

SPEAKING TRUTH TO THE POWER THAT FUNDS THEM: A JURISPRUDENCE OF ASSOCIATION FOR ADVOCACY ORGANIZATIONS FINANCIALLY DEPENDENT ON GOVERNMENT GRANTS AND CONTRACTS

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INTRODUCTION

Americans have a constitutional role and a corresponding constitutional duty to establish and maintain the legitimacy of government in a manner consistent with the purposes set forth in the Constitution.¹ In performing this constitutional role, the people have a right to act in concert by forming associations.² The First Amendment protects “the right of the people peaceably to assemble, and to petition the Govern-

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1. See U.S. CONST. pmbl.
 2. See U.S. CONST. amend. I.

ment for a redress of grievances.”³ This First Amendment right protects both associations and the individuals who associate. It means that individuals performing their continuing constitutional duty to “ordain and establish”⁴ the Constitution may do so by acting together rather than alone. The right of individuals to associate and the rights of associations to represent the people are defining features of democratic government.⁵ The importance of the right to associate and the right of associations to represent the people becomes much clearer when contrasted with atomization and the destruction of both associations and associational rights that are core features of totalitarian regimes.⁶ In democratic systems, associations facilitate participation and representation by interacting with government. Associations speak truth (as they see it) to power.

This article focuses on associations’ ability to play this important role in democratic government when they are financially dependent on government. The question explored here is how associations speak truth to the power that funds them. In particular, this article explores whether financial dependence on government affects an association’s ability to represent the interests of its members in dealings with the government. This issue cannot be addressed solely in terms of the First Amendment; rather, it requires considerations of the terms of associations’ interactions with government as well.

A recent article on association by Ashutosh Bhagwat suggests that associations that are financially dependent on government fall outside of a jurisprudence of association.⁷ Bhagwat suggests that, “government-sponsored community groups are not the sorts of associations at the heart of the First Amendment’s protection and goals.”⁸ He reasons that “[s]uch groups, which are necessarily under heavy state influence, cannot play the kind of independent role in self-governance—including values free of state interference and in over-

3. *Id.*

4. U.S. CONST. pmbl.

5. This insight is the fundamental contribution of the mid-twentieth century theory of liberal pluralism. See, e.g., ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 3 (1956) (arguing that democratic theorists are “concerned with processes by which ordinary citizens exert a relatively high degree of control over leaders”). For an insightful critique of the post-World War II pluralist theories, see GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966).

6. FRANZ NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 400 (1942) (outlining the core features of national socialism as compared to democratic societies).

7. See Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 978 (2011) (arguing that association should be understood in terms of its role in self-government).

8. *Id.* at 1017–18.

seeing and petitioning public officials—that the First Amendment envisions.”⁹ While this analysis may apply to some organizations, its general acceptance as a principle of the jurisprudence of association would have such broad application and such fundamental implications in contemporary circumstances that a very large share of associations would fall outside the jurisprudence of association. Limiting the First Amendment to self-financing organizations would impoverish the concept of association and impede analysis of the roles of associations in an era of government outsourcing.

This article suggests alternatives to limiting the First Amendment to self-financing organizations. Part I explores the concept of financial dependence on government and the implications of this dependence for the role of an association in democratic governance. Part II explores the implications of the judicially created state action doctrine for developing a jurisprudence of association for organizations dependent on government financing. It argues that reliance on autonomy claims under the state action doctrine would impose the unacceptable price of linking associational autonomy with multiple forms of constitutionally impermissible discrimination, and denial of participation. Part III suggests that the Spending Clause provides a framework for a jurisprudence of association that accounts for government funding. This jurisprudence of association would balance accountability to government with limits on the conditions that government can impose on the receipt of government funds and on the use of funds that a government contractor raises from non-governmental sources. A jurisprudence of association based on the Spending Clause would focus on the terms of the intersection of government with organizations, not on illusions of associational autonomy despite government funding. Part IV suggests that the Spending Clause provides at least the possibility of a jurisprudence of association that takes account of government funding and is more coherent than the state action doctrine and its contemporary avatars. It also suggests that political strategies adopted by associations dependent on government financing are likely to play important roles in shaping the jurisprudence of association.

I.

EVIDENCE AND IMPLICATIONS OF FINANCIAL DEPENDENCE ON GOVERNMENT

Financial dependence results from the confluence of two trends. The first is government outsourcing, and the second is the inability of

9. *Id.* at 1018.

organizations to raise sufficient funds for their missions and operations from non-governmental sources. The result is that the purported independent sector has become a dependent sector. Although these are not new developments, there are relatively few systematic studies of the implications of financial dependence.¹⁰ Data on government contracts with nonprofits are difficult to access comprehensively.¹¹ The reliance of nonprofit organizations on government funding is necessarily inconsistent with the claims of organizational independence and autonomy that still form the core of tax-exempt entities' narrative of an independent sector offering an alternative to both government and markets. In the current economic climate, budget shortfalls at all levels of government and resultant cutbacks on distributions to nonprofit organizations are making nonprofits' dependence on government more obvious and less deniable.¹²

The literature on government contracting raises significant questions about the implications of outsourcing for accountable government. Jody Freeman and Martha Minow raise issues of government transparency and accountability in what they describe as "government by contract."¹³ While noting that outsourcing is not new, they find that

10. As discussed in this Part, there is a tendency to speak of "partnerships" between exempt entities and government. Without a more fully developed concept of dependence, this invocation of a partnership is a metaphor rather than an analytical construct.

11. Data from Form 990, the information return filed annually by tax-exempt entities, is unreliable because it is far from clear that it asks exempt entities to report the full amount of their government contracts. This uncertainty arises from the absence of a statutory or regulatory definition of a grant or a contract that would control reporting on the Form 990. In the absence of such guidance, it is possible to take a range of positions on what is reportable as a grant or a contract and what might be characterized as a contribution. The Pew Charitable Trust, which developed a database on government contracts, warns users that data on nonprofit entities are particularly unreliable and fragmentary. See *Methodology for Pew's Tax Expenditure Database*, SUBSIDYSCOPE, http://www.subsidyscope.org/tax_expenditures/methodology/ (last visited Jan. 22, 2012).

12. See Elizabeth McNichol et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 27, 2012), <http://www.cbpp.org/cms/index.cfm?fa=view&id=711> (noting that for fiscal year 2013, states have projected or addressed budget shortfalls and that anticipated cuts in spending will result in eliminating or lowering payments to non-profit organizations). See generally THE NAT'L COUNCIL OF NONPROFITS, <http://www.councilofnonprofits.org> (last visited Jan. 22, 2012) (addressing the implications of government revenue shortfalls for payments under contracts with nonprofit organizations); THE NONPROFIT Q., <http://www.nonprofitquarterly.org> (last visited Jan. 22, 2012) (covering government contracting issues important to nonprofit organizations).

13. See GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha L. Minow eds., Harvard Univ. Press 2009).

the “current scope and scale are unprecedented.”¹⁴ They raise questions about government’s capacity to manage the contracts and contractors and “more broadly, about the compatibility of the American outsourcing regime with the country’s professed commitment to the democratic values of public participation, accountability, transparency, and the rule of law.”¹⁵

Students of government contracting have not focused on distinctions among contractors or on the implications of contracting for the contractors themselves. This oversight may reflect an assumption that most government contractors are taxable entities. Certainly the large defense contractors that sell military hardware to the government are indeed taxable businesses, as are the private security companies that provide what appear to be private armies.¹⁶ The issue in the case of taxable entities is not whether these contracts are good for the sellers. The sole purpose of taxable entities is to sell goods and services to the government and, in some cases, to sell the same goods and services to private parties. The issue is whether these contractual relationships are good for our system of representative, accountable government.

Issues of accountability arise with respect to nonprofit contractors as well.¹⁷ Tax status does not provide a predicate for assuming enhanced accountability of nonprofit, tax-exempt entities. But, there are two critical differences between taxable and tax-exempt entities that require a focus on the implications of government contracting for the contracting entity in the case of nonprofit contractors that does not arise in the same way with respect to taxable contractors. This difference in focus arose because most nonprofit contractors claim to pursue an exempt purpose, namely the organization’s mission that provides the reason for their exemption from taxation. The question then arises whether the work that the organization performs under a government contract is consistent with its mission. A second difference is that many nonprofit contractors also claim to represent their members or

14. *Id.* at 1 n.2 (citing PAUL C. LIGHT, FACT SHEET ON THE NEW TRUE SIZE OF GOVERNMENT 1 (2003), available at http://www.brookings.edu/~media/Files/rc/articles/2003/0905politics_light/light20030905.pdf).

15. *Id.* at 1; see also Laura A. Dickinson, *Public Values/Private Contract*, in GOVERNMENT BY CONTRACT, *supra* note 13, at 335, 335–59.

