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It's My Party and I'll Do What I Want to: Political Parties, Unconstitutional Conditions, and the Freedom of Association

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POLITICAL PARTIES, UNCONSTITUTIONAL CONDITIONS, AND THE FREEDOM OF ASSOCIATION

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INTRODUCTION

Political parties occupy a unique place in First Amendment law.¹ On the one hand, if the First Amendment protects any group in its right to associate, it should protect a group of people joining in concert to influence the country's democratic governance.² On the other hand,

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² Throughout this Article, I refer to the protections of the First Amendment even where states or localities, rather than the national government, are the relevant governing authorities. Technically, individuals' and organizations' rights of free speech, press, assembly, and petition, and the derivative right of expressive association are protected against state and local government infringement by the Fourteenth Amendment’s Due Process Clause, through which the First Amendment has been incorporated. See, e.g., Williams v. Rhodes, 393 U.S. 23, 30–31 (1968); Fiske v. Kansas, 274 U.S. 380, 386–87 (1927); Gitlow v. New York, 268 U.S. 652, 666 (1925).

³ See, e.g., Morse v. Republican Party of Va., 517 U.S. 186, 241 (1996) (Scalia, J., dissenting) (“[W]e have always treated government assertion of control over the internal affairs of political parties—which, after all, are simply groups of like-minded individual voters—as a matter of the utmost constitutional consequence.”); Cousins v. Wigoda, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring in the result) (“The right of members of a political party to gather in a national political convention in order to formulate proposed programs and nominate
because parties play a central role in the electoral process through their power to nominate candidates,\(^3\) parties are sometimes considered to be "state actors" that must adhere to constitutional limitations on their autonomy.\(^4\) The Supreme Court has said that states can require parties to use primaries,\(^5\) and has held that parties may not exclude blacks from those primaries,\(^6\) but the Court has also held that parties retain some autonomy in preventing outsiders from participating in the primaries—even where the primaries are paid for by the state.\(^7\)

The Court's *ad hoc* approach to developing doctrine in this field has produced contradictory results via incompatible methodologies. A more consistent approach is needed, and we can move toward one if we treat parties as autonomous organizations with First Amendment rights, and we also accept that the parties may waive those rights in exchange for government benefits.

More concretely, states should be able to require parties to open themselves to the participation of (and influence by) outsiders, but only where the parties accept that limitation on their First Amendment rights in exchange for some benefit that government need not provide. Where the government is not bargaining at all, but rather is simply demanding that the parties comply with a regulation that limits their expressive ability, the limitation on parties' First Amendment rights should be

candidates for political office is at the very heart of the freedom of assembly and association.\..."

3. This role is ironic, given that the Constitution itself does not speak of parties and, indeed, the Constitution's divisions of government power sought to minimize parties' effectiveness. See *The Federalist No. 10* (James Madison) (describing the Constitution's plan for separating powers as a way of combating the effects of faction).

4. Parties have also been analogized to common carriers, whose businesses are "clothed with a public interest," *Munn v. Illinois*, 94 U.S. 113, 126 (1877), and are therefore subject to a greater degree of regulation than that applicable to other businesses. See Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 278 & n.10 (2001) (citing LEON D. EPSTEIN, *Political Parties in the American Mold* 157–58 (1986) (analogizing parties to utilities)).


6. *See infra* Part I.B.

unconstitutional, at least unless the regulation passes strict scrutiny.\(^8\)
Where, however, there is some benefit accorded to parties—principally
automatic ballot access for parties’ nominees and state-funded primaries
to select those nominees—the government should be able to attach some
conditions to that benefit consistent with the “unconstitutional-
conditions” doctrine.\(^9\) Although that doctrine’s contours are not well
defined, it permits the government—“[w]ithin broad limits”—to
courage people or groups to behave in a certain way by offering a
benefit to those who act in such a manner.\(^10\) Analyzing the regulation of
political parties through the unconstitutional-conditions doctrine permits
the government to advance its interest in broadening access to politics
while still respecting parties’ right to autonomy.

In Part I of this Article, I explain political parties’ ambiguous
position in First Amendment doctrine. I address the freedom of
expressive association and the corollary right not to associate with
outsiders, first as applied to groups whose primary purposes are non-
political, and then as applied to parties. I also address the question of
parties’ status as state actors and the effect that parties’ role in the
electoral process has had on their ability to exercise the right not to
associate. I argue that parties’ status as state actors should turn on the
advantages they receive from the state, such that parties who receive no

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8. See *infra* Part III.A.2.

9. I am under no illusion that characterizing the issue as an unconstitutional-
conditions problem will resolve all controversies about the extent of permissible
regulation of parties. As others have noted, the unconstitutional-conditions doctrine
is “profoundly unclear.” Ashlie C. Warnick, *Accommodating Discrimination*, 77 U.
CIN. L. REV. 119, 173 (2008); see also sources cited *id.* at 173 n.346 noting that the
Court’s applications of the doctrine are widely viewed as “inconsistent.” See ERWIN
2011). Some have even argued that no theoretically satisfying solution to
unconstitutional-conditions problems is possible. See Frederick Schauer, *Too Hard:
Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989 (1995). Nevertheless, an unconstitutional-conditions analysis,
I argue, focuses us on the right question: When should parties be deemed to forfeit
their First Amendment freedoms in exchange for state-conferred advantages over
other private expressive associations? Framing the issue in this way may not resolve
all questions, but it does help to identify which problems are difficult ones, and to
resolve some easy ones, as I discuss below.

such advantages should receive the rights to which other expressive associations are entitled under the First Amendment.

Part II further develops this inquiry into state-conferred advantages by exploring the unconstitutional-conditions doctrine. I first address the limits the Court has placed on the government’s ability to offer benefits for the non-assertion of constitutional rights, and then I discuss how cases involving political parties’ First Amendment rights already reach results that are consistent with an unconstitutional-conditions approach. I argue that while parties should be presumptively autonomous expressive associations, the government should be able to reserve the benefits of state funding and automatic ballot access for those parties that refrain from exercising their constitutional rights in ways the state finds objectionable.

Part III considers how such a rule would affect existing doctrine as well as foreseeable controversies, finding that the largest effect may be seen in parties that do not consistently win elections and in those states that have eliminated partisan primaries in favor of the “top-two” primary that does not guarantee ballot access for parties’ nominees.

I. POLITICAL PARTIES’ PLACE IN FIRST AMENDMENT LAW

To think of government regulation of parties as limiting the exercise of First Amendment rights, we must begin with the understanding that parties and their members do have First Amendment rights—particularly the freedoms of speech, assembly, and expressive association.11 As the Court has explained, a group’s protected expression is affected by its membership, and therefore restrictions on groups’ freedom to decide their own membership policies are necessarily restrictions on their freedom of expression.

This Part proceeds in three sections featuring summaries, analyses, and critiques of existing doctrine. Section A explains that political parties are expressive associations. Accordingly, under the First Amendment, they have the right to determine the content of their own messages and to exclude outsiders from participating in their activities.

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This argument has been the basis for several modern Supreme Court decisions limiting the authority of states to control party activity, though the Court has never accepted party autonomy completely. Section B analyzes the White Primary Cases, the chief doctrinal counter-example to the proposition that parties are autonomous expressive associations. Finally, section C explains and critiques commentators' attempts to recast parties' rights under the First Amendment.

A. Political Parties as Expressive Associations

Political parties are quintessential expressive associations, perhaps even the epitome of the kind of associations the First Amendment should protect. Parties are "groups of like-minded individual voters" organized for the purpose of winning elections and influencing public policy. Accordingly, it should come as no surprise that parties have been accorded the First Amendment rights applicable to expressive associations, including the right to conduct their internal affairs free of government interference and the right to determine for

12. See, e.g., Cousins v. Wigoda, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring in the result) ("The right of members of a political party to gather in a national political convention in order to formulate proposed programs and nominate candidates for political office is at the very heart of the freedom of assembly and association. . ."); Nancy L. Rosenblum, Political Parties as Membership Groups, 100 COLUM. L. REV. 813, 816 (2000) ("[A]mong associations of civil society, political parties are primus inter partes.").


14. See, e.g., Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997) ("The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."); Kusper v. Pontikes, 414 U.S. 51, 57 (1973) ("The right to associate with the political party of one's choice is an integral part of [the freedom of association].").

15. See, e.g., Cousins, 419 U.S. at 487 ("The National Democratic Party and its adherents enjoy a constitutionally protected right of political association."); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.").

themselves the content of the messages they wish to promote.\textsuperscript{17} The Court has recognized that this second right encompasses a right of non-association, for such a right helps ensure that associations’ messages are not altered or diluted\textsuperscript{18} by the presence or participation of people with contrary views.\textsuperscript{19} As the Court has often repeated, the “freedom of association . . . plainly presupposes a freedom not to associate.”\textsuperscript{20}

Such a divergence in policy views can lead to damaging consequences when parties are “raided” by outsiders.\textsuperscript{21} In 2008, Barack Obama and Hillary Clinton were in a relatively close contest for the Democratic presidential nomination. In an attempt to create controversy at the Democrats’ nominating convention and ultimately hurt that party’s chances in the general election, conservative commentator Rush Limbaugh engineered “Operation Chaos,” under which Republican supporters would vote in Democratic primaries by temporarily registering as Democrats in states holding closed primaries.\textsuperscript{22} Those Republican supporters voted for Clinton in the primaries so as to aid her in closing Obama’s small lead, and to increase the chance of a

\textsuperscript{17} See, e.g., Tashjian v. Republican Party of Conn., 479 U.S. 208, 224 (1986); Democratic Party of the U.S. v. Wis. ex rel. La Follette, 450 U.S. 107, 123–24 (1981).

\textsuperscript{18} More dramatically, the right to exclude implicates groups’ “right to exist” because a group cannot form an identity without the ability to exclude those who would change the group’s defining characteristics. John D. Inazu, The Unsettling “Well-Settled” Law of Freedom of Association, 43 CONN L. REV. 149, 153 & n.7 (2010) (citing RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 142 (1984) (“When an institution that is voluntary in membership cannot define the conditions of belonging, that institution in fact ceases to exist.”)).

\textsuperscript{19} See Cal. Democratic Party v. Jones, 530 U.S. 567, 578 (2000) (calling it “obvious” that non-party members “who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful”).


\textsuperscript{21} See Cal. Democratic Party, 530 U.S. at 579 (“[A] single election in which the party nominee is selected by nonparty members could be enough to destroy the party . . . . Ordinarily, however, being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it.”).

\textsuperscript{22} See Jennifer Parker, Is Limbaugh’s Operation Chaos Working?, ABC NEWS, POLITICAL PUNCH (May 6, 2008), http://abcnews.go.com/blogs/politics/2008/05/is-limbaughs-op/.
convention fight.23 “Operation Chaos” was ultimately unsuccessful (Obama won the nomination with an insubstantial amount of controversy and then won the general election), but Limbaugh’s scheme demonstrated the potential for persons opposed to a party’s views to disrupt the party’s deliberations.24

The 2012 Republican primaries may have seen a similar effect, even without the deliberate maneuvering of “Operation Chaos.” In Michigan, Democrats comprised ten percent of voters in the Republican primary and voted for Rick Santorum over Mitt Romney, the candidate favored by the Republican “establishment,” by a factor of three-to-one.25 The election was close, and Michigan split its delegates between the candidates.26 Santorum may have owed his delegates to the votes of Democrats who wanted Republicans to run a weak candidate in the general election.27

23. Id.

24. The example suggests that it may be overly optimistic to treat raiding as a minor, speculative, or “hypothetical” problem because of the belief that people would not want to join groups opposed to their philosophies. Cf. Christian Legal Soc’y v. Martinez, 130 S. Ct. 2971, 2992 (2010) (“Students tend to self-sort and presumably will not endeavor en masse to join—let alone seek leadership positions in—groups pursuing missions wholly at odds with their personal beliefs. And if a rogue student intent on sabotaging an organization’s objectives nevertheless attempted a takeover, the members of that group would not likely elect her as an officer.”).


27. Governor Romney has claimed that Democrats' votes were an attempt to give the Republican nomination to Santorum, who was perceived to be a weaker candidate in the general election. See Romney Blasts Santorum for “Dirty Trick” Calls to Michigan Dems Encouraging Vote in GOP Primary, FOX NEWS (February 28, 2012), http://www.foxnews.com/politics/2012/02/28/santorum-encourages-michigan-democrats-to-vote-against-romney-in-phone-calls/. See also Spangler, supra note 25. It is impossible to determine how many voters were so motivated, but certainly the number is greater than zero.

California’s 2002 gubernatorial election similarly involved partisan attempts to influence another party to nominate a weak candidate. Incumbent Democratic
Likewise, the outcome of Tennessee’s 2012 Democratic primary for the U.S. Senate may have been affected by the participation of non-Democrats who took advantage of Tennessee’s open-primary law. The seven-candidate primary contest was won by Mark Clayton, who was active in a group opposing abortion rights and gay marriage.28 The Tennessee Democratic Party disavowed the candidacy of “its” nominee, and called on Democrats “to write-in a candidate of their choice in November.”29 These examples show that the participation of non-party members can have a significant effect on parties’ associational rights of self-definition—even going so far as to result in the election of a nominee whom the nominating party does not support.

Further, as the Supreme Court noted in California Democratic Party v. Jones,30 the participation of non-party members can affect the nomination in more ways than altering the identity of the ultimate nominee: “Even when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions—and, should he be elected, will continue to take somewhat different positions in order to be renominated.”31

governor Gray Davis spent ten million dollars on advertisements critical of Richard Riordan, the Republican front-runner. See Bill Schneider, California’s Governor Gets His Wish, CNN POLITICS (Mar. 8, 2002), http://articles.cnn.com/2002-03-08/politics/pol.play.davis_1_true-blue-think-tank-bill-simon-gray-davis? s=PM:ALLPOLITICS. The Republican primary was won by Bill Simon, a conservative perceived as a weaker challenge in the general election than Reardon would have been. Davis beat Simon in the general election, only later to be recalled and replaced by Arnold Schwarzenegger. The California experience shows that it is particularly important for a party to be able to restrict the primary electorate to party members if opposition parties will actively promote the nomination of weak candidates.


31. Id. at 579–80.
All this suggests that political parties—like all other expressive associations—should have the right to control their messages by limiting the people who can influence those messages. And that is largely what the Supreme Court held in *California Democratic Party*. To understand the doctrinal context of that case, however, it is necessary to address the right of expressive association as it has developed in other areas.

The Supreme Court has long recognized private groups' First Amendment right to control their own speech and the concomitant right to control their memberships. As the Court has reasoned, a group's members color the message that the group expresses; accordingly, an organization is unable to exert control over its messages if it cannot limit the persons who form the organization. Therefore, the Constitution permits private groups—as long as the groups engage in speech sufficient to qualify them as "expressive associations," and political parties certainly qualify—to distinguish between potential members on the basis of ideology, sex, race, sexual orientation, and any other basis even if such discrimination would be unconstitutional when undertaken by the government.

In *Boy Scouts of America v. Dale*, for example, the Court struck down New Jersey's attempt to apply its ban on sexual-orientation discrimination to the Boy Scouts. In doing so, it upheld the right of the Boy Scouts to control its membership as a way of controlling its

32. Id. at 575–76, 581–82.
33. The Court has treated the associations as possessing the First Amendment rights of their members, permitting those members to speak and conduct other First Amendment activity as a group, rather than merely individually. Of particular note, the Court has refused to give credence to the idea that these associations, because they are artificial entities, can be regulated outside the strictures of the First Amendment. See, e.g., Citizens United, Inc. v. Fed. Election Comm'n, 558 U.S. 310, 343, 130 S. Ct. 876, 900 (2010) ("The Court has ... rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of [political] speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").
36. Id. at 659.
message. The Court noted that the mission of the Scouts was to inculcate certain values in boys, and that the inclusion of an openly gay assistant scoutmaster would interfere with the Scouts’ ability to advocate certain values.

