending limits justified by well documented "mounds of evidence."

Two members of the Working Group, John Bonifaz and Jamin B. Raskin, take issue with the Brigade's temerity on the topic litigation strategy. Instead of directing litigation solely to overturning *Buckley*, they would dedicate some resources to more proactive litigation. In their separate comment to the Report, the two men detail an offensive on campaign finance reform. The plan includes: 1) constitutional challenges to private funding for public elections as violating the First and Fourteenth Amendments (the "wealth primary"); 2) using section 5 of the Voting Rights Act (VRA) of 1965 to challenge the current campaign finance system; and 3) selective use of corporate shareholder derivative suits to challenge illegal campaign contributions.

The wealth primary argument combines two lines of Supreme Court Cases – one line defining the role of state action in the election process (*Terry v. Adams*,[51] holding that exclusion from preprimary activities on basis of race is unconstitutional) and the other line giving the maxim that economic discrimination in the election process is unacceptable (*Harper v. Virginia State Board of Elections*,[52] for the proposition that poll taxes are unconstitutional).

46. 473 U.S. 402 (1985).
47. 515 U.S. 200 (1995).
48. 497 U.S. 547 (1990).
49. 501 U.S. 808 (1991).
50. 347 U.S. 483 (1954).
51. 345 U.S. 461 (1953).
52. 383 U.S. 663 (1966).

However, as implied in their comment, wealth primary litigation might have standing problems. The typical wealth primary case would involve non-wealthy voters as plaintiffs, so getting the trial court to find standing for such a theoretical claim may be difficult.

Using the VRA of 1965 builds on a previous line of cases recognizing that "vote dilution" was an injury to voting rights. "[T]he concept of vote dilution recognizes that the formal right to register and vote – even when suffrage is universal – may be rendered meaningless by the election rules and other structural conditions under which the vote is cast." The same idea could be applied to state political practices that place a "wealth barrier" between the average citizen and the political process.[53]

If successful, shareholder derivative suits would certainly cramp the ability of corporations to contribute money in the political process. But contributions are already limited under FECA. Furthermore, as Bonifaz and Raskin recognize, the typical shareholder derivative suit challenging political contributions would be claiming waste.[54] This would necessarily imply that the corporation wasn't getting a good return on their investment – i.e., that their contribution or independent expenditure did not sufficiently corrupt the politician enough to be a good deal for the corporation. If corruption is a cornerstone interest for overturning *Buckley*, then it would be dangerous to create the impression that contributions don't corrupt politicians in some way. For this reason, Bonifaz and Raskin suggest the use of shareholder derivative suits against *illegal* contributions.[55]

XII. The Strategic Campaign

To draw a net around its theories, the Report ends by setting out a practical plan for overturning *Buckley*. Most important on the list is a targeted litigation campaign. Given the capital and labor expense of litigation, however, the Brigade will need to prioritize their opportunities - intervening in the most important cases, and filing *amicus* briefs in others. Finding just the right cases to take forward will be difficult. To ensure the best possible outcome, the statute being disputed should be drafted carefully, and come with a well-documented congressional record supporting the need for the legislation. Also, the legislation could limit total contributions, facilitating the argument that the limitation should be subjected to the intermediate scrutiny of contribution limits[56] (Ed Foley also makes this suggestion in his comment to the Report[57]). Resources should also be directed to cases defending contribution limits and voluntary spending cap programs.[58]

The Brigade wants to make itself available to counsel litigants defending reform legislation, as well as to counsel legislators writing campaign finance reform statutes.[59]

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53. WORKING GROUP, *supra* note 1, at 135.
54. *Id.* at 137.
55. *Id.* at 138.
56. *Id.* at 90.
57. *Id.* at 143.
58. *Id.* at 94-95.
59. WORKING GROUP, *supra* note 1, at 99-100.

The Brigade also calls on legal scholars to continue criticizing *Buckley's* reasoning. Scholars will be useful in convincing the Court that a new turn on this issue will not lead to more confusion and dissatisfaction.

Critical to all phases of the effort will be gathering factual data on the current campaign finance system. The following is a short list of questions that could be researched:

- When more money is spent in a campaign, does this translate into more issues discussed, in more depth?
- Are contributors more likely than the average constituent to gain a venue with their politicians?
- Is there a correlation between declining voter participation and perceptions of political corruption?
- How much time do candidates spend raising campaign funds?
- Why do promising leaders decide not to run for office?

Gathering data on these and other issues related to the current political system will help legislators provide a strong factual basis for their statutes. The data will also help litigators defending reform statutes in the courts.[60]

Finally, the Brigade calls for a campaign of their own to gain academic and popular support for reform. Scholars, newspaper, radio and television commentators should be encouraged to attract attention to issues of reform through their mediums. Newspaper editorial boards will need extra coaxing, says the Report, because of their concerns that reform will prohibit newspapers from endorsing political candidates.[61] The Report, however, doesn't discuss one possible concern that the media may have about campaign finance reform. An effective limit on campaign spending would very likely have a dampening effect on advertising revenues. Maybe this isn't such a big deal, but where the pocketbook is concerned there is likely to be some coaxing to do.

XIII. Conclusion

As is clear from the Working Group's Report, removing *Buckley* as a roadblock to reform will not be an easy task. Nevertheless, campaign finance reform continues to be a controversial issue in American politics, and very few people would argue that the status quo is acceptable. Meaningful reform will continue to be blocked by *Buckley* and its progeny if nothing is done. And this Report is valuable because it offers straightforward legal arguments and a practical plan for removing "constitutional" limits on popular reform. From beginning to end, the Report reflects the common sense and expertise of the Working Group in developing a sound strategy.

As good as the Report is, though, it is still just a blueprint for success. Now its time for the *Buckley* Brigade to ride out onto the battlefield of the state and federal courts and win us the campaign finance reform we so desperately need.

60. *Id.* at 102-04.
61. *Id.* at 104-06.