WHAT IF... *BUCKLEY* WERE OVERTURNED?

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On January 30, 1976, the Supreme Court issued its historic decision in *Buckley v. Valeo*,[1] which has set the constitutional contours of debate about campaign finance reform ever since. Many of those who would like to see the campaign finance laws changed have been frustrated by the parts of *Buckley* that struck down, under the First Amendment, limits on expenditures by candidates and on independent expenditures by others. In particular, they object to the portions of *Buckley* that treat the spending of money as equivalent to speech for First Amendment purposes and to the Court's rejection of Congress' imposition of limits on the amount of money that can be spent by candidates on their own behalf and by individuals and political committees independently of any candidate. They believe that it is necessary to overrule those parts of *Buckley* in order to achieve meaningful change in the financing of elections for public office in this country.[2]

The purpose of this essay is not to debate whether *Buckley* was properly decided (although it is impossible to skirt the question entirely), nor whether it is necessary to overrule it in order

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

2. Some advocates of campaign finance reform believe that a constitutional amendment is the best way to overrule *Buckley*. That approach raises issues about how a constitutional amendment would fit with the remainder of First Amendment jurisprudence and whether creating special rules for election expenditures is an appropriate subject for a constitutional amendment. Those issues are beyond the scope of this paper. See *The Constitution Project "Great and Extraordinary Occasions," Developing Guidelines for Constitutional Change* (The Century Foundaton Press, 1999).

to reform our political system.[3] Rather, the purpose is to explore what effect overruling *Buckley* would have on other related areas of First Amendment jurisprudence, an issue which has received almost no attention. Under our system of constitutional adjudication based on precedent, it is nearly impossible to overrule a single decision—especially one as seminal as *Buckley*—without significant ripple effects on both the precedents on which it was based and the cases that have subsequently cited it. Therefore, this analysis will consider both the cases on which *Buckley* relied to reach its conclusions, and those which have relied on *Buckley* itself.

The paper begins with a discussion of the parts of *Buckley* on which the critics have focused. It describes the Court's reasoning and the precedent on which it relied to reach its conclusions. Next it considers the impact that overturning the expenditure rulings in *Buckley* would have on those authorities. The remainder of the paper then analyzes other subject areas beyond campaign finance reform where *Buckley* has had a major impact—commercial speech, compulsory dues and fees, associational rights, fundraising activities, and non-electoral political speech—and attempts to assess what would happen in these areas if *Buckley* were overruled.

A word about methodology. Our principal means of locating the areas in which *Buckley* has played a significant role was to examine the cases citing the relevant portions of *Buckley*. Since *Buckley* is long and is frequently cited, we limited our search to decisions of the United States Supreme Court, the federal Courts of Appeals, and the highest courts of the twelve largest states. In addition, while writing this essay, I realized that there are a number of cases that do not cite *Buckley* itself but where *Buckley*'s influence is nevertheless clear. The reason is that *Buckley* is often the first in a series of cases, and once the law advances beyond a certain point, more recent decisions are cited as stronger precedents than *Buckley*. Given this phenomenon of the non-citation of *Buckley*, there may well be other areas of the law where *Buckley* has had a significant influence; those areas, however, could only be located by shepardizing not only *Buckley*, but all its progeny, a task beyond our limited resources. However, where we were aware of significant cases, or lines of

3. Clearly some reforms can go forward with *Buckley* intact. An Act to Reform Campaign Finance, 117 Maine Legislature, Initiated Bill 5, LD 1823 (Nov. 5, 1996) (adding Chapter 4, Title 21, "The Maine Clear Election Act").

cases[4] which built on *Buckley* without citing it, we have included those as well.

I. THE BUCKLEY DECISION.

After a series of campaign scandals in the 1972 election, including but not limited to the fundraising that contributed to Watergate, Congress took decisive action. It saw the problem in two parts: first, some people were making large contributions to candidates and parties, which at least gave the appearance of buying favors; second, races were considered to be too expensive to enable ordinary citizens to run for office, and some people, with their own money or with access to money from others, were thought to have too much influence, regardless of the source of the money or whether it was raised in large or small amounts. Thus, the Federal Election Campaign Act of 1974 ("FECA")[5] set limits on how much money an individual or a political action committee ("PAC") could give to a candidate and how much PACs, individuals, and candidates could spend with lawfully raised money. FECA had a number of other features, but for these purposes, only its expenditure and contributions limitations are relevant.

The lengthy opinion for the Court in *Buckley* was not signed by any single Justice, almost certainly because the decision was a joint product. In order to have the rules established for the 1976 elections as early as possible, the case was considered on an expedited basis, with the decision issued less than three months after it was argued. The only dissenter on the expenditure issues was Justice White; however, Chief Justice Burger also dissented in part, because he would have invalidated more of the statute than the majority, also on First Amendment grounds.

When campaign finance reformers speak of overruling *Buckley*, they do not mean the entire opinion. Indeed, they very much like the part which upholds the authority of Congress to control the size of contributions that individuals can make to candidates ($1,000 per election) and that PACs can make to candidates ($5,000 per election). And they also approve of the ruling that it is constitutional to condition receipt of federal benefits on an agreement to abide by reasonable conditions relating to campaign spending.

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4. See notes 21-30.
5. 2 U.S.C. § 431 et seq. (1994).

Rather, their objections are focused on the limits on expenditures, which in turn have several elements: (1) the overall amount that a candidate may spend from funds lawfully raised, principally from others; (2) the amount that an individual may spend on his or her own candidacy; and (3) the amount that an individual or a PAC may spend in support of, or opposition to, a candidate, but independent of that candidate or the candidate's opponent.[6]

All of the Court's holdings have a common thread and a common rationale: in the context of political elections in the last quarter of the twentieth century, "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[7] This conclusion is often referred to as the notion that "spending money is the equivalent of speech in a political context for purposes of the First Amendment," in contrast to treating campaign spending as pure conduct which can be regulated with less judicial scrutiny.