Religious organizations present a particularly close analogue to parties because both kinds of groups unite their members under a shared ideology. The Court has recognized that both religious groups and political parties have a First Amendment right to control their memberships and select their leaders free of governmental interference because such autonomy is necessary for the groups to develop their identities and missions. This autonomy helps society as well, as it increases the diversity of opinion available in the marketplace of ideas.

The Court’s recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, which applied the “ministerial exception” to hold the church and school immune from anti-

37. *Id.* at 653–54.
38. *See id.* at 653–56.
39. *See* Daniel A. Farber, *Foreword: Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 *Minn. L. Rev.* 1483, 1501-02 (2001) (“Churches, though they receive special treatment under the religion clauses, are also classic expressive associations, being groups whose main purpose is to engage in protected First Amendment activities. . . . Indeed, to some extent, the Court may be using religious organizations as a model for other expressive associations.”).
44. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (“[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .”).
discrimination laws in its dismissal of a teacher, exemplifies this philosophy. The Court recognized the ministerial exception for the same reason it has granted autonomy to other expressive associations under the First Amendment: Autonomy from state control over a group’s membership permits the group to control its own First-Amendment-protected expression. As the Court explained, “[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so . . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.” Justice Alito’s concurring opinion, drawing on nonreligious expressive-association cases, further noted the parallels between religious groups and secular expressive associations. As he wrote, the First Amendment right to autonomy held by organizations such as the Boy Scouts, whose message about homosexuality was arguably tangential to its primary focus on teaching outdoor skills, “applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals.” Likewise, the First Amendment’s protections of associational autonomy should apply with “special force” to political parties, “whose very existence is dedicated to the collective expression and propagation of shared [political] ideals.”

An organization’s freedom of association extends beyond membership decisions to other matters that “rais[e] the same First Amendment concerns about affecting the group’s ability to express its message.” For example, in the foundational right-of-expressive-association case of NAACP v. Alabama ex rel. Patterson, the Court held unconstitutional Alabama’s requirement that the NAACP disclose the names and addresses of all its Alabama members. The Court

46. Id.
47. Id. at 706.
48. Id.
49. See id. at 712–13 (Alito, J., concurring).
50. Id. at 712.
51. Id. (internal citation omitted).
54. Id. at 466.
reasoned that “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”

Similarly, political parties, like other expressive associations, should have the constitutional right not only to control their memberships but to make other decisions that affect their ability to form and promote their messages.

These cases demonstrate that non-political (e.g., religious and educational) associations possess a constitutional right to operate autonomously as to matters affecting the messages they express. Parties’ focus on political issues—the core concern of the First Amendment—means that parties present at least as strong a case for First Amendment protection as do other groups that the Court has treated as expressive associations.

The Court was receptive to party autonomy in California Democratic Party v. Jones, which struck down California’s blanket primary. Under the blanket primary, voters (regardless of their partisan affiliations) were permitted to vote for candidates seeking parties’ nominations. Unlike in an open primary, blanket-primary voters were not limited to voting for candidates seeking the nomination of the same party; rather, blanket-primary voters could vote for one candidate seeking to become the Democratic nominee for governor and another

55. Id. at 462.

56. See, e.g., Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000) (“Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.”); Monitor Patriot Co. v. Roy, 401 U.S. 265, 271—72 (1971) (“[I]f it be conceded that the First Amendment was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,’ Roth v. United States, 354 U.S. 476, 484, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”).

57. Cf. Republican Party of Minn. v. White, 536 U.S. 765, 783 (2002) (noting “the obvious point” that the First Amendment provides at least as much protection to speech during an election campaign as it does to speech at other times).

58. Alaska and Washington also used the blanket primary; California Democratic Party effectively invalidated those laws as well.
candidate seeking the Republican nomination for attorney general.\textsuperscript{59} The parties were obligated to nominate whichever candidate received the most votes—even if that candidate’s support came from voters unaffiliated with (or even ideologically opposed to) those parties.\textsuperscript{60}

That fact proved decisive. Relying on earlier cases discussing the importance of a party’s right to select standard-bearers who could effectively communicate the party’s message, the Court held that it violated the First Amendment for the state to force the party to nominate a candidate whose message would be different from that preferred by the party itself.\textsuperscript{61} In fact, the Court stated that “[i]n no area is the political association’s right to exclude more important than in the process of selecting its nominee.”\textsuperscript{62}

Had the blanket primary \textit{not} determined the party’s nominee, the Court was quite clear that the blanket primary would have been constitutional.\textsuperscript{63} The Court contrasted the blanket primary then used in California with the nonpartisan blanket (or “top-two”) primary used in Louisiana.\textsuperscript{64} The two systems are similar, each allowing voters regardless of party affiliation to vote for candidates.\textsuperscript{65} But whereas votes in a blanket primary are tallied separately for each party and determine the parties’ nominees, the top two vote-getters in a nonpartisan blanket primary advance to the general election regardless of their partisan affiliations. Thus, the general election could be a race between two candidates of the same party, and the election does not determine any

\textsuperscript{59} See \textit{id.} at 576 n.6 (describing the difference between open and blanket primaries).

\textsuperscript{60} \textit{id.} at 570 (quoting \textit{CAL. ELEC. CODE ANN.} § 15451) (West 1996)).


\textsuperscript{62} \textit{Cal. Democratic Party}, 530 U.S. at 575.

\textsuperscript{63} \textit{See generally} John R. Labbé, Comment, \textit{Louisiana’s Blanket Primary After California Democratic Party v. Jones}, 96 NW. U. L. REV. 721 (2002) (asserting that because Louisiana’s version of the blanket primary was exempted by dicta in \textit{California Democratic Party}, it is presumed to be constitutional).

\textsuperscript{64} \textit{See Cal. Democratic Party}, 530 U.S. at 585–86.

\textsuperscript{65} \textit{id.}
party’s nominee. The last distinction—between primaries that choose parties’ nominees and elections that whittle the candidates to two regardless of party—is, in the view of the Court, the “constitutionally crucial one.” The party’s First Amendment rights are triggered by a primary “when the election determines a party’s nominee.” When the election is not determinative, then the election is a “public affair” and the state possesses substantial discretion to set the rules governing participation.

California Democratic Party built on several other cases that had recognized parties’ First Amendment right to some degree of independence from state regulation. Notably, Democratic Party of the United States v. Wisconsin ex rel. La Follette held that if the party preferred to run a closed primary, the state could not demand that delegates to the party’s national convention be chosen through an open primary. Tashjian v. Republican Party of Connecticut held that a state could not force a party to hold a closed primary if the party preferred to invite independents to participate. Eu v. San Francisco County Democratic Central Committee held that states could not interfere with parties’ internal governance or prevent parties’ governing bodies from endorsing candidates in primary elections. And, although technically not reaching the merits of the case, O’Brien v. Brown expressed “grave doubts” about the power of the government to interfere with a party’s choice of which delegates to seat at its convention. California Democratic Party, then, was far from an outlier; the Court had protected parties’ autonomy in several cases.

Yet the right of political parties to choose the individuals with whom they wish to associate is in tension with the canonical White Primary Cases, which held unconstitutional attempts by the Texas

66. See id. at 586.
67. Id.
68. Id. at 573 n.4.
70. Id. at 123–24.
71. 479 U.S. 208 (1986).
72. Id. at 224–25.
74. Id. at 224–25, 229, 230–31, 233.
75. 409 U.S. 1 (1972) (per curiam).
76. Id. at 5.
Democratic Party—and even by a political “club” known as the Jaybird Party or Jaybird Democratic Association— to restrict participation in the candidate-nomination process to whites. The Court concluded that the ostensibly private organizations seeking to exclude blacks were sufficiently tied to the state to make the organizations’ discrimination “state action,” and therefore in violation of the constitutional prohibition of racial discrimination in voting. Further, in Clingman v. Beaver the Court held that, although under Tashjian parties have a right to invite independents to vote in their primaries, parties do not have a right to invite members of other parties if the state chooses to run a semi-closed primary.

Current law, then, favors, but does not fully embrace, what Professors Persily and Cain have termed the “libertarian paradigm” in its understanding of parties. This “libertarian paradigm” treats parties as “a species of private, organized interest groups, which should thus be accorded maximal rights of association, privacy, expression, and freedom from state discrimination.” It therefore stands in contrast to other models such as the “managerial paradigm,” under which states are given nearly carte blanche in their regulation of parties, and the

79. Smith, 321 U.S. 649; Condon, 286 U.S. 73; Herndon, 273 U.S. 536. The Fifteenth Amendment provides that “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1.
81. Id. at 593–94. Two parties who jointly wish to permit each other’s members to vote in a blanket primary to choose only those parties’ nominees may, however, have a constitutional right to hold such a “voluntary blanket primary” notwithstanding Clingman v. Beaver. See State v. Green Party of Alaska, 118 P.3d 1054 (Alaska 2005) (holding that parties enjoy a right under the Alaska Constitution to use voluntary blanket primaries); Margaret P. Aisenbrey, Note, Party On: The Right to Voluntary Blanket Primaries, 105 MICH. L. REV. 603 (2006) (“[A] voluntary blanket primary is the unconstitutional partisan blanket primary without the unconstitutional element—state-mandated party participation.”).
83. Id. at 782.
84. See id. at 779–82.
“progressive paradigm,” which treats parties as obstacles to democracy and is reflected at least to some extent in the movement behind the blanket primary and Justice Stevens’s dissenting opinion in California Democratic Party.\(^{85}\) These differing conceptions of parties lead to different understandings of their place under the Constitution, and so it is not surprising that Justice Stevens found compelling reasons to support the blanket primary in its attempt “to make the democratic process more robust by involving the entire electorate in the process of selecting those who will serve as government officials,”\(^ {86}\) while the majority scoffed at the idea that such an interest could overcome the liberty of an association of individuals to determine its own message.\(^ {87}\)

As the White Primary Cases illustrate, the state-action doctrine limits the ability of certain organizations to operate autonomously. If a group is so connected with the government as to be a state actor, not only is the government permitted to restrict the associational rights of the group, but the group is constitutionally obligated to adhere to non-discrimination requirements. Few nominally private entities are considered state actors, but political parties—at least some of them—are among the ones in that category. The next section considers the state-action doctrine as applied to parties, concluding that state action, like parties’ autonomy under the First Amendment, should turn on the parties’ decision to accept benefits from the government.

**B. State-Action Cases and State-Conferred Benefits**

The Supreme Court has inconsistently treated political parties as both expressive associations and state actors.\(^ {88}\) As expressive

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85. See id. at 785–87.
86. Cal. Democratic Party, 530 U.S. at 600–01 (Stevens, J., dissenting).
87. See id. at 582–86 (per curiam).
88. See, e.g., Daniel H. Lowenstein, Legal Regulation and Protection of American Parties, in HANDBOOK OF PARTY POLITICS 456, 459 (Richard S. Katz & William Crotty eds., 2006) (“[D]espite the lack of an articulated rationale from the Supreme Court, . . . [p]arties are both state actors subject to constitutional and statutory limits on their ability to deprive individuals of constitutional rights and private actors whose own constitutional rights merit protection.”); Issacharoff, supra note 4, at 278 (“The principal cases addressing the institutional prerogatives of (at least the major) political parties . . . alternatively treat them as the political
associations, parties are entitled to First Amendment rights, including the rights to speech and assembly, as well as the derivative right of association and the correlative right not to associate with those who might interfere with the parties' messages. But as state actors, parties are bound to comply with constitutional demands of equal protection despite the unavoidable effect such compliance has on their expression and their identities. Cases such as California Democratic Party have held that parties enjoy an associational right to autonomy in matters of their own internal governance as well as the right not to have their nominees determined by outsiders, and yet the White Primary Cases have held that parties cannot exclude blacks from their primaries.

In holding that political parties—at least dominant ones—qualify as state actors, the White Primary Cases focused on the close relationships between the parties and the government. In particular, because of the facts involved in those cases, the focus was on the relationships between the Democratic Party in certain Southern states (most notably Texas) and the governments of those Southern states. The Court held that these relationships were close enough that the Democratic Party should be treated as the state insofar as it set limitations for participation in its primary election, and thus the Party was held bound by the Fifteenth Amendment’s non-discrimination requirement.

What exactly these relationships consisted of, however, was unclear. Different Justices gave different reasons for finding state action satisfied, some of which, as I will explain below, are difficult to square equivalent of common carriers subject to ordinary regulatory oversight, or as rights-bearing entities entitled to protection from state incursion.

90. Id. at 567.
94. See, e.g., Smith, 321 U.S. at 664–65 (per curiam) (“The privilege of membership in a party may be . . . no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State.”).
with the autonomy given to political associations under the First Amendment in subsequent cases. One significant reason the White Primary Cases offered for treating parties as state actors, however, was that the parties received benefits from the state.\footnote{95} According to this argument, it was wrong to allow the state to farm-out a significant governmental function by according parties advantages in the candidate-selection process without subjecting the parties to the requirements of equal-treatment that the Constitution imposes on the states.\footnote{96}

A state-action analysis focusing on government benefits can provide a template for determining the permissible limits states may impose on parties’ associational rights. To the extent that parties’ status as state actors turns on the benefits they receive from the government, the state action doctrine already in essence holds that parties must sacrifice their First Amendment rights as a result of receiving those benefits.\footnote{97} Accordingly, even though the White Primary Cases did not rely consistently on a government-benefits theory, such a theory is consistent with much of the analysis in those cases, and squares far better with the modern interpretation of the First Amendment, which has recognized parties’ right to autonomy to a much greater extent than did the First Amendment doctrine at the time.

Smith v. Allwright\footnote{98} is the most significant of the White Primary Cases because it held the Texas Democratic Party excluded black persons from primary elections even though no statute required or encouraged the exclusion. Further, unlike Terry v. Adams, which was decided nine years later, Smith produced a majority opinion. Smith is

\footnotesize{95. See Terry, 345 U.S. 461; Smith, 321 U.S. 649; Condon, 286 U.S. 73.}
\footnotesize{96. See, e.g., Terry, 344 U.S. at 475–76 (opinion of Frankfurter, J.) (“If the Jaybird Association . . . is a device to defeat the law of Texas regulating primaries, and if the electoral officials, clothed with State power in the county, share in that subversion, they cannot divest themselves of the State authority and help as participants in the scheme.”); Condon, 286 U.S. at 88 (finding that when political parties are “invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere.”).}
\footnotesize{97. See Terry, 345 U.S. 461; Smith, 321 U.S. 649; Condon, 286 U.S. 73.}
\footnotesize{98. 321 U.S. 649 (1944).}
therefore significant for two reasons: First, its result applies throughout
the country, and not just to those states whose statutes themselves
discriminate on the ground of race, as in *Nixon v. Herndon*,
or whose statutes give a subset of the party control over the qualifications
of primary voters, as in *Nixon v. Condon*. Because, today, no state would
adopt a statute that explicitly discriminates on the basis of race,*
*—rather than *Nixon v. Herndon* or *Nixon v. Condon*—is more
important for modern understandings of parties’ place in relation to the
state-action doctrine. Second, the rationale of *Smith*’s majority opinion—and
not just the result of the case—is controlling because it commanded
the votes of seven Justices. By contrast, *Terry v. Adams* produced a
strange 3-1-4-1 split, with the Justices disagreeing as to rationale.

But while the principles announced in *Smith* merit our attention,
they must be evaluated critically if one is to square them with parties’
expansive First Amendment rights as recognized in cases decided since
the 1970s. At times, *Smith* seems to indicate that parties are state actors
simply because of the extent to which they are regulated by the state.
There is language in *Terry* that appears to reflect that rationale too.