16. See LAURA A. DICKINSON, OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN AN ERA OF PRIVATIZED FOREIGN AFFAIRS 6 (Yale Univ. Press 2011) (noting the rise in the use of for-profit companies in foreign aid and military operations).

17. Human services organizations, including religiously affiliated charities such as Catholic Charities and Lutheran Social Services, are funded in substantial part by government funds. Much of the scholarship in this area consists of the analysis of aggregate data, not case studies of particular organizations.

supporters as well as their beneficiaries and the “public interest” through advocacy, including lobbying.¹⁸ Nonprofits can certainly lobby, although some types of exempt entities are subject to various limits on lobbying.¹⁹ Taxable entities may also lobby, but they generally do not claim that their lobbying represents broad segments of the public. Taxable entities may argue that their positions would be good for the country, but they do not generally argue that their advocacy roles are essential to democracy. Nonprofits have been remarkably silent about the impact, if any, that their dependence on revenue from government contracts has on their role in representing people and facilitating participation in public policy debates. This article focuses on the implications of government funding for the associational will and capacity to speak truth to the power that funds them.

As early as 1976, the Commission on Private Philanthropy and Public Needs (Filer Commission) noted that exempt organizations were becoming increasingly dependent on government funding and concluded that there was no alternative to such dependence, stating that “government [funding] . . . is a matter of life and death for many organizations”²⁰ and “an indispensable fact of life” for the nonprofit sector as a whole.²¹ At the same time, the Filer Commission found that individuals’ “impulse to associate” provided an important balance to the increasing scope of government.²² The Filer Commission did

18. *See What We Do*, CTR. FOR LOBBYING IN THE PUB. INT., <http://www.clpi.org/about-us/what-we-do> (last visited Jan. 24, 2012) (aiming to increase nonprofit advocacy); *see also* JEFFREY M. BERRY, *LOBBYING FOR THE PEOPLE* (1977) (discussing the increasing significance of public interest groups’ role in American politics); JEFFREY M. BERRY & DAVID F. ARONS, *A VOICE FOR NONPROFITS* 24–31 (2003) (arguing that nonprofits should, and often do, lobby on behalf of their constituencies and interests).

19. *See* I.R.C. § 501(h) (2006) (placing limits on lobbying expenditures for certain tax-exempt organizations); *see also* *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding the constitutionality of lobbying limits for certain tax-exempt organizations).

20. The Filer Commission engaged many of the leading experts of the time, and its study remains one of a few such systematic studies of the exempt sector. *See* COMM’N ON PRIVATE PHILANTHROPY & PUBLIC NEEDS, *REPORT: GIVING IN AMERICA: TOWARD A STRONGER VOLUNTARY SECTOR* 96 (1975).

21. *Id.*

22. *Id.* at 47–48. The Filer Commission explained its concerns in the following terms based on the experiences of the two administrations, those of President Johnson and President Nixon, which shaped its thinking:

The federal government’s unavailing efforts to control the economy follow many frustrating social programs of the Great Society and both add to the evidence of our sense that in our increasingly complex society there is no one body, one governing structure, that holds the answers to society’s problems, is equipped to find the answers by itself or could put them into effect if it did. In the wake of Watergate, moreover, we are probably less persuaded than ever to stake our destiny totally on the wisdom or

not explain how exempt organizations could fulfill this role in light of their financial dependence on government. Indeed, the Filer Commission identified what it described as the “dilemma” over control and finances that exempt entities were confronting.²³ The Filer Commission seemed to base its hope that exempt entities would operate independently on what it described as some modicum of private support.²⁴ At the same time, the Filer Commission expressed concern that non-profit contractors would become indistinguishable from government agencies, thereby depriving their beneficiaries and the country of innovative ideas.²⁵ It stated the problem with admirable clarity when it observed that receipt of government funding raised the question of “whether the managers of the organization regard themselves and behave as independent operators or as civil servants.”²⁶ This remains one of the important unaddressed questions about exempt entities that engage in government contracting.

When Ronald Reagan took office, his new administration abolished a number of agencies involved with nonprofit contractors engaged in grassroots activism and substantially reduced the funding of others. These dramatic and highly visible changes became the focus of the first systematic study of the consequences of changes in government budget priorities for nonprofits and, by extension, of nonprofits’ financial dependence on government grants and contracts.²⁷ Stating that “an elaborate partnership exists between nonprofit organizations and government at all levels,”²⁸ Alan J. Abramson and Lester Salamon reported on the limited portion of nonprofit funding that came from private contributors. Their study found that government funding was as important as the Filer Commission suggested and, as a consequence, the Reagan budget cuts seriously impaired the missions and operations of many nonprofit organizations.²⁹ The book ends not

beneficence of centralized authority. This sorry and sordid chapter in recent history has dramatically demonstrated the virtues of . . . a vigorous public-minded and independent sector.

Id. at 48.

23. *Id.* at 96.

24. *Id.* at 99.

25. *Id.* at 96.

26. *Id.* at 99.

27. ALAN J. ABRAMSON & LESTER SALAMON, *THE NONPROFIT SECTOR AND THE NEW FEDERAL BUDGET* xi (1986).

28. *Id.* at xv. The study traced the development of nonprofit federalism, which the authors describe as “linking governments at all levels to nonprofit organizations across a broad front.” *Id.* at 54. For a discussion of the history of nonprofit federalism, see *id.* at 56–66.

29. The study found that nonprofits, considered in the aggregate, lost twenty-seven percent of their federal funding by fiscal year 1985 while, at the same time, health

by calling on exempt entities to rely on non-government sources of revenue, but with a careful discussion of various budget proposals then at issue and their implications for various types of nonprofit entities.³⁰ The study found that private giving could not replace the government funds lost in the Reagan administration's reallocation of resources.³¹

A 2006 study prepared by the Urban Institute, based on 2002 data, documented increasing dependence on government grants and contracts.³² Robert D. Reischauer, then-president of the Urban Institute, expressed the aspiration that the study would "free discussion of the nonprofit sector's relationship to government from both wishful and insular thinking."³³ This is a lofty aim that elegantly captures the difficulty of overcoming the effects of the nonprofit narrative of independence and their claims to privacy while operating with public money. One chapter addresses advocacy, focusing largely on a description of current tax law limitations.³⁴ It reports that in 2002, only two percent of organizations with annual revenues over \$25,000 reported lobbying expenses on their Form 990.³⁵ Forty-two percent of organizations that declared lobbying expenses on their tax forms received government grants.³⁶ Sixty-four percent of these organizations were large organizations.³⁷ The author expressed concern about balancing legitimate demands for disclosure of the use of public funds and the real desire of organizations to maintain privacy with respect to

care organizations absorbed an increased share of the reduced amount of federal government resources. *Id.* at 73.

30. *Id.* at 73–81.

31. *Id.* at 86–90. The authors conclude, "In short, the assumption that is often made that private giving can compensate for cutbacks in federal spending in fields where nonprofits are active seems highly unlikely to say the least." *Id.* at 90.

32. NONPROFITS & GOVERNMENT: COLLABORATION & CONFLICT (Elizabeth T. Boris & C. Eugene Steuerle eds., 2006); see Alan J. Abramson et al., *Federal Spending and Tax Policies: Their Implications for the Nonprofit Sector*, in NONPROFITS AND GOVERNMENT, *supra* at 107, 107–37 (focusing on the difficulty of developing data in the area of government contracting and clearly explaining their approach to developing estimates).

33. Robert D. Reischauer, *Forward*, in NONPROFITS & GOVERNMENT: COLLABORATION & CONFLICT, *supra* note 32, at ix, x.

34. Elizabeth J. Reid, *Advocacy and the Challenges It Presents for Nonprofits*, in NONPROFITS & GOVERNMENT: COLLABORATION & CONFLICT, *supra* note 32, at 343, 343–71.

35. *Id.* at 354–55. While there is no reason to question whether this figure correctly reflects reporting on Form 990, there is reason to question whether Form 990 in the aggregate present reliable data.

36. *Id.* at 352.

37. *Id.* It is unclear whether grants include contracts or whether the terms are being used interchangeably. It is also unclear how large organizations are defined for this purpose.

governance.³⁸ Understanding government contracting and dependence on government funding in this context is not addressed apart from the statement that “[m]any groups report a dampening effect on advocacy when they are entwined with government through grants and contracts.”³⁹

Nonprofit dependency on government funding intensified by 2010.⁴⁰ A national survey of nonprofit organizations with government contracts indicated that government revenue was the largest single source of funding for three out of every five nonprofits engaged in human service activities.⁴¹ The report focused primarily on problems that nonprofits incur in contracting with government, such as late payment or failure to fund entire projects.⁴² To date, no report or study has addressed issues such as a reluctance to lobby for anything other than continued government funding.

