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STRICTLY SCRUTINIZING CAMPAIGN FINANCE RESTRICTIONS (AND THE COURTS THAT JUDGE THEM)

John C. Eastman*

“Precision about the relative rigor of the standard to review contribution limits was not a pretense of the Buckley [v. Valeo] per curiam opinion.”¹ This may be the Supreme Court’s greatest understatement in the election law arena. For nearly a quarter of a century, lower courts grappled with whether the Buckley Court, when upholding restrictions on contributions to candidates, actually applied a lower standard of review than the strict scrutiny standard it applied when striking down various restrictions on expenditures.² Even the Court could not agree on whether Buckley actually applied a lower level of scrutiny to political contributions—speech, or at least expressive conduct that lies at the very core of the First Amendment—than it applied to other kinds of speech and expressive conduct.³

Earlier this year however, a majority of the Court put that question to rest, at least with respect to restrictions on contributions to candidates.⁴ However, the numerous opinions in Nixon v. Shrink Missouri Government PAC reveal deep division in the Court, even on this preliminary

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¹ J.D., University of Chicago; Ph.D., Claremont Graduate School; Associate Professor at the Chapman University School of Law; and Director of the Claremont Institute Center for Constitutional Jurisprudence. In the latter capacity, Dr. Eastman is counsel for Plaintiffs in Lincoln Club of Orange County v. City of Irvine, a case raising a First Amendment challenge to a municipal ordinance that restricts contributions to independent expenditure committees. Lincoln Club of Orange County v. City of Irvine, No. 99-1262 (C.D. Cal. Aug. 16, 2000). This case is currently pending before the United States Court of Appeals for the Ninth Circuit. See id., appeal docketed, No. 99-CU-1262 (C.D. Cal. Aug. 28, 2000).
³ See infra notes 11-12 and accompanying text (discussing the Eighth Circuit’s recognition of the disagreement among members of the Buckley Court).
⁴ See Nixon, 120 S. Ct. at 903-04 (recognizing that Buckley upholds such restrictions if they are “closely drawn to match a ‘sufficiently important interest’”).
question on the standard of review. One can expect lingering confusion as lower courts grapple with the appropriate level of scrutiny to apply to other kinds of campaign finance restrictions.

One thing is clear, however. Presently, the Supreme Court applies a slightly lower level of scrutiny when assessing restrictions on contributions to candidates than it applies when assessing restrictions on expenditures. As a result, local governments have structured their campaign finance restrictions as facial limitations on contributions rather than on expenditures, hoping to find constitutional comfort in the more lenient level of scrutiny. In making such a simplistic distinction between “contributions” and “expenditures,” the Supreme Court misunderstands Buckley and its rationale, and fails to take into account subsequent cases in which the Court applied “exact” or strict scrutiny when assessing restrictions on contributions to noncandidate committees. Furthermore, the Court fails to appreciate that such restrictions cannot properly be sustained, even under the lower level of scrutiny applied to restrictions on contributions to candidates.

In part to demonstrate the imprecision of the Buckley per curiam opinion, Part I of this Article summarizes the pre-Nixon circuit split that created the Buckley standard of review. Part II analyzes restrictions on election speech and political association in a context that falls between contributions to candidates and expenditures, namely, contributions to independent expenditure committees, and tries to reconcile the facially conflicting holdings in Buckley and Citizens Against Rent Control v. Berkeley. Looking beyond the simplistic distinction between “contributions” and “expenditures,” this Article contends that limits on contributions to independent expenditures infringe upon core First Amendment rights of political speech and association. The impact of this infringement has been more severe than the Court was willing to acknowledge concerning the restrictions on contributions to candidates at issue in Buckley and Nixon, and thus must be subject to strict scrutiny. Moreover, this Article contends that the Supreme Court has applied strict scrutiny to such restrictions in the context of contributions to committees making independent expenditures in a ballot measure election, and that the same level of scrutiny is appropriate when assessing these restrictions on contributions to independent expenditure committees in candidate elections. Part III contends that restrictions on contributions to independent expenditure committees are unconstitutional even under the slightly-less-than-strict, “rigorous” scrutiny that the Court now applies to

restrictions on contributions to candidates. Therefore, these restrictions are clearly unconstitutional under the strict scrutiny that should be applied.

I. CIRCUIT SPLIT BEFORE NIXON

The Supreme Court in *Nixon* clarified that *Buckley* applied, albeit cryptically, a less than strict level of scrutiny (though more than intermediate scrutiny) when assessing restrictions on contributions to candidates. However, prior to this decision, the courts of appeals were split on what level of scrutiny *Buckley* actually applied. Most courts held that *Buckley* required strict scrutiny of restrictions on contributions to candidates as well as restrictions on expenditures. The Ninth Circuit, in contrast, read *Buckley* as requiring a slightly lower standard of review when assessing restrictions on contributions to candidates.

Both sides of the split found support in the loose language of *Buckley*’s per curiam opinion. The Eighth Circuit in *Carver v. Nixon*, for example, quoted passages from *Buckley* that subjected restrictions on contributions to “the closest scrutiny” because “[c]ontribution and expenditure limitations operate in an area of the most fundamental First Amendment activities” and because they “impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties.” The Eighth Circuit noted that under this standard, “a significant interference with protected rights of political association may be sustained’ only when the State can demonstrate ‘a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”

The Eighth Circuit recognized that various members of the *Buckley* Court have contended, in dicta, that a lower level of scrutiny should apply to restrictions on contributions. The Eighth Circuit also recognized, however, that other members of the Court have strongly disagreed, “arguing that nothing less than strict scrutiny should apply to contribution

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7. *See*, e.g., *Harwin v. Goleta Water Dist.*, 953 F.2d 488, 491 n.6 (9th Cir. 1991).
8. 72 F.3d 633 (8th Cir. 1995).
9. *Id.* at 636 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14, 18, 25 (1976) (per curiam)).
limits.” The Eighth Circuit concluded from these various conflicting opinions that:

The [Supreme] Court has not ruled that anything other than strict scrutiny applies in cases involving contribution limits. When the Court in *Buckley* analyzed the contribution limits, it articulated and applied a strict scrutiny standard of review . . . . Therefore, like other courts since the *Buckley* decision, we must apply the “rigorous” standard of review articulated in *Buckley*.

In a world accustomed to debating what “is” is, it may be argued that the Eighth Circuit’s opinion is a bit schizophrenic. Strict scrutiny, in its customary formulation, requires that restrictions on First Amendment rights be narrowly tailored to further a compelling governmental interest. The test recited by the Eighth Circuit, on the other hand, speaks of a “sufficiently important interest” that is “closely drawn to avoid unnecessary abridgment of associational freedoms” —arguably a somewhat less stringent formulation. Even if one rejects the argument that “sufficiently important” is less strict than “compelling,” or that “closely drawn” is less strict than “narrowly tailored,” there certainly is schizophrenia in the Eighth Circuit equating “strict” scrutiny with the “rigorous” scrutiny articulated in *Buckley* and as applied by other courts. The only other decision cited by the Eighth Circuit was *Harwin v. Goleta Water District,* a case in which the Ninth Circuit expressly stated (albeit

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12. *Id.* (citing CMA, 453 U.S. at 201-02 (Blackmun, J., concurring); *Citizens Against Rent Control*, 454 U.S. at 302 (Blackmun and O’Connor, JJ., concurring) (stating that the “ordinance cannot survive constitutional challenge unless it withstands ‘exacting scrutiny’").

13. *Id.* at 637 (citing *Buckley*, 424 U.S. at 25 and *Harwin v. Goleta Water Dist.*, 953 F.2d 488, 491 n.6 (9th Cir. 1991) wherein the Ninth Circuit recognized “that contribution limits may be subject to a lower level of scrutiny, but require[d] the government to show a ‘sufficiently important interest and employ[ ] means closely drawn to avoid unnecessary abridgement of associational freedoms’” (quoting *Buckley*, 424 U.S. at 25)).

14. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (holding that a restriction on political speech can be upheld “only if it is narrowly tailored to serve an overriding state interest”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (requiring the State to show a subordinating interest that is “compelling” and the employment of means “closely drawn to avoid unnecessary abridgement” in order to uphold a restriction of freedom of speech); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (indicating that “only a compelling state interest . . . can justify limiting First Amendment freedoms”).


16. See, e.g., *Daggett v. Webster*, 81 F. Supp. 2d 128, 132 n.10 (D. Me. 2000). This district court stated: “I will not engage in the debate whether the ‘closely drawn’ standard is nevertheless the same as ‘strict scrutiny.’ Perhaps the Supreme Court will address that semantic confusion in *Shrink PAC.*” *Id.*

17. 953 F.2d 488 (9th Cir. 1991).
in dicta) that “contribution limits are subject to a lower level of scrutiny than expenditure limits.”