100. 286 U.S. 73 (1932).
101. Id. at 663–65.
102. Justice Reed authored the opinion of the Court. Chief Justice Stone and
Justices Black, Douglas, Murphy, Jackson, and Rutledge joined the Court’s opinion.
Justice Frankfurter concurred in the result without filing an opinion. Justice Roberts
dissented. See *Smith*, 321 U.S. at 650.
103. 345 U.S. 461 (1953).
104. Justice Black authored the lead opinion, which was joined by Justices
Douglas and Burton. See id. at 462. Justice Frankfurter concurred in the result, see
id. at 470, as did Justice Clark, who was joined by Chief Justice Vinson and Justices
Reed and Jackson. See id. at 477. Justice Minton dissented. Id. at 484.
105. See *Smith*, 321 U.S. at 663 (noting that by statute Texas “directs the
selection of all party officers”); id. (“Primary elections are conducted by the party
under state statutory authority.”); id. (arguing that parties are state actors in carrying
out the “legislative directions” that they are “required to follow”); id. (“The party
takes its character as a state agency from the duties imposed upon it by state statutes
. . . .”).
106. Justice Frankfurter, despite finding that state action was satisfied because
of elected officials’ participation in the Jaybird primary, recognized that the state
regulation of primaries and parties was not itself enough to trigger state action.
*Terry*, 345 U.S. at 475–76 (“The State of Texas has entered into a comprehensive
scheme of regulation of political primaries . . . . If the Jaybird Association, although
the surface, this approach makes sense: If the state controls the operations of the party during the nomination process—regulating such details as the forms of the primary ballot, the date of the primary, the role of the party's county chairmen, and the requirements for candidates to appear on the primary ballot—then the party is not fully an autonomous "private" entity. This analysis, however, assumes that states have the ability to exert such control over parties. Later cases have challenged that assumption, and have held that parties have the right to direct their own internal affairs free of governmental interference.

Further, an extent-of-regulation analysis raises the troubling inference that an organization's First Amendment right to autonomy against government control can be limited or eliminated by an exertion of government control. In other words, the more the government regulates a group, the more the group is considered to be "an agency of the State." Such bootstrapping presents an opportunity for the government simply to take unilateral action that would limit

not a political party, is a device to defeat the law of Texas regulating primaries, and if the electoral officials, clothed with State power in the county, share in that subversion, they cannot divest themselves of the State authority and help as participants in the scheme." (emphasis added).

107. See Smith, 321 U.S. at 653 n.6 (extensively cataloguing the Texas statutes regulating the "primary election machinery").

108. See Terry, 345 U.S. at 484 (Clark, J., concurring) ("[W]hen a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever guise, takes on those attributes of government which draw the Constitution's safeguards into play.").

109. See Terry, 345 U.S. at 469 ("For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. . . . It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election.") (emphasis added).

110. See, e.g., Eu, 489 U.S. at 229–33.

111. Cf. Marsh v. Alabama, 326 U.S. 501, 506 (1946) ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.").

112. See Smith, 321 U.S. at 663.
constitutional rights—a dangerous one if we view constitutional liberties as protections against the government.\textsuperscript{113}

Some language in Smith appears to shift the focus from the extent of government’s control over parties to the character of the activity performed by the party. Thus, even where the Court in Smith assumed that the government could “impose[]” “duties” on parties, the focus was on the duties—the public functions that remained public even when the state required them to be performed by ostensibly private political parties.\textsuperscript{114} in the Court’s words, “the duties do not become matters of private law because they are performed by a political party.”\textsuperscript{115}

\textsuperscript{113.} To say that such an argument is dangerous or unusual is not to say that it is unprecedented, however. Analogous arguments have occasionally appeared in other contexts. In South Dakota v. Opperman, for example, the Supreme Court upheld inventory searches of automobiles, relying significantly on the reduced expectations of privacy that individuals have in their cars as compared to other areas, such as houses. 428 U.S. 364, 367–68 (1976). And people have such a reduced expectation of privacy, the Court explained, because cars “are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements.” \textit{Id.} at 368. Thus, the government was permitted to conduct searches of cars in part because it had regulated cars in other ways. \textit{Id. See also} New York v. Burger, 482 U.S. 691 (1987) (holding constitutional a warrantless search of a junkyard because of the reduced expectation of privacy applicable to closely regulated industries).

Perhaps similar is the Supreme Court’s jurisprudence concerning regulatory takings. Part of the takings analysis involves an assessment of the property owner’s “investment-backed expectations,” which may depend in part on the government regulations that apply to the property. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–28 (1978). Likewise, whether a property interest exists under the Due Process clauses of the Fifth and Fourteenth Amendments (which prohibit “depriv[ations] . . . of life, liberty, or property, without due process of law”), U.S. CONST. amend. V; U.S. CONST. amend. XIV, depends to some extent on state law defining property. \textit{See, e.g.,} Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (“Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .”). Even so, states cannot eliminate constitutionally protected property rights simply by legislating away the right. \textit{See Webb’s Fabulous Pharmacies, Inc. v. Beckwith}, 449 U.S. 155, 164 (1980) (”[A] State, by ipse dixit, may not transform private property into public property without compensation . . . .”). By the same token, states should not be able to eliminate parties’ First Amendment rights simply by unilaterally imposing regulations on the parties.

\textsuperscript{114.} 321 U.S. at 663.

\textsuperscript{115.} \textit{Id.}
This public functions analysis is better than relying on the extent of government control because it avoids the bootstrapping problem where more government regulation of parties increases government’s power to regulate parties; and at the same time, the public functions analysis will ensure that the state will not evade voting rights by transferring authority over elections to private entities.116

Nevertheless, a public-functions analysis is still problematic insofar as it assumes the state has the power to require parties to carry out those state functions. If the First Amendment generally prohibits the state from interfering with an expressive association’s membership policies or internal operations, it would make little sense if the government could interfere with those policies or operations simply by demanding that the association carry out some state function. By analogy, government can certainly limit individuals’ speech if those individuals choose to take certain government jobs, for example, police officers,117 school teachers,118 or the civil service.119 But aside from the


117. See City of San Diego v. Roe, 543 U.S. 77, 78 (2004) (upholding the firing of a police officer who had sold sexually explicit videos of himself in a police uniform); McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (“The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”); cf. Rankin v. McPherson, 483 U.S. 378, 378–79 (1987) (declaring McPherson’s dismissal for her political statements unconstitutional because there was no showing that the statements had a negative effect on the functioning of the government office).

118. See Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968) (holding a teacher’s dismissal unconstitutional where it was based on political statements not affecting the teacher’s ability to carry out his job and relevant to the public concern).

119. See U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO, 413 U.S. 548, 548 (1973) (upholding the Hatch Act’s restrictions on the political activities of civil-service employees); United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 75 (1947) (affirming the dismissal of an action to enjoin enforcement of the Hatch Act). See also Waters v. Churchill, 511 U.S. 661, 672 (1994) (plurality opinion) (“[T]hough a private person is perfectly free to uninhibitedly and robustly criticize a state governor’s legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing.”). See generally DIMINO, ET AL., VOTING RIGHTS AND ELECTION LAW 708–36
unique situation of military conscription, the government cannot *force* adults to take jobs that involve the performance of public functions, and then restrict speech because of the public functions those individuals have been required to perform.  

A slightly different reading of *Smith*, however, permits parties to be treated in most circumstances as state actors while staying true to the parties' rights under the First Amendment.  

Under this reading, the key is not that the state is regulating the parties, but rather that giving parties the "public function" of winnowing candidates places the parties and the state in a mutually beneficial relationship. The parties benefit the state by carrying out a "state function" in winnowing the field of candidates to a manageable number from which voters can choose in the general election. If the parties did not perform this function, the government would have to do it; therefore, the party's primary elections benefit the state by freeing it from the obligations of winnowing candidates.  

(2010) (discussing, with annotations, the aforementioned and other cases relating to restrictions on public employees).

120. *Cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58–59 (1996) ("[P]etitioner argues that the abrogation power is validly exercised here because the [Indian Gaming Regulatory] Act grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands. It is true enough that the Act extends to the States a power withheld from them by the Constitution. Nevertheless, we do not see how that consideration is relevant to the question whether Congress may abrogate state sovereign immunity. The Eleventh Amendment immunity may not be lifted by Congress unilaterally deciding that it will be replaced by grant of some other authority. *Cf. Atascadero [State Hosp. v. Scanlon]*, 473 U.S. [234,] 246–247 [(1985)] ("[T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court").) (citation omitted).


122. *See id. at 660* ("[S]tate delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state.").

123. In this way political parties may be different from some entities that receive state-conferred advantages in exchange for greater regulation but are not considered state actors. Utility companies, for example, may receive the benefit of monopoly status and they may be subject to common-carrier regulation, but providing utility service is not "traditionally the exclusive prerogative of the State," thus utility monopolies are not state actors. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974).

Parties' administration of primary elections may be more nearly an exclusively state function, although this is hardly clear. *See Morse v. Republican Party of Va.*,
the same token, however, the arrangement benefits the parties. Giving a party's nominee automatic access to the general-election ballot obviously increases that candidate's chance of victory, and thus advances the party's ability to enact its preferred policies. Therefore, if parties were permitted, not required, to perform the public function of winnowing candidates, they might well accept limitations on their associational freedoms as the cost of receiving those state-conferred benefits.

Unfortunately, Terry, the last White Primary case, did not rest its discussion on the existence of such a mutually beneficial relationship between the state and the alleged state actor. Terry held that the Jaybird Political Association, which received no government benefits, was nonetheless a state actor in conducting its firehouse primary to determine the candidate whom the Jaybirds would support in the Democratic Primary. But that case did not yield a majority opinion, and in the decades since there has been no agreement on the case's rationale. The precedential value of the case may be further limited by the unusual factual circumstance of the case. As the opinions repeatedly noted, the Jaybird primary was the only election in the county that had any practical significance because of the Jaybirds' dominance within the

517 U.S. 186, 274 (1996) (Thomas, J., dissenting) ("When the Party picks a candidate according to its own partisan criteria, it does not act on behalf of the State."); Kurita v. State Primary Bd. of the Tenn. Democratic Party, No. 3:08-0948, 2008 U.S. Dist. LEXIS 88071, at *21 (M.D. Tenn. Oct. 14, 2008) ("The power to select a nominee for a political party has never been reserved traditionally and exclusively to the State of Tennessee. In fact, just the opposite is true, as the Tennessee General Assembly . . . reserved power exclusively to the political party to choose the nominee whose name will appear on the general election ballot."), aff'd, 472 Fed. App'x 398 (6th Cir. 2012) (unpublished).

124. Williams v. Rhodes, 393 U.S. 23, 31 (1968) ("The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes.").

125. Terry v. Adams, 345 U.S. 461, 486–89 (Minton, J., dissenting) (quoting the parties' stipulations of facts and concluding that they "show the complete absence of any compliance with the state law or practice, or cooperation by or with the State").

126. See id. at 462 (Justice Black announced the judgment of the Court, rather than the opinion.).

127. See CHEMERINSKY, supra note 9, at 537.
Democratic Party, and the Democrats’ dominance in the whole electorate.\textsuperscript{128}

The Court’s most recent discussion of parties’ place as state actors, in \textit{Morse v. Republican Party of Virginia},\textsuperscript{129} provides support for

\begin{quote}128. \textit{See} \textit{Terry}, 345 U.S. at 469 (“The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded . . . . The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county.”). \textit{Id.} at 482 (Clark, J., concurring) (“The record discloses that the Jaybird Democratic Association operates as part and parcel of the Democratic Party, an organization existing under the auspices of Texas law.”). \textit{Id} at 483 (“Quite evidently the Jaybird Democratic Association operates as an auxiliary of the local Democratic Party organization . . . .”). \textit{Id} at 484 (“[A black person’s vote in the Democratic primary] must be an empty vote cast after the real decisions are made. And because the Jaybird-endorsed nominee meets no opposition in the Democratic primary, the Negro minority’s vote is nullified at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count . . . . [T]he Jaybird Democratic Association is the decisive power in the county’s recognized electoral process.”).

Modern cases applying a more limited version of the state-action doctrine have distinguished \textit{Terry} by pointing to the practical dominance of the Jaybirds in the electoral process in Fort Bend County at that time. \textit{See} \textit{Flagg Bros., Inc. v. Brooks}, 436 U.S. 149, 158 (1978) (“The [state-action] doctrine does not reach to all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce ‘the uncontested choice of public officials.’”) (quoting \textit{Terry}, 345 U.S. at 484 (Clark, J., concurring)); \textit{Morse}, 517 U.S. at 269 (Thomas, J., dissenting) (“The nub of \textit{Terry} was that the Jaybird primary was the \textit{de facto} general election and that Texas consciously permitted it to serve as such . . . .”); \textit{Kurita}, 2008 U.S. Dist. LEXIS 88071 at *23.

Although the practical power of the Jaybirds provides a means of distinguishing the case from nearly all modern controversies, its premise is questionable as a matter of first principles and has been called into question by later cases. Why, one might ask, should an organization lose its First Amendment rights as it grows more influential? In holding that a gay-rights group could not use state anti-discrimination law to force parade organizers to permit it to march in Boston’s St. Patrick’s Day parade, the Court was not moved by the notoriety of that parade: “[T]he size and success of petitioners’ parade makes it an enviable vehicle for the dissemination of GLIB’s views, but that fact, without more, would fall short of supporting a claim that petitioners enjoy an abiding monopoly of access to spectators.” \textit{Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc.}, 515 U.S. 557, 577–78 (1995). By analogy, a political party or political “club” should not be considered a state actor without a monopoly on access to voters—or at least without the special advantages in the electoral process that accompany automatic ballot position.

\textit{129. Morse}, 517 U.S. 186.
the approach suggested in this article—permitting state regulation of parties only in exchange for benefits provided to those parties. The case involved the Republican Party of Virginia’s attempt to charge a fee to people wishing to be delegates to a convention at which the party would choose its nominee for the United States Senate.130 Because § 5 of the Voting Rights Act prohibits certain “State[s] or political subdivision[s]” from changing their election laws without obtaining preclearance,131 and because this fee was not granted preclearance, the question arose whether the party was a “State or political subdivision.”132

In Morse, a badly divided Supreme Court held that the party was acting on behalf of the state in running its convention, and accordingly the rule was subject to preclearance.133 In finding the requisite connection between the state and the party, the opinions focused on the benefits the party received from the state—chiefly automatic ballot access for the party’s nominee. Justice Stevens authored the lead opinion, which was joined only by Justice Ginsburg.134 In his view, the party was exercising delegated state power because it was the beneficiary of state-provided advantages, especially ballot position.135 Those advantages allowed the party to exercise the state function of selecting the names to appear on the state’s ballot.136 Because the state “ratifie[d]” the party’s
choice of candidates by placing the party’s nominees on the ballot,\textsuperscript{137} the party was “exercis[ing] delegated power over the electoral process” and was a state actor.\textsuperscript{138}

Beyond the public-functions analysis seen in the \textit{White Primary Cases}, however, Justice Stevens’s opinion recognized that more is required than simply state regulation of the parties, or even the parties’ performance of a public function.\textsuperscript{139} Rather, the parties must have \textit{chosen} to accept the duty of performing a public function: “The major parties have no inherent right to decide who may appear on the ballot. That is a privilege conferred by Virginia law, not natural law. If the party \textit{chooses} to avail itself of this delegated power over the electoral process, it necessarily becomes subject to the regulation.”\textsuperscript{140}

The other opinions in \textit{Morse} were even more strongly protective of parties’ rights. Justice Breyer’s concurrence (which was joined by Justice O’Connor and Justice Souter)\textsuperscript{141} cautiously agreed that the convention fee should be treated as the action of the state, noting that “the Party chose to avail itself of special state-law preferences, in terms of ballot access and position, offered to the convention’s choice.”\textsuperscript{142} The four dissenters would not have treated the party as a “State or political subdivision,” even considering the advantages that state law gave the party and the public functions it exercised with respect to Virginia elections.\textsuperscript{143}

\textsuperscript{137.} \textit{Id.} at 197 (“[Major] parties are effectively granted the power to enact their own qualifications for placement of candidates on the ballot, which the Commonwealth ratifies by adopting their nominees.”). \textit{See also id.} at 197 (“[T]he parties ‘ac[t] under authority’ of Virginia when they decide who will appear on the general election ballot.”) (quoting 28 C.F.R. § 51.7 (1995) (second alteration in original)).

\textsuperscript{138.} \textit{Id.} at 225.