The most thoughtful look at the implications of government contracting for the nonprofits that depend on federal, state, or local governments for funding, written by Stephen Rathgeb Smith and Michael Lipsky, is based on the experience of nonprofits dependent on government funding in the Reagan administration.⁴³ Smith and Lipsky expressed concern about nonprofit reliance on contracts leading to dependence on political patrons, a process they call “corporatist.”⁴⁴ Smith and Lipsky describe this relationship as “unbalanced reciprocity” controlled by the government agencies that provide the funding to sustain the nonprofit organizations.⁴⁵ They suggest that financial dependence inhibits speaking truth to the sovereign funder.⁴⁶

The foregoing studies raise important questions that currently have no answers and that, in many instances, are not yet understood as part of a jurisprudence of association. The idea of dependence is underdeveloped, and it is unclear what constitutes dependence on government funding. For example, one could question whether

38. *Id.* at 364–68.

39. *Id.* at 352. The source of this observation is not noted.

40. ELIZABETH R. BORIS ET AL., *HUMAN SERVICES NONPROFITS AND GOVERNMENT COLLABORATION: FINDINGS FROM THE 2010 NATIONAL SURVEY OF NONPROFIT GOVERNMENT CONTRACTING AND GRANTS* 5–8 (2010).

41. *Id.* at 7 (relying on data from 2009).

42. *Id.* at 1.

43. STEVEN RATHGEB SMITH & MICHAEL LIPSKY, *NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING* (1993) (discussing generally the ways in which contracting has affected nonprofits).

44. *Id.* at 187 (concluding that nonprofits are “implementors of government policy”).

45. *Id.* at 172.

46. *Id.* at 179.

dependence is a matter of a particular share of an organization's operating budget or a more complex idea based on the margin needed for the organization to survive. An even more complex question is whether dependence is a matter of the financing needed to permit the organization to continue to engage in a particular mission. In addition, it is by no means clear what exempt entities are doing as government contractors. Are they contracting to provide services in areas where they have a particular expertise because of their own exempt activities or are they contracting to provide services that are only tangentially related, or not related at all, to their exempt purposes? A related issue is whether exempt entities are pursuing their own missions with government funds or whether they are implementing government programs under the direction of the government. Under what circumstances is it possible to do both? At the same time, what are the appropriate mechanisms for accountability with respect to the use of public money?

Including questions of organizational capacity and government funding in a jurisprudence of association implicates constitutional predicates and judicial doctrines that may initially seem far removed from the jurisprudence of association based on the First Amendment. To the contrary, the issue is how First Amendment rights of association and the structural role of associations in participatory representative government can be integrated with the financial realities of government funding and the duty of government to ensure transparency and accountability. A dynamic in which exempt entity contractors claim autonomy and the government asserts control cannot provide the framework for a jurisprudence of association for entities dependent on government funding. Nonprofit organizations now face a dilemma of how to claim autonomy despite dependency on government grants and contracts.

Part II, below, analyzes autonomy claims by exempt entities based on the judicially created state action doctrine and the implication of discrimination that follows from the autonomy claim made under the state action doctrine. It then analyzes the Supreme Court's expansion and transformation of the state action doctrine as a First Amendment claim of expressive association, which also protects discrimination in the name of associational rights.

II.

STATE ACTION AND EXPRESSIVE ASSOCIATION:
A JURISPRUDENCE OF AUTONOMY CLAIMS
AND DISCRIMINATION

The existing literature on government contracting focuses on accountability issues, including whether contractors are accountable to the government and to the people and, if so, to what extent. From this perspective, the most commonly invoked constitutional predicates are the non-delegation doctrine⁴⁷ and the appointment clause.⁴⁸ This article, in contrast, focuses on the implications of government contracting for associations to represent their members and supporters and to facilitate their participation in shaping public policy. From this perspective the most important constitutional principles are the state action doctrine and the Spending Clause.⁴⁹ Both address the degree of autonomy associations might claim from the government that funds them and the costs associations pay in asserting autonomy. As this Part and the following Part discuss in detail, these two doctrines have very different implications for a jurisprudence of association that considers government funding of associations.

Associations utilize the state action doctrine to argue for autonomy from the government that funds them.⁵⁰ The role of government is, in this framework, to provide funds but not to interfere with how associations operate. This is the same perspective that exempt entities apply to non-governmental contributors, who gain no special role in exempt entities by virtue of their roles as contributors. This interference is, of course, precisely what the students of the effect of outsourcing on democratic governance fear.⁵¹ In her seminal article on privatization, Gillian Metzger concludes that the state action doctrine cannot serve as the basis of contractor accountability to the govern-

47. Gillian E. Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, in *GOVERNMENT BY CONTRACT*, *supra* note 13, at 291, 291–309; *see also* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

48. Paul R. Verkuil, *Outsourcing and the Duty to Govern*, in *GOVERNMENT BY CONTRACT*, *supra* note 13, at 310, 310–34; *see also* PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* (2007).

49. *See* U.S. CONST. art. I, § 8, cl. 1.

50. For an example of this reasoning, see discussion of Independent Sector's amicus brief, *infra* notes 241–249.

51. *See generally* Introduction to *GOVERNMENT BY CONTRACT*, *supra* note 13, at 10 (claiming that democratic participation is damaged when government operates through private actors that are not subject to, for example, the same level of transparency requirements as government agencies); VERKUIL, *OUTSOURCING SOVEREIGNTY*, *supra* note 48, at 196 (arguing that the use of contractors to displace functions normally performed by government officials is dangerous to democracy).

ment and to the people because of its internal incoherence and instability.⁵² While determining that an organization is engaged in state action would interdict claims against the organization based on infringing the claimants' civil liberties, the jurisprudence in this area provides little basis for confidence that state action determinations could be made with any coherence and consistency.

This article suggests that the state action doctrine cannot play a useful role in a jurisprudence of association in an era of government contracting because precedents have confused autonomy claims under the state action doctrine with a justification for private discrimination, which is itself fundamentally inconsistent with the role of associations in democracy.

This Part examines the re-emergence of a judicially created doctrine once presumed dead, or nearly so.⁵³ In the long discussion of the internal operation of the doctrine,⁵⁴ commentators lost sight of its origins as a limitation on the right of the federal government to enforce federal statutes and constitutional amendments enacted after the Civil War to ensure the rights of freed slaves, including the right to vote.⁵⁵ In other words, both courts and commentators failed to consider the state action doctrine as a doctrine about the scope and structure of government. Importantly for this analysis, the state action doctrine was, from its beginning, a doctrine in which the courts consciously and intentionally linked limitations on the civil liberties of freed slaves

52. Metzger, *Privatization as Delegation*, *supra* note 47, at 1410–45.

53. Chief Justice Rehnquist fueled the reemergence of the state action doctrine in 2000. *See* *United States v. Morrison*, 529 U.S. 598, 619–27 (2000). For a contemporary assessment of the state action doctrine, see *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248 (2010). For a contemporary defense of the state action doctrine, see Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767 (2010).

54. Analyses of the state action doctrine have become technical exercises in arguing that an activity is or is not state action and that an organization is or is not a state actor. Constitutional law case books recount this doctrinal thread. *See, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 693–716 (17th ed. 2010).

55. Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381 (2009) (analyzing the violence during reconstruction as “political terror”); *see also* CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008) (describing the historical context of *United States v. Cruikshank*). The Supreme Court refused to uphold criminal convictions of private parties for engaging in a violent criminal conspiracy to deny freed slaves the right to vote, reasoning that only actions by states were subject to federal prosecution to enforce constitutional rights, in *United States v. Cruikshank*, 92 U.S. 542 (1875).

with limitations on the scope of government.⁵⁶ In its current form it is still used to limit the constitutional rights of Americans on many grounds.⁵⁷

The origin of the state action doctrine is in the *Civil Rights Cases*.⁵⁸ In the *Civil Rights Cases*, the Supreme Court held that the Civil Rights Act of 1875 was unconstitutional to the extent that it regulated discrimination by a private party based on race. All four of the consolidated cases dealt with discrimination in travel, lodging, or places of public entertainment. None involved the physical violence that was pervasively practiced against African-Americans attempting to vote. The Court held that the Fourteenth Amendment prohibited discrimination by states, not by private persons,⁵⁹ and it concluded that the Fourteenth Amendment only empowered Congress to provide relief against improper state action, not to legislate with regard to violations of constitutional rights by private individuals or organizations. The Court was fully aware that this position brought with it a judicial endorsement of the idea that the rights set forth in the Constitution could not be protected by the federal government.⁶⁰

The Court did not treat this analysis as purely a matter of theory. Indeed, the Court stated quite clearly and graphically that a person might well pay for her rights with her life without disturbing the limits placed on the federal government's ability to protect either rights or the person seeking to exercise those rights in the face of private actions, including illegal actions.⁶¹ The Court was content to require that

56. For an important exception to this general tendency, see Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341 (2003).

57. See *infra* notes 85–104 and accompanying text (discussing expressive association).

58. *Civil Rights Cases*, 109 U.S. 3 (1883).

59. *Id.* at 11 (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action . . .”).