Whatever its pedigree, the Eighth Circuit held that, under Buckley, strict scrutiny was to be applied to restrictions on contributions, and confirmed this position several times before the Supreme Court’s Nixon decision rejected it. In Russell v. Burris, for example, the Eighth Circuit explicitly rejected the Government’s pitch for a more lenient level of review and instead applied Buckley’s “‘closest scrutiny,’” reiterating that only restrictions “closely drawn” to further a “compelling interest” would survive. And in Shrink Missouri Government PAC v. Adams, the Eighth Circuit unambiguously stated that Buckley “articulated and applied a strict scrutiny standard of review.”

The Fourth Circuit followed the Eighth Circuit and upheld restrictions on contributions by lobbyists only after subjecting them to “strict scrutiny.” Similarly, the District Court for the District of Colorado subjected a state contribution limit to “strict scrutiny” because the Buckley Court had “subjected the Federal Election Campaign Act’s (FECA) contribution limitations ‘to the closest scrutiny.’” As a basis for its decision, the district court cited a string of Supreme Court decisions that applied strict scrutiny to various restrictions on First Amendment speech and associational rights. In addition, the Colorado district court relied

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18. Id. at 491 n.6.
20. Id. at 567 (citing Carver, 72 F.3d at 636 (quoting Buckley, 424 U.S. at 25)).
22. Id. at 521 (quoting Carver, 72 F.3d at 637); see also Rosenstiel v. Rodriguez, 101 F.3d 1544, 1553 n.8 (8th Cir. 1996) (rejecting the government’s “[s]eizing upon an excerpt from Buckley” to contend that a lower than strict level of scrutiny applies); Arkansas Right to Life State PAC v. Butler, 983 F. Supp. 1209, 1220 n.10 (W.D. Ark. 1997) (“[B]ased on the Eighth Circuit’s analysis of the Supreme Court’s decisions in this area, strict scrutiny applies in cases involving contribution limits.”).
on *Grant v. Meyer*, a case in which the Tenth Circuit subjected restrictions on corporate contributions in a ballot measure election to strict scrutiny.\(^{26}\)

District courts in the First and Sixth Circuits had applied strict scrutiny to restrictions on contributions to candidates. In *Fireman v. United States*,\(^{27}\) the District Court for the District of Massachusetts applied a strict scrutiny analysis to assess whether FECA's $1,000 contribution limit warranted criminal sanctions.\(^{28}\) In *Frank v. City of Akron*,\(^{29}\) the Northern District of Ohio strictly scrutinized an Ohio contribution limit, noting that “[w]hile the *Buckley* Court did not employ strict scrutiny language, subsequent case law makes clear that strict scrutiny applies.”\(^{30}\) Finally, in *Republican Party of Minnesota v. Pauly*,\(^{31}\) a Minnesota district court subjected a contribution limitation to “the closest scrutiny,” holding that such a restriction could be “sustained only when the state demonstrates a compelling state interest and the regulation is closely drawn to avoid unnecessary abridgement of First Amendment freedoms.”\(^{32}\)

As already noted, the Ninth Circuit took a different position, which also found some textual support in the *Buckley* opinion. In *Goleta Water District*, the Ninth Circuit, citing *Buckley*, noted in dicta that contribution limits could be subject to a lower level of scrutiny than expenditure limits.\(^{33}\) The Ninth Circuit recognized what came to be known as *Buckley*’s “speech by proxy” argument:\(^{34}\)

By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee only

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\(^{28}\) Id. at 233.

\(^{29}\) 95 F. Supp. 2d 706 (N.D. Ohio 1999).

\(^{30}\) Id. at 710 n.6. Although the court cited *Krise v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998), to support this statement, *Krise* involved restrictions on expenditures and was not proper authority for the holding that a restriction on contributions to candidates was also subject to strict scrutiny. See id. (citing *Krise*, 142 F.3d at 913).

\(^{31}\) 63 F. Supp. 2d 1008 (D. Minn. 1999).

\(^{32}\) Id. at 1013 (citing *Carver v. Nixon*, 72 F.3d 633, 636 (8th Cir. 1995), cert. denied, 518 U.S. 1033 (1996), and *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).

\(^{33}\) Harwin v. Goleta Water Dist., 953 F.2d 488, 491 n.6 (9th Cir. 1991) (citing *Buckley*, 424 U.S. at 20-21).

\(^{34}\) See *California Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981) (plurality opinion) (*CMA*) (coining *Buckley*'s "speech by proxy" argument).
marginally restricts the contributor's ability to engage in free communication. A contribution is a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization involves little direct restraint on his political communication, because it permits symbolic expression of support evidenced by a contribution, but does not infringe upon the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.35

The Ninth Circuit did not address the passages in Buckley from which the Eighth Circuit and other courts discussed above concluded that strict scrutiny was the appropriate standard of review. Moreover, the discussion was dictum. The circuit court simply noted: "While it is conceivably arguable that a lower level of scrutiny should apply to discriminatory contribution limits because contribution limits are subject to a lower level of scrutiny than expenditure limits, . . . we need not decide this question today."36

Nevertheless, this dictum became holding one year later. In Service Employees International Union v. Fair Political Practices Commission,37 the Ninth Circuit, again citing the "speech by proxy" passages from Buckley, held that "[t]he Supreme Court has applied a somewhat less stringent test than strict scrutiny to decide the constitutionality of contribution limitations."38 The Ninth Circuit also relied on FEC v. Massachusetts Citizens for Life, Inc., in which the Supreme Court stated: "‘We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.’"39 This language from Massachusetts Citizens for Life, however, is also

35. Buckley, 424 U.S. at 20-21 (footnote omitted).
36. Harwin, 953 F.2d at 491 n.6 (citing Buckley, 424 U.S. at 20-21).
37. 955 F.2d 1312 (9th Cir. 1992).
38. Id. at 1322 (citing Buckley, 424 U.S. at 20-21).
39. Id. (quoting FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 259-60 (1986)).
dicta, as the case involved independent expenditure limitations, not contribution limitations. Moreover, the Court in Massachusetts Citizens for Life cited California Medical Ass’n v. FEC to support its statement that restrictions on contributions require less compelling justification than restrictions on independent spending. That proposition from CMA only garnered a plurality and was specifically rejected by Justice Blackmun in his concurring opinion, who also recognized the ambiguous “speech by proxy” provisions of Buckley.

Finally, in Vannatta v. Keisling, the Ninth Circuit reaffirmed its prior holding, specifically distinguishing “strict” from “rigorous” scrutiny, by holding that “[r]estrictions on contributions to campaigns are subjected to less exacting scrutiny than restrictions on independent expenditures in support of a campaign.” The Ninth Circuit utilized the same “sufficiently important interest” and “closely drawn” means test from Buckley that courts elsewhere in the country were treating as a strict scrutiny test, but it stated that “while contribution limitations are reviewed under a ‘rigorous’ level of scrutiny, they are not reviewed under strict scrutiny.”

Noting that the test is less stringent than strict scrutiny, the court nevertheless emphasized that it “is still a rigorous one.”

Given the loose language of the Buckley opinion, this confusion among the circuits was perhaps inevitable. As the District Court for the District of Columbia noted:

The conflict arises from the broad range of language used in Buckley. In some places, the Court suggests that all First Amendment activity should be afforded maximum protection, see, e.g., 424 U.S. at 14 . . . (First Amendment “affords the broadest protection to political expression”); id. at 14-15 . . .

40. See Massachusetts Citizens for Life, 479 U.S. at 241.

41. Id. at 259-60 (citing California Med. Ass’n v. FEC, 453 U.S. 182, 194, 196-97 (1981) (plurality opinion) (CMA)). The Court also cited NPCAC in support of its dictal statement. Nothing in NPCAC supports the proposition.

42. CMA, 453 U.S. at 202 (Blackmun, J., concurring).

43. 151 F.3d 1215 (9th Cir. 1998).

44. Id. at 1220 (Brunetti, J., concurring in part and dissenting in part, concurring portion was adopted as the unanimous opinion of the court) (citing Massachusetts Citizens for Life, 479 U.S. at 259-60, for the proposition that the Court has “consistently held that restrictions on contributions require less compelling justification than restrictions on independent expenditures”).