In analyzing the issues, the Court relied on two related sets of rights—the right of the speaker who wishes to make his or her opinions heard, and the rights of individuals to associate together in order to make a greater impact than is possible if each person proceeded on his or her own. The Court saw these as two mutually reenforcing rights, especially in the context of political expression regarding elections, which the Court recognized as one of the central purposes animating the First Amendment.[8]

The Court's rationale proceeded roughly as follows. In *United States v. O'Brien*,[9] the Court upheld a statute forbidding the burning of draft cards. The law was challenged on the ground that draft card burning was symbolic speech and hence entitled to the highest form of First Amendment protection. However, the *O'Brien* Court held that the non-speech reasons to support a ban on draft card burning—the law was needed to carry out the Selective Service registration system in effect at

6. In describing the statutory scheme, the *Buckley* Court did not specify the amounts of the ceilings except for item 3, the limit of $1,000 on independent expenditures, but instead referred the reader to the statutory appendix. 424 U.S. at 13. That omission might have been due to the complexity of some of the limits, but it is also consistent with the Court's overall approach that it was not quarreling with Congress over a particular limit, but instead disapproved of any government-established ceilings.

7. Id. at 19.

8. Id. at 14.

9. 391 U.S. 367 (1968).

that time—sufficed to permit any incidental infringement on speech. To justify that result, the Court in *O'Brien* found that the law was not intended to restrain speech, but was simply regulating conduct, which raised far fewer First Amendment concerns.

The *Buckley* Court, however, rejected the analogy to *O'Brien*, even though it recognized that "[s]ome forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two."[10] The Court then went on to observe that it "has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment."[11]

In support of that proposition, the Court cited several cases. First, it relied on *Bigelow v. Virginia*,[12] in which the Court set aside a conviction for publishing a paid ad for abortion services to be performed in New York, where they were legal, in a newspaper in Virginia where (prior to *Roe v. Wade*) abortions were illegal. The Court also relied on *New York Times Co. v. Sullivan*,[13] in which the First Amendment was held to be a defense to a charge of libel against the *New York Times*, which had been paid to publish an advertisement critical of the racist conduct of certain Alabama officials. What is important in both of these cases for purposes of *Buckley* is that the First Amendment was seen as a shield, not just for the person whose ideas were being published, but also for the person who received the money which the principal speaker paid to have the message delivered. In addition, the Court cited *Cox v. Louisiana*,[14] which contrasted picketing with both newspaper comments and a telegram expressing a point of view, noting that the latter involved "a pure form of expression" even though sending a telegram obviously involved an expenditure of money.[15]

The Court further distinguished the *O'Brien* line of cases on the ground that the government interest there was not in "suppressing communication."[16] In contrast, the goal of limiting

10. 424 U.S. at 16.
11. Id.
12. 421 U.S. 809 (1975).
13. 376 U.S. 254 (1964).
14. *Buckley*, 379 U.S. 559 (1965).
15. 424 U.S. at 16.
16. Id. at 17

campaign expenditures is to equalize the relative abilities of individuals to affect the outcome of elections by capping the amounts that could be spent. As the Court observed, the FECA restrictions being challenged "impose[d] direct quantity restrictions on political communication[s] and association[s]," unlike *O'Brien*, which allowed the draft card burner to express his position as often he wanted as long as he did not destroy his draft card in doing so.[17] The Court further noted that the challenged provisions "reduce[d] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[18] Although *O'Brien* can be criticized for its conclusions that protection of the draft card served military preparedness functions and that the law was not solely intended to suppress speech, those rationales do distinguish the law from FECA, which was defended on the ground that too much electoral speech was itself an evil that could be attacked by the government. Accordingly, because the Court viewed FECA as imposing output restrictions on political speech, it concluded that the highest form of First Amendment scrutiny would be required to sustain the expenditure ceilings.[19]

Having settled on the standard of review, the Court first examined the $1,000 limit on expenditures by individuals, which it found prevented almost all independent communications, and then the ceilings on total spending by a candidate. Although the latter were much higher than the limits for individuals, the Court found that they still substantially restricted what candidates could spend. The Court also observed that the restrictions on overall candidate spending limited the rights of association of other would-be contributors by putting a ceiling on total monetary contributions, thereby effectively precluding some individuals from associating with the candidate of their choice by providing financial support. The Court also noted that these limits

17. Id. at 18.

18. Id. at 19.

19. In a subsequent portion of the opinion, the Court distinguished between contributions made to a candidate, on the one hand, and expenditures either made by a candidate or made by an individual or PAC independently of any candidate, on the other. Id. at 21-23. The Court found that contributions are entitled to less First Amendment protection, in part because the act of giving money is less of an expression of one's views than is, for example, taking out an advertisement to support a candidate. The distinction between contributions and expenditures can be criticized either as insufficiently protective of the right to contribute, or as too protective of the right to spend, because the medium of communication in both cases can be seen as spending money. This essay assumes the continued viability of that distinction unless the expenditure ceilings rulings in *Buckley* are overturned.

still allowed other individuals to donate as much of their time as they chose, thereby discriminating between those who had time to devote to political work and those who had money.

The Court further observed that the $1,000 limitation on independent expenditures by groups such as PACs "precludes most associations from effectively amplifying the voices of their adherents, the original basis for the recognition of the First Amendment protection of freedom of association."[20] In support of that proposition, the Court relied on cases such as *NAACP v. Alabama*,[21] in which the State sought to obtain from the NAACP a list of the names of its financial supporters, over an objection based on the First Amendment right of association. Because the Court concluded that the right to associate extended to those who do so by making contributions, the Court rejected the State's efforts to obtain that information.[22] The Court concluded its general discussion of expenditure limits by stating that FECA's expenditure rules "impose[d] significantly more severe restrictions on protected freedoms of political expression and association than do [the] limitations on financial contributions."[23]

With respect to the different types of limitations, the Court first upheld the $1,000 limit on contributions to candidates because it did not "undermine to any material degree the potential for robust and effective discussion of candidates, and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties."[24] The adverse impact of this ruling on the level of political debate was diminished by the Court's next holding, striking down expenditure limits because they "impose[d] direct and substantial restraints on the quantity of political speech," most dramatically the $1,000 limitation for independent expenditures by individuals and groups.[25] The Court found that "a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups and candidates" by prohibiting individuals "from voicing their views . . . through means that entail aggregate expenditures of more than $1,000 during a calendar year."[26]

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20. Id. at 22.