\textsuperscript{139.} \textit{See id.} at 199 (reading \textit{Smith v. Allwright} to hold that “‘recognition of the place of the primary in the electoral scheme,’ rather than the degree of state control over it” was the key to the state-action question); \textit{id.} at 200 n.17 (“While it is true that political parties in \textit{Smith} were subject to extensive regulation, nothing in our decision turned on that factor.”); \textit{id.} (noting the “irrelevance of state regulation”).

\textsuperscript{140.} \textit{Id.} at 198 (emphasis added) (footnote omitted).

\textsuperscript{141.} \textit{Id.} at 190.

\textsuperscript{142.} \textit{Id.} at 238 (Breyer, J., concurring) (emphasis added).

\textsuperscript{143.} \textit{Id.} at 250–51 (Kennedy, J., dissenting); \textit{id.} at 254–63 (Thomas, J., dissenting).
C. Commentators' Suggested Reforms

Commentators have noted the inconsistent way the Supreme Court has treated parties, and have offered several alternative approaches for determining the constitutionality of government regulation of parties. The arguments on behalf of those alternatives have been based explicitly on political theory; the commentators favor legal regimes that encourage parties to play the roles they think are optimal for society and for the electoral process.\textsuperscript{144} Professors Persily and Cain, for example, argue that "[s]tate laws that dictate party membership, organization, or nominating procedures" are unconstitutional "unless they are necessary for expanding interest group participation in the party system."\textsuperscript{145} They defend their compromise formulation in normative terms, arguing that sometimes "parties' associational autonomy must give way to the larger interest of open participation of interest groups in the party system."\textsuperscript{146}

Professor Samuel Issacharoff rejects the idea that party autonomy should be protected for its own sake. Rather, he has argued that parties should receive First Amendment protection only to the extent that such protection is necessary to permit parties "to play their proper role in a democratic system based on partisan competition"\textsuperscript{147} and to "maintain[] a proper level of competitiveness in the political marketplace."\textsuperscript{148} In his view, the blanket primary should be unconstitutional only if it "so completely disrupted the ability of political parties to function as to defeat the parties' ability to play their role in the political process"\textsuperscript{149} by, for example, undermining any incentives the parties have "to undertake voter education and mobilization."\textsuperscript{150}

Similarly, Professor Gregory Magarian has criticized First Amendment doctrine granting autonomy to political parties, arguing that

\begin{itemize}
  \item \textsuperscript{144} Professor Elizabeth Garrett has argued that commentators are not the only ones whose approaches to these issues are colored by political theory. See Elizabeth Garrett, \textit{Is the Party Over? Courts and the Political Process}, 2002 SUP. CT. REV. 95, 131 ("[T]o decide political party cases, judges are very likely to rely on their own views of the best governance structures for a stable democracy.").
  \item \textsuperscript{145} Persily & Cain, \textit{supra} note 82, at 800 (emphasis omitted).
  \item \textsuperscript{146} \textit{Id.} at 802.
  \item \textsuperscript{147} Issacharoff, \textit{supra} note 4, at 276.
  \item \textsuperscript{148} \textit{Id.} at 299.
  \item \textsuperscript{149} \textit{Id.} at 309.
  \item \textsuperscript{150} \textit{Id.} at 308.
\end{itemize}
such autonomy produces consequences that cause "remarkable damage to our electoral system." Magarian blames the Court’s "political engineering," i.e., the promotion of a two-party system and party autonomy, for reduced public interest and participation in politics, less competitive elections, and squelched political debate. His proposed solution is to recast the First Amendment "as an affirmative constitutional commitment to foster a vigorous, broadly participatory electoral discourse."

Magarian characterizes his solution as reflecting a "public rights" view of the First Amendment; he reads the Amendment as promoting the public benefit of a more informed and deliberative electorate, permitting government to restrict individual expression when doing so would advance democratic deliberation. Such an approach is reminiscent of Justice Stevens’s position in California Democratic Party: Where the state acts to broaden political participation, parties’ desire for autonomy should yield. Magarian’s position draws on other arguments for government intervention into the marketplace of ideas, most closely identified with Professor Owen Fiss. Such an attitude requires an extraordinary faith in government’s ability and willingness to promote the appropriate level of speech and to determine when one side of a debate has an unfair advantage. Because there is no agreement about how much value should be placed on different kinds of political speech, there is a risk that government’s power to aid democratic deliberation will in

152. Id.
155. See Cal. Democratic Party v. Jones, 530 U.S. 567, 595 (2000) (Stevens, J., dissenting) ("In my view, while state rules abridging participation in its elections should be closely scrutinized, the First Amendment does not inhibit the State from acting to broaden voter access to state-run, state-financed elections." (footnote omitted)).
156. See generally OWEN M. FISS, THE IRONY OF FREE SPEECH (1998) (arguing that government intervention can promote equality and free speech by counterbalancing the advantages that certain private interests possess).
fact undermine it by promoting an orthodoxy or promoting the political views of the party or parties in power.

With this concern in mind, other commentators, such as Professors Persily and Cain writing separately, have offered functionalist defenses of party autonomy.\textsuperscript{157} Professor Cain has argued that party autonomy protects against two ways in which majoritarian pressures might limit the ideological choices presented to the electorate. First, autonomy interferes with the ability of the dominant party to use party regulation as a way of giving itself an electoral advantage by, for example, requiring parties to select nominees through a process that will make it difficult for other parties to field competitive candidates.\textsuperscript{158} Such an effort, according to Cain, may have been evident in \textit{Tashjian v. Republican Party}, which held that Connecticut could not force the Republicans to nominate candidates via a closed primary.\textsuperscript{159} Second, autonomy makes it more difficult for "a centrist majority (independents and moderate partisans) [to] fix[] the rules to give themselves an advantage over a much smaller minority of ideologues in the selection of candidates."\textsuperscript{160} By preventing moderates from marginalizing "bright-colors partisan[s],"\textsuperscript{161} party autonomy mitigates Duverger's Law (which holds that single-member district, plurality-winner systems encourage candidates and parties to adopt the ideological positions of the median voter) and ensures that the parties will present ideological choices that differ from each other—to the benefit of those in the electorate who desire a choice other than middle of the political spectrum.\textsuperscript{162}

Professor Michael Kang offers another, related, functionalist defense of party autonomy.\textsuperscript{163} He argues that state regulation of parties is often the result of party leaders' attempts to use the machinery of the

\begin{footnotes}
\item[158] Cain, supra note 157, at 807.
\item[159] See id.
\item[160] Id. at 808. (footnote omitted).
\item[162] See Cain, supra note 157, at 810.
\end{footnotes}
state to defeat intra-party rivals. Consequently, judicial decisions that invalidate such regulations force the parties themselves to resolve their disputes internally—a result Kang deems "healthy."

The political theories upon which these arguments rest are contestable—and contested. Some people agree with Magarian that the participation of third parties improves the electoral process by broadening debate; others view it as destabilizing. Some believe that it is important to have parties that offer voters significantly different ideological visions; others believe it is better to avoid divisiveness and to offer more choices in the middle of the political spectrum. Some believe that incumbent protection undermines democracy; others believe it improves democracy by allowing voters to identify their representatives. Some people think that competitive elections should be preferred; others like to draw districts that ensure that certain groups are represented. And some people think that parties are at best necessary evils that undermine the common good; others think that parties can be institutions that promote democratic participation and government responsiveness.

Likewise, the approach advocated here, which adopts the "libertarian paradigm," (to use Persily and Cain’s term) can be criticized as being based on a view of the role of parties that is not universally held. Nevertheless, the use of a libertarian, private-rights approach here is defensible because the point here is not to offer a normative, functional prescription for a legal regime that molds political parties to fit a preferred political theory. Rather, this Article advocates an approach to regulation of parties that makes sense in terms of First Amendment doctrine and the language of the First Amendment itself. As even Professor Issacharoff has noted in preferring his functionalist approach to one based on parties’ autonomy, the Amendment’s prohibition on governmental interference with the freedom of speech or assembly is much more amenable to a libertarian, private-rights conception of

164. See id. at 174–80.
165. Id. at 182.
166. See Garrett, supra note 144, at 131 ("[S]everal different outcomes are often consistent with plausible visions of democratic institutions.").
167. See id. at 134 (suggesting that an advantage of the blanket primary might be that it “moderates an increasingly partisan system”) (footnote omitted).
168. See generally, e.g., E.E. SCHATTSCHEIDER, PARTY GOVERNMENT (1942).
political parties than to an approach that protects political association only insofar as it promotes some ideal form of political competition.\textsuperscript{169} Thus, while others have rested their analysis on the instrumental concern that parties be allowed to serve a role in promoting debate or democratic competition, this Article places parties’ associational rights squarely within the traditional rights-based framework of First Amendment doctrine. Because other expressive associations are entitled to operate autonomously, and because parties serve the same expressive purposes that are served by other private expressive associations, parties should enjoy the same right.

This is not to say that the private-rights approach lacks functional advantages. As \textit{California Democratic Party v. Jones} noted, one danger of the blanket primary was the ideological convergence of candidates to the middle of the political spectrum, resulting in less choice for voters.\textsuperscript{170} And as noted at the outset of this Article, concerns about party raiding are sufficiently troublesome that we might give pause before requiring parties to accept the participation of outsiders.\textsuperscript{171} Those concerns might be instrumental, in that we might think the democratic process is healthier when parties nominate ideologically distinct candidates, which is more likely when the nomination process is open only to party members. But the concerns might sound in other, more libertarian concerns regarding the individual right to speak and associate even if such speech leads to consequences that some portion of society might view as unfortunate.

Commentators who have rejected a libertarian paradigm have done so because of the benefits that the state provides to parties—especially the major parties—and the extent to which the state regulates the entire electoral process, including the nomination process.\textsuperscript{172} That is,

\textsuperscript{169} Issacharoff, \textit{supra} note 4, at 313 (“Whether [an approach to parties’ rights focusing on the extent to which ‘they are the essential servants of the democratic process’] is amenable to judicial administration and can be fitted within the unreceptive constitutional text remains to be seen.”); \textit{id.} at 310 (“Unfortunately, there is little in constitutional text or doctrine that easily prepares the terrain for such a move [from autonomy-based claims of parties’ rights to functional ones].”).
\textsuperscript{171} See \textit{supra} notes 21–32 and accompanying text.
\textsuperscript{172} See Issacharoff, \textit{supra} note 4, at 279 (criticizing \textit{California Democratic Party v. Jones} for its “desire to strike down the blanket primary as a constitutionally unacceptable intrusion upon party autonomy, while at the same time leaving
these critics object to decisions such as *California Democratic Party v. Jones* as permitting parties to have their cake and eat it too: The parties get to keep the benefits of, for example, automatic ballot position and state-funded primaries while ignoring the rules the state has established for conducting those primaries. The commentators' response has been to treat parties as hybrid quasi-governmental and quasi-private organizations, which (unlike other expressive associations) may be regulated by the state to the extent that such regulation encourages parties to act in particular ways deemed beneficial for society or the electoral process.

The commentators are correct that existing Supreme Court doctrine has not uniformly accepted the idea that parties should enjoy the same First Amendment rights as are enjoyed by other expressive associations. As Professor Issacharoff has pointed out, even *California Democratic Party* appears to accept limitations on parties' freedom that would not be constitutional if applied to the National Rifle Association (NRA) or the American Civil Liberties Union (ACLU). Justice Stevens noted this anomaly in his dissenting opinion in that case, in which he pointed out that "anyone can 'join' a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined reasonable period of time before an election," and he objected to the "obvious mismatch between a supposed constitutional right 'not to associate' and a rule that turns on nothing more than the state-defined timing of the new associate's essentially untouched an extraordinary regulatory framework that defines the electoral arena"); *id.* at 278 ("[T]he ability [of parties] to make a full-throated demand for autonomy from state regulation is compromised by the fact that the present party system is so fundamentally the product of a heavily regulated electoral arena.").


174. Issacharoff, *supra* note 4, at 278 ("While *Jones* clearly draws from this rights-bearing tradition [protecting parties from the influence of non-members], it carefully avoids disrupting the extensive regulatory caselaw, including the state-law requirements that parties hold primary elections with exceedingly slight eligibility requirements for voter participation.").

application for membership. Justice Scalia (ironically the author of the Court’s opinion in *California Democratic Party*) noted a similar anomaly in his dissenting opinion in *Tashjian v. Republican Party of Connecticut*, where he complained that it made no sense for the First Amendment to give parties the right to invite non-members to vote in primaries without giving the parties the choice whether to select their nominees by primaries in the first place. Thus, although cases tend to use libertarian rationales in protecting parties’ rights to exert some control over their membership, those cases do not uniformly adhere to a libertarian paradigm.

When it comes to parties’ rights, existing doctrine has not uniformly applied any other paradigm either. However, libertarian autonomy has been the overwhelmingly dominant paradigm applied to First Amendment controversies not involving parties. For example, we protect protests, rallies, and vulgar, violent, and sexually explicit speech even though such speech causes emotional harm to listeners. In all these cases, the Court has interpreted the First Amendment as demanding that society accept the damage caused by speech (unless the clear-and-present-danger test is satisfied) because it

176. Id.
177. 479 U.S. 208 (1986).
178. Id. at 237 (Scalia, J., dissenting).
184. See *Brandenburg*, 395 U.S. at 447 (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”).
understands the First Amendment as establishing a libertarian presumption that the “freedom of speech” is the freedom of the individual to decide whether to speak even when society considers the speech harmful.\textsuperscript{185} If we wish to make doctrine consistent, it makes sense to apply the libertarian paradigm to parties as well. And if that means that fewer people participate in politics, then the state should have to address that consequence (if at all) by means other than suppressing party members’ speech and association rights.

But there is nothing in the libertarian paradigm (or in recognizing that parties have First Amendment rights as associations of individuals who themselves have First Amendment rights) that requires states to provide parties a benefit and subsidize the exercise of those rights. The “decision not to subsidize the exercise of a fundamental right does not infringe the right.”\textsuperscript{186} It is fully consistent with a libertarian conception of parties to recognize parties’ right not to associate, but to offer them a state-financed primary election or automatic ballot access for their nominees on the condition that they not exercise that right. The next Part turns to the restrictions the Constitution places on government’s ability to make such conditional offers.

\section*{II. Conditioning Benefits on Waivers of Parties’ First Amendment Rights}

The analysis thus far has demonstrated that we have been unable to settle on any rationale for determining the line between permissible state regulation of parties and parties’ right to autonomy. The Supreme Court tends to speak in terms of autonomy but has been unwilling to accept the implications of such an approach. Commentators tend to promote party autonomy only to the extent that it brings about a political

\begin{footnotesize}
\begin{enumerate}
\item[185.] See, e.g., Cohen v. California, 403 U.S. at 24 (“The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”).
\end{enumerate}
\end{footnotesize}
system favored by the commentators—with grounding neither in the First Amendment itself nor in First Amendment doctrine outside the elections context.

In this Part, I argue for an alternative. Parties, like other expressive associations, should presumptively be free of government regulation that imposes a burden on their expression, including their ability to define themselves and articulate messages of their choosing. But just as we sometimes allow states to require individuals and other expressive associations to surrender their rights in exchange for a government benefit, states should be able to require parties to surrender some of their associational freedom in exchange for government benefits such as automatic ballot position for party nominees and a state-financed primary.

This Part contains three sections. In section A, I explain that the government may, as a general matter, condition a government benefit on the waiver of constitutional rights. I provide examples of several cases in which the Court has upheld a decision by the government to subsidize certain speech, even though doing so in effect "penalizes" people who engage in other speech by making them ineligible for the subsidy.

Section B discusses the limits on the government's power to condition a benefit on the waiver of constitutional rights. Although the Supreme Court's jurisprudence in this area has been much criticized as inconsistent, this section attempts to describe when such conditioning is most likely to be constitutional and when it is most likely to be struck down. The focus is on three limits: the requirement of a connection between the government benefit and the condition, the requirement that the benefit not be coercive, and the requirement that the government not condition access to a public forum on the non-assertion of constitutional rights.