45. Id. (citing Service Employees Int’l Union v. Fair Political Practices Comm’n, 955 F.2d 1312, 1322 (9th Cir. 1992)).

46. Id. (quoting Service Employees, 955 F.2d at 1322); see also Montana Right to Life Ass’n v. Eddleman, 999 F. Supp. 1380, 1385 (D. Mont. 1998) (citing Buckley as requiring a “rigorous” standard of review to contribution limitations).
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(First Amendment "has its fullest and most urgent application" to political campaigns). However, these excerpts stand in contrast to the Court's view, discussed above, that contribution caps are a relatively minor threat to First Amendment rights... In the end, none of these passages from *Buckley* resolves the question of exactly how to examine contribution caps once they have been determined to have a severe impact upon free speech rights.47

Indeed, the Supreme Court did not definitively settle on an applicable standard of review for more than twenty years after *Buckley*. When assessing contributions to multicandidate committees in *CMA*, for example, Justice Marshall, writing for a plurality only, claimed that *Buckley* applied a lower level of scrutiny to contributions, under a "'speech by proxy'" rationale.48 Justice Blackmun, who provided the necessary and dispositive fifth vote for the holding in the case, expressly rejected Justice Marshall's position, contending instead that *Buckley* subjected contribution limits to "the closest scrutiny."49

The dispute lingered over to the next term. In *Citizens Against Rent Control v. City of Berkeley*,50 a majority of the Court applied exacting scrutiny to strike down Berkeley's restrictions on contributions to committees making independent expenditures in ballot measure elections.51 Justice Marshall concurred only in the judgment to press his argument for a lower level of scrutiny: "Because the Court's opinion is silent on the standard of review it is applying to this contribution limitation, I must assume that the Court is following our consistent position that this type of governmental action is subjected to less rigorous scrutiny than a direct restriction on expenditures."52 Yet, the Court was not silent; it applied "exact scrutiny," which the Court has elsewhere described as strict scrutiny.

The reluctance by courts to adopt this lower level of scrutiny proposed by Justice Marshall seems to be based on the recognition that contribution limits infringe on one's right to political speech and association in

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49. Id. at 202 (Blackmun, J., concurring in the judgment) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).
51. Id. at 294.
52. Id. at 301 (Marshall, J., concurring).
the election context, rights that lie at the very core of the First Amend-
ment. Although the Supreme Court in Nixon clarified the issue and held
that contributions to candidates are subject to less than strict scrutiny (al-
though still greater than intermediate scrutiny), one can expect lower
courts to remain reluctant and not to extend this holding beyond the nar-
row confines of the contribution-to-candidate context. This proposition
is especially true in light of the fact that Nixon did not purport to over-
rule the use of exacting scrutiny applied by the majority in Citizens
Against Rent Control when assessing restrictions on contributions to
committees making independent expenditures in ballot measure elec-
tions.53

The next section addresses a series of cases that fall between Buck-
ley/Nixon and Citizens Against Rent Control, attempts to discover a co-
herent distinction between the two cases, and assesses whether restric-
tions on contributions to committees making independent expenditures
in candidate elections should be analyzed under the Buckley/Nixon lower
level of scrutiny or the Citizens Against Rent Control strict scrutiny.

II. SCRUTINIZING THE MIDDLE CASE

In Nixon, a majority of the Supreme Court held that contributions to
candidates are entitled to less First Amendment protection than other
kinds of speech.54 At the other end of the campaign finance spectrum,
the Supreme Court has held repeatedly that restrictions on expenditures
are subject to strict scrutiny and can be sustained only if narrowly tai-
lored to further a compelling governmental interest.55 This section ad-
dresses three California cases involving municipal ordinances that fall be-
tween those two poles.56 The ordinances challenged in all three cases,
and many others like them not yet challenged, restrict contributions to
independent expenditure committees, and therefore are neither a restric-
tion on contributions to candidates nor a facial restriction on expendi-
tures.

The first case involved the following provision of the Huntington
Beach, California Campaign Reform Law, enacted in 1994:

54. Id. at 903-04 (citing Buckley, 424 U.S. at 20-21).
55. See Buckley, 424 U.S. at 44, 47; FEC v. National Conservative PAC, 470 U.S. 480,
496 (1985).
56. In another recent case, the Eastern District of North Carolina declined to pre-
liminarily enjoin a North Carolina statute that restricts contributions to independent expen-
498 (E.D.N.C. 2000).
Any person or committee, during the twelve (12) months preceding a City election, that makes independent expenditures or incurs obligations supporting or opposing city candidate(s) shall not accept any contribution(s) from any person in excess of the amounts set forth in Section 2.07.050(a) [$300 for a regular election cycle, $200 for a recall election cycle] during the applicable time periods as set forth in Section 2.07.070 of this Chapter.57

Shortly after its enactment, this provision was challenged in federal court by a group of individuals who wished jointly to purchase a newspaper advertisement in support of or in opposition to candidates in the November 1994 Huntington Beach municipal elections.58 The United States District Court for the Central District of California denied the city's motion to dismiss and essentially held that the ordinance was unconstitutional:

[The ordinance] infringes on the Plaintiffs' rights of speech and of association protected by the First Amendment and the Fourteenth Amendment to the United States Constitution . . . . The effect of [the ordinance] is to restrict the independent expenditures that Plaintiffs . . . desire to make, but a restriction on independent expenditures is not justified by any sufficiently compelling governmental interest . . . [and] on its face also restricts the contributions that Plaintiff . . . desires to make to a committee for the purpose of making independent expenditures, but such contributions are even more remotely connected to the dangers of corruption of candidates than are the independent expenditures themselves, so likewise are not justified by any sufficiently compelling governmental interest.59

The election took place before a final judgment was rendered, however, and the case became moot because the committee that brought the suit was registered under California law as a single-election-only committee rather than a permanent committee.60

The second case involved a very similar provision of San Francisco, California's Campaign Finance Reform Ordinance:

No person other than a candidate shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect

57. HUNTINGTON BEACH, CAL., MUN. CODE § 2.07.050(b) (1994).
59. Id. at 2-3.
60. See Righeimer, No. 94-676 (C.D. Cal. 1995) (order granting defendant's motion for summary judgment).
to a single election in support of or opposition to such candidate, including contributions to political committees supporting or opposing such candidate, to exceed $150.\footnote{San Francisco, Cal., Admin. Code art. XII, § 16.508(a) (2000).}

Because “person” is defined to include any “association,” “committee,” or “club,” however organized, the ordinance limited contributions to independent expenditure committees.\footnote{Id. at § 16.508.} A committee, formed to make independent expenditures supporting the re-election of Willie Brown as Mayor, challenged that ordinance in San Franciscans for Sensible Government v. Renne.\footnote{San Franciscans for Sensible Gov’t v. Renne, No. 99-02456 (N.D. Cal. Sept. 8, 1999) (order granting plaintiffs’ motion for a preliminary injunction) (on file with Catholic University Law Review).} A preliminary ruling in this litigation also declared the ordinance constitutionally problematic. On September 8, 1999—less than two months before the November municipal elections in San Francisco—the District Court for the Northern District of California preliminarily enjoined San Francisco from enforcing its ordinance, holding that the plaintiffs demonstrated both irreparable harm and a likelihood of success on the merits of their First Amendment challenge to the ordinance.\footnote{See id. at 15.} In a short, unpublished decision, the Ninth Circuit Court of Appeals affirmed the district court’s grant of the preliminary injunction,\footnote{See San Franciscans for Sensible Gov’t v. Renne, No. 99-16995 (9th Cir. Oct. 20, 1999) (order affirming order granting preliminary injunction) (on file with Catholic University Law Review).} and Willie Brown’s supporters waged an active independent expenditures campaign on his behalf in the November 1999 election.\footnote{See Zachary Coile, Floodgates Opened to Campaign Spending, S.F. EXAMINER, Oct. 21, 1999, at A26.} The City of San Francisco eventually reached a settlement agreement with the plaintiffs, in which it agreed to no longer enforce the ordinance against committees making only independent expenditures, although the settlement specifies that it will not have preclusive effect in litigation over any future legislation adopted by San Francisco.\footnote{See San Franciscans for Sensible Gov’t v. Renne, No. C99-2456 (N.D. Cal. 2000) (stipulated judgment).}

The third case, heard in the United States District Court for the Central District of California, involved the following ordinance that was enacted in 1995 in the city of Irvine, California: \footnote{As reflected in documents produced by the city during the litigation, a committee appointed by the Irvine City Council “voted to delete [IMC 1-2-404(B)] on the advice of the City Attorney due to the fact that this provision is currently being challenged in court.}
Any person, including any committee, that makes any independent expenditure during an election cycle in support of or opposition to any City candidate, shall not accept any contribution(s) from any person which exceeds in the aggregate the amount set forth in this section for that election cycle [currently $320, adjusted for inflation].