21. 357 U.S. 449 (1958).

22. The Court also cited *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and *NAACP v. Button*, 371 U.S. 415 (1963). Although both cases focused on rights of association, they were in a context where money was not a major concern.

23. *Buckley*, 424 U.S. at 23.

24. Id. at 29.

25. Id. at 39.

26. Id. at 40. At that point the Court noted that the cost of a quarter page adver-

In a subsequent part of its opinion, the Court dealt with the asserted governmental interest in equalizing the ability of candidates to make their views known. In rejecting that rationale as a justification for a restriction on speech, the Court observed that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment," citing *New York Times v. Sullivan*[27] and cases cited by it.[28] The Court also cited *Mills v. Alabama*,[29] and *Miami Herald Publishing Co. v. Tornillo*,[30] both of which struck down burdens on First Amendment rights, although, unlike *Bigelow* and *Sullivan*, neither involved situations in which the spending of money was a significant aspect of the speech being protected. In *Mills*, the restriction forbade the publication of editorials, but only on the day of an election, and in *Tornillo* the publisher was free to write whatever it chose, but it was required to provide an opportunity for a reply if the newspaper criticized a candidate for elected office. Since the Court in *Buckley* saw the expenditure limitations imposed by Congress in FECA to be more sweeping than those it had set aside in *Mills* and *Tornillo*, it had no choice but to strike them down also.

Finally, the Court rejected efforts to limit spending by candidates from their personal or family resources, observing that a candidate, no less than others, has the right to "vigorously and tirelessly . . . advocate his own election."[31] Indeed, the Court noted, the fact that candidates use their own money *lessens* the problem of corruption which was identified as the rationale for sustaining limits on contributions by others.[32] In the end, the Court concluded that the primary purpose of the restriction on personal spending was to limit the total spending in elections, but this, the Court said, could not be done:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and can-

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tisement in a major metropolitan daily exceeded $1,000. Id.

27. 376 U.S. at 266, 269.
28. *Buckley*, 424 U.S. at 48-49.
29. 384 U.S. 214 (1966).
30. 418 U.S. 241 (1974).
31. *Buckley*, 424 U.S. at 52.
32. Id. at 53, 55.

> didates and collectively as associations and political committees—who must retain the control over the quantity and range of debate on public issues in a political campaign.[33]

Justice White's dissent is noteworthy principally for what it did not say on these issues. He began with a general discussion of the power of Congress to regulate elections, which was not in dispute in *Buckley*, and then considered the First Amendment issues for nearly seven pages. During that discussion, he did not cite a single case to support his position, nor did he specifically indicate his disagreement with the holdings of the cases on which the majority relied or on their applicability to this issue. For those reasons, it is difficult to determine the precise basis for Justice White's disagreement, beyond his clearly expressed view that the judgments of Congress and the President on these issues should be respected.[34]

What does seem reasonably clear from Justice White's dissent is that he is much more willing to tolerate regulation of political campaigns, where the legislature has identified dangers to the political process, "[a]t least so long as the ceiling placed upon the candidates is not plainly too low. . . ."[35] It is also apparent that Justice White is far more willing to accept rationales based on "the integrity of federal campaigns,"[36] and that, for him, the related concern arising from the perception that money can buy elections is sufficient to trump whatever First Amendment considerations stand in the way.[37]

II. POSSIBLE BASES FOR OVERRULING BUCKLEY

In my view, the *Buckley* majority has the better of the constitutional argument, but that is not the focus of the remainder of this inquiry. Rather, taking the majority opinion as a given, the question is, what would happen to First Amendment jurisprudence if the Court overturned the expenditure rulings in *Buckley*? Before examining the impact of such a ruling on both the cases on which *Buckley* relied and the cases that have followed

33. Id. at 57.

34. Perhaps the press of time explains why Justice White and the majority did not specifically respond to the authorities cited by the other, although, by and large, the majority dealt with the substance of Justice White's objections in its opinion.

35. Id. at 265-66.

36. Id. at 266.

37. Id.

it, it is necessary to consider the various grounds on which *Buckley* might be overruled or narrowed.

Among political activists—if not academics—who call for overruling *Buckley*, the most popular cry is for reversing the conclusion that spending money to run for office is speech under the First Amendment. Such a ruling would permit government to regulate the total amount that a candidate could spend, the amount of an individual's personal wealth that could be used in his or her own race, and the amount that an individual or a group could spend on independent expenditures. With those rulings, the government could control both contributions and expenditures and might well set much lower limits on contributions than the courts have been willing to uphold.[38]

A second possibility is that the Court might agree that spending money in an election contest is speech, but conclude that, because the regulation is content-neutral, it should be treated like an economic regulation, subject to more limited scrutiny, as in *Glickman v. Wileman Bros. & Elliott, Inc.*,[39] and *Turner Broadcasting System Inc. v. FCC*.[40] But the "market" in elections is quite different from that in agricultural commodities or cable television, especially when the focus is on independent expenditures and direct speech by candidates. It seems highly unlikely that the Court would continue to equate spending money with speech in an election context, and yet, at the same time, treat elections as markets, subject to economic regulation not limited by the First Amendment. Moreover, since spending limits apply only to election-related speech, it is difficult to imagine that the Court would say that the rules are not based on the content of the speech.[41] Thus, as long as spending limits are imposed only on speech in connection with elections, it seems extremely unlikely that the Court would take this route rather than a more direct approach to overruling *Buckley*. Therefore, this essay will not consider what would happen to other First Amendment cases if this second rationale were adopted.