Section C moves from discussing the unconstitutional-conditions doctrine generally to examining the Supreme Court's jurisprudence concerning the regulation of parties. It explains that the Court has already distinguished between direct regulations of parties and election regulations that limit the use of a state-provided benefit, such as the ballot. This second class of regulations has an effect on parties' expression, but has been more likely to survive First Amendment scrutiny. Thus the foundation for an unconstitutional-conditions approach to party regulation is already present.
A. Constitutionally Conditioning Benefits

It is clear that sometimes the government may provide benefits only to recipients who agree to forego the assertion of a constitutional right, including the First Amendment right to associate and not to associate. That is, even though the government may not be able to demand that a person or group act in a particular way (because there is a constitutional right to act otherwise), the government may encourage its preferred behavior by providing a benefit to persons or groups acting in the favored manner. For example, although individuals have the constitutional right to criticize governmental policies, the government can demand that a presidential spokesperson refrain from criticizing the administration if he wants to continue to receive the benefit of his position and salary.

In *Christian Legal Society v. Martinez*, the Court held that a state university could distribute the benefits of being a “registered student organization,” such as funding from the university’s student-activity fee, to only those student organizations that accepted potential members on a non-discriminatory basis. The organizations undoubtedly had the constitutional right not to associate with people who held different religious, moral, or ideological beliefs, but they did not have the right to demand that the university subsidize their discrimination. Rather, the state constitutionally put the groups to a choice: Accept our benefit with a string attached, or exercise your First Amendment right not to associate and do it without our help.

Likewise, the government can condition a candidate’s receipt of public campaign funds on the candidate’s agreement not to spend a certain amount of money—even though such expenditures would be protected by the First Amendment—but the candidate is under no obligation to accept the public funds if he or she concludes that they are

188. *Id.* at __, 130 S. Ct. at 2978.
not adequate compensation for the agreement not to assert his or her constitutional rights.191

Similarly, in the landmark unconstitutional-conditions case of Rust v. Sullivan,192 the Court held that the government could constitutionally restrict the speech of healthcare providers when they were participating in a government-funded program.193 And Rust is only one case among many that have permitted the government to condition a benefit on the waiver of constitutional rights. National Endowment for the Arts v. Finley194 held that the government can fund “decent” art even though artists have a right to produce art that is indecent.195 Under Regan v. Taxation with Representation of Washington,196 the government can condition a tax exemption on an organization’s willingness to forego lobbying, even though such lobbying is protected by the First Amendment.197 In Grove City College v. Bell,198 the Court permitted Congress to condition colleges’ federal funding on compliance with Title IX “because Grove City could decline the Government’s funds.”199

Likewise, in Locke v. Davey,200 the Court held that Washington State could provide scholarships to students on the condition that those students not pursue a degree in devotional theology.201 Again, the scholarship recipients had a choice: Pursue a degree in devotional theology on your own dime, or accept our money and refrain from exercising the right to study that field.202

191. See Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976) (per curiam) (“Congress . . . may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.”) See also id. at 90–108 (upholding public-financing provisions of the Federal Election Campaign Act).
193. Id. at 196–99.
195. Id. at 587–88.
197. Id. at 549–50.
201. Id at 719–21.
202. Id. at 720–21 & n.4.
In *United States v. American Library Association*, the Court held that Congress could provide funding to libraries for Internet access on the condition that such funding not be used to permit patrons to access certain (largely sexually themed) material.

And, of course, courts routinely permit criminal defendants to waive their rights (to silence, to juries, and to the presumption of innocence, for example) in exchange for certain benefits, so long as such waivers are knowing, voluntary, and intelligent.

Thus, it is settled doctrine that the government may condition certain benefits on the waiver of constitutional rights, including ones contained in the First Amendment. Granting autonomy to expressive associations does not mean that government must subsidize those organizations' activities by providing them with benefits paid for by the rest of society. Still less does it mean that organizations are constitutionally entitled to subsidies even though they behave in ways the government disapproves of, such as by discriminating on the basis of race, sex, sexual orientation, or political ideology.

### B. When Are Conditions Unconstitutional?

The government's power to subvert constitutional rights by paying for their non-assertion, although well established, is limited. The limits are the subject of the "unconstitutional-conditions doctrine," which establishes that some conditions on government benefits (some government requests for the waiver of constitutional rights) are unconstitutional even though the government is only threatening to withhold a benefit that it need not provide in the first place. The difficulty is in determining when the doctrine applies; in other words, determining when a condition is unconstitutional. The Court has been far


204. *Id.* at 201 (describing the funding limitations in the Children's Internet Protection Act, 114 Stat. 2763A-335).

205. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

206. *See* Volokh, *supra* note 40, at 1924–27 (explaining that under prevailing doctrine the government has "no duty to subsidize" the exercise of First Amendment rights).

from clear in answering that question, but the cases do provide some helpful guideposts.

1. To Be Valid, a Condition Must Relate to the Purpose of the Government Benefit

Critically, for the government to be able to limit constitutional rights in exchange for a benefit, there must be a connection between the condition and the purpose of the benefit. That is, the government must show that exercising the right would interfere with the policy that the government is trying to achieve by offering the benefit. As the Supreme Court said one hundred years ago, Congress may offer benefits “upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded.”

Modern unconstitutional-conditions cases reflect this requirement. For example, in *Pickering v. Board of Education*, the Court held that a schoolteacher could be fired for speech critical of the Board only if the benefits of the speech were outweighed by a loss of efficiency in the operation of the school. That is, the teacher’s job could be conditioned on his agreement not to exercise his First Amendment rights if, but only if, his speech would interfere with the government’s ability to carry out its policy of educating children.

This requirement of a connection between the condition and the government benefit helps ensure that the government has a reason for encouraging the waiver of constitutional rights other than simple disagreement with the rights. The government may not use its practically

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208. See *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Warnick*, supra note 9, at 173, 177–78 (discussing this “essential nexus” test).

209. 512 U.S. at 385.

210. Lewis Publ’g Co. v. Morgan, 229 U.S. 288, 316 (1913).


212. *Id.* at 568 (noting the task of balancing “the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees”); see also *Rankin v. McPherson*, 483 U.S. 378 (1987) (holding that a clerical employee in a constable’s office could not be fired for political speech that was unlikely to impair the operation of the office).

unlimited resources to buy off its citizens from exercising their constitutional rights. But if the government is funding a program, it may refuse to fund persons or activities that do not help to achieve the goals of the program.\textsuperscript{214}

Consider a condition on government benefits that requires recipients to refrain from criticizing the current President. Applied to a presidential spokesperson who stands to lose her position and salary if she expresses disagreement with the President, the condition is constitutional because the purpose of the government funding (the job, with its salary and other benefits) is to assist the President in conveying his ideas. The purpose of the funding is obviously undermined if the spokesperson opposes, rather than aids, the President. If welfare benefits were made conditional on refraining from criticizing the President, however, the condition would be unconstitutional because a welfare recipient’s criticism of the administration in no way undermines the low-income-assistance purpose of the welfare program.\textsuperscript{215}

One way for the government to demonstrate that it is merely seeking to limit the uses to which its money is being put is to allow the recipient of the benefit to exercise the disfavored constitutional right so long as the government’s money is not used in that effort. Thus, where a government requires a benefit recipient to segregate the benefit and not to use it in a particular manner, that condition stands a very good chance of surviving a First Amendment challenge.

As an example, compare \textit{Regan v. Taxation with Representation of Washington}\textsuperscript{216} with \textit{FCC v. League of Women Voters}.\textsuperscript{217} Taxation with Representation upheld a law prohibiting charitable organizations from using tax-deductible contributions for lobbying.\textsuperscript{218} The organizations

\begin{itemize}
\item \textsuperscript{214} See DANIEL A. FARBER, THE FIRST AMENDMENT 203 (3d ed. 2010) ("The basic principle seems to be that the government can condition use of its facilities or employment on forbearance from speech that interferes with the purpose of the government program.").
\item \textsuperscript{215} The Supreme Court struck down a similar condition in \textit{Speiser v. Randall}, 357 U.S. 513 (1958). That case held unconstitutional a California law that conditioned a veterans’ property-tax exemption on the taxpayer’s signing a declaration that he did not favor the forcible or violent overthrow of the United States government. \textit{Id}.
\item \textsuperscript{216} 461 U.S. 540 (1983).
\item \textsuperscript{217} 468 U.S. 364 (1984).
\item \textsuperscript{218} 461 U.S. at 551.
\end{itemize}
undoubtedly had a First Amendment right to lobby, but the Court held that the organizations had no right to require the government to subsidize that lobbying by according them tax advantages.\textsuperscript{219} \textit{League of Women Voters}, however, struck down a law that conditioned funding for public broadcasting on the broadcasters’ refraining from editorializing.\textsuperscript{220} Again, the broadcasters had a right to editorialize, but the government argued that they should have no right to do so with the government’s money.\textsuperscript{221} Yet, the government’s argument failed in \textit{League of Women Voters}, and the Court explained what distinguished the case from \textit{Taxation with Representation}:

In this case, . . . unlike the situation faced by the charitable organization in \textit{Taxation With Representation}, a noncommercial educational station that receives only 1\% of its overall income from CPB [Corporation for Public Broadcasting] grants is barred absolutely from all editorializing. Therefore, in contrast to the appellee in \textit{Taxation With Representation}, such a station is not able to segregate its activities according to the source of its funding. The station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity.\textsuperscript{222}

Likewise, \textit{Rust} upheld the government’s conditional funding of a family-planning program.\textsuperscript{223} The government had required that the participants in the program not advocate abortion as a method of family planning, but the recipients of the government benefit were free to speak in favor of abortion \textit{ad libitum} at any time and in any place other than as part of the program the government was funding.\textsuperscript{224} In upholding the

\begin{itemize}
\item \textsuperscript{219} \textit{Id.} at 546–48.
\item \textsuperscript{220} 468 U.S. at 402.
\item \textsuperscript{221} \textit{Id.} at 399.
\item \textsuperscript{222} \textit{Id.} at 400.
\item \textsuperscript{223} 500 U.S. 173 (1991) (upholding regulations promulgated under Title X of the Public Health Service Act, 42 U.S.C. §§ 300–300(a)(6)).
\item \textsuperscript{224} \textit{See id.} at 196 ("The regulations govern the scope of the Title X project's activities, and leave the grantee unfettered in its other activities."); \textit{Id.} at 198 ("The
program, the Court stressed the recipients' freedom to exercise constitutional rights when not using the government's money: "The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities."\[^{225}\] As the Court further explained:

> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in League of Women Voters and Regan, not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.\[^{226}\]

The importance of a connection between the condition and the purpose of the benefit is reflected in other unconstitutional-conditions cases as well. In Legal Services Corp. v. Velazquez,\[^{227}\] the Court struck down a condition on funding applicable to legal-aid organizations that prohibited the organizations from challenging the validity of a limitation on welfare.\[^{228}\] The prohibition applied to all of the organizations' activities, including those not funded by the government.\[^{229}\] In United States v. American Library Association,\[^{230}\] however, the Court upheld a condition on library funding against an unconstitutional-conditions challenge.\[^{231}\] The law challenged in that case, the Children's Internet Protection Act (CIPA), required libraries that had accepted federal funds

\[^{225}\] Id. at 196.
\[^{226}\] Id. at 198.
\[^{228}\] Id. at 548–49.
\[^{229}\] Id. at 538 (citing §§ 504(d)(1) & (2) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996).
\[^{231}\] Id. at 211–12.
for Internet access to block access to obscenity and some pornography.\textsuperscript{232} Accordingly, the plurality in \textit{American Library Association} distinguished \textit{Legal Services Corp.} by noting that CIPA merely limited the ways in which the libraries were able to spend the money given them by the government.\textsuperscript{233}

Thus, conditions on the \textit{use} of a government benefit are far more likely to be upheld than are conditions purporting to regulate \textit{recipients} of the money in their behaviors unrelated to the government benefit.\textsuperscript{234} Limiting the government to these milder "use" conditions ensures that the government is acting for reasons other than simple rights-suppression. It also makes it less likely that the condition will result in fewer exercises of rights than if the government had not provided the benefit at all. In other words, a "use" condition does not distort the public's behavior by driving out the disfavored rights.\textsuperscript{235}

I do not mean to overstate the amount of clarity in the doctrine. The unconstitutional-conditions doctrine has been criticized extensively as incoherent,\textsuperscript{236} and so the guideposts discussed here are only factors that the Court has treated as significant in the past. Further, it may not always be easy to determine when best to characterize a condition as affecting merely the use of government funds as opposed to the other activities of a recipient. In \textit{American Library Association}, for example, the government provided funds for Internet access and wished to limit that access by requiring that the funding recipients install filtering software on Internet terminals.\textsuperscript{237} The plurality treated this limit as a mere condition on the use of the government funds, noting that the condition served to "help[\ldots] carry out these programs [to increase access to the Internet]."\textsuperscript{238} It is not clear, however, why the blocking-software

\begin{itemize}
\item 232. \textit{Id.} at 201 (plurality opinion).
\item 233. \textit{Id.} at 211–12 ("Congress may certainly insist that these 'public funds be spent for the purposes for which they were authorized.'") (quoting \textit{Rust v. Sullivan}, 500 U.S. 173, 196 (1991)).
\item 235. \textit{See FARBER, supra} note 214, at 204 ("The most recent cases seem to focus on whether the government has added its own voice, neutrally enhanced speech in some part of the private sector, or distorted the normal functioning of the 'market' for speech.").
\item 236. \textit{See, e.g.}, \textit{CHEMERINSKY, supra} note 9, at 1010.
\item 237. 539 U.S. 194 (2003).
\item 238. \textit{Id.} at 212 (plurality opinion).
\end{itemize}
requirement should have been considered a limit on the use of funds, since the law was phrased as offering funds only to those libraries with a "policy" of blocking access to harmful material.\textsuperscript{239} Likewise, in \textit{Locke v. Davey},\textsuperscript{240} the Supreme Court upheld the state's decision not to permit scholarship recipients to use the state money for degrees in devotional theology, explaining that "[t]he State has merely chosen not to fund a distinct category of instruction."\textsuperscript{241} But again it is not clear why that is the appropriate characterization; Davey could have paid his own way for a degree in devotional theology, but he would not have been able to do so at the institution where he was receiving his secular degree.\textsuperscript{242}

The Court's most recent confrontation with the unconstitutional-conditions doctrine, \textit{Agency for International Development v. Alliance for Open Society International, Inc.},\textsuperscript{243} provides support for the analysis in this Article. The law at issue, the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, conditions funds on each recipient's "[hav[ing] a policy explicitly opposing prostitution and sex trafficking . . . ."\textsuperscript{244} A different provision of the law, less controversial and unchallenged in the case, directs that none of the money provided by the government be used to promote prostitution or sex trafficking.\textsuperscript{245}

In an opinion by Chief Justice Roberts, the Court struck down the anti-prostitution-policy condition. The Court explained that conditions on government benefits are more likely to be sustained when the conditions "define the limits of the spending program"\textsuperscript{246} than when the conditions "seek to leverage funding to regulate speech outside the contours of the program itself."\textsuperscript{247} Because the anti-prostitution-policy

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 201.
\item 540 U.S. 712 (2004).
\item \textit{Id.} at 721.
\item \textit{Id.} at 716 (citing Wash. Admin. Code §§ 250-80-020(12)(f)-(g)); \textit{Id.} at 721 n.4 ("Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology.").
\item 570 U.S. ____, 133 S. Ct. 2321 (2013)
\item \textit{Id.} at ____, 133 S. Ct. at 2326.
\item \textit{Id.}
\item \textit{Id.} at ____ , 133 S. Ct. at 2328.
\item \textit{Id.} at ____ , 133 S. Ct. at 2328, 2330 (citing the distinction "between conditions that define the federal program and those that reach outside it").
\end{enumerate}
\end{footnotesize}
condition regulated speech outside the government program,\textsuperscript{248} it was unconstitutional.\textsuperscript{249} Likewise, restrictions on political parties' freedom of association should be held unconstitutional when they apply outside of the particular programs (say, primary elections) that the government is funding.