60. *Id.* at 17 (“[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.”).

61. *Id.*

individuals exercising their constitutional rights pay with their lives, as is apparent in this litany of possible situations in which the actions of private persons do not violate the constitutional rights of other private persons:

An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the law of the State where the wrongful acts are committed.⁶²

If states chose not to protect the exercise of constitutional rights, the individual had no recourse. Private persons were permitted to violate the constitutional rights of other private persons. In practice, this principle applied even when the private act violated state law. The federal system offered no protection for individuals seeking to exercise their constitutional rights. The states refused to act, and, under the state action doctrine, the federal government could not act.

Justice Harlan's powerful dissent distinguishing legal from social rights represents a path not taken and often overlooked.⁶³ Describing the majority opinion and thus, the state action doctrine, as based on "grounds entirely too narrow and artificial,"⁶⁴ Justice Harlan concluded that "the substance and the spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."⁶⁵ Justice Harlan based his line of attack on the distinction between legal and social rights.⁶⁶ He stated that "[n]o government ever has brought or ever can bring, its people into social intercourse against their wishes."⁶⁷ But, according to Justice Harlan, "[t]he rights which Congress, by the act of 1875, endeavored to secure and protect are legal, not social rights."⁶⁸ Justice Harlan's distinction between social and legal rights was blurred into the distinction between public

62. *Id.*

63. *Civil Rights Cases*, 109 U.S. at 26–62 (Harlan, J., dissenting).

64. *Id.* at 26 (Harlan, J., dissenting).

65. *Id.* (Harlan, J., dissenting) ("[T]he court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.").

66. *Id.* at 59 (Harlan, J., dissenting).

67. *Id.* (Harlan, J., dissenting).

68. *Id.* (Harlan, J., dissenting).

and private, which seemed to capture the autonomy claim while obscuring the burden on civil liberties inextricably linked with it.

For associations, the state action doctrine in its original form lives on in claims of autonomy from government. This claim is apparent in the cases and commentaries relating to political parties, a trend that began with the White Primary Cases.⁶⁹ Political parties claimed that they were private associations that could exclude African-Americans who were qualified to vote in the party primaries from exercising their rights. The Supreme Court proved remarkably diffident in addressing this issue. This strategy resulted in a decision that the Texas Democratic Party could exclude qualified African-American voters registered as Democrats.⁷⁰ The Court's path out of this position resulted in the first direct judicial challenge to the state action doctrine in the context of primary elections.⁷¹ The last of the White Primary Cases⁷² was decided seventy years after the Court created the state action doctrine in the *Civil Rights Cases* and one year before the Court decided *Brown v. Board of Education*.⁷³ By any measure, the state action doctrine achieved the unworthy linkage between autonomy claims and deprivation of civil liberties that the Court set forth in the *Civil Rights Cases*.

The White Primary Cases did not settle the issue of autonomy claims based on state action made by private associations. Indeed, contemporary scholars remain divided over the Court's ultimate rejection of the state action doctrine in the White Primary Cases.⁷⁴ These scholars do not defend the use of state action to protect private discrimination on racial grounds. Their error is to claim that party autonomy claims can be decoupled from the deprivation of other civil liberties, including the right to participate in political parties and their primaries, under the state action doctrine. One scholar suggests that the courts should play a less intrusive role and that the distinction between public and private should not be the focus.⁷⁵ He suggests

69. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927). For an analysis of the state action claims in the White Primary Cases, see Frances R. Hill, *Constitutive Voting and Participatory Association: Contested Constitutional Claims in Primary Elections*, 64 U. MIAMI L. REV. 535, 588–97 (2010).

70. *Grovey v. Townsend*, 295 U.S. 45 (1935).

71. *Allwright*, 321 U.S. 649 (overruling *Grovey*, 295 U.S. 45).

72. *Terry*, 345 U.S. 461.

73. 347 U.S. 483 (1954).

74. See, e.g., Daniel Hayes Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741 (1993); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750 (2001).

75. Lowenstein, *supra* note 74, at 1747–54.

“disavow[ing] the White Primary Cases and treat[ing] parties as purely private in nature.”⁷⁶ The author does not consider disavowing the state action doctrine and developing a more participatory and less discriminatory and exclusionary jurisprudence of association.

Another leading scholar calls for a “functional theory of party autonomy” based on the First Amendment.⁷⁷ He is concerned about the limits placed on political party autonomy.⁷⁸ Nothing in the article explains why the author faults the White Primary Cases and not the state action doctrine as developed in the *Civil Rights Cases*. Doing so would have contributed to a jurisprudence of association that did not rely on the illusion of autonomy but focused instead on the complex intersections of organizations and government.

In contrast to analyses of the continued utility of the state action doctrine as the jurisprudential basis for associations’ autonomy claims, Professor Charles Black suggests that the appropriate autonomy claims should be based on government structure.⁷⁹ Under Black’s structural analysis, the state action doctrine is unnecessary. He argues that a state law that interfered with the right to associate and the right to petition the government for redress of grievances “would constitute interference with a transaction which is part of the working of the federal government.”⁸⁰ Black asserts that the rights to associate and to petition the government are “founded on the very nature of a national government running on public opinion.”⁸¹ Black would limit the reach of government under his structural approach by determining the reach of the federal government interest. He states “this theory of protection against state infringements needs to lead no further than the point where a legitimate national political interest is no longer fairly discernible.”⁸² What Black offered was a constitutional basis for protecting associational autonomy without a simultaneous deprivation of civil liberties—in short, a jurisprudence of association freed from the state action doctrine.⁸³ This approach is another path not taken, or not yet taken.

76. *Id.* at 1749 (arguing that there would be no cost in racial discrimination and that it would bring constitutional doctrine into accord with the commonsense notion that parties are not government agencies).

77. Persily, *supra* note 74, at 766.

78. *Id.* at 754.

79. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 39–51 (1969).

80. *Id.* at 40.

81. *Id.* at 41.

82. *Id.* at 48.

83. *Id.* at 54–57.

Although the state action doctrine was once thought to be nearing extinction,⁸⁴ it survived and its influence spread. In most instances, the state action doctrine is not publicly identified. Instead, it infiltrates and transforms other constitutional predicates into avatars of the state action doctrine. Two instances in the jurisprudence of association illustrate this process: expressive association jurisprudence and the jurisprudence of members' rights within organizations.

The first instance involves the process through which the state action doctrine has become the foundation of the expressive association jurisprudence. The transformation of the state action doctrine into the expressive association doctrine detaches the doctrine from its foundation in federalism but retains the state action doctrine's link between an autonomy claim and discrimination.

The *Civil Rights Cases* involved a federal statute that guaranteed civil rights and a claim by private persons that such protection was unconstitutional because the Fourteenth Amendment applied only to state action.⁸⁵ This was also the framework of the White Primary Cases.⁸⁶ Unlike the *Civil Rights Cases* and the White Primary Cases, the expressive association cases do not have a foundation in federalism. Instead, in the expressive association cases the states are seeking to enforce their laws protecting their citizens' civil liberties and end up confronting claims by organizations that these efforts violate the First Amendment rights of the association.⁸⁷ Organization managers are looking to the federal government to interdict enforcement of state laws by the states in the name of organizational autonomy. In effect, the Court has blurred the state action doctrine into the First Amendment to create an extra-constitutional doctrine of associational autonomy that consolidates the control of organizational managers. Under the judicially created doctrine of expressive association, neither state governments nor the federal government can enter this realm of privacy to protect the constitutional rights of the people. The state action doctrine gave some theoretical, but certainly not practical or opera-

84. Charles L. Black, Jr., *Forward: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95–96 (1967).

85. *Civil Rights Cases*, 109 U.S. 3, 8–11 (1883).

86. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

87. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (discussing the New Jersey Public Accommodation Act); *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (discussing the California Civil Rights Act); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (discussing the Minnesota Human Rights Act).

tional, scope to the idea that state governments would enforce criminal laws against lynching or other deprivations of civil liberties and could do so without violating the Fourteenth Amendment. Expressive association has abandoned even this threadbare rationalization of the state action doctrine, namely, that it made federal enforcement of claims under the United States Constitution unnecessary because state law offered protection that was both ample and consistent with the federal structure. Expressive association jurisprudence does not involve even this threadbare claim that federal rights will be protected in state courts but instead relies on the First Amendment to limit the scope of state and federal laws protecting the rights of individuals to associate. Expressive association jurisprudence protects entities and their managers against any attempts by state or federal governments to enforce civil rights statutes that association leaders would prefer not be enforced. The First Amendment, long thought to be essential to the people's ability to protect their civil liberties, is being co-opted by organization managers and turned against the people in order to exclude them from protection by either the federal government or state governments.