A third way the result in *Buckley* might be overturned is if the Court found the reasons in support of the rules—either those

38. See, e.g., *National Black Police Ass'n v. District of Columbia Bd. of Elections*, 924 F. Supp. 270 (D.D.C. 1996).

39. 117 S. Ct. 2130 (1997).

40. 117 S. Ct. 1174 (1997).

41. Although these rules are content based, because they apply only to speech (spending) involving elections, they are not viewpoint based since they do not single out certain parties or candidates for disfavored treatment.

argued in *Buckley* or other rationales—to be sufficiently compelling to satisfy the strict scrutiny demands of the First Amendment. Using this logic, the following corruption argument (or something like it) might succeed: candidates can be corrupted by independent expenditures, as well as by direct contributions; candidates who must raise large amounts of money, even in amounts of no more than $1,000, are corrupted by the process and only spending limits can prevent that from happening; accretions of individual wealth used by a candidate on his or her own election is corrupting of the system because such wealth is unrelated to broad political support for the ideas of its fiscal backer; and at some level, spending money is no longer a communication function but rather a reflection of economic power, which government may regulate. The bottom line is that the government, at some point, can decide that enough spending (speech) is enough in races for elected offices.

Several points are significant regarding these possible rationales for allowing the government to place some limits on electoral spending. First, the impact on other cases would depend in large part on which rationale was accepted. Second, to the extent that these rationales recognize that spending money is a protected activity, but only up to a point, they ask the Court to draw lines, which it has been very reluctant to do (rightly in my judgment), although it did approve the lines drawn by Congress for contributions. Third, some rationales allow regulation of total expenditures by a candidate, but not independent expenditures, while the reverse is true for others. Not only would that affect the impact on other cases, but it also suggests that the Court is unlikely to start tinkering with parts of the *Buckley* ruling, while leaving others in place.

Given the multiple possible grounds available for limiting parts of *Buckley* or overruling it on a narrow basis, it would take an essay several times the length of this one to cover all of the options. Therefore, this essay will assume that any overruling will be on one of two grounds: (1) that spending money should not be treated as speech in an election context, which is the rationale advanced by the most vocal political proponents of overruling *Buckley* and is the broadest ground for doing so, or (2) that at some point the government *may* step in to set overall spending limits in order to cleanse the election process. Because the focus of this essay is on the impact of overruling *Buckley* on other cases, the discussion is organized around those cases, with

either or both of the rationales brought in, depending on which is applicable.

III. IMPACT ON OTHER CASES

The decisions on which *Buckley* relied to reach its conclusions regarding the constitutionality of expenditure limitations fall into two categories: (a) those that lead to the conclusion that campaign expenditures should be treated as speech rather than conduct; and (b) those that help assess whether the governmental interests in favor of expenditure limitations are sufficient to sustain the rules under this heightened scrutiny.

A. PRE-*BUCKLEY* DECISIONS

The two principal cases cited by the Court were *Bigelow v. Virginia*,[42] (decided just seven months before *Buckley*), and *New York Times Co. v. Sullivan*.[43] If *Buckley* were overturned on the theory that campaign expenditures are conduct and not speech for First Amendment purposes, these decisions would be in serious jeopardy, or would at least require a different rationale to sustain them.[44]

In both *Bigelow* and *Sullivan*, the defendant had printed an ad in a newspaper which was alleged to be illegal (*Bigelow*) or libelous (*Sullivan*). In neither case was the defendant the primary speaker, but simply the entity that had accepted money to run an ad that was prepared by another person, either with the goal of selling a service (*Bigelow*), or expressing an opinion (*Sullivan*). In contrast, the speakers covered by *Buckley*, whose expenditures, and hence whose speech, would be limited, are the very persons who seek to have their messages widely disseminated, either about their own candidacies, or those of persons whom they support or oppose. In all three cases, of course, the dissemination costs money. Therefore, if *Buckley* were reversed on the theory that spending money takes speech outside of the First Amendment, advertisements taken out in all forms of media would be treated principally as conduct involving the receipt of money, and the speech in *Bigelow* and *Sullivan* would be unprotected, at least under this rationale.

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42. 421 U.S. 809 (1975).

43. 376 U.S. 254 (1964).

44. That result might also produce an expansion of *O'Brien*, a case with which most supporters of First Amendment rights are uncomfortable.

Put another way, the fact that a publisher receives money, either for an advertisement or for the sale of its product, has never been seen to make the First Amendment inapplicable. But if the expenditure limits in *Buckley* were overturned on the theory that paying for speech is conduct not entitled to First Amendment protection, it is doubtful that that proposition would survive—at least for advertisements. Thus, although all of the primary speakers would still be able to receive First Amendment protection in stating their views, if they sought to amplify their messages, which inevitably costs money, that activity would probably not be entitled to First Amendment protection if *Buckley* were overruled.

Whether the same fate would befall other parts of a newspaper or other publication is less clear. For example, to the extent that newspapers provide commercial information, such as stock market quotes or racing results, they could be seen as businesses that sell information, with those items given reduced protection, like formal advertisements. But even if the Court ruled that "money is not speech" under the First Amendment, the decision to sell a newspaper or a book, rather than give it away, would not deprive it of its First Amendment protections.

The second group of cases relied on in setting aside the expenditure limits were the right of association cases, principally *NAACP v. Alabama*,[45] in which the Court used that branch of First Amendment jurisprudence to prevent the state from obtaining the names of the NAACP's financial supporters. Again, if collecting money is simply conduct, the names of those contributors would no longer be protected by the First Amendment. However, other supporters, who did not give money, would not have their identities disclosed, at least on this theory. Indeed, some of the disclosures might not involve contributors, but persons with whom the NAACP did business, who might still prefer not to have their association made public. Yet the identities of everyone who made a contribution or did business with any nonprofit would be subject to disclosure if *Buckley* were overturned, unless some other provision of the Constitution came to the rescue.