A local political action committee (PAC) challenged the Irvine ordinance in *Lincoln Club of Orange County v. City of Irvine*. This PAC tried to participate in the November 1998 Irvine municipal elections by making independent expenditures in support of or in opposition to Irvine candidates, and again sought to participate in the November 2000 elections. In May 2000, the district court denied the city's motion to dismiss but, unlike Righeimer, did not do so on substantive grounds. In August 2000, the court denied the plaintiffs' motion for summary judgment and instead granted the city's cross-motion for summary judgment, holding in a short minute order that the city had "serpentined its way through the applicable cases and drafted an ordinance that escapes unconstitutionality." The court reasoned that because the city's ordinance facially restricted only contributions (not expenditures) made to committees making "candidate-related independent expenditures," such contributions could be regulated, apparently without subjecting the regulations to strict scrutiny. "Restricting contributions made to independent expenditure committees engaged in candidate-related expenditures," noted the court, "can be said to be a constitutionally valid means to curtail any one person or committee from making an unlimited candidate 'expenditure,' thereby reducing the Buckley concerns of corruption or the appearance thereof." The case is currently pending before the Ninth Circuit Court via a Huntington Beach lawsuit. The district court had issued its ruling denying Huntington Beach's motion to dismiss and holding that the ordinance unconstitutionally infringed upon First Amendment rights nearly four months before this document was written.

73. Id. No. 99-1262 (C.D. Cal. Aug. 16, 2000) (ruling granting defendant's motion for summary judgment; denying plaintiffs' cross-motion for summary judgment, or, in the alternative, for preliminary injunction).
74. Id.
75. Id. (citing Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam)).
of Appeals.\textsuperscript{76}

Other local governments have enacted similar ordinances. In Orange County, California, for example, seven of the twenty-eight municipal jurisdictions have ordinances restricting contributions to independent expenditure committees. In addition to the Huntington Beach and Irvine ordinances discussed above, Laguna Beach limits such contributions to $250.\textsuperscript{77} Laguna Niguel imposes a $350 limit if the committee spends or intends to spend more than $1,000 in the city’s elections.\textsuperscript{78} Anaheim (the home of Disneyland) caps such contributions at $1,000.\textsuperscript{79} Orange City’s cap is set at $500,\textsuperscript{80} and Orange County imposes a $1,000 limitation on contributions to committees making independent expenditures in supervisory elections.\textsuperscript{81} Several state ordinances impose similar limits on con-

\textsuperscript{76} See Lincoln Club, No. 99-CU-1262 (C.D. Cal. Sept. 28, 2000).

\textsuperscript{77} See LAGUNA BEACH, CAL., MUN. CODE tit. 1, § 1.14.030(c) (2000). This code provides:

No person or committee that spends or incurs independent expenditures during the twelve months preceding a city election on independent expenditures supporting or opposing candidates, or supporting or opposing the recall of an elective city officer, shall accept any contribution or contributions from any person totaling more than two hundred fifty dollars in an elective city officer or recall election cycle.

\textit{Id.}

\textsuperscript{78} See LAGUNA NIGUEL, CAL., CAMPAIGN CONTRIBUTION LIMITATION ORDINANCE § 2-8-15(d) (2000). This ordinance provides:

Any person or committee that spends or incurs more than $1,000 of its independent expenditures during the 12 months preceding a City election on independent expenditures supporting or opposing one or more City candidates or City measures shall not accept a contribution totaling more than $350.00.

\textit{Id.}

\textsuperscript{79} See ANAHEIM, CAL., MUN. CODE § 1.09.050 (2000). This code provides:

Any person or committee that spends or incurs more than twenty-five percent of its independent expenditures during the twelve months preceding a city election on independent expenditures supporting or opposing a City Candidate(s) shall not accept any contribution(s) from any person in excess of the amounts set forth in Section 1.09.050.010 [$1,000] during the applicable time period.

\textit{Id. ch. 1.09.050.040.}

\textsuperscript{80} See ORANGE, CAL., MUN. CODE tit. 2, § 2.10.050(C) (2000). This code provides:

Any committee that spends or incurs more than twenty-five (25) percent of its independent expenditures during the twelve (12) months preceding a City election on independent expenditures supporting or opposing a City Candidate or City Candidates, shall be subject to the contribution limitations set forth in this chapter, [$500 for regular election cycles, $250 for recall election cycles].

\textit{Id.}

\textsuperscript{81} See ORANGE COUNTY, CAL., CAMPAIGN REFORM ORDINANCE § 1-6-5(e). This ordinance provides:

Any person or committee that spends or incurs more than twenty-five (25) percent of its independent expenditures during the twelve (12) months preceding a
tributions to independent expenditure committees.82

Such ordinances can, and often will, have the effect of barring permanent associations (as opposed to committees formed for the purpose of participating in a single election) from making any expenditures in municipal elections, because such associations will often have accepted "contributions" in excess of the applicable limits long before deciding to participate in any given election. The Orange County, California-based group that challenged the Irvine ordinance, for example, has membership dues of $2,000 annually. This precludes the group, as currently constituted, from making independent expenditures in Huntington Beach, Irvine, Laguna Beach, and Laguna Niguel elections, and bars it from making such expenditures in Anaheim, Orange, and Orange County elections if its expenditures in those cities account for more than twenty-five percent of its total independent expenditures in that election cycle.83 Of particular concern is the fact that the club was barred from participating in Irvine's November 1998 municipal elections because of dues it had accepted before the city had even adopted the ordinance.

The Supreme Court has not addressed specifically whether a campaign finance law that facially restricts contributions to committees making independent expenditures in candidate elections, but has an effect of restricting expenditures, should be subject to strict scrutiny or something

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82. See, e.g., ARK. CODE ANN. § 7-6-203(k) (Michie 2000) ("An independent expenditure committee may not accept any contribution or cumulative contributions in excess of five hundred dollars ($500) in value from any person or business."); KY. REV. STAT. ANN. § 121.150(4),(6),(10) (Michie Supp. 1998); OKLA. STAT. ANN. tit. 25, app. § 10-1-2(a)(1) (West 1995) ("No person or family may contribute more than five thousand dollars ($5000) to a political action committee or a party committee in any calendar year.").

83. Cf. IRVINE, CAL., MUN. CODE § 1-2-404(B) (2000) (establishing contribution limits). The mere possibility that such groups could make independent expenditures by reducing their annual dues should not alter the conclusion that such restrictions affect expenditures. Consequently, the group challenging this ordinance will have to reduce its annual dues from $2,000 to $80 (1/4 of the $320 currently permitted under the ordinance per four-year election cycle), one twenty-fifth the current level, or expand its current membership of about 300 to approximately 7500, so as to comply with this requirement. Moreover, government cannot, consistent with the First Amendment, interfere with the internal organization or affairs of a private association unless its interference is narrowly tailored to further a compelling interest (i.e. strict scrutiny). See Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984). The radical change in dues structure and/or membership that would be required for such groups to exercise their First Amendment right to participate in the political process would be a significant intrusion into the club's internal structure and affairs, requiring that such ordinances should be strictly scrutinized.
less than strict scrutiny. In two closely analogous contexts, however, the Court has come down on opposite sides of what must necessarily be a very fine line.

In *Buckley*, the Supreme Court rejected the argument that a restriction on contributions to candidates should be treated as a restriction on expenditures because of its effect on expenditures. The Court noted that:

The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limit to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.\(^84\)

In *Citizens Against Rent Control Coalition for Fair Housing v. City of Berkeley*,\(^85\) however, the Supreme Court invalidated a Berkeley ordinance that placed a cap on contributions to committees making independent expenditures in support of or in opposition to ballot measures.\(^86\) The Court noted that restrictions on contributions to independent expenditure committees “automatically affects expenditures,”\(^87\) and for that reason (among others), the Court subjected the ordinance to “exacting” scrutiny.\(^88\) Although the Court did not precisely define “exacting” scrutiny, the Court has used “exacting” and “strict” scrutiny interchangeably in other contexts,\(^89\) and appears to have done so in *Citizens Against Rent Control* as well.\(^90\)

The ordinances under consideration here fall delicately between the

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86. Id. at 300.
87. Id. at 299.
88. Id. at 294, 298.
89. McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 347 (1995) (defining “exacting scrutiny” to mean that a restriction can be upheld “only if it is narrowly tailored to serve an overriding state interest”).
90. Justice Marshall filed an opinion concurring only partly in the judgment because he believed that the majority was “silent” about the standard of review it was applying. *Citizens Against Rent Control*, 454 U.S. at 301 (Marshall, J., concurring). Yet the majority was not silent, twice stating that it was applying exacting judicial review. *See id.* at 294, 298. Furthermore, the Court expressly stated that “[t]he contribution limit . . . automatically affects expenditures” and therefore “plainly contravenes both the right of association and the speech guarantees of the First Amendment.” *Id.* at 299-300. Unlike Justice Blackmun’s concurring opinion in *California Medical Ass’n v. FEC*, 453 U.S. 182, 201 (1981) (plurality opinion) (Blackmun, J., concurring) (*CMA*), Justice Marshall’s opinion in *Citizens Against Rent Control* was not necessary to the Court’s judgment; therefore, it has no precedential weight.
circumstances addressed in these two opinions. On the one hand, these ordinances involve limits on contributions to independent expenditure committees, *not* the limits on contributions to candidates that were at issue in *Buckley*. On the other hand, the committees subject to the ordinances make independent expenditures in support of or in opposition to candidates, not ballot measures which were at issue in *Citizens Against Rent Control*. Thus, unless one is willing to subscribe to the view that *Citizens Against Rent Control* implicitly overruled *Buckley*, a rationale must be found that reconciles these otherwise incompatible holdings to analyze the middle case appropriately.