The leading expressive association case is *Boy Scouts of America v. Dale*.⁸⁸ The Supreme Court held that Boy Scout managers could exclude a former eagle scout from any role as a troop leader because he was openly gay, even though there was little evidence that the appropriate policy bodies of the organization had defined an anti-gay policy or that Dale would advocate gay causes in his role as a scoutmaster.⁸⁹ The New Jersey Supreme Court ruled in favor of Dale based on New Jersey civil rights laws.⁹⁰ The United States Supreme Court struck down the New Jersey state statute that protected Dale's civil liberties. This case inverts the federalism concerns in the *Civil Rights Cases* while entrenching the limitation on any government's ability to protect civil liberties when they are burdened by an association that claims it is a private association beyond the reach of any government.⁹¹

88. *Dale*, 530 U.S. 640 (2000).

89. *Id.* at 650–55 (relying on private memoranda circulated among Boy Scout leaders and statements in their pleading before the Court, not on any public documents forming part of the Boy Scouts' public statements of their mission and values).

90. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1218–19 (N.J. 1999).

91. It will be surprising to some, perhaps, that the Internal Revenue Service defined one of the few limits on autonomy claims linked with racial discrimination when it refused to grant tax-exempt status to private schools that either excluded African-American students or placed conditions on their attendance. The schools made state action claims. The Supreme Court did not address these cases in state action terms but instead crafted the public policy doctrine that required 26 U.S.C. § 501(c)(3) tax-

In his dissent in *Dale*, Justice Stevens focused on the denial of civil liberties in the name of the right of association.⁹² Justice Stevens began his dissent by addressing the majority's denial of New Jersey's right to protect the civil liberties of its citizens, stating unequivocally "every state law prohibiting discrimination is designed to replace prejudice with principle."⁹³ In this light, Justice Stevens vigorously refuted the majority's conclusion that the Boy Scouts had a public position that would make a gay scout unfit for membership or a gay scoutmaster, himself an eagle scout, unfit for leadership.⁹⁴ Justice Stevens rejected the idea that the First Amendment protects an association's right to discriminate.⁹⁵ He noted, "until today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law."⁹⁶ Citing the Court's precedents upholding state anti-discrimination laws in the face of claims by organizations that they had a constitutional right to define their own membership even when the organizations' decisions resulted in a violation of state anti-discrimination statutes,⁹⁷ Justice Stevens found that the association in question was required to show that admission of particular members would impose a serious burden on the organization's shared goals.⁹⁸ Justice Stevens' dissent argued that the First Amendment does not protect "a freedom to discriminate at will."⁹⁹ In these cases, a court must make an independent determination of whether the claim to membership would impose a substantial burden on the organization's ability to pursue its basic goals.¹⁰⁰ The dissent concluded:

exempt schools that qualified for the § 170 charitable contribution deduction to operate in a manner consistent with public policy. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 579 (1983). For a discussion of this case in terms of tax law, see FRANCES R. HILL & DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ENTITIES*, 7-1 to -32 (2002 with biannual supplements). The public policy doctrine has not been applied to burdens on civil liberties in contexts other than education on grounds other than race.

92. *Dale*, 530 U.S. at 663–700 (Stevens, J., dissenting). Justice Stevens was joined by Justice Souter, Justice Breyer, and Justice Ginsburg. *Id.* at 663.

93. *Id.* at 664 (Stevens, J., dissenting).

94. *Id.* at 676–78 (Stevens, J., dissenting).

95. *Id.* at 678–79 (Stevens, J., dissenting).

96. *Id.* at 679 (Stevens, J., dissenting).

97. *Id.* at 678–84 (Stevens, J., dissenting) (citing *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)).

98. *Id.* at 683 (Stevens, J., dissenting).

99. *Id.* at 686 (Stevens, J., dissenting).

100. *Id.* at 686–87 (Stevens, J., dissenting).

If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate non-expressive private discrimination, on the other hand. Shielding a litigant's claim from judicial scrutiny would, in turn, render civil rights legislation into a nullity, and in turn this important constitutional right into a farce.¹⁰¹

The dissent found no evidence that the Boy Scouts faced fundamental burdens on its expressive activity by permitting Dale to serve as a scoutmaster.¹⁰²

In a brief dissent, Justice Souter, joined by Justice Breyer and Justice Ginsburg,¹⁰³ reasoned:

[N]o group can claim a right of expressive association without identifying a clear position to be advanced over time in an unequivocal way. To require less, and to allow exemption from a public accommodations statute based on any individual's difference from an alleged group ideal, however expressed and however inconsistently claimed, would convert the right of expressive association into an easy trump of any antidiscrimination law.¹⁰⁴

The dissents in *Dale* provide a principled way of reconciling the competing claims of association and civil liberties. The key is ensuring that claims of infringement on rights of expressive association are clearly related to the organization's fundamental purposes and the means essential to achieving those legitimate purposes. This approach supersedes the state action doctrine; the majority, by contrast, extends the state action doctrine into First Amendment jurisprudence.

The second instance of the transformation and transplanting of the state action doctrine is foreshadowed in dicta from Justice Scalia's opinion for the Court in *Davenport v. Washington Education Ass'n*.¹⁰⁵ This case involved the terms under which a union could use part of the agency fees paid by nonmembers for political speech. The nonmembers claimed that a state statute required that the union secure affirmative authorization from nonmember employees before using part of the fees paid to the union by the nonmembers to fund the union's political speech.¹⁰⁶ The Court held that affirmative authorization did not bur-

101. *Id.* at 687 (Stevens, J., dissenting).

102. *Id.* at 688–98 (Stevens, J., dissenting).

103. *Id.* at 700–02 (Souter, J., dissenting) (indicating that claims that prejudice against homosexuals had declined did not control the case).

104. *Id.* at 701–02 (Souter, J., dissenting).

105. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

106. *Id.* at 183.

den the union's First Amendment associational rights because the money in question did not belong to the union in the same way that member dues belonged to the union.¹⁰⁷ In contrast to membership dues, the agency fees were paid due to a government requirement and could thus be regulated by the government.¹⁰⁸ This is a state action distinction between union dues paid by union members, which are private funds belonging to the union, and agency fees paid by nonmembers who work in a union shop and thereby benefit from benefits won by union collective bargaining, which are paid as a result of state action. This distinction makes no sense from the perspective of a jurisprudence of association if "association" encompasses both the rights of the entity and the rights of its members. Here, the members would be afforded lesser constitutional protection against compelled political speech than nonmembers. Justice Scalia suggested that the outcome might have been different if the case had involved a private sector union.¹⁰⁹ Although this comment is dicta, it may well suggest that Justice Scalia, and perhaps others on the Court, would be willing to use the state action doctrine to limit the rights of association members to participate in decisions relating to the use of general treasury funds for independent expenditures.¹¹⁰ This would impose an impermissible burden on members' participatory rights¹¹¹ and would do so solely by virtue of transforming the state action doctrine into a claim of entity and managerial rights under the First Amendment.

These two avatars of state action in First Amendment guise are now more dangerous to civil liberties than is the state action doctrine in its undisguised form. At the same time, neither the disguised nor the undisguised forms of the state action doctrine provide the autonomy that organizations dependent on government financing seek. This apparent paradox becomes clearer if one looks at the implications of government funding for determining whether there has been state action or whether the organization in question is a state actor.

The siren song of the state action doctrine promises organizations a blanket form of entity autonomy that it cannot deliver. Determinations of whether a relationship with government implicates state action are becoming increasingly difficult to predict and thus to structure.

107. *Id.* at 185.

108. *Id.* at 191.

109. *Id.* at 190–91.

110. *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (overruling *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652 (1990)).

111. Frances R. Hill, *Nonparticipatory Association and Compelled Political Speech: Consent as a Constitutional Principle in the Wake of Citizens United*, 35 N.Y.U. REV. L. & SOC. CHANGE 552, 600 (2011).

Describing the state action doctrine as “one of the most complex and discordant doctrines in American jurisprudence,” a 2010 review of the state action doctrine, observed:

Despite a recent lull in scholarly engagement with the doctrine—perhaps out of sheer frustration—the task of defining state action and determining its proper limits is no less important today than it was in the previous century. As the public becomes more private, and the private becomes more public, the contours of the state action doctrine may come to define the contours of our most basic constitutional rights. In recent years, increased privatization, arbitration, and deregulation have significantly altered the foundation upon which the traditional understanding of the public/private distinction has been built. There is a need for a continuing discourse on that distinction and on the appropriate bounds of the state action doctrine, as these concepts directly implicate the limits on our constitutional rights.¹¹²

These issues and uncertainties are found in the relationship between the government and associations that contract with it. Associations that invoke the state action doctrine or one of its avatars as the constitutional basis of an autonomy claim have no assurance of success. Issues of what constitute state action and what relationships make an association a state actor are unstable to the point of jurisprudential incoherence. No association can be certain of the outcome of any particular claim to autonomy. For example, racially segregated private schools that sought exemption from federal taxation were denied exemption because they were state actors.¹¹³ Yet, a school for special needs children that did not raise issues of racial discrimination, but did receive some ninety percent of its funding from government, was not treated as engaged in state action.¹¹⁴ The Court reached the same result in a case about nursing homes funded through Medicaid.¹¹⁵ But associations cannot rationally conclude that the Court will find state action only in cases involving racial discrimination. For reasons that cannot be discerned in light of the prior state action jurisprudence, the Court held that a high school athletic association was a state actor because of government “entwinement” with its activities.¹¹⁶ These cases do not offer a principled framework for determining if a

112. *State Action and the Public/Private Distinction*, *supra* note 53, at 1250–51.