Applied to political parties, as discussed below, the government may well be able to offer parties money for primary elections while setting the rules for conducting those elections.\textsuperscript{250} Such matters as scheduling, poll locations, and the qualifications of voters would seem to have the requisite connection to the government benefit because they specify the kinds of primary elections to which the government money may be put. By contrast, extraneous limitations, such as rules governing party membership, party governance, or party speech, would appear to be too distantly related to the government funding to permit the government to condition the funds on them.

Similarly, where the special government benefit is automatic ballot access for the parties' nominees (often selected in state-funded primaries), this principle means that the government can force parties to limit their exercise of First Amendment rights in selecting the nominee to appear on the ballot. That is, the government may say to parties: "You are free to support any candidate you wish, through any process you wish. But that candidate will receive automatic placement on the ballot only if chosen in a manner that is open to participants regardless of race (sex, sexual orientation, ideology, party membership, etc.)." This principle also could permit the government to condition parties' automatic ballot access on the parties' agreement to select nominees through a particular process (e.g., primaries rather than caucuses). If the government were able to offer automatic ballot access only to parties using certain nomination processes, parties would retain the freedom to speak and to associate (or not to associate) as they wished, but at the same time, the state would avoid aiding organizations whose behavior it

\begin{footnotesize}
\begin{itemize}
\item[248.] See id. at \textsuperscript{----}, 133 S. Ct. at 2330–31.
\item[249.] See id. at \textsuperscript{--}, 133 S. Ct. at 2332.
\item[250.] See supra notes 171–178 and accompanying text.
\end{itemize}
\end{footnotesize}
views as immoral\textsuperscript{251} or simply bad for the democratic ideals the state wishes to promote.\textsuperscript{252}

One particularly noteworthy application of this relationship requirement concerns limits on speech by corporations. The benefits of incorporation (perpetual life and limited liability) seem far removed from the First Amendment activity that the government would be trying to limit,\textsuperscript{253} and \textit{Citizens United v. Federal Election Commission} strongly suggests that the current Court would not permit government to condition corporate status on the acceptance of speech limitations.\textsuperscript{254} \textit{Citizens United} acknowledged what the Court had already recognized in \textit{Austin v. Michigan Chamber of Commerce}\textsuperscript{255}—that "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets."\textsuperscript{256} Nevertheless, the Court held that the state could not condition those advantages on the corporation's refraining from speaking.\textsuperscript{257} Indeed, the Court (quoting Justice Scalia's dissent in \textit{Austin}) called the point "rudimentary."\textsuperscript{258} By holding that corporations have the right to make independent campaign-related expenditures, the Court concluded that individuals have the right to make such expenditures and the right to assemble in groups for the purpose of making such expenditures.\textsuperscript{259}

\begin{itemize}
\item \textsuperscript{251} \textit{E.g.}, ethnic discrimination against certain potential voters or party members.
\item \textsuperscript{252} \textit{E.g.}, a party's insistence on running a closed primary.
\item \textsuperscript{253} Other restrictions imposed as a condition of incorporation would be valid if there were a closer connection between the restrictions and the benefits provided by the state. Thus, a state could require politically active corporations—like all other corporations—to appoint a treasurer, file documents of incorporation with the state, and consent to service of process.
\item \textsuperscript{254} 558 U.S. 310 (2010).
\item \textsuperscript{255} 494 U.S. 652 (1990).
\item \textsuperscript{256} 558 U.S. at 351 (quoting \textit{Austin}, 494 U.S. at 658–59) (alteration in \textit{Citizens United}).
\item \textsuperscript{257} See \textit{Citizens United}, 558 U.S. at 350–51.
\item \textsuperscript{258} \textit{Id.} at 351 ("It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.") (quoting \textit{Austin}, 494 U.S. at 680 (Scalia, J., dissenting)).
\item \textsuperscript{259} See \textit{SpeechNow.org v. Fed. Election Comm'n}, 599 F.3d 686 (D.C. Cir. 2010), \textit{cert. denied} 131 S. Ct. 553 (2010) (holding that individuals' contributions to an unincorporated association engaging exclusively in independent advocacy could not constitutionally be limited).
\end{itemize}
Additionally, if those groups assume the corporate form, the government may not subject those corporate groups to additional speech limits. Accordingly, at least as long as Citizens United is good law, government may not condition access to incorporation and its advantages on a group’s agreement to forego speech.

2. The Government Benefit Must Not Coerce the Waiver of Constitutional Rights

A constitutional right means little if the state can dictate the terms under which it must be surrendered. Accordingly, the government may not seek waivers of constitutional rights by “offering” to give parties a “benefit” to which the parties would be entitled outright. In such an instance, there would be no exchange and the parties would be exercising no choice; the organization will have given up its rights for nothing. Thus, the government may not require parties to surrender their associational rights as a condition of being able to advertise or lobby.260

Similarly, the government’s adoption of the single-member district, plurality-winner (“SMDP”) electoral system should not be considered a “benefit” to the major parties—even though they are likely to be more successful under such a system than under potential alternative systems. There is no question that SMDP systems encourage the dominance of two relatively centrist parties (a phenomenon known as Duverger’s Law).261 Accordingly, it is plausible to argue that government’s use of the SMDP system is a benefit to the major parties,


for which the parties might be required to surrender some First Amendment rights.\textsuperscript{262}

Treating the SMDP system as a benefit that would justify restrictions on major parties’ rights would be problematic, however, for a couple reasons. First, the government is not giving the parties the option of a SMDP system. Instead, the government is imposing such a system whether the parties like it or not (in some situations even major parties would favor an alternative system). Consider the situation facing a major party that has considerably less support in a jurisdiction relative to the opposing major party. That party (for example, Republicans in Massachusetts or Democrats in Oklahoma) might well prefer a proportional-representation system, at least for some races, than a plurality-winner one in which it is almost certain to lose. Thus, although the SMDP system may conceivably be seen as a “benefit” to major parties, it is not a benefit that is part of any bargain. The parties have no right to refuse the “benefit,” and without that choice any surrender of First Amendment rights is the product of compulsion.

Second, the state must choose some kind of electoral system,\textsuperscript{263} and no system is the neutral result of some pre-political state of nature. Whatever system is chosen will give an advantage to somebody, and therefore this approach would permit the government always to limit the First Amendment rights of that advantaged party.

For example, if a state’s adoption of a SMDP system can justify its restriction of major parties’ First Amendment rights, could it restrict the rights of third parties if it switched to a proportional-representation system? Additionally, some proportional-representation methods encourage candidates to develop close connections to their parties, while others encourage candidates to appeal to voters independently—even competing for votes against members of their own parties.\textsuperscript{264} Treating

\textsuperscript{262.} See Issacharoff, \textit{supra} note 4, at 292 (“The powerful position of the major parties is an artifact of a distinct political arrangement: the use of single-member, first-past-the-post electoral districts as the basis for all major elective offices . . . . It ill behooves the beneficiaries of such a state-conferred privilege to claim an absolute immunity against the state conditioning the terms under which they may operate within that beneficial environment.”).

\textsuperscript{263.} See U.S. CONST. art IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”).

\textsuperscript{264.} See CLARK ET AL., \textit{supra} note 261, at 648–53. Compare, for example, a system that allocates a percentage of legislative seats to a party and leaves the choice
states as providing a benefit to whomever is privileged by an election law allows the state to demand that someone not exercise constitutional rights no matter what laws a state enacts.

This anti-coercion principle applies as well to call into question government-provided benefits that are irresistible. Again, the point is that the recipient must retain some genuine choice as to whether to accept the government’s offer. A state cannot use its unlimited power to tax to give the recipient an “offer he can’t refuse.” Unfortunately, there is no settled way to determine which conditions are coercive, and “[t]oday’s overwhelming scholarly consensus ... is that coercion-based

of officials to the party with a system that assigns the seats to the highest polling candidates from the party.


267. See Sullivan, supra note 265, at 1494 (noting that the unconstitutional-conditions doctrine is an attempt to address the fear that “Leviathan, swollen with tax dollars, will buy up people’s liberty”).
theories of unconstitutional conditions are doomed to failure because they necessarily rely upon the now-discredited faith in some form of preexisting baseline.\textsuperscript{268}

This lack of a baseline against which to measure coercion can lead to concerns about predictability and administrability, which might cause us to hesitate before applying unconstitutional-conditions analysis to the regulation of political parties. In fact, however, coercion is unlikely to be much of a concern in the context of parties because the Court has already implied that ballot access—perhaps the most tempting benefit that could be given to a party—is not unconstitutionally coercive.\textsuperscript{269} Practically though, ballot access is so crucial to winning elections, and winning elections is so crucial to parties’ ability to affect policy, that ballot access might be considered a coercive benefit.\textsuperscript{270}

If ballot access is unconstitutionally irresistible, however, any attempt by the government to condition such access on the waiver of constitutional rights would be unconstitutional unless the government satisfied strict scrutiny. Such a conclusion would undermine not simply \textit{Terry v. Adams},\textsuperscript{271} which forbade the Jaybird Democratic Association from conducting a whites-only “primary” with its own money, but also \textit{Smith v. Allwright},\textsuperscript{272} which forbade the Texas Democratic Party from holding a whites-only primary at state expense.\textsuperscript{273}

There is another problem with forbidding states from conditioning ballot access on a party’s agreement to forego the exercise of its constitutional rights. Several Supreme Court cases have explained that parties are not completely free to operate independently from state law when they are taking advantage of a state benefit.\textsuperscript{274} Thus, although these cases may not explicitly discuss their holdings in unconstitutional-

\begin{itemize}
\item \textsuperscript{269} See infra cases and discussion accompanying notes 275–293.
\item \textsuperscript{270} As an example, in 2010 Lisa Murkowski became only the second person (Strom Thurmond was the first) to win a United States Senate election as a write-in candidate. Chenwei Zhang, Note, \textit{Towards a More Perfect Election: Improving the Top-Two Primary for Congressional and State Races}, 73 OHIO ST. L.J. 615, 615-16 (2012).
\item \textsuperscript{271} 345 U.S. 461, 469–70 (1953).
\item \textsuperscript{272} 321 U.S. 649, 664 (1944).
\item \textsuperscript{273} \textit{Id}
\item \textsuperscript{274} See infra cases and discussion accompanying notes 275–293.
\end{itemize}
conditions terms, they are consistent with allowing the government to condition a benefit on a party’s agreement to surrender some of its right of expressive association. If states were forbidden from using ballot access to encourage preferred behavior, those cases would be called into question.

*Timmons v. Twin Cities Area New Party*\(^{275}\) provides a helpful example. That case involved a challenge to Minnesota’s ban on “fusion” candidacies.\(^{276}\) The Minnesota law provided that no candidate could appear on the ballot as the nominee of two different parties.\(^{277}\) The New Party wished to nominate a candidate who was also the nominee of the Democratic-Farmer-Labor Party.\(^{278}\) Because of the law, however, the candidate’s name could not appear on the ballot as the nominee of both parties.\(^{279}\)

In upholding the law, the Supreme Court stressed that the fusion ban did not “directly” prevent the New Party from associating with its preferred candidate;\(^{280}\) rather, it simply provided that the state-printed ballot would not list the candidate as the New Party’s nominee.\(^{281}\) The Court accepted the party’s “right to select its own candidate,” but held that such a right does not mean “that a party is absolutely entitled to have its nominee appear on the ballot as that party’s candidate.”\(^{282}\) The Court further explained that while a party’s decision to nominate a candidate is “core associational activit[y],”\(^{283}\) the appearance of that candidate’s name on the ballot is not.\(^{284}\) Thus, *Timmons* suggests that while parties are

\(^{275}\) 520 U.S. 351 (1997).
\(^{276}\) Id. at 353–54.
\(^{277}\) Id. at 354 n.3 (citing MINN. STAT. § 204B.04; subdiv. 2, § 204B.06, subdiv. 1(b) (1994)).
\(^{278}\) Id. at 354.
\(^{279}\) Id.
\(^{280}\) Id. at 361.
\(^{281}\) See id. ("The New Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen."); id. at 363 ("The party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party’s candidate.").
\(^{282}\) Id. at 359.
\(^{283}\) Id. at 359–60.
\(^{284}\) See id. at 363 ("Ballots serve primarily to elect candidates, not as forums for political expression.").
autonomous, rights-bearing entities, states need not provide parties with no-strings-attached benefits to subsidize the exercise of those rights.

Further, Timmons also suggests that ballot position for a party’s nominee is one of those benefits that may be conditioned on the waiver of a party’s constitutional rights. In other words, Timmons allowed the state to force the party to choose between ballot access and its constitutional right to nominate its preferred candidate. Accordingly, ballot access must not be too tempting a benefit as to make the choice involuntary.

Employing a similar analysis, Wisconsin ex rel. La Follette held that states could hold open primaries, but could not require delegates to a party’s national convention to vote in accordance with the results of those primaries. Again, the Court drew a distinction between the state-run elections, which are subject to state regulation, and the party’s process of deliberating and nominating candidates, which is governed by party rules. In fact, the Court noted the “substantial interest” that a state has “in the manner in which its elections are conducted,” and further referred to Wisconsin’s decision to open “its primary,” underscoring the perspective that states can establish rules for how they choose to run elections, but they cannot force parties to abide by rules that interfere with the parties’ expression.

New York State Board of Elections v. Lopez Torres again noted state authority to regulate parties’ methods of candidate-selection “when the State gives the party a role in the election process [],” such as allowing the party nominee to “appear . . . on the general-election

286. Id. at 126.
287. See id. (“[I]f Wisconsin does open its primary, it cannot require that Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules.”).
288. Id. (emphasis added).
289. Id. (emphasis added); see also Tashjian v. Republican Party of Conn., 479 U.S. 208, 236 (1986) (Scalia, J., dissenting) (“The State is under no obligation . . . to let its party primary be used, instead of a party-funded opinion poll, as the means by which the party identifies the relative popularity of its potential candidates among independents.”) (emphasis added)).
291. Id. at 203.
Where the party receives such a benefit, the state may limit the right the party would otherwise enjoy “to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform.”

Thus, although there is probably a limit to government’s ability to coerce a party into surrendering its First Amendment rights, ballot access itself is not coercive.

3. Government May Not Enforce Viewpoint-Based Conditions on Access to a Public Forum

Several unconstitutional-conditions cases make clear that the government may not purport to create a public forum for private speech but selectively deny access to speakers wishing to express viewpoints disfavored by the government. For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*, a state university used its student-activities fund to pay for student newspapers but denied funding to one student group because of the religious viewpoint it expressed in its publications. The Court struck down the discriminatory funding, holding that the fund was a designated public forum—a physical or metaphorical place set aside by the government “to encourage a diversity of views from private speakers.” Further, the Court held that access to the fund could not be based on the viewpoint of the speakers. Stated differently, a state may not condition access to a public forum on a speaker’s agreement to refrain from exercising his constitutional right to offer a particular viewpoint.

To the same effect is *Legal Services Corp.*, which held that the government could not constitutionally fund legal services but prohibit the funding recipients from challenging the validity of welfare laws. The

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292. *Id.*
293. *Id.* at 202–03.
295. *Id.* at 830–32.
296. *Id.* at 834; *see also id.* at 830 (“The SAF [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”).
297. *Id.* at 832–35.
Court analogized the legal-aid funding to the funding in *Rosenberger*, holding that “[a]lthough the LSC program[‘s] . . . purpose is not to ‘encourage a diversity of views,’ the salient point is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message.” Consequently, the Court struck down the viewpoint-based restriction on the LSC’s speech.