The other category of associational cases is exemplified by *NAACP v. Button*,[46] a case also cited by the *Buckley* majority. In *Button*, the State of Virginia had regulated the practice of law in

45. 357 U.S. 449 (1958).
46. 371 U.S. 415 (1963).

a manner that prevented the NAACP from gaining access to the courts to advance its political and social goals of fostering integration. However, the Court held that, in doing so, Virginia violated the NAACP's First Amendment right of association. Although *Button* did not involve economic rights, follow-up cases, such as *United Mine Workers v. Illinois Bar Ass'n*,[47] did. There the right of association was used to enable the mineworkers union to help its members bring workers' compensation cases, despite State Bar rules forbidding such assistance. That holding would be in serious jeopardy if seeking to recover money damages for personal injuries sustained by members of the union, as in *United Mine Workers*, like seeking to spend money in an election on behalf of a group that wished to support or oppose a candidate, were entitled to diminished First Amendment protection.

The second part of the *Buckley* expenditure analysis—finding that the claimed state interests were insufficient to override the First Amendment—was based in large part on FECA and its operation. As noted above, the Court upheld the limitations set by Congress on the amount that one person could give to a candidate in an election in order to prevent corruption or the appearance of it. But when the same anti-corruption rationale was used to defend the expenditure limitations, the Court reasoned that contribution limits, not spending caps, were the best way to control corruption, thereby undermining the asserted interest in limiting spending by candidates.[48] Second, the Court ruled that, for those who were spending their own money, either on their own candidacy or for independent expenditures, there is no anti-corruption basis for limits in those situations since one cannot corrupt oneself with one's own money. Since it found no other compelling justification for the various spending caps, it found them to be unconstitutional.

To support its conclusions, the Court cited several cases that would also be in danger if the Court were now to accept any of the rationales offered to defend these various expenditure limits. In this part of the opinion, the Court again relied on *New York Times v. Sullivan*, principally to make the point that the First

47. 389 U.S. 217 (1967).

48. In a similar vein, the Court cited with approval the observation made by Judge Tamm in the Court of Appeals that expenditure limits would be irrational if, for example, they forbade a candidate from spending money which he had raised by collecting one dollar from every voter, since there could be no possible corrupting influence in that situation. *Buckley*, 424 U.S. at 56 n.64.

Amendment never allows the suppression of the quantity of speech, while harking back to its point on the need for money to amplify one's voice to reach a larger audience. To the extent that this aspect of *Buckley* focused on a different part of *Sullivan*, that, too, would be in jeopardy because the Court again rejected the notion that the First Amendment allows a person to state his views, but also allows the state to limit their dissemination. Again, *Sullivan* might survive because it is so firmly entrenched in our First Amendment jurisprudence, but some different analysis would be required to reach that result.

The other cases relied on in *Buckley* bore on the question of the relative severity of the expenditure restrictions in FECA. The Court saw the expenditure limits as ceilings on the total quantity of speech in an election, and it contrasted those restrictions with two cases in which it found a far less serious intrusion to be invalid, even though in neither of the cases was there a cumulative limit on the amount of speech that could be made by any one person. Thus, in *Mills v. Alabama*,[49] the limitation only applied to editorials regarding candidates on election day and was intended to prevent unfair surprises. In *Tornillo* there were no limitations on what a newspaper could say so long as it was willing to give the political candidate who was criticized an opportunity to reply, which was claimed to be necessary to enable him to defend himself. Although the Court considered both of those restrictions to be far less severe than the expenditure limits in *Buckley*—a judgment that is unlikely to be altered in the future—it struck down all of the limits as inconsistent with the First Amendment. Thus, if spending money on political speech is protected as speech, and not considered pure conduct, the only way that this part of *Buckley* could be overturned would be if the Court concluded that all of the restrictions—in *Mills*, *Tornillo* and *Buckley*—are constitutional because the interests advanced are sufficiently weighty to overcome the First Amendment. Even though the laws at issue in all three cases seek to foster democratic and fair elections, an interest of the highest order, it is highly unlikely that the Court would suddenly find that even those lofty interests outweigh the longstanding rules that any direct interference with the First Amendment activities can not be sustained.

In conclusion, it is difficult to imagine how *Bigelow*, *New York Times v. Sullivan*, *NAACP v. Alabama*, *United Mine*

49. 384 U.S. 214 (1966).

Workers v. Illinois, *Mills* or *Tornillo* could survive an overruling of *Buckley* on the issue of limiting expenditures in campaigns for elected office.

B. POST-*BUCKLEY* CASES

1. Commercial Speech

For many years prior to 1975, the generally accepted jurisprudence under the First Amendment was that commercial speech was not entitled to any protection.[50] The doctrine began to evolve in *Bigelow v. Virginia*,[51] a case which was specifically relied on in *Buckley* for the proposition that spending money for political purposes was speech under the First Amendment. Four months later, the Court completed its commercial speech revolution in *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, Inc.*[52]

In *Virginia Board of Pharmacy*, consumers successfully challenged a Virginia statute that made it unlawful to advertise the price of prescription drugs as a violation of the First Amendment. In terms of First Amendment doctrine, the outcome is striking because paid commercial speech is at the other end of the spectrum from speech regarding political elections, since commercial speech merely seeks to promote conduct which itself is not entitled to First Amendment protection. Therefore, if the money spent in *Buckley* were not considered speech, surely the money spent advertising the prices of prescriptions drugs would not be protected under the First Amendment; in that event, the Virginia law would have been judged solely under the very lenient tests applied to economic regulations. While the *Virginia Board of Pharmacy* opinion went well beyond *Buckley*, if *Buckley*'s treatment of spending as speech were reversed, the *Virginia Board of Pharmacy* decision almost certainly could not stand. The result, as the Court noted, is that consumers would be kept in the dark about the price of a product which may be essential to their health.[53]

The following year the Court decided the second in what has become a long series of commercial speech cases. In *Bates v.*

50. See *Valentine v. Chrestensen*, 316 U.S. 52 (1942).
51. 421 U.S. 809 (1975).
52. 425 U.S. 748 (1976).
53. Id. at 763-64.