The *Buckley* Court offered two arguments to defend its claim that contribution limits do not affect expenditures, yet neither distinguishes *Buckley* from *Citizens Against Rent Control*. First, the Court noted that "[t]he overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons." 91 But the same can be said of contributions to independent expenditure committees (as the *Buckley* Court itself seemed to acknowledge). In either case, there is no effect on expenditures, *only if* one assumes that the candidate or independent expenditure committee can simply raise funds from a greater number of people.

It may be argued that the assumption is simply false with respect to independent expenditure committees. In the *Lincoln Club* case, for example, membership would have to expand from 300 to 7,500 individuals in order to make up for the lower contribution limit, an expansion that is both impractical and barred by the club's bylaws. Yet the assumption is even more far-fetched in the candidate context. Candidates price discriminate in ways that must make even the airlines green with envy. In particular, a candidate can receive $10,000 in contributions from some donors and not be precluded from accepting contributions of $100, $10, or less from other donors. The only reasonable assumption to draw from this behavior is that candidates persuade as many people as they can to make contributions at each contribution level. Thus, imposing a contribution limit, even (perhaps especially) in the candidate context, will "automatically affect expenditures." 92 *Buckley*’s analysis here is simply counterintuitive, and it may well be, at least on this point, that *Citizens*

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92. *Citizens Against Rent Control*, 454 U.S. at 299. Arguably, this may be more true for candidates than it is for certain kinds of independent expenditure committees. Committees such as the Lincoln Club, for example, openly impose significant annual dues. Under general economic principles, a reduction in dues would likely result in a greater pool of potential members.
Against Rent Control should be read as implicitly rejecting this rationale underlying the Buckley holding.

Second, Buckley noted that contribution limits would "compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." According to Buckley, overall political expression would not be affected by contribution limits, just shifted from candidates to noncandidates.

Unfortunately, this argument also does not distinguish Citizens Against Rent Control from Buckley. It can just as easily be said that a limit on contributions to independent expenditure committees simply compels would-be contributors to make independent expenditures on their own, and simply shifts, rather than reduces, "the total amount of money potentially available to promote political expression."

The Citizens Against Rent Control Court rejected such an argument, recognizing instead that some people choose to make their political voices heard through the medium of a political committee. Because these people would not simply shift their contribution moneys into solo political expenditures, the Court rightly recognized that the contribution limit "automatically affects expenditures." But the same is equally true of contributors to candidates, and perhaps even more so. Many contributors simply choose to make their political voices heard by using the unique bully pulpit opportunity afforded by another's candidacy. Indeed, the Court's analysis in Buckley seems incredibly naïve on this point.

Having once been a candidate for federal office, I can safely say that very few contributors would engage in the same amount of political expression on their own as they are willing (or can be persuaded) to make possible via contributions to candidates. A limitation on contributions, therefore, necessarily affects expenditures, whether those contributions were destined for candidates or for independent expenditure committees. Perhaps Citizens Against Rent Control should also be read to implicitly reject this rationale underlying the Buckley holding.

Looking at whether a contribution limit "affects expenditures," therefore, does not help resolve the inconsistency between Buckley and Cit-
zens Against Rent Control. Buckley's apparent lower level of scrutiny was also based on the type of message that a contribution conveyed, however. The Buckley Court held that a limitation on contributions to candidates "entails only a marginal restriction upon the contributor's ability to engage in free communication." The Court reasoned that such a "contribution serves as a general expression for the candidate and his views, but does not communicate the underlying basis for the support." The Court then noted that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." The Court concluded that "[w]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor."

On its face, the Buckley Court's "speech-by-proxy" rationale for contributors applies equally to contributions made to "association[s]" and "candidate[s]." The broader application to "associations," however, must be viewed as dicta because Buckley involved only restrictions on contributions to candidates, not restrictions on contributions to noncandidate associations. Any other reading of Buckley would irreconcilably conflict with Citizens Against Rent Control, when the Court applied "exacting" scrutiny in part because a restriction on contributions to independent expenditure committees "imposes a significant restraint on the freedom of expression of . . . those individuals who wish to express their views through committees." Citizens Against Rent Control, then, must at the very least be viewed as rejecting the broader, obiter dicta application of the Buckley "speech-by-proxy" rationale.

Restrictions on contributions to independent expenditure committees also infringe upon the First Amendment's freedom of association guarantee, particularly because the collective voice of the association's members is enhanced when joined together. Yet the Supreme Court has also come down on opposite sides of a very thin line with respect to the effect that contribution limits have on the freedom of association. In Citizens

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98. Buckley, 424 U.S. at 21-22.
99. Id. at 21.
100. Id.
101. Id.
102. Id.
103. Id. at 6-7 (discussing the statutes at issue).
Against Rent Control, the Court held that restrictions on contributions to independent expenditure committees infringe on an organization's would-be donors' right of association and were therefore subject to "exact-acting" scrutiny. On the other hand, the identical argument was recognized and rejected in Buckley, in the context of contributions to candidates as well as political associations:

The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations [in contrast to its expenditure limitations] permit associations and candidates to aggregate large sums of money to promote effect advocacy . . . . In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.

Because the Buckley Court viewed limits on contributions as a less severe restriction on First Amendment interests than other restrictions on First Amendment rights, it arguably applied a lower level of scrutiny when assessing such restrictions.

Again, reconciling these two opinions seems futile. Making a contribution serves to associate the contributor with the recipient whether the contribution is made to a candidate or to an independent expenditure committee. In both cases, contributions "enabl[e] like-minded persons to pool their resources in furtherance of common political goals." Consequently, the infringement on the right of association affected by a contribution limit is as severe in one context as it is in the other.

105. Id. at 294. The Court further explained that: "To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on ballot measures, while placing none on individuals acting alone, is clearly a restraint on the right of association." Id. at 296.

106. Buckley, 424 U.S. at 22-23.

107. See id. at 23. The Court later held that Buckley did apply a lower level of scrutiny to contributions. See Nixon v. Shrink Mo. Gov't, 120 S. Ct. 897, 904 (2000).

108. Buckley, 424 U.S. at 22.
The only way to reconcile *Buckley* and *Citizens Against Rent Control* is to distinguish the two cases in a way that really has no relevance to the strength of the "expressive speech" or associational interests at issue. *Buckley* dealt with contributions to candidates; *Citizens Against Rent Control* dealt with contributions to independent expenditure committees. Two possibilities are readily available. *Buckley* dealt with restrictions in candidate elections, while *Citizens Against Rent Control* dealt with restrictions in ballot measure elections.

While these factual distinctions are relevant to the strength of the government's interest in restricting speech and associational rights, they are not relevant to the strength of the First Amendment speech and associational interests (and hence to the level of scrutiny that is appropriate). Contributions to candidates, in candidate elections, implicate concerns with quid pro quo corruption in ways that contributions to independent expenditure committees, in ballot measure elections, simply do not. As the Court noted in *Citizens Against Rent Control*, "'[t]he state interest in preventing corruption of officials . . . is not at issue here.'"\(^{109}\) Restrictions on contributions to candidates are more likely to survive the applicable level of scrutiny because they actually further the government's interest in avoiding quid pro quo corruption. That fact, however, says nothing about whether the degree of scrutiny should be strict and exacting, or something less.

Put simply, the *Buckley* Court, and the *Nixon* Court which relied on *Buckley*, improperly allowed the inquiry into whether the restrictions furthered the government interest in avoiding quid pro quo corruption to color its assessment of the First Amendment speech and associational interests that were being infringed. The result is an analytically unsatisfying distinction between the two cases, lest *Citizens Against Rent Control* be viewed as overruling *Buckley* (and *Nixon* in turn be viewed as reinvigorating *Buckley* at the expense of *Citizens Against Rent Control*).

So, on which side of the line do restrictions on contributions to committees making independent expenditures in candidate elections fall? One is tempted to say that because the distinction between *Buckley* and *Citizens Against Rent Control* is itself analytically unsound, one could just as readily argue for either side. After all, this Article previously discussed two alternative versions of the distinguishing circumstances, one

\(^{109}\) *Citizens Against Rent Control*, 454 U.S. at 297, 299 (quoting C & C Plywood Corp. v. Hanson, 583 F.2d 421, 425 (9th Cir. 1978): "Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure.").
of which cuts in favor of Buckley while the other cuts in favor of Citizens Against Rent Control. The contributions under consideration here, like those in Citizens Against Rent Control, are made to independent expenditure committees, not to candidates. Yet, they are made to committees making independent expenditures in candidate elections such as those at issue in Buckley, not in ballot measure elections.