113. *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974); *Norwood v. Harrison*, 413 U.S. 455 (1973).

114. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).

115. *Blum v. Yaretsky*, 457 U.S. 991, 1011–12 (1982).

116. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 302 (2001).

relationship between government and an association constitutes state action. If the association finds that it is, for some reason, treated as a state actor or as being involved in state action, it is subject to government control in unforeseeable ways and to unforeseeable degrees. Apart from the denial of tax exemption of racially segregated private schools, the Court has no means of protecting civil liberties in the absence of state action. Indeed, the Court embraces expressive association as a means of allowing organization managers to interdict enforcement of civil rights statutes.

The state action doctrine cannot serve as the basis of a jurisprudence of association for organizations that are financially dependent on government. Its doctrinal incoherence is only part of the problem; more compelling is the absence of any means of balancing organizations' autonomy claims with the government's duty to ensure accountability. Any claim of autonomy must satisfy the understanding that rights of association must be consistent with the principles and operational practices of democratic government. Neither the state action doctrine nor its contemporary appearance as expressive association can satisfy this standard. Expressive association is a jurisprudence of organizations without participation and thus of compelled political speech and denial of civil liberties. What is needed instead is a jurisprudence that examines the intersection with government without focusing primarily on an autonomy claim used to limit both accountability and civil liberties.

III.

THE SPENDING CLAUSE: A JURISPRUDENCE OF GOVERNMENT-ASSOCIATION INTERSECTION

A constitutional predicate for a jurisprudence of association that focuses on the terms of government-association intersection is found in the Spending Clause, which provides that "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States" ¹¹⁷

A jurisprudence of association based on the Spending Clause can provide a framework for defining the terms of government funding that preserves elements of organizational autonomy and provides for accountability in the use of federal funds. A properly specified Spending Clause jurisprudence treats associations that contract with government as entities that engage in multiple activities and perform multiple

117. U.S. CONST. art I, § 8, cl. 1.

roles, only some of which are properly subject to constitutional conditions based on government funding.¹¹⁸

This interpretation of the Spending Clause is obscured by efforts to develop a concept of unconstitutional conditions that amounts to a jurisprudence of organizational autonomy despite organizations' dependence on government funding. As discussed below, this jurisprudence of unconstitutional conditions focused almost exclusively on how to limit government authority has stymied efforts to define both the terms of accountability and the terms of autonomy.¹¹⁹ What is needed is a jurisprudence of constitutional conditions that defines the parameters of government authority to impose conditions on financially dependent organizations. Reorienting Spending Clause jurisprudence in this manner would make an important contribution to the jurisprudence of association for organizations that are dependent on government financing.

A Spending Clause jurisprudence that considers accountability for public money and concerns over organizational autonomy cannot succeed without meaningful consideration of how to understand and characterize an organization's contracts with government. The core question is whether the government is funding an organization to implement a government program or whether the government is funding an organization to implement its own program. Organizations claiming autonomy despite government funding tend to characterize their relationship with government as one between a contributor and an organization pursuing its own programs. In this formulation, the government is simply another contributor. While organizations are always dependent on contributors, government funding is seen as raising no distinctive issues. The government, in contrast, is likely to take the position that it uses public money to contract with organizations in order to implement government programs. In the ideal case, the organization and the government have a common view of what the program is and how it should be implemented—but this cannot be presumed. Without reading the contracts at issue in the context of specific organizations' own positions and prior programs funded with non-government funds, it is not possible to draw conclusions about either particular cases or general patterns. This kind of research has not yet become part of Spending Clause analyses.

118. For an analysis of governance as negotiated relationships between public and private actors, see Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

119. See *infra* notes 241–249 and accompanying text.

Contemporary Spending Clause jurisprudence is based on *South Dakota v. Dole*.¹²⁰ The Court, in an opinion by Chief Justice Rehnquist, held that the federal government could withhold highway funds from a state that did not set its drinking age at twenty-one as required under the federal statute authorizing federal government distribution of funds to the states for highway construction and maintenance.¹²¹ The right of Congress to condition the receipt of federal funds is not in dispute.¹²² The scope and nature of the conditions that may be imposed are not limited by the enumerated powers of Article I.¹²³ The *Dole* Court traced the resolution of this issue to *United States v. Butler*, a 1936 case in which the Court held that “the power of Congress to authorize expenditures of public money for public purposes is not limited by the direct grants of legislative power found in the Constitution.”¹²⁴ This does not mean that Congress exercises unlimited authority under the Spending Clause.

In *Dole*, the Court observed that “[t]he spending power is of course not unlimited” and identified four “general restrictions articulated in our cases.”¹²⁵ First, the “exercise of the spending power must be in pursuit of ‘the general welfare.’”¹²⁶ The Court observed that in making this determination “courts should defer substantially to the judgment of Congress.”¹²⁷ The second restriction is that Congress must state its condition “unambiguously” so that the recipient state may choose whether to accept the funds subject to the condition.¹²⁸ These two limitations on government discretion under the Spending Clause are relatively uncontroversial.¹²⁹ The remaining two limitations were disputed in *Dole* and remain controversial.

120. 483 U.S. 203 (1987).

121. *Id.* at 205–06.

122. *Id.*

123. *Id.* at 207. Professor Tribe traces this debate to James Madison, who argued that the Spending Clause was limited by the Article I enumerated powers, and Alexander Hamilton, who argued that Congress could impose a broader range of conditions under the Spending Clause. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 834–35 (2d ed. 1988).

124. *Dole*, 483 U.S. at 207 (quoting *United States v. Butler*, 297 U.S. 1, 66 (1936)).

125. *Id.* at 207.

126. *Id.*

127. *Id.*

128. *Id.*

129. Deference to Congress with respect to whether specific allocations of federal funds serve the general welfare has elicited calls for greater judicial intervention. *See, e.g.*, Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 226–29 (2001). For an analysis of Spending Clause jurisprudence that predicts that the Roberts Court is unlikely to embrace more searching judicial review but is likely to seek to rely on a clear notice principle that is unlikely to have much operational impact on most issues that arise under the Spending Clause, see Samuel R.

The third limitation on government authority under the Spending Clause is based on the assertion that any condition must be limited by its relationship to the purpose for which the federal funds were allocated.¹³⁰ The *Dole* Court stated this restriction in rather tentative terms, observing, “our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’”¹³¹ The majority in *Dole* rejected Justice O’Connor’s dissent urging the Court to focus on this element of the Spending Clause jurisprudence.¹³²

Justice O’Connor dissented on the grounds that requiring the state to increase its legal drinking age was “not a condition on spending reasonably related to the expenditure of state funds” but was instead “an attempt to regulate the sale of liquor.”¹³³ Describing the majority’s reasoning with respect to the relationship between the purpose of the grant and the condition imposed on it as “ cursory and unconvincing,”¹³⁴ Justice O’Connor argued that the distinction between a permissible and an impermissible condition on a federal grant could and should be determined by distinguishing a condition (permissible) from a regulation (impermissible).¹³⁵ Under this reasoning, a permissible condition specifies how the federal money should be spent while an impermissible regulation goes beyond such specifications relating to the use of money. Justice O’Connor concluded that regulation of the drinking age in *Dole* was not consistent with determining how federal money should be expended.¹³⁶ This distinction was, to Justice O’Connor, a means of limiting federal government authority and preserving the scope of the appropriate authority of the states under the Spending Clause.¹³⁷

Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L. J. 345, 393–409 (2008).

130. *Dole*, 483 U.S. at 207–08.

131. *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

132. *Id.* at 208–09 n.3.

133. *Id.* at 212.

134. *Id.* at 213. Justice O’Connor reasoned that “[w]hen Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State’s social and economic life because of an attenuated or tangential relationship to highway use or safety.” *Id.* at 215.

135. *Id.* at 215–16.

136. *Id.* at 218.