As applied to an electoral context, this rule means that if the government seeks to impose a viewpoint-based condition on parties, the “benefit” offered by the government must be more than access to a designated or traditional public forum, for example, the right to have a statement printed in a voter’s guide or the right to distribute literature on a street corner. Neither a ballot nor a primary election, however, is a forum for speech. As even Justice Kennedy, who is notable for his speech-protective jurisprudence, has stated, “The purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression.” Accordingly, the government

299. Id. at 542 (quoting *Rosenberger*, 515 U.S. at 834).
300. Id. at 536–37, 548–49.
301. See Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 453 n.7 (2008); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (“Ballots serve primarily to elect candidates, not as forums for political expression.”). If a ballot were a forum, it would be necessary to determine the kind of forum. A designated public forum is generally open to a class of speakers, and strict scrutiny applies whenever the government denies access to a speaker within that class. The government is free to restrict access to a non-public forum, however, so long as its actions are reasonable and viewpoint-neutral. See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 669 (1998). Non-public fora are characterized by selective access depending on the discretion of the government. Presumably the rules for ballot access would render the ballot a designated public forum if it were a forum at all.
303. *Burdick v. Takushi*, 504 U.S. 428, 445 (1992) (Kennedy, J., dissenting); see also id. at 438 (opinion of the Court) (“[T]he function of the election process is
should be able to condition ballot access and funding for primary elections on the waiver of constitutional rights, so long as the government satisfies the other requirements of the unconstitutional-conditions doctrine (a benefits/condition connection and non-coercion).

III. IMPLICATIONS OF AN UNCONSTITUTIONAL-CONDITIONS ANALYSIS

This Article has argued that restrictions on political parties’ right of autonomous self-governance should be treated as conditions on government benefits—specifically on the benefits of automatic ballot access for the parties’ nominees and a state-funded mechanism for choosing those nominees. If this approach were to be employed, parties’ freedoms under the First Amendment would likely be both broader and narrower than under current doctrine. In section A, I take an historical look, addressing the ways the Supreme Court might have decided cases in the established canon dealing with parties’ associational rights if it followed the approach advocated here. Next, in section B, I focus on present controversies and assess the ways an unconstitutional-conditions analysis may affect cases adjudicating parties’ rights in the future.

A. How Would an Unconstitutional-Conditions Analysis Affect Existing Doctrine?

If limits on parties’ associational freedom were analyzed as conditions placed on government benefits, the most significant doctrinal change would be that parties would be able to exercise a choice. Until now, state laws challenged as violations of parties’ rights have tended to be phrased as mandatory requirements or prohibitions. Under the

‘to winnow out and finally reject all but the chosen candidates,’ Storer [v. Brown], 415 U.S. [724], at 735 [(1974)], not to provide a means of giving vent to ‘short-range political goals, pique, or personal quarrel[s].’ Ibid.Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.”).

304. Of course, this is not to say that the government may demand any concession it pleases as a condition of ballot access. The Supreme Court has held, for example, that states may not require candidates to submit to drug tests as a condition of appearing on the ballot. Chandler v. Miller, 520 U.S. 305, 308–09 (1997).
approach favored by this Article, however, the consequence of a party’s failure to comply with a regulation would not be criminal punishment, but only the loss of a state-provided benefit. State funding for primary elections might be available, for example, for those parties that agree to nominate their candidates in such primaries; that agree to hold closed, open, or blanket primaries to choose their nominees; or that agree to hold their primaries on a certain day chosen by the state.

1. Who Can Consent to a Restriction of a Party’s First Amendment Rights?

There is a preliminary conceptual question that must be addressed: If “the party” has the right to decide whether to accept the government benefits with strings attached, who should be able to make the choice on behalf of the party?\textsuperscript{305} The question of who is, or who may act on behalf of, the party is troublesome under current doctrine.\textsuperscript{306} In \textit{Tashjian v. Republican Party of Connecticut}, for example, the Supreme Court held that parties have the right to invite independents to participate in their primaries, even if state law prescribes that primaries shall be

\textsuperscript{305} Parties are notoriously amorphous groups—“informal, broad-ranging political . . . coalition[s] within which diverse factions alternately cooperate and compete to advance their particularized interests . . . .” Kang, \textit{supra} note 163, at 142. The classic expression of the political version of the Mystery of the Most Holy Trinity is V.O. Key’s distinction between the party-in-the-electorate (voters), the party in government (government officials), and the party organization (party leaders). See V.O. Key, Jr., \textit{Politics, Parties, and Pressure Groups} 164, 206–07, 315–16 (5th ed. 1964); Persily & Cain, \textit{supra} note 82, at 778.

\textsuperscript{306} See, e.g., Dimino et al., \textit{supra} note 119, at 466, 478, 483, & 514 (raising the who-is-the-party question generally, and particularly concerning \textit{Tashjian v. Republican Party of Connecticut}, 479 U.S. 208 (1986), \textit{Eu v. San Francisco County Democratic Central Committee}, 489 U.S. 214 (1989), and \textit{Duke v. Massey}, 87 F.3d 1226 (11th Cir. 1996)). One attempt to make sense of the Court’s holdings concerning parties’ associational rights organizes the nomination process temporally from the initial establishment of rules governing candidate-selection through the primary elections, with the party-government’s interests being foremost earliest in the process, followed by the interests of the party organization and then the party-in-the-electorate. See Lauren Hancock, Note, \textit{The Life of the Party: Analyzing Political Parties’ First Amendment Associational Rights When the Primary Election Process in Constrained Along a Continuum}, 88 Minn. L. Rev. 159 (2003).
closed. This conclusion brought protests from the dissenting Justice Scalia, who argued that the party is (and therefore ought to act on behalf of) "the general party membership"—which would have the most influence in a closed primary. Yet two Terms later, the Court unanimously concluded in *Eu* that parties' official governing bodies had a constitutional right to endorse candidates in primary elections—before the general party membership had a chance to express its choice about which candidates should receive the party's endorsement.

Thankfully, the who-acts-for-the-party question is much simpler under an analytical approach that treats parties as autonomous entities. The people who decide whether to accept the government's conditional benefits are those people vested with such authority by the members of the party. Because the party, as an expressive association, has the right

307. 479 U.S. at 211–13, 225, 229.
308. *Id.* at 236 (Scalia, J., dissenting).
309. *Eu* v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 222–29 (1989). The Court brushed off this point by asserting that there was a difference between the governing bodies' endorsement (which, presumably, is not "the party's" endorsement) and the nomination itself (which is). *Id.* at 229 n.19. The state's objection to the endorsements, however, was not predicated on a conclusion that the governing bodies were conferring the party's official endorsement; rather, it was that they should not be permitted to give one primary candidate an advantage when the membership as a whole may have preferred a different candidate.

By rejecting this argument, the Court seems to have held that the official governing body is able to exercise the party's First Amendment rights in endorsing primary candidates because the party permits the governing body to carry out that function. That is, it is not the state's business to protect the party membership from such endorsements if the party itself entrusts the responsibility of making endorsements to the party leadership. Such a view is fully consonant with the theory of parties as autonomous organizations that underlies the rest of *Eu*, and with the analysis in this Article.

Oddly, however, a different portion of *Eu* distinguished between the rights of party members and the rights of the parties. The Court opined that even if a party consented to a ban on endorsements by the party leadership in primary elections, such consent would be unable to waive "the independent First Amendment rights of the parties' members." *Id.* at 226 n.15.

310. Only once, in *Eu*, has the Supreme Court addressed the argument that a restriction on parties' associational activity was constitutional because the parties consented to it. 489 U.S. at 225 n.15. California had argued that parties consented to its ban on primary-election endorsements by parties' governing bodies because (1) "legislators who could repeal the ban" were members of parties; (2) some parties' by-laws banned such endorsements anyway; and (3) the parties participated in the
to structure itself as it sees fit,\textsuperscript{311} it can place the responsibility to make decisions for the party in whichever hands it thinks best.\textsuperscript{312} The party may even decide to take those decisions out of the hands of individuals by, for example, adopting a provision in its charter mandating the use of a certain nomination process, leaving no power to party officials to agree to an alternate process in exchange for a government benefit.\textsuperscript{313}

2. Subjecting the Rights-of-Parties Cases to an Unconstitutional-Conditions Analysis

In this sub-section, I examine the major cases the Supreme Court has decided concerning the rights of political parties, and I suggest how those cases would have been decided under the analysis advocated in this Article.

I begin with \textit{Wisconsin ex rel. La Follette}, which presented a conflict between a Democratic Party rule forbidding open primaries and a Wisconsin state law requiring them.\textsuperscript{314} After the Wisconsin electorate chose delegates for the Democratic Convention by an open primary, the party refused to seat the delegates.\textsuperscript{315} The Court held that the party was within its rights to do so.\textsuperscript{316} More particularly, the Court ruled that although the state could choose to hold an open primary if it wished to do so, it could not force the party to accept the results of such a primary.\textsuperscript{317} Under the approach advocated here, the Court’s analysis is correct. The state can fund an open primary if it wishes, but the state should not be

\textsuperscript{311} See, e.g., 489 U.S. at 229–33 (describing the right and applying it in \textit{Eu}).
\textsuperscript{312} See \textit{id.} at 231 n.21 ("By regulating the identity of the parties' leaders, the challenged statutes may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message.").
\textsuperscript{313} Cf. \textit{Marchioro v. Chaney}, 442 U.S. 191, 193–94, 198–99 (1979) (discussing the responsibilities held by the party’s state committee under the terms of the party’s charter).
\textsuperscript{315} \textit{id.} at 112–13.
\textsuperscript{316} \textit{id.} at 126.
\textsuperscript{317} \textit{id.}
able to force a party to surrender its right to determine the method of selecting its nominees or delegates. Nevertheless, Wisconsin should be able to place less pressure on the party. Had Wisconsin, for example, offered the party automatic ballot access as an incentive to abide by the results of the open primary, then an unconstitutional-conditions approach would have permitted such an arrangement.

Likewise, California Democratic Party correctly held that the state’s requirement that parties use a blanket primary was unconstitutional. Even though the primary was paid for by the state, as Justice Stevens noted five times in dissent, the Court was correct to strike down the blanket primary because it was not simply a state-funded option available to the parties to use if they chose. Rather, the winner of the blanket primary was legally designated as the nominee of the party regardless of whether the party itself would have chosen to have a different kind of primary or no primary at all. So even if it would be constitutionally permissible for states to offer ballot access or primary funding conditioned on use of the blanket primary, this law was not such an offer.

In Tashjian, the party’s desire to hold a semi-closed primary conflicted with Connecticut law requiring closed primaries. The Court again sided with the party, holding that parties have the right to invite unaffiliated voters to participate in their primaries. Under an unconstitutional-conditions analysis, the party would be free to open its primary, but the state could decide to fund the primary on the condition that it be closed to all but party members.

The same result occurs under the factual scenario presented in Clingman v. Beaver. There, the party wished to hold an open primary (inviting not just unaffiliated voters but also voters affiliated with other parties), and the state objected. In the actual case, the Court sided with

319. See id. at 570 ("[T]he candidate of each party who wins the greatest number of votes "is the nominee of that party at the ensuing general election." (quoting CAL. ELEC. CODE ANN. § 15451 (West 1996))).
321. Id.
323. Id. at 584–85.
the state, holding that the party had no right to “associate” with people who preferred to maintain their affiliation with an opposition party.\textsuperscript{324} Under the approach preferred in this Article, however, the case would be identical to \textit{Tashjian}. In both cases, the state should be able to decide on the rules for determining a voter’s eligibility to vote in a state-financed primary, but the party would be free to forego the financing if it preferred to have its nominee selected by a different electorate.

The same rule should apply to parties who wish to permit individuals to participate in their nomination processes (or any other party activities) even if those individuals have already participated in another party’s primary. Notwithstanding the Court’s contrary dictum in \textit{American Party of Texas v. White},\textsuperscript{325} permitting parties to set their own rules for participation does nothing to threaten the “integrity” of primaries. And if their integrity were somehow threatened by a voter’s participation in two different primaries in the same year, the parties themselves can correct the problem by deciding to exclude such voters.\textsuperscript{326}

Cases involving the associational rights of parties involve more than primary elections. In \textit{Eu}, for example, the party challenged the constitutionality of state laws regulating “internal party governance.”\textsuperscript{327} The laws restricted “the organization and composition of [the party’s] official governing bodies, [limited] the term of office for state central committee chair, and [required] that the chair rotate between residents of northern and southern California.”\textsuperscript{328} The Supreme Court unanimously\textsuperscript{329} struck down these limits on the party members’ associational freedom, as it would under the approach favored here.\textsuperscript{330} The state was not placing

\textsuperscript{324.} \textit{Id.} at 585–87, 598.
\textsuperscript{325.} 415 U.S. 767 (1974).
\textsuperscript{326.} \textit{Cf. Tashjian v. Republican Party of Conn.}, 479 U.S. 208, 224 (1986) (finding insubstantial a state interest in “protect[ing] the integrity of the Party against the Party itself”); Democratic Party of the U.S. v. Wis. ex rel. La Follette, 450 U.S. 107, 123–24 (1981) (“[A] State, or a court, may not constitutionally substitute its own judgment for that of the Party.”).
\textsuperscript{328.} \textit{Id.} at 229.
\textsuperscript{329.} Chief Justice Rehnquist, though, did not participate. \textit{See id.} at 233.
\textsuperscript{330.} In \textit{Marchioro v. Chaney}, 442 U.S. 191 (1979), the Court upheld a state law requiring parties to maintain a state committee consisting of two party members
limits on the way a party was permitted to use government resources; rather, the state was simply interfering in the party’s selection of its leaders and “prevent[ing] the political parties from governing themselves with the structure they think best.”

The California laws at issue in *Eu* not only restricted the party’s ability to choose its leaders, but they also restricted the speech of those leaders, prohibiting the party’s governing bodies from endorsing candidates in primary elections. The Court unanimously struck down that prohibition as well, reasoning that it interfered with the party leadership’s ability to communicate its views about which candidates most closely adhered to party principles.

Analyzed under an unconstitutional-conditions approach, such a prohibition is easily unconstitutional if the party is given no benefit in exchange for the speech ban. If, however, the state were to condition a state-financed primary on the party’s willingness to ban its governing bodies from endorsing candidates, that presents a more difficult case. The ban restricts speech only minimally, because the individual members of the party, including the individual members of the party’s governing bodies, may speak and endorse candidates. Accordingly, the condition may not be so onerous as to be unconstitutional for that reason alone. Further, the condition is related (albeit tangentially) to the government benefit. The state prefers to fund a primary election that measures the preference of party members untainted by influence from the party leadership. Thus, the party’s agreement to refrain from endorsing primary candidates might be considered analogous to the party’s willingness to defer to the state’s choice of qualifications for primary voters, with both being permissible conditions on the state funding.

On the other hand, speech restrictions might be too far removed from the state funding to be permissible conditions on the funding. The

332. See *id.* at 217 (quoting CAL. ELEC. CODE ANN. § 11702 (West 1977)).
333. See *id.* at 217 n. 4, 222–29.
endorsement ban does not involve the conducting of the state-funded election itself, as do rules about the persons permitted to vote, the form of the ballots, the time the election is conducted, or even the choice whether to have a primary election instead of a convention or some other method of candidate selection.

Thus, it would not always be clear when a state’s offer of a benefit to a party would amount to an unconstitutional condition. Nevertheless, simply requiring the states to offer parties a benefit in exchange for a waiver of First Amendment rights should resolve a large number of potential disputes—in ways that make a good deal of sense in terms of both policy and First Amendment doctrine.

B. Future Implications

Analyzing party regulation under the unconstitutional-conditions doctrine makes some hard cases easy. Most obviously, when the state is not providing any benefit to the parties, it should not be able to exact any conditions. Thus, in states where parties do not have special privileges concerning ballot access or state-funded primaries, any abridgment of parties’ freedom of association should be unconstitutional, at least unless the restriction passes strict scrutiny. Under current law, it is unclear whether such special privileges are necessary to permit the state to regulate the parties, and Terry seems to indicate that even political clubs that receive no state benefits must be treated as arms of the state. Under this Article’s approach, however, the issue is made much easier because the party has not done anything to surrender its autonomy.