Another holding from Buckley itself, however, together with the holding in FEC v. National Conservative PAC, prevents us from being agnostic between these two positions. Buckley invalidated limits on individuals who made independent expenditures in candidate elections, and it held that because such expenditures were unconnected to candidates by definition, the restrictions did not sufficiently further the government's interest in avoiding quid pro quo corruption to pass constitutional muster. NCPAC extended the ruling and invalidated restrictions on committees making independent expenditures in candidate elections, for the same reasons.

Because, according to these holdings, independent expenditures themselves do not sufficiently implicate concerns with quid pro quo corruption to warrant infringement on First Amendment speech rights, contributions to independent expenditure committees, which are even further removed from candidates (and therefore from any concern with quid pro quo corruption), simply cannot sufficiently further the government's anti-corruption interest. That was the precise holding of the Central District of California in Righeimer, and it is analytically sound.

Moreover, it is a position recently recognized by the lead opinion in Colorado Republican Federal Campaign Committee v. FEC. Justice Breyer, in an opinion joined by Justices O'Connor and Souter, stated:

Contributors seeking to avoid the effect of the $1,000 [limit on contributions to candidates] indirectly by donations to the national party could spend that same amount of money (or more) themselves more directly by making their own independent expenditures promoting the candidate . . . . If anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) in-

112. NCPAC, 470 U.S. at 497.
dependent expenditure made directly by that donor. In any case, the constitutionally significant fact, present equally in both instances, is the lack of coordination between the candidate and the source of the expenditure.\textsuperscript{115}

Although only a plurality opinion, four of the remaining six Justices would have gone further. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, would have treated all party coordinated expenditures—"contributions" under federal election law—as protected by the First Amendment.\textsuperscript{116} Justice Thomas would have gone further still, rejecting the Buckley distinction between contributions and expenditures altogether.\textsuperscript{117}

When dealing with independent expenditure committees, drawing the line between the ballot-measure-election and the candidate election simply does not hold analytical water. The line between independent expenditures (and the contributions that make them possible), on one hand, and contributions to candidates, on the other, does. Moreover, this latter line is derived from Buckley's own focus on furthering the government's anti-corruption interest. And it is a line that is consistent with the recognition in Buckley, NCPAC, and Colorado Republican that independent expenditures do not implicate quid pro quo corruption concerns. Accordingly, because limits on contributions to committees making independent expenditures "automatically affect expenditures," and do so in a context that does not sufficiently implicate the government's anti-corruption concerns, the "exact ing" scrutiny applied in Citizens Against Rent Control should be applied to the restrictions under consideration here.

The line between contributions to candidates and candidate-controlled committees, on the one hand, and contributions to noncandidate committees, on the other, may be subtle, but it is not without some merit. As the Buckley Court saw it, the principal message expressed by a contribution to a candidate is one of support for the candidate's election to office. With respect to that message, Buckley correctly stated that such a message was not undermined by limits on the amount of the contribution. In contrast, the principal message expressed by a contribution to a noncandidate committee is agreement with and furtherance of that committee's

\textsuperscript{115} Id. at 617 (emphasis added) (citing Buckley, 424 U.S. at 44-48 and NCPAC, 454 U.S. at 498).
\textsuperscript{116} Id. at 630 (Kennedy, J., concurring and dissenting in part).
\textsuperscript{117} See id. at 636 (Thomas, J., concurring and dissenting in part). Justice Thomas stated: "In my view, the distinction lacks constitutional significance, and I would not adhere to it. As Chief Justice Burger put it: '[C]ontributions and expenditures are two sides of the same First Amendment coin.'" Id. (Thomas, J., concurring and dissenting in part).
views. As the Court noted in *Citizens Against Rent Control*, contributions to such committees are made by people who join "with others to advocate common views."\(^{118}\) The ability to express those views is undermined by restrictions on contributions, every bit as much as if the committee’s expenditures were themselves restricted.

This formulation of the *Buckley"speech-by-proxy" rationale is not entirely satisfying, of course, for it ignores the fact that contributions to candidates, like contributions to independent expenditure committees, are often made by people who wish to advocate the views being pro pounded by the candidate, and who, in fact, utilize the candidate’s unique bully pulpit position to advance their own views. But that is a flaw in the *Buckley* analysis itself, not in the distinction between *Buckley* and *Citizens Against Rent Control* offered above. The distinction at least has the virtue of reconciling the two opinions, and it is consistent with the holdings in two other major cases decided by the Court about the same time as *Citizens Against Rent Control*.

In *California Medical Ass'n v. FEC*,\(^ {119}\) decided the term before *Citizens Against Rent Control*, the Court tested the constitutionality of restrictions on contributions to multicandidate committees. Federal election law permits multicandidate committees to contribute $5,000 to candidates (instead of the $1,000 that individuals and other committees may contribute).\(^ {120}\) The Court upheld the restrictions in order to prevent evasion of the $1,000 restriction on individual contributions to candidates, a restriction that *Buckley* upheld because it furthered the government’s interest in avoiding quid pro quo corruption of candidates or the appearance of such corruption. Although no such concern presents itself in restrictions on contributions to independent expenditure committees, which by definition have no involvement with candidates, that distinguishing fact, like the fact that *Citizens Against Rent Control* dealt with ballot measure elections rather than candidate elections, is relevant only to the strength of the government’s interest, not to the level of scrutiny that should be applied to judge that interest.

More relevant for present purposes is the fact that in *CMA*, Justice Marshall attempted to apply the “speech by proxy” rationale beyond the contribution-to-candidate context at issue in *Buckley*.\(^ {121}\) This position, had it prevailed, would have strongly suggested that the “speech by proxy” rationale should be applied to the contributions under considera-

\(^ {119}\) 453 U.S. 182 (1981) (plurality opinion) (*CMA*).
\(^ {120}\) *See id.* at 185.
\(^ {121}\) *Id.* at 196.
tion here. Justice Marshall garnered only a plurality in support of his position, however,\(^{122}\) so his opinion is of "no precedential value."\(^{123}\)

Justice Blackmun, who provided the dispositive fifth vote in \textit{CMA}, expressly rejected Justice Marshall's contention that contributions to multi-candidate committees were merely speech by proxy entitled to lesser First Amendment protection.\(^{124}\) Although Justice Blackmun recognized that there was language in \textit{Buckley} "that might suggest [the plurality's] conclusion," he noted that \textit{Buckley} also stated that "contribution and expenditure limitations both implicate fundamental First Amendment interests", and that 'governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'\(^{125}\)

Because Justice Blackmun supplied the necessary fifth vote, and his opinion is narrower on the merits than that of the plurality, his opinion controls.\(^{126}\) It is controlling only for points that can be said to be fairly subsumed within the reasoning of the plurality.\(^{127}\) That is not the case on the standard of review question, for the plurality did not believe that strict scrutiny was required, and as a result did not address whether in its view the statute at issue in the case survived strict scrutiny.\(^{128}\) The four

\(^{122}\) See id. at 184.

\(^{123}\) Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982) (holding that a plurality opinion is of "no precedential value"); see also Bratton v. City of Detroit, 704 F.2d 878, 885 (6th Cir. 1983) (holding that a plurality decision has "little precedential value"); cf. Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1056 (9th Cir. 1997) (holding that a state supreme court plurality opinion was of "no precedential value").

\(^{124}\) \textit{CMA}, 453 U.S. at 202 (Blackmun, J., concurring).

\(^{125}\) Id. (Blackmun, J., concurring) (quoting \textit{Buckley} v. Valeo, 424 U.S. 1, 25 (1976) (per curiam)).

\(^{126}\) See Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976): "When a fragmented Court decides a case and no single rationale . . . enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred.'"); see, e.g., Romano v. Oklahoma, 512 U.S. 1, 8-9 (1994).

\(^{127}\) See King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). The \textit{King} court stated:

\textit{Marks} is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.

\textit{Id.} at 781. \textit{But see} Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 694 (3rd Cir. 1991) (noting that when "the majority votes to uphold a law as constitutional, the 'narrowest grounds' principle will identify as authoritative the standard articulated by a Justice or Justices that would uphold the fewest laws as constitutional"), \textit{aff'd in part and rev'd in part}, 505 U.S. 833 (1992).

\(^{128}\) See \textit{CMA}, 453 U.S. at 195-97. Adding to the confusion, Justice Blackmun's de-
dissenting Justices would have dismissed the appeal on jurisdictional grounds, \(^{129}\) and although three of four dissenting Justices sat on the Court in *Citizens Against Rent Control* and subscribed to the “exacting” scrutiny applied in that case, they did not reach the question in *CMA*. \(^{130}\)

All that can really be said is that the “speech by proxy” rationale applied in *Buckley* did not garner the support of a majority of the Court in *CMA*. The distinction we have drawn above is therefore consistent with *CMA*, although *CMA* is not conclusive authority to support the distinction.