137. *Id.*

Justice O'Connor's distinction between permissible conditions related to the federal government interest and impermissible regulations that are not related to the federal government interest in making federal funds available to a state or to an association has found little support among commentators. No court has yet conceptualized germaneness in terms that would permit it to be used as a general principle of accountability for the use of federal funds while at the same time permitting it to be used to limit federal government authority. The logic of a germaneness argument is based on the idea of enumerated and thus limited federal powers. It is an argument that the federal government can do indirectly, through allocation of federal funds to the states or through contracts with taxable or tax-exempt corporations, what it could have done directly. This principle may work more effectively as a principle of accountability to government for the use of federal funds,¹³⁸ than it can work as a principle that would limit the authority of the federal government.¹³⁹ If this assumption is correct, it would help to explain why there has been relatively little effort made to develop a workable concept of germaneness. This article suggests that negotiation contracts with the government may offer some scope for clarifying expectations and avoiding disputes that are not available if the parties treat all issues as matters of unconstitutional conditions. The article also suggests that jurisprudence would benefit from much more work that takes account of government contracting with its unique asymmetry of authority between the parties. This article proposes that further work of this type may suggest that germaneness provides a framework for both reasonable limits on government authority and a new focus on a jurisprudence of constitutional conditions rather than on the current focus solely on unconstitutional conditions.¹⁴⁰

The fourth limitation on government authority enumerated in *Dole* involves "other constitutional provisions [that] may provide an independent bar to the conditional grant of federal funds."¹⁴¹ This

138. The important questions of implementation by the state or association receiving the funds and oversight by the federal government agency responsible for distributing the funds consistent with the terms of the applicable legislation, regulations, and contracts, are issues that have received limited academic attention but are integral to any discussion of Spending Clause jurisprudence.

139. The leading critics of Spending Clause jurisprudence have focused on the implications of the spending power for federalism. See, e.g., Baker, *supra* note 129.

140. These are topics beyond the scope of the current article. They are raised to suggest that associations that depend on government funding have taken a wrong turn in seeking autonomy rather than focusing on the terms of intersection with government.

141. *Id.* at 208.

fourth element has become a self-contained, freestanding jurisprudence of unconstitutional conditions.¹⁴² The issue in *Dole* was whether the Twenty-First Amendment constituted an independent bar for these purposes.¹⁴³ The Court held that it did not.¹⁴⁴ The Court reasoned that the “independent constitutional bar” language in earlier cases “stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.”¹⁴⁵ The *Dole* Court gave similarly cursory treatment to claims that a condition would be unconstitutional if it were coercive—describing the loss of five percent of the highway funds as “relatively mild encouragement,” the Court refused to find coercion.¹⁴⁶

In her seminal article on unconstitutional conditions, Professor Kathleen Sullivan found little merit in analyses based on germaneness. She concluded that “germaneness focuses excessively on legislative process,”¹⁴⁷ a conclusion that reflects Professor Sullivan’s reason for focusing on unconstitutional conditions rather than on the other elements of the *Dole* framework.¹⁴⁸ Her goal is “to bolster the role of the Constitution as a barrier protecting individuals from the state.”¹⁴⁹ Consistent with this analytical goal, Professor Sullivan states: “The central challenge for a theory of unconstitutional conditions is to explain *why* conditions on government benefits that ‘indirectly’ pressure preferred liberties should be as suspect as ‘direct’ burdens on those same rights.”¹⁵⁰ Professor Sullivan directs her analysis at the distinction between First Amendment cases concerning the Spending Clause and First Amendment jurisprudence outside the Spending Clause context. She is not attempting to equate the two but rather to narrow the conceptual distance in a way that offers greater First Amendment pro-

142. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989) (arguing that the unconstitutional conditions doctrine serves to moderate power distribution among government parties and rightsholders).

143. *Dole*, 483 U.S. at 209.

144. *Id.*

145. *Id.* at 210. The Court offered two examples: “a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress’ broad spending power.” *Id.* at 210–11.

146. *Id.* at 211. The Court reasoned that “‘to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties,’” and it endorsed the utility of “‘a robust common sense’” in interpreting the Spending Clause. *Id.* (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937)).

147. Sullivan, *supra* note 142, at 1506.

148. *Id.*

149. *Id.*

150. *Id.* at 1419 (emphasis in original).

tection under the Spending Clause. Her method is to require strict scrutiny of all conditions placed on government subsidies.¹⁵¹ She concludes that “[s]ince some of these burdens may ultimately survive strict scrutiny, this theory does not compel the conclusion that government may *never* burden a preferred liberty.”¹⁵² Professor Sullivan does not discuss the implications of her analysis for the government’s responsibility for the use of public money or contractors’ accountability in using public money.

Professor Sullivan certainly recognizes the basic structure of a benefit provided in exchange for acceptance of a condition.¹⁵³ The exchange or contract nature of a Spending Clause issue tends to become obscured if one focuses primarily on the conditions, and this loss of focus on the transaction may be one reason that Professor Sullivan argues that germaneness analyses arise from the desire to prevent corruption rather than from the desire to see that both parties to the contract receive the benefit of their bargain.¹⁵⁴ She concludes that “germaneness has more to do with disciplining governmental activity according to some independent norm of appropriate legislative process than it does with protecting constitutional rights.”¹⁵⁵ These are important considerations, but they should not subsume considerations of accountability in the use of public money.¹⁵⁶

Dole deals with a distribution to a state, not to an association. Its constitutional context is federalism, not the rights of association. For purposes of this article, it is noteworthy that *Dole* does not involve advocacy. Subsequent cases, which are discussed below, have involved grants to associations that included advocacy among their activities. These cases do not address the reasons that either the government contracted to distribute funds to the organization or the reasons that organizations agreed to accept government funding. The cases are generally unclear in addressing the terms of the contract between the government and the associations. Without this kind of analysis, doctrine is detached from the language of the actual contracts and from the expectations of the parties to the contracts. The concepts of

151. *Id.* at 1506.

152. *Id.* (emphasis in original).

153. *Id.* at 1421–28 (analyzing the “components of an unconstitutional conditions problem”).

154. *Id.* at 1456–76.

155. Thinking about advocacy from a condition of financial dependence was not part of Professor Sullivan’s project. *Id.* at 1476. It is an issue of growing importance some twenty years later in a very different world.

156. *Id.* at 1415.

dependence and autonomy have no meaningful content under such an approach.

The Court decided *Rust v. Sullivan* four years after *Dole*.¹⁵⁷ *Rust* involved federal grants for “preventive family services” limited to “pre-conception counseling, education, and general reproductive health care.”¹⁵⁸ The relevant regulations imposed three conditions on these grants. First, the grant funds could not be used to provide “counseling concerning the use of abortion as a method of family planning.”¹⁵⁹ Second, the regulations prohibited use of the grant funds to “encourage, promote, or advocate abortion as a method of family planning.”¹⁶⁰ Third, abortion activities funded from sources other than the federal government grants had to be “physically and financially separate” from any prohibited abortion activities.¹⁶¹ The petitioners, organizations that received grants and doctors who supervised care, brought suit on behalf of themselves and their patients.¹⁶² *Rust* involved a facial challenge to these conditions on First Amendment grounds, arguing that the regulations amounted to viewpoint discrimination.¹⁶³

In an opinion written by Chief Justice Rehnquist, the Court held that the conditions did not impermissibly burden the First Amendment rights of the health care provider, the doctors, or the patients.¹⁶⁴ The

157. *Rust v. Sullivan*, 500 U.S. 173 (1991).

158. *Id.* at 179 (emphasis in original).

159. *Id.*

160. *Id.* at 180. The regulations provide that “[f]orbidden activities include lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion as a method of family planning, using legal action to make abortion available in any way as a method of family planning, and paying dues to any group that advocates abortion as a method of family planning as a substantial part of its activities.” *Id.*

161. *Id.* at 180.

162. *Id.* at 181.

163. *Id.* at 192. The Court, citing petitioners’ brief, described their claim in the following terms:

Petitioners contend that the regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit ‘all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.’ . . . They assert that the regulations violate the ‘free speech rights of private health care organizations that receive Title X funds, of their staff, and of their patients’ by impermissibly imposing ‘viewpoint-discriminatory conditions on government subsidies’ and thus ‘penaliz[e] speech funded with non-Title X monies.’

Id.

164. *Id.* at 193.

majority reasoned that selectively funding a program is not viewpoint discrimination, but rather is within Congress' discretion to fund one activity and not another.¹⁶⁵ The Court concluded that "[w]ithin far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."¹⁶⁶

The majority in *Rust* devoted only cursory attention to the claims by petitioners that the conditions imposed in the grant constituted unconstitutional conditions.¹⁶⁷ Instead of analyzing the regulations at issue here with the framework set forth in *Dole*, the Court relied primarily on a distinction between a condition placed on a recipient and a condition placed on a project.¹⁶⁸ The majority dismissed the relevance of cases in which the Court had found that burdens on speech constituted unconstitutional conditions in Spending Clause cases, reasoning that "our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."¹⁶⁹ The majority then cited two cases implicating First Amendment rights. In *FCC v. League of Women Voters* the Court struck down a statute prohibiting noncommercial television or radio stations receiving federal grants from engaging in editorializing.¹⁷⁰ In *Rust*, the Court observed that the statute at issue in *League of Women Voters* placed an absolute bar on editorializing, but that the statute could have been upheld had it permitted the grant recipient to separate its federal funds from its private funds and use only its private funds for editorial activity.¹⁷¹ In *Regan v. Taxation With Representation*,¹⁷² the Court upheld

165. *Id.*

166. *Id.* at 194.