But are we likely to see states that don’t give parties such advantages? Arguably, we already do. After the Supreme Court invalidated California’s blanket primary as infringing parties’ right not to associate with nonmembers, the “top-two primary,” otherwise known as the nonpartisan blanket primary, gained in popularity. Under such a system, all aspirants for office run in the “primary” election, and the two candidates with the most votes advance to the general election,

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335. See infra notes 338–343 and accompanying text.
regardless of party. Thus, the “primary” does not result in any candidate securing a party’s nomination, and it is possible that two candidates from the same party will oppose each other in the general election. Under a “top-two” system, therefore, party nominees do not receive automatic access to the general-election ballot. Louisiana has used such a system since 1978 except for a brief period from 2008–10. Washington State began using a version of the top-two primary in 2008, and California adopted such a system in 2010. There have been attempts to adopt such a system elsewhere, including in Oregon, Alaska, and Montana.

In a state employing such a system, restrictions on parties’ associational rights—whether they deal with parties’ membership; choice of officers; use of primaries, caucuses, or conventions for choosing nominees; or selecting party platforms—should be invalid. Although theoretically a restriction could survive if it passed strict scrutiny, most of the assertedly compelling interests behind such a law would be plainly insufficient. Many of them, like some arguments offered in support of California’s blanket primary in California Democratic Party, are inconsistent with the very idea of parties exercising the right to express their own viewpoints and advocate for political positions that their

337. Id.
338. Id.
members support. For example, a state should not be able to override a group’s right to exclude unwanted persons simply by citing a state interest in providing more people with the opportunity to join and participate in such an organization. This is little different from a naked opposition to the exercise of parties’ right to refuse to associate with certain individuals, and the government’s opposition to the exercise of a constitutional right is hardly a compelling reason to permit abridgments of the right.

The Supreme Court rejected such an interest as insufficient to overcome parties’ rights as long ago as 1974 in Cousins v. Wigoda. The Court held that the party had the right to determine the method for selecting delegates to its convention, notwithstanding contrary state law purportedly based on the interest “in protecting the effective right to participate in primaries . . . .” The Court has applied the same libertarian rule to non-partisan expressive associations in such cases as Boy Scouts of America v. Dale and Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.

Other interests, such as increasing opportunities for independents to participate meaningfully in elections, would be served by the “top-two” format itself, and so no additional restrictions on parties’ rights would be necessary.

The only interests that might be compelling, as Eu offered, would be protecting the “civil rights of party adherents”—an interest that would prevent a party from reinstating the exclusionary policies of the White Primary Cases. Morse v. Republican Party of Va., 517 U.S. 186, 269 (1996) (Thomas, J., dissenting); see also Terry v. Adams, 345 U.S. 461, 484 (1953) (Clark, J., concurring) (noting that as a result of the dominance of the Democratic Party and the fact that the winner of the Jaybird primary typically ran unopposed in the Democratic primary, the Jaybird primary was where “the real decisions [we]re
interfere with parties’ freedom—and protecting the “integrity” of elections. Any interest in election integrity would seem insufficient to permit states to interfere in internal party deliberations or nomination processes, however, because the “top-two” primary does not give automatic ballot access to party nominees. It is therefore difficult to credit the state’s interest in the integrity of an election that neither selects public officials nor plays any other formal role in the state’s electoral process.

Minor parties present another situation where state regulation should be invalid because of the lack of benefit provided in exchange for the limitation on the parties’ rights. Minor parties often lack the automatic ballot access granted to major parties, and instead minor parties and their candidates must comply with sometimes-burdensome signature requirements to gain access to the ballot. States should have no role, therefore, in limiting minor parties’ right not to associate or any other First Amendment rights.

made”—“the sole stage of the local political process where the bargaining and interplay of rival political forces would make [a vote] count”).

351. Eu, 489 U.S. at 232.

352. In dicta in Marchioro v. Chaney, 442 U.S. 191, 196–97 (1979), the Court suggested that state laws requiring certain “limited functions” to be performed by parties’ central committees might be constitutional means of ensuring that the electoral “process is conducted in a fair and orderly fashion.” Those “limited functions” included “filling vacancies on the party ticket, providing for the nomination of Presidential electors and delegates to national conventions, and calling statewide conventions.” Id. at 197. The Court opined that these “functions are directly related to the orderly participation of the political party in the electoral process,”—a rationale that applies in a much more substantial manner in states where party nomination ensures a candidate’s placement on the ballot than in states where it does not. Id.

353. See generally Jenness v. Fortson, 403 U.S. 431 (1971) (upholding a signature requirement); Williams v. Rhodes, 393 U.S. 23 (1968) (striking down a signature requirement); DIMINO ET AL., supra note 119, at 196–97 (stating that the benefit of automatic ballot access given to the major parties is the relief from these signature requirements.).

354. Five states require minor parties to select their nominees by primaries. The Sixth Circuit held that Ohio’s requirement of primaries was unconstitutional when combined with that State’s requirement that parties file a petition 120 days before the primary. Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 585–95 (6th Cir. 2006). The Ohio Secretary of State has issued a directive governing the petition requirements applicable to minor parties in an attempt to resolve the
In states that do fund primaries and provide the winner with an automatic place on the general-election ballot, the parties should face a choice: They may choose nominees in accordance with the rules as set by the states, or they may choose nominees in whatever way they prefer, but at the cost of sacrificing the state-conferrred benefits. Thus, blanket primaries and open primaries (the constitutionality of which was nominally left open by *California Democratic Party*, even though the Court's analysis would appear to foreordain their demise\(^{355}\)) could not be mandated, but states could decide not to fund any other method of candidate-selection. The approach favored here would represent a 180-degree shift from current doctrine, which permits states to require parties to use primaries or conventions at the state's option, but which also permits parties to override state choices about who should be permitted to vote in state-financed primaries.

Under an approach to party regulation that requires states to bargain with parties, parties could choose their nominees by caucuses, conventions, or primaries if they were willing to forego the state's proffered benefits. They could permit only long-term party members or long-term state residents to vote.\(^{356}\) They could charge a fee for voting.\(^{357}\) They could ask non-party members to participate in the nomination process. They could impose religious or ideological tests for nominees.\(^{358}\) They could apply sex-based quotas for selecting delegates to their constitutional problems. See Jon Husted, Ohio Secretary of State, *Directive 2013-02*, Jan. 31, 2013, available at http://www.ballot-access.org/2013/Ohio-2013-directive.pdf.


356. Cf. *Marston v. Lewis*, 410 U.S. 679 (1973) (upholding a fifty-day durational residency requirement); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down a requirement that voters be residents of the state for one year and of the county for three months); *Carrington v. Rash*, 380 U.S. 89 (1965) (striking down a law prohibiting service members who have moved to the state during their service from voting during their period of service).


conventions,\textsuperscript{359} as the Democratic Party does today\textsuperscript{360} (despite both the \textit{White Primary Cases} and the Court’s condemnation of quotas in Equal Protection doctrine).\textsuperscript{361} If there are intra-party disputes as to the party’s nominations, those disputes should be resolved by the party itself using whatever procedures it adopts.\textsuperscript{362}

It may well be that most major parties will accept states’ conditional offers of automatic ballot access and funding for primaries. If they do, then the result will be an electoral system that protects the democratic values of the states’ voters, as reflected in the choices of state policy-makers. Some states may return to the blanket primary, for example, if parties know that they stand to lose a benefit if they decide to use a different nomination method. At the same time, states’ policy-makers will know that their power to influence parties would be limited; parties would be able to opt-out whenever they determined that the cost of complying with the state rules outweighed the benefits, and so state regulations would take into account the desires of the parties even if they did not track those desires exactly.

The implications of an unconstitutional-conditions analysis go beyond primaries and other means of selecting nominees. Because the state-conferred benefits relate to the nomination process,\textsuperscript{363} it is unlikely


\textsuperscript{360.} See Democratic Party of the U.S., Delegate Selection Rules for the 2012 Democratic National Convention, Rule 6(c) (“State Delegate Selection Plans shall provide for equal division between delegate men and delegate women and alternate men and alternate women within the state’s entire convention delegation.”).


\textsuperscript{363.} See supra Part II.B.1.
that states could impose conditions on parties' other activities as a condition of receiving those benefits. Accordingly, parties could establish ideological tests for party membership (and not just party nominees), thus insulating themselves from the possibility of party raiding. This would mean that a party need not enroll every voter who wishes to be a member of a party, though of course there is plenty of incentive for major parties to make themselves as welcoming of voters as possible.

In fact, the freedom to set membership qualifications is easier to demonstrate under current law than is the freedom to conduct a nomination process without state interference. Smith, the case holding racial discrimination in the Texas Democratic Party primary unconstitutional, distinguished voting qualifications from qualifications for party membership: "The privilege of membership in a party may be, as this Court said in Grovey v. Townsend, 295 U.S. 45, 55 [(1935)], no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State." Presumably the Court believed that voting qualifications for primary elections were tied to the Fifteenth Amendment's prohibition on race-based denials of the right "to vote," whereas membership qualifications did not have the requisite relationship to elections unless party membership was a precondition to voting.

In practice, as Justice Stevens noted in California Democratic Party, people generally freely join parties by filling out a brief form or indicating their party preference when registering to vote. There is no screening of applicants, no requirement that members pay dues, no requirement of sponsorship, and no requirement that members participate

364. Smith v. Allwright, 321 U.S. 649, 664–65 (1944). Parties succeed by winning elections. Thus, their chances of winning elects are increased by obtaining support from more voters; therefore, parties have an interest in encouraging as many people as possible to support the party.

365. U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

366. Cal. Democratic Party v. Jones, 530 U.S. 567, 596 (2000) (Stevens, J., dissenting) ("In the real world, . . . anyone can 'join' a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined reasonable period of time before an election . . . ").
in any party activities. But the reasons for these lax requirements are practical. Parties—especially relatively non-ideological major parties—have every incentive to appeal to as many people as possible. Imposing burdens on would-be members would likely reduce a party’s membership and its influence in elections.

Nevertheless, there are circumstances where a party would want to prevent a person from joining or to expel a member, and the party should have every right to do so. It is easy to understand that small, ideologically driven parties would need the right not to associate as a means of protecting their identities. Such a party could be overrun—“raided”—by adherents of a competing philosophy, who could then exercise control over the party’s message. 367

Even major parties, however, would benefit from being able to exclude certain would-be members. 368 Consider, for example, the facts of a state case from New York, Rivera v. Espada. 369 In that case, Espada, a Democratic State Senator, announced his intention to join the Republican Party. 370 Because a change in enrollment would not take effect until after the next election, however, 371 he decided to seek the Democratic nomination. After determining that Espada was not in sympathy with the Democratic party, the county committee expelled Espada from the party. 372 Under state election law, it was the responsibility of the county committee chair to conduct an initial investigation into the sympathies of the party member in question, but it was the responsibility of a court to

367. See id. at 578 (opinion of the Court) (“The impact of voting by nonparty members is much greater upon minor parties, such as the Libertarian Party and the Peace and Freedom Party. In the first primaries these parties conducted following California’s implementation of [the blanket primary], the total votes cast for party candidates in some races was more than double the total number of registered party members.”).

368. The current division within the Republican Party between the “Establishment” and “Tea Party” factions demonstrates that new factions can change the ideological character of major parties too. See generally Zhang, supra note 270, at 616–17.


370. Id. at 427.

371. See generally Rosario v. Rockefeller, 410 U.S. 752 (1973) (upholding New York’s rule providing that persons registering with a party must do so at least thirty days before a general election, and further providing that the registration shall not take effect until after the general election).

372. See 777 N.E.2d at 237.
cancel the individual’s party registration if the committee chair came to a “just” determination that the individual was out of sympathy with the party. As the New York Court of Appeals explained, “the court’s role is to ensure that the County Committee Chair reaches a decision on the basis of sufficient evidence and does not consider inappropriate factors.” In other words, the court tells the party which factors are “[a]ppropriate” for it to consider in evaluating its own members and how much evidence of disloyalty is “sufficient” to oust them.

Such a role for the courts is inconsistent with a First Amendment that grants autonomy to parties as expressive associations. The First Amendment permits government to limit associations’ right to control their memberships when the government is acting to further a compelling interest, such as the eradication of racial discrimination, but in Espada there was no allegation that the Democrats’ decision to expel Espada was motivated by prejudice. Rather, the court (incredibly) held that the state constitution’s Speech or Debate Clause made it improper for the party to base its decision on “Senator Espada’s participation in Senate Majority [i.e., Republican] Conference activities, his voting record on legislation, the change in his seating in the Senate Chamber and other legislative conduct.” One can hardly imagine a more blatant infringement of the right of association than to require a party to continue to associate with a legislator whose “legislative conduct” the party finds unacceptable.

In recent years there have been several controversies surrounding the party designations of candidates appearing on ballots. The Supreme Court has decided one of those cases. In Washington State Grange v. Washington State Republican Party, the party challenged a Washington policy of designating each candidate’s party preference on

373. N.Y. ELEC. L. § 16-110(2) (McKinney 2012).
374. 777 N.E.2d at 238.
375. Id.
376. See supra note 78 and accompanying text.
377. 777 N.E.2d at 237 (describing the ground for Espada's ouster as the Democratic Party's conclusion that Espada was "not in sympathy with the principles of the" party).
378. N.Y. CONST. art. III, § 11 (“For any speech or debate in either house of the legislature, the members shall not be questioned in any other place.”).
the ballot. The party reasoned that the designation was bound to convey a message that the candidate was affiliated with or nominated by the party, even if that was not in fact true.\textsuperscript{381} The Court held that the policy did not facially violate the First Amendment because the ballot could be designed in such a way as to make clear that the designation referred to the candidate’s preference for the party, and not vice-versa.\textsuperscript{382}

For the most part, issues about party designations on general-election ballots do not implicate parties’ free-speech rights because ballots are not fora for parties’ speech. Washington State Grange appears to recognize that states may not use ballots to convey misimpressions about parties’ expression\textsuperscript{383} and parties may raise constitutional concerns if the state includes only some parties’ designations,\textsuperscript{384} but the parties do not have an affirmative right to use state-produced ballots to express their messages.\textsuperscript{385} Thus, if a state wishes to use a ballot without party designations, the parties have no right to demand otherwise.

\textsuperscript{381} Id. at 454.

\textsuperscript{382} Id. at 456–57. On remand, the Ninth Circuit considered an as-applied challenge to the law and held that there was insufficient evidence “to create a triable issue of widespread voter confusion.” Wash. State Republican Party v. Wash. State Grange, 676 F.3d 784, 792 (9th Cir. 2012); see also Libertarian Party of N.H. v. Gardner, 638 F.3d 6 (1st Cir.), cert. denied 132 S. Ct. 402 (2011) (holding that the Libertarian Party had no First Amendment right to prevent the use of the word “Libertarian” on the ballot next to the name of a candidate who was not the nominee of the party, given that the party had not demonstrated voter confusion).

\textsuperscript{383} See 552 U.S. at 459 (“[B]ecause there is no basis in this facial challenge for presuming that candidates’ party-preference designations will confuse voters, [the law providing that ballots include such designations] does not on its face severely burden respondents’ associational rights.”); see also id. at 456–57 (Roberts, C.J., concurring).

\textsuperscript{384} See Schrader v. Blackwell, 241 F.3d 783 (6th Cir. 2001) (holding that it is constitutional for states to provide party designations on ballots only for qualified political parties, \textit{i.e.}, those that received 5% of the vote in the last gubernatorial election or that attain a sufficient number of petition signatures).

\textsuperscript{385} See Wash. State Grange, 552 U.S. at 453 n.7 (“The First Amendment does not give parties a right to have their nominees designated as such on the ballot.”).
CONCLUSION

To this point, cases and commentary have portrayed controversies about regulation of political parties as requiring a choice between the autonomy of parties and the power of the government to regulate elections. Supporters of government regulation have seen such regulation as worth the cost of limiting parties’ freedom. Opponents have argued that parties’ First Amendment rights entitle them not only to run themselves as they see fit but to receive the assistance of the government in doing so.

This Article has suggested a third way. By permitting government to condition benefits on parties’ waiver of First Amendment rights, this new proposal respects parties’ rights and treats parties as autonomous organizations, while still permitting government to encourage parties to act in ways that promote society’s democratic ideals.