State Bar of Arizona,[54] the Court set aside discipline imposed against two lawyers who ran an advertisement for their legal clinic which delivered reduced price legal services intended for middle and lower income consumers. Again, *Buckley* and *Virginia Board of Pharmacy* were central to the proposition that speech does not lose its First Amendment protection because it is in the form of paid advertising.

Over the next twenty years, the Supreme Court's commercial speech jurisprudence has been a major source of First Amendment protection for those who wish to speak and need to spend money in order to do so. In most of the cases, *Buckley* was not cited because the direct commercial speech cases such as *Virginia Board of Pharmacy* and the subsequent *Central Hudson Gas & Electric Corp v. Public Service Comm'n of N.Y.*,[55] (where the Court's four part test was established), were relied on.[56] Nonetheless, it is clear that none of the protections for commercial speech would have been possible without *Buckley*, and they would almost certainly be overturned if *Buckley's* rules on expenditure limits were reversed on the ground that spending money is not speech for the purpose of the First Amendment.[57]

2. Mandatory Spending Cases

Under various federal and state labor laws, individuals can be required to pay money to a union or other collective bargaining agent authorized to bargain on their behalf, even if they do not wish to become members of the union. Some of those who were required to pay the fees objected on the grounds that some of the money was being spent for purposes of which they disapproved—such as lobbying or other ideological activities—and that were unrelated to the collective bargaining rationale that entitled the union to charge non-members for their service.

In one such challenge, *Abood v. Detroit Board of Education*,[58] the Court concluded that unions could not use mandatory

54. 433 U.S. 350 (1977).

55. 447 U.S. 557 (1980).

56. But see *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 420 (1993) (*Buckley* cited in quote from *Virginia Bd. of Pharmacy*).

57. The commercial speech doctrine, propelled by *Buckley*, has been extended beyond advertising for traditional products and services. Thus, in *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984), the Court cited *Buckley* in setting aside an FCC regulation limiting Dial-a-Porn service except between 9:00 p.m. and 8:00 a.m. and requiring that the payment be by credit card before transmission of the message.

58. 431 U.S. 209 (1977).

payments for expenditures unrelated to collective bargaining if the person making the payment objected. In ruling that the First Amendment protected the objectors in *Abood*, the Court relied on *Buckley* for the principle that contributing to an organization for the purpose of spreading a message that the contributor supports is protected by the Constitution and that, therefore, the Constitution also gives individuals the right to object to their money being spent to send messages of which they disapprove. As subsequent cases make clear, the proper remedy is not simply to require a disclaimer, so that the objectors are not associated with the offending speech, but rather to entitle the dues-payer to a rebate of the portion of the dues used for ideological, as opposed to collective bargaining, purposes. Once again, it is clear that, without the recognition in *Buckley* that spending of money is speech for First Amendment purposes, there could have been no First Amendment challenge to compelled expenditures by collective bargaining agents such as unions.[59]

Another area in which the mandatory spending issue has arisen is in the context of state universities, which may include either a mandatory fee or a negative check-off system, under which a student must object to the fee before registration or pay it. There have been a series of cases (some successful) in which *Abood*-type objections have been raised to a check-off system, and others are currently being litigated involving mandatory fees. For example, in *Galda v. Bloustein*,[60] the negative check-off for the student Public Interest Research Group was challenged, and *Buckley* was cited as supporting the proposition that compulsory contributions for purposes for which students are ideologically opposed are as much a constitutional infringement as would be a prohibition against contributions to those groups. The Court sent the case back for further scrutiny under the heightened First Amendment standard, and the challengers' position was upheld on the second appeal.[61] Once again the Court relied on *Buckley* for the proposition that a forced expenditure of money violates the First Amendment and can only be justified

59. In some of the subsequent cases dealing with compulsory payments, *Buckley* was cited, see *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991), while in others it was not, *Keller v. State Bar of California*, 496 U.S. 1 (1990), although in *Keller* the reliance on *Buckley* principles was clear from the lower court's opinion. See *Keller v. State Bar of California*, 226 Cal. Rptr. 448 (Cal. Ct. App. 1986).

60. 686 F.2d 159 (3d Cir. 1982).

61. *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985).

by compelling state interests. Clearly, if spending money is not speech, these cases would have to be reversed.

Current challenges to mandatory spending provisions proceed on the same *Buckley* rationale. The principal difference is that the states are defending their rules on the ground that the criteria for determining which organizations receive the funding are neutral and that the money being spent furthers the educational goals of the university.[62] Again, there is no dispute about the applicability of the central proposition of *Buckley* regarding the equation of speech and the expenditure of money; the only dispute is over whether the asserted state interests are an appropriate counter-balance.[63]

In a related context, efforts by a state to enhance the voice of one speaker at the expense of another were rejected in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*.[64] The Utilities Commission there had directed the company to allow a consumer organization to include in its monthly billing statement (at no cost to the company) an insert to solicit members. The utility contended that this directive violated its First Amendment rights by requiring it to transmit a message that it opposed. The first part of the *Buckley* expenditure analysis—equating speech with money—was not at issue in *Pacific Gas*, but the rationale on which the State relied to sustain those mandatory expenditure requirements—the need to enhance the voice of those less able to speak—was explicitly rejected there as in *Buckley*. If the directive at issue in *Pacific Gas* had been sustained, and if the Utilities Commission then sought to impose the additional costs on the company, instead of the consumer

62. See *Hays County Guardian v. Supple*, 969 F.2d 111, 122-24 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993). The Supreme Court has recently agreed to hear a case in which the Seventh Circuit ruled that the use of a mandatory student activity fee to fund political organizations violated the First Amendment rights of objecting students. *Southworth v. Grebe*, 157 F.3d 1124 (7th Cir. 1998), cert. granted, 119 S. Ct. 1332 (1999).

63. The outcome of these cases may depend on the applicability of *FCC v. League of Women Voters*, 468 U.S. 364 (1984), in which the Court sustained a challenge to the ban on editorializing by non-commercial broadcasting stations that received grants from the Corporation for Public Broadcasting. The government argued that one purpose of the law was to prevent the use of taxpayers' money to promote views with which some taxpayers disagreed. However, the Court, relying on *Buckley*, observed that virtually every congressional appropriation will involve a use of public money that some taxpayer finds objectionable, and that, therefore, other governmental interests must be found to sustain that kind of a ban.