If there were any doubt that the Court has rejected the “speech by proxy” rationale to assess restrictions on contributions to independent expenditure committees at the lower level of scrutiny applied in *Buckley* to candidate contribution restrictions, all doubt was removed in *FEC v. NCPAC*. \(^{31}\) In *NCPAC*, the Court expressly rejected the government’s contention that contributions to independent expenditure committees were merely “speech by proxy” entitled, under *Buckley*, to less First Amendment protection than other speech. \(^{132}\) As a result, the Court held that “their collective action in pooling their resources to amplify their voices” was “entitled to full First Amendment protection” \(^{133}\) and applied strict scrutiny to invalidate the independent expenditure restrictions at issue in the case.

However subtle the line between *Buckley* and *Citizens Against Rent Control*,...

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129. See id. at 209 (Stewart, J., dissenting).

130. The fourth dissenter in *CMA* was Justice Stewart, who retired at the end of the October 1980 term and was replaced by Justice O’Connor by the time the Court decided *Citizens Against Rent Control*. Justice O’Connor was clearly in the “exacting scrutiny” camp in *Citizens Against Rent Control*, joining Justice Blackmun’s opinion concurring in the judgment. *Citizens Against Rent Control* for Fair Housing v. City of Berkeley, 454 U.S. 290, 302 (1981) (Blackmun and O’Connor, JJ., concurring). Justice Stewart’s position on the subject cannot be ascertained with any certainty.

131. 470 U.S. 480 (1985) (*NCPAC*).

132. Id. at 494-95. The Court found that the “First Amendment freedom of association [was] squarely implicated” and that contributions to independent expenditure committees “are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to ‘amplify[y] the voice of their adherents.'” Id. at 494 (citing *Buckley*, 424 U.S. at 22; NAACP v. Alabama, 357 U.S. 449, 460 (1958); *Citizens Against Rent Control*, 454 U.S. at 295-96). “[T]he ‘proxy speech’ approach is not useful in this case,” the Court noted, because “contributors obviously like the message they are hearing from these organizations and want to add their voices to that message.” Id. at 495.

133. Id. at 495.
Strictly Scrutinizing Campaign Finance Restrictions

...may be, it seems to be the line that the Court has drawn and applied over this series of cases. Despite the fact that the ordinances under consideration here pose limits on contributions to committees making independent expenditures in candidate elections rather than ballot measure elections, subjecting those ordinances to the “exacting” scrutiny on the Citizens Against Rent Control side of the line is the only position consistent with Buckley, on the one hand, and Citizens Against Rent Control, NCPAC, and Justice Blackmun’s controlling opinion in CMA, on the other, for several reasons.

First, unlike the primary expressive purpose of announcing support for a candidate that the Court believed was furthered by the contributions to candidates at issue in Buckley, contributions to independent expenditure committees are made primarily to further the committee’s views. This contention is true whether the committee is participating in a ballot measure election or a candidate election. Second, the Buckley Court expressly relied upon the fact that restrictions on contributions to candidates leave contributors free to express their political speech in other ways—either through individual independent expenditures or by becoming “a member of any political association.” Restricting that association not only seems distinct from the restriction at issue in Buckley, but actually undermines one of the grounds upon which the Buckley decision rests. Finally, the Supreme Court has not confined Citizens Against Rent Control’s “exacting” scrutiny to the ballot measure context.

In NCPAC, the Supreme Court cited Citizens Against Rent Control to support its application of strict scrutiny to restrictions on independent expenditure committees opposing candidates because such committees “are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to ‘amplify[ ] the voice of their adherents.’” The Court elaborated:

...obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be

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134. See id. As the Court noted in NCPAC, such “contributors obviously like the message they are hearing from these organizations and want to add their voices to that message.” Id.

135. Buckley, 424 U.S. at 22.

136. NCPAC, 470 U.S. at 494 (quoting Citizens Against Rent Control, 454 U.S. at 295-96).
able to buy expensive media ads with their own resources.137

Several lower courts have followed Citizens Against Rent Control and strictly scrutinized restrictions on contributions to committees making independent expenditures in candidate elections despite the fact that Citizens Against Rent Control involved a ballot measure election restriction. In the Righeimer case, for example, the district court held that the Huntington Beach ordinance was subject to strict scrutiny, and explicitly cited Citizens Against Rent Control as the basis for its holding.138 The District Court for the Northern District of California went even further, holding in San Franciscans for Sensible Government that “making contributions to PACs . . . which make only independent expenditures . . . is highly protected speech and may not be regulated.”139

The Eighth Circuit Court of Appeals has also adopted this position: “State-enforced limits on contributions to political action committees stifle ‘not only free political speech, but also free political association,’ and are reviewed according to a strict scrutiny standard.”140 And, although not specifically relying on Citizens Against Rent Control, the Fourth Circuit Court of Appeals and the District Court for the Western District of Arkansas have likewise subjected limits on contributions to independent expenditure committees to strict scrutiny.141

In contrast, the same district court that decided Righeimer seems to have rejected strict scrutiny in the Lincoln Club case.142 Indeed, although it is hard to ascertain from the short minute order just what level of scrutiny the district court applied, it appears to have adopted something akin to rationale basis review.143 Similarly, the Sixth Circuit Court of Appeals

137. Id. at 495 (emphasis added).
140. Russell v. Burris, 146 F.3d 563, 571 (8th Cir. 1998) (quoting Day v. Holahan, 34 F.3d 1356, 1365 (8th Cir. 1994)).
143. In the face of disputed evidence about the city’s purpose in enacting the contribution limitations, the court granted summary judgment for the city because “[r]estricting contributions made to independent expenditure committees engaged in candidate-related expenditures can be said to be a constitutionally valid means to curtail any one person or committee from making an unlimited candidate ‘expenditure,’ thereby reducing the
in *Kentucky Right to Life, Inc. v. Terry* 144 and the District Court for the District of Colorado in *Citizens for Responsible Government State PAC v. Buckley*, 145 both applied a lower level of scrutiny when assessing restrictions on contributions to PACs that could make both independent expenditures and contributions to candidates. According to the Sixth Circuit: “The [Supreme] Court has clearly stated that this type of political speech [by proxy]... does not receive the full First Amendment protection afforded direct political contributions because limitations on contributions to permanent committees do not significantly infringe on First Amendment rights.” 146 Similarly, the District Court for the District of Colorado stated that “political speech does not receive the full protection afforded direct political contributions” because there is no significant First Amendment infringement. 147

Courts applying strict scrutiny have the better argument and the one more consistent with prevailing Supreme Court precedent. *Terry* and *Citizens for Responsible Government* mistakenly treated the plurality opinion in *CMA* as if it were binding precedent and did not address the Court’s more authoritative opinion in *Citizens Against Rent Control*. *Lincoln Club* also mistakenly relied upon the plurality opinion in *CMA*, and its resort to what was tantamount to a rational basis review finds no support even in the slightly-less-than-strict scrutiny the *Buckley* Court applied to contributions to candidates. Quite simply, the courts subjecting restrictions on contributions to independent expenditure committees to strict scrutiny have the better argument because such restrictions affect expenditures and intrude upon associational rights. Further, it is the only position consistent with a rationale that reconciles the Supreme Court’s decisions in *Citizens Against Rent Control*, *NCPAC*, and Justice Blackmun’s opinion in *CMA*, on the one hand, and *Buckley* and *Nixon*, on the other.

Even if the standard of review applied in *Buckley* for contributions to candidates applied to the ordinances under consideration here, *Buckley* concerns of corruption or the appearance thereof.” *Id.* (emphasis added). By relying at the summary judgment stage on what “can be said” to be the purpose rather than what the city was able to prove with undisputed evidence, the court seems to have taken refuge in the doctrine that legislation will be sustained if it furthers any conceivable legitimate government purpose, a doctrine appropriate only under Equal Protection rationale basis review, but not under any of the more strict levels of scrutiny. *See, e.g., McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (holding that “[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it”).

144. 108 F.3d 637 (6th Cir. 1997).
145. 60 F. Supp. 2d 1066 (D. Colo. 1999).
147. *Citizens for Responsible Gov’t*, 60 F. Supp. 2d at 1087.
actually held that such restrictions on associational activity are "subject to the closest scrutiny."

Although, as the Court in Nixon held, that may not be the strictest level of scrutiny, it is still scrutiny with a punch—something more than the intermediate scrutiny that the Court applies when assessing restrictions on speech conduct or time-place-manner restrictions, for example. 