64. 475 U.S. 1 (1986).

group, the first element of *Buckley* would also have been cited to protect *Pacific Gas*.[65]

Another offshoot of *Buckley*'s equating compelled expenditures with speech arose in a somewhat unusual context in *People v. Warren*.[66] The defendant was convicted of attempted criminal possession of a weapon. He pled guilty, was fined $2,500, and was ordered to contribute an additional $2,500 to a gun control advocacy organization. The court overturned the latter portion of the sentence, citing *Buckley* for the proposition that forced political contributions could not be required.

3. Associational Rights

In the portions of its opinion discussing the rights of both political committees and individuals to make contributions to candidates, the *Buckley* Court recognized that it was dealing not only with the right of free speech, but also the right of free association: these rights are often seen as mutually reenforcing under the First Amendment. The associational aspect of *Buckley* has also been used to establish First Amendment protection in subsequent cases.

For example, *In re Primus*,[67] involved a disciplinary action brought against a lawyer who had solicited a client on behalf of the American Civil Liberties Union. The act of solicitation was recognized as being more than simply speech, but was nonetheless protected because of the associational rights recognized in *Buckley* and other cases. The importance of the First Amendment's associational aspects was also made clear in a decision rendered the same day as the *Primus* case, *Ohralik v. Ohio State Bar Ass'n*.[68] In *Ohralik*, the same type of conduct—solicitation of a client (albeit while the client was still in the hospital after an

65. Two years ago, the Supreme Court divided 5-4 on whether mandatory payments by California fruit growers could be used for advertising, when certain growers would not benefit from the advertising. *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). The majority rejected the *Abood* line of cases because there was no ideological objection to the spending, and it also found that the commercial speech doctrine was not implicated because the advertising requirement was an aspect of economic regulation, not regulation of speech. Although the dissent disagreed on both propositions, no one challenged the *Buckley* holding that spending money is an action protected by the First Amendment and that mandatory spending requirements can, in some situations, violate the First Amendment. See also *Turner*, 117 S. Ct. 1174 (1997) (coerced carriage of broadcast signals over cable television facilities upheld as economic, not speech regulation).

66. 452 N.Y.S.2d 50 (N.Y. App. Div. 1982).

67. 436 U.S. 412 (1978).

68. 436 U.S. 447.

automobile accident)—was held to be unprotected by the First Amendment, in part because there was no associational interest at stake as there was in *In re Primus*.

In *Ozonoff v. Berzak*,[69] the fact that the payment of money was involved did not preclude the application of the First Amendment's associational rights. A physician had refused to undergo a loyalty check required for employment with the World Health Organization. The court, citing *Buckley*, found that the doctor's First Amendment rights of association were infringed, even though he was being paid money in exchange for his employment. A similar approach was used in *Marshall v. Stevens People and Friends for Freedom*.[70] In that case, the Secretary of Labor sued to enforce subpoenas against several individuals and committees who opposed the unionization of the J.P. Stevens textile mills. The Secretary wanted the list of contributors to the committees, and they argued that enforcement of the subpoenas would infringe their rights of association under the First Amendment. The court relied on *Buckley* to conclude that, with respect to the non-supervisory employees of Stevens, the government did not adequately justify its need for the information about the contributors, and hence the First Amendment precluded the enforcement of those subpoenas.

4. Raising Money

Although *Buckley* involved First Amendment protection for spending money, the Court has extended its rationale to raising money in order to spend it. The extension is justified because, as a practical matter, the ability to raise money, in order to speak, often depends on the right to spend money in order to raise that money. *Meyer v. Grant*[71] involved a challenge to a Colorado statute that made it a felony to pay any person to circulate an initiative petition. Proponents of a proposed constitutional amendment concluded that they could not obtain the necessary signatures without paying signature gatherers, and they challenged the statute on First Amendment grounds. Comparing the prohibition to the campaign expenditure limitations struck down in *Buckley*, the Court noted that the law necessarily reduced the quantity of expression available and that it was impermissible to silence those who could afford to pay for petition circulators.

69. 744 F.2d 224 (1st Cir. 1984).
70. 669 F.2d 171 (4th Cir. 1981).
71. 486 U.S. 414 (1988).

Again, relying on *Buckley*, the Court held that it was not a permissible state interest for government to restrict the speech of one group in order to enhance the speech of another.

Buckley has also been cited in other comparable circumstances. Thus, in *Hardie v. Fong Eu*,[72] the California Supreme Court relied on *Buckley* to sustain a challenge to the constitutionality of statutes limiting the amounts that could be spent in circulating initiative petitions. A similar challenge was also successful in *New Jersey Citizen Action v. Edison Township*.[73] At issue was a municipal ordinance that required, among other things, that canvassers be fingerprinted in order to obtain a license. Based on *Buckley*, the Court struck down the fingerprinting provision because the state's interests in disclosure were insufficient. Obviously, raising money via the canvass would not have been protected under the First Amendment but for *Buckley*'s holding that spending, or in this case raising money in order to spend money, is the equivalent of speech for First Amendment purposes. And in another case, *Hayes County Guardian v. Supple*,[74] the existence of paid advertising in a student newspaper was not sufficient to disentitle it to First Amendment protection in a challenge to a regulation banning the newspaper's distribution on campus. Once again, the Court cited *Buckley* for the proposition the government may not restrict the speech of some elements of society in order to enhance the relative voices of others, and hence the justification of fostering the education of students enrolled in the journalism program, which was producing a competing newspaper, was rejected.

The intersection of the protection of speech and associational rights is illustrated by a series of cases successfully challenging state and local laws limiting the ability of charitable organizations to raise money. The first of these, *Village of Schaumburg v. Citizens for a Better Environment*,[75] involved a statute that forbade the solicitation of funds by an organization that did not spend at least 75% of the money raised on charitable activities. The Village defended its law on the grounds that it prevented fraud—admittedly a worthy purpose—and argued that the group could engage in all the speech it wanted, as long as it did not try to raise money. After reviewing the cases in

72. 134 Cal. Rptr. 201 (Cal. 1976).
73. 797 F.2d 1250 (3d Cir. 1986).
74. 969 F.2d 111 (5th Cir. 1992).
75. 444 U.S. 620 (1980).

which the spending of money was protected by the First Amendment, the Court held that the activity at issue there was clearly protected.[76]

Schaumberg was followed by *Maryland v. Joseph H. Munson Co.*,[77] in which a similar, but somewhat more flexible, statute, was also set aside, this time in a case brought by a professional fundraiser, not a charity. And in *Riley v. National Federation of the Blind*,[78] the Court again struck down a fundraising provision, this one requiring mandatory disclosure of the percentage of money raised by professional fundraisers that ended up going to charity. Again, like *Schaumberg*, neither opinion cited *Buckley*, although its central proposition—that spending money can be speech for First Amendment purposes—was the foundation for the rulings. And in all three cases, the associational activities of those who supported the charity were an important part of the decisions.

5. Non-Electoral Political Speech

Closely related to speech involving an election among candidates is the issue of speech related to political subjects, such as legislative issues on a ballot. Here, too, the impact of *Buckley* has been significant. Two years after *Buckley*, and relying heavily on it, the Court in *First National Bank of Boston v. Bellotti*,[79] struck down a Massachusetts statute that prohibited corporations from making contributions or expenditures for the purpose of influencing ballot referenda. Again, that ruling would not exist but for *Buckley*'s conclusion that spending money—even by a corporation—to make one's views known on issues of public importance, is entitled to First Amendment protection. Similarly, in an area between issue advocacy, as in *Belotti*, and election advocacy, as in *Buckley*, the Court has allowed nonprofit corporations to make independent expenditures in support of candidates, who agree with them on their issues, despite the ban on for-profit corporations making such expenditures, *Federal Election Commission v. Massachusetts Citizens for Life*.[80] Neither of those opinions could have reached these results without *Buck-*

76. The opinion cited *Bates*, but not *Buckley*; as noted above, even though *Buckley* had been a central part of the decision in *Virginia Bd. of Pharmacy*, which led to *Bates*.

77. 467 U.S. 947 (1984).

78. 487 U.S. 781 (1988).

79. 435 U.S. 765 (1978).

80. 479 U.S. 238 (1986).

ley's conclusion that money is speech in the context of a political campaign.

A case involving anonymous leaflets opposing a proposed school tax levy also illustrates the importance of *Buckley*'s equating spending money with speech in a political context. In *McIntyre v. Ohio Elections Commission*,[81] the Supreme Court set aside a $100 fine imposed against a pamphleteer who failed to disclose her identity. *Buckley* was cited for a number of propositions, but what is significant for these purposes is that, if the spending of money to produce the leaflets had been seen as conduct and not speech, the First Amendment might not have applied, and her conviction might have stood.[82]

Another example where the result might well have been different if spending money were not treated as speech for First Amendment purposes, is *Baldwin v. Redwood City*.[83] The city had a code governing the direction, location, and maintenance of all types of signs, with various specific provisions for temporary political signs, as well as aggregate restrictions on the number of permitted signs. Relying heavily on *Buckley*, the Court set aside the ordinance because it limited the quantity of campaign signs, and therefore political expression, for which there was no substantial countervailing interest. Indeed, limiting the quantity of signs, and necessarily the quantity of money spent, was the core purpose of the ordinance, and without *Buckley*, the law would probably have been sustained.

Another attempt at limiting the quantity of political speech was held unconstitutional in *San Francisco County Democratic Central Committee v. Eu*.[84] The restrictions there banned partisan pre-primary endorsements, and the Court cited *Buckley* to establish that the state may not restrict the speech of some persons in order to enhance the relative voice of others. Once again, the issue of quantity, this time on a temporal rather than volume basis, was the underlying rationale that the Court rejected, as it had in *Buckley*.

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81. 514 U.S. 334 (1995)

82. *McIntyre* followed a similar ruling in *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987), in which an Oklahoma statute forbidding the distribution of anonymous campaign literature was set aside on First Amendment grounds, as was a similar provision of the California Election Code in *Schuster v. Imperial County Municipal Court*, 167 Cal. Rptr. 447 (Cal. Ct. App. 1980).

83. 540 F.2d 1360 (9th Cir. 1976).

84. 792 F.2d 802 (9th Cir. 1986).

CONCLUSION

It is impossible to predict precisely what would happen if the expenditure limitation rulings in *Buckley* were overturned. However, there can be no serious doubt that the First Amendment legal landscape beyond the campaign finance area, as well as within it, would be significantly altered. That would be true whether the Court concluded that spending money on elections is not speech (which would have a major impact on many practices that the courts have recently sustained), or it ruled that the governmental interest in leveling the playing field outweighs the interests of candidates and their supporters in unrestrained debate (which would seem to undermine the basic relation between the government and the right to speak under the First Amendment). In either case, the ripple effect would extend not only to cases that have relied on *Buckley*, but also to those on which it relied and which are a central part of our First Amendment jurisprudence. While individual cases may well have distinguishing features that might cause courts to reach the same result without *Buckley,* they would have to do so under a different rationale.

Although there are some rationales that the Court might adopt that would have lesser impacts, the likelihood of their adoption does not seem great and their impact in the campaign finance area, if adopted, might be quite limited. And even if their impact outside the campaign finance area would be different, and perhaps less dramatic, they would surely have effects that should be considered.

But if the broad grounds for overturning the expenditure limitations rulings in *Buckley* were used, it seems reasonably clear that a substantial body of First Amendment law would have to change. At the very least, there are major questions about whether these other First Amendment decisions would survive, and those who wish to see the demise of *Buckley's* expenditure limitation rulings need to come to grips with these effects on other cases before their advocacy takes them to a place where they and their supporters do not want to be.