As the Ninth Circuit Court of Appeals noted, Buckley "applied a somewhat less stringent test than strict scrutiny." The test, however, "is still a 'rigorous' one," and the government must still demonstrate "a sufficiently important interest and employ means closely drawn to avoid unnecessary abridgement of associational freedoms." As the Court noted in Nixon, "a contribution limit involving 'significant interference' with associational rights . . . could survive [only] if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'"

The ordinances under consideration here clearly and significantly restrict associational activity. Because they do not (and under Buckley, could not) restrict potential contributors from individually making independent expenditures of any amount on behalf of or against candidates, the only effect of such ordinances is to limit individuals who wish to associate together for political advocacy. As such, the ordinances must, at the very least, be "'closely drawn' to match a 'sufficiently important interest.'" For the same reason we distinguished Citizens Against Rent Control from Buckley above, restrictions on contributions to independent expenditure committees cannot meet even this watered-down test.

III. LIMITS ON CONTRIBUTIONS TO INDEPENDENT EXPENDITURE COMMITTEES DO NOT FURTHER GOVERNMENT'S INTEREST IN AVOIDING CORRUPTION OR THE APPEARANCE OF CORRUPTION OF CANDIDATES

In Buckley, the Supreme Court upheld restrictions imposed by FECA on contributions to candidates because the infringement on the First
Amendment was closely drawn to further the government's sufficiently compelling interest in preventing quid pro quo corruption of candidates or the appearance of such corruption. However, the same Court struck down FECA's limitations on independent expenditures by individuals because "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." The Court extended that ruling in NCPAC when it invalidated restrictions on expenditures made by independent expenditure committees, noting:

It is of course hypothetically possible here, as in the case of the independent expenditures forbidden in Buckley, that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in Buckley, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

By definition, as the District Court for the Central District of California held in the Righeimer case, contributions to independent expenditure committees "are even more remotely connected to the dangers of corruption of candidates than are the independent expenditures themselves, so likewise are not justified by any sufficiently compelling governmental interest." The Eighth Circuit has explained why: "the concern of a political quid pro quo for large contributions, which becomes a possibility when the contribution is to an individual candidate, . . . is not present

156. Id. at 47.
when the contribution is given to a political committee or fund that by itself does not have legislative power.\textsuperscript{159} Quite simply, a limitation on contributions to \textit{independent expenditure committees} lacks the necessary causal link to the legitimate governmental interest in avoiding corruption and the appearance of corruption; thus, any attempt to bring such ordinances under the \textit{Buckley} umbrella cannot properly be sustained.

The same distinction between direct contributions to candidates and contributions to independent expenditure committees underlay the Court's decision in \textit{Citizens Against Rent Control}.\textsuperscript{160} Although, as discussed above, the committee challenging the Berkeley ordinance was formed to oppose a ballot measure rather than a candidate, \textit{NCPAC}'s severing of the connection between independent expenditures and candidate corruption in candidate elections renders that distinction immaterial.\textsuperscript{161} In both cases, restrictions on the contributions to independent expenditure committees are unconstitutional because the expenditures made possible by the contributions did not implicate the government's concern with quid pro quo corruption.\textsuperscript{162}

The Supreme Court did uphold a $5,000 cap on contributions to multi-candidate committees in \textit{CMA},\textsuperscript{163} but the plurality opinion in that case is easily, and properly, distinguished. Indeed, the controlling opinion in the case strongly supports the claim that contributions to independent expenditure committees cannot be restricted because they do not further the government's legitimate anti-corruption purpose.\textsuperscript{164}

Under federal election law, individuals may contribute a maximum of $1,000 per election to any candidate and $25,000 cumulatively to federal candidates in any given year.\textsuperscript{165} Political committees that qualify as "mul-

\begin{itemize}
\item \textsuperscript{159} Day v. Holahan, 34 F.3d 1356, 1365 (8th Cir. 1994) (citing \textit{Buckley}, 424 U.S. at 26-27). The Eighth Circuit also held that the $100 limit at issue was "too low to allow meaningful participation in protected political speech and association." \textit{Id.} at 1366. Although that discussion was unnecessary to the court's holding invalidating limits on contributions to independent expenditure committees (given the court's recognition that the State's interest in avoiding quid pro quo corruption was not furthered by such limits), the statute at issue also limited contributions by such committees directly to candidates. \textit{See id.} at 1365. Accordingly, the discussion was necessary to the court's holding that the $100 limit was different in kind from the $1,000 limitation upheld in \textit{Buckley}. \textit{See id.} at 1366.
\item \textsuperscript{160} \textit{Citizens Against Rent Control Coalition for Fair Housing v. City of Berkeley}, 454 U.S. 290, 296 (1981).
\item \textsuperscript{161} \textit{FEC v. National Conservation PAC}, 470 U.S. 480, 496-500 (1985) (\textit{NCPAC}).
\item \textsuperscript{162} \textit{See id.} at 497; \textit{Citizens Against Rent Control}, 454 U.S. at 297-99.
\item \textsuperscript{163} \textit{California Medical Ass'n v. FEC}, 453 U.S. 182, 195-99 (1981) (plurality opinion) (\textit{CMA}).
\item \textsuperscript{164} \textit{See id.} at 200-01.
\item \textsuperscript{165} \textit{See id.} (citing 2 U.S.C. §§ 441a(a)(1)(A), (a)(3)).
\end{itemize}
ticandidate” committees, on the other hand, may contribute $5,000 to candidates. The Court recognized that this statutory disparity provided an opportunity for individuals to “evade” both the $1,000 limit and the $25,000 aggregate limit “by channeling funds through a multicandidate political committee.” Accordingly, the Court upheld the limitation as “an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld . . . in Buckley.”

Significantly, Justice Blackmun stressed that “this analysis suggests that a different result would follow if [the limits] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates.” Justice Blackmun stated that “[m]ulticandidate political committees are . . . essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption . . . in contrast [to] contributions to a committee that makes only independent expenditures [, which] pose no such threat.” Justice Blackmun’s more narrow opinion was controlling because it was necessary to the disposition of the case.

Finally, in its most recent case addressing this subject in a closely analogous context, Justice Breyer, writing for a plurality of the Court in Colorado Republican Committee v. FEC, recognized specifically that the “constitutionally significant fact, present equally” in independent expenditures and in contributions to independent expenditure committees, “is the lack of coordination between the candidate and the source of the expenditure.”

On the other hand, twenty years ago, the District Court for the District of Columbia, in Mott v. FEC, upheld FECA’s limit on contributions to multicandidate committees when challenged by a contributor who wished to earmark her contribution for independent expenditures. Mott does not govern the restrictions on contributions to independent expenditure committees under consideration here for two reasons. First,

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166. Id. (citing 2 U.S.C. § 441a(a)(2)(A)).
167. Id.
168. Id. at 199.
169. Id. at 203 (Blackmun, J., concurring).
170. Id. (Blackmun, J., concurring).
171. See supra notes 124-25 and accompanying text.
173. Id. at 617.
175. Id. at 133, 137.
the FECA provision at issue in *Mott* did not distinguish between independent expenditure committees and multicandidate committees that could make contributions directly to candidates. The same provision was at issue the following year in the *CMA*, and as described above, the dispositive opinion of Justice Blackmun drew such a distinction and strongly suggested that a restriction on contributions to committees making only independent expenditures would be unconstitutional.

Second, and more fundamentally, *Mott* was decided before the Supreme Court in *NCPAC* completely severed the connection between independent expenditures and any concern with quid pro quo corruption of candidates, the only concern that to this day the Court has recognized as sufficiently compelling to sustain such restrictions. To the extent *Mott*’s holding ever stood for the proposition that contributions to independent expenditure committees (as opposed merely to multicandidate committees) could be sustained because they furthered the government’s interest in avoiding quid pro quo corruption, that holding simply does not survive the Supreme Court’s decision in *NCPAC*.

IV. CONCLUSION

Without the nexus to government’s legitimate concern with avoiding corruption or the appearance of corruption of candidates—the only interest that the Supreme Court has recognized as sufficiently compelling to warrant the intrusion on First Amendment speech and associational rights effected by restrictions on campaign contributions and expenditures—restrictions on contributions to independent expenditure committees simply do not pass constitutional muster. That is the result initially adopted by the Central District of California in *Righeimer* (though later rejected in *Lincoln Club*), and it is the result foreshadowed by the Northern District of California’s order in *San Franciscans for Sensible Government* preliminarily enjoining San Francisco from enforcing its restrictions. It is the only result that gives full credence to the robust exchange of ideas that the First Amendment was designed to protect.

176. *Id.* at 137 (citing to § 441a(a)(1) of FECA’s Amendments).
179. See *CMA*, 453 U.S. at 198-99 (recognizing that the government’s interest in preventing evasion of contribution limits was a constitutionally sufficient purpose, but that an anti-evasion purpose must be read in light of the limits on contributions to candidates that the Court had upheld in *Buckley*, limits which furthered an anti-corruption purpose).