167. Counsel for petitioners was Professor Laurence Tribe, with Professor Kathleen Sullivan as one of the co-counsels. *Id.* at 176. Professor Sullivan's article, *Unconstitutional Conditions*, was published two years before the case was decided. Sullivan, *supra* note 142.

168. *Rust*, 500 U.S. at 197–99.

169. *Id.* at 197 (emphasis in original).

170. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984). The station received one percent of its funding from the federal grant but could not use its private funds to finance editorial activities. *Id.* at 400.

171. *Rust*, 500 U.S. at 197 ("We expressly recognized, however, that were Congress to permit the recipient stations to 'establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid.") (citing *League of Women Voters of Cal.*, 468 U.S. at 400)).

172. *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

a statute that limited the amount of money an exempt entity could use for lobbying because it could establish an affiliated organization not subject to lobbying limits.¹⁷³ The *Rust* Court claimed that “in [*Taxation With Representation*] we held that Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts.”¹⁷⁴ The public charity prohibited from using its funds for unlimited lobbying was free to lobby through a social welfare organization provided that it did not transfer money from the public charity to the social welfare organization.¹⁷⁵ The majority concluded that “[t]he condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights.”¹⁷⁶

The majority relied on the distinction between entity and project grantees as one component of the grantee’s activity in rejecting the claim that the staff members’ First Amendment rights were violated.¹⁷⁷ Concluding that no one in this case was denied a benefit and that no First Amendment rights were violated, the majority reasoned that an organization’s rights are preserved when it can receive funding from other sources in order to achieve the goals disallowed by the regulations.¹⁷⁸

Justice Blackmun, joined by Justice Marshall, dissented, finding that the regulation imposed unconstitutional conditions.¹⁷⁹ The dissent stated that, “the Court, for the first time, upholds viewpoint-based suppression of speech solely because it is imposed on those dependent upon the Government for economic support.”¹⁸⁰ The dissent characterized the provisions relating to counseling and referrals as a clear case of regulating speech based on content and viewpoint, stating that “[w]hile suppressing speech favorable to abortion with one hand, the

173. *Rust*, 500 U.S. at 197–98.

174. *Id.* at 197.

175. *Id.* at 197–98. For an analysis of the tax laws applicable in this case, see HILL & MANCINO, *supra* note 91, at 5-1 to -5.

176. *Rust*, 500 U.S. at 198 (“Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures.”) (citing *Taxation With Representation*, 461 U.S. at 548).

177. *Id.* at 196.

178. *Id.*

179. *Id.* at 204–20 (Blackmun, J., dissenting) (arguing that the regulations violated the First and Fifth Amendments).

180. *Id.* at 204 (Blackmun, J., dissenting).

Secretary compels antiabortion speech with the other.”¹⁸¹ The dissent found that the limitations on advocacy were also viewpoint-based because they placed no limits at all on the use of federal grant money to lobby against abortion.¹⁸² The dissent made no reference to the Spending Clause and ignored the distinction between a grantee and a project made by the majority.¹⁸³

Rust involved an association, not a state, and federalism concerns played no role. The Court in *Rust* avoided the core issues of protected speech with its distinction between an entity and a project. This distinction limited the impact of the terms of the grant to that part of the larger entity that implemented the federal government program for which federal funds had been allocated to the association. In effect, the majority in *Rust* treats the federal money received by the project as payment for a service rendered to the federal government rather than simply as a contribution to the association to operate its own program. At the same time, the entity is free to use non-federal funds to operate programs that are not subject to the federal conditions. *Rust* treats the project as the de facto grant recipient and holds that, under the regulations at issue, the conditions placed on the speech of the entity and the staff with respect to abortion as a method of family planning applied only to the project, not to the entity.¹⁸⁴ Yet, this distinction, which is made repeatedly in the majority opinion, also requires separate structures for each activity. Segregation of funds is insufficient. *Rust* appears to require separate structures on the model of *Taxation With Representation*.¹⁸⁵ While these structures can be commonly controlled, they must be separate in ways that would appear to vary with the language of each statute or regulation. At the same time, the Court made it clear that broad prohibitions on lobbying and other forms of advocacy could be sustained under the Spending Clause.

Rust provides a mechanism for limiting the scope of disputes over claims relating to unconstitutional conditions. Two additional cases, *DKT International v. USAID*¹⁸⁶ and *Alliance for Open Society*

181. *Id.* at 209 (Blackmun, J., dissenting).

182. *Id.* at 210 (Blackmun, J., dissenting).

183. *Id.* at 204–20 (Blackmun, J., dissenting).

184. *Id.* at 196.

185. *Cf.* *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1997) (upholding a statute limiting the amount of money a tax-exempt organization could devote to lobbying activities and arguing that the organization could create an affiliate § 501(c)(4) status that would not be subject to the same lobbying limitations).

186. *DKT Int'l v. USAID*, 477 F.3d 758 (D.C. Cir. 2007), *rev'g* 435 F. Supp. 2d 5 (D.D.C. 2006).

International v. USAID,¹⁸⁷ addressed below, raise more directly the issue of speech by exempt entities that are funded in some part by government contracts.¹⁸⁸ Both cases involve organizations that entered into agreements with the United States Agency for International Development (USAID) to engage in programs combating HIV/AIDS.¹⁸⁹ Both agreements required that the organizations not use government funds to promote or advocate the practice or legalization of prostitution or sex trafficking and, in addition, that the organizations adopt a policy that explicitly opposes prostitution or sex trafficking.¹⁹⁰ Neither organization advocated the practice or legalization of prostitution or sex trafficking but both organizations took the position that adopting an explicit policy opposing prostitution or sex trafficking would impede their efforts to reach persons involved in these activities in order to combat HIV/AIDS.¹⁹¹

DKT International argued that being required to adopt an explicit policy against prostitution and sex trafficking was an unconstitutional condition imposed on the use of its funding from non-governmental sources.¹⁹² DKT received approximately sixteen percent of its funding from USAID and the remainder from “private donors, foundations, international organizations, and other governments.”¹⁹³ DKT argued that this case should be controlled by the First Amendment, that the government requirements should be treated as a viewpoint-based restriction on speech, and that the requirement should therefore be subject to strict scrutiny.¹⁹⁴ The government argued that the case should instead be decided under the Spending Clause, and that strict scrutiny should not apply.¹⁹⁵ The government argued that the applicable statute expressly referenced opposition to prostitution and sex trafficking as

187. *Alliance for Open Society Int’l v. USAID*, 651 F.3d 218 (2d Cir. 2011), *aff’d* 570 F. Supp. 2d 533 (S.D.N.Y. 2008).

188. The cases represent a circuit split. *DKT International* considers the nature of a government contract by addressing the issue of whether the government is funding a government program or an organization program. *DKT Int’l*, 477 F.3d at 758. On the other hand, *Alliance* elaborates the expressive associations avatar of the state action doctrine, basing a claim for autonomy on expressive association claims. *Alliance for Open Society Int’l*, 651 F.3d at 218. Whether or not the Supreme Court hears either one of these cases, the issue is being more sharply defined.

189. *Alliance for Open Society Int’l*, 651 F.3d at 223; *DKT Int’l*, 477 F.3d at 760.

190. *Alliance for Open Society Int’l*, 651 F.3d at 223 (explaining the requirements of organizations receiving funding through the Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003); *DKT Int’l*, 477 F.3d at 759.

191. *Alliance for Open Society Int’l*, 651 F.3d at 228; *DKT Int’l*, 435 F.3d at 761.

192. *DKT Int’l v. USAID*, 435 F. Supp. 2d 5, 10–11 (D.D.C. 2006).

193. *Id.* at 9.

194. *Id.* at 11.

195. *Id.*

part of the program to eradicate HIV/AIDS.¹⁹⁶ In the words of the District Court, the government took the position that:

DKT is free to adopt any policy it wishes with respect to prostitution and sex trafficking; however, the government is not obligated to and will not subsidize the policy DKT has chosen to adopt. Non-governmental organizations, like DKT, do not have an entitlement or a right to government funds. Thus, DKT's First Amendment rights are not infringed. Because DKT challenges the government's refusal to fund its chosen activities, defendants contend, the Spending Clause provides the proper framework for evaluating the funding conditions in question, not the First Amendment.¹⁹⁷

Because the government began with the premise that it was funding a government program, not DKT's program, it argued that its eligibility requirements were permissible because they

[E]nsure that (1) the government's goals are not distorted and 'garbled' by its grantees; (2) government funds do not free up other funds the grantee may have to pursue contradictory or inconsistent goals; and (3) the government speaks with a single, clear voice in the international arena concerning its policy.¹⁹⁸

The District Court held that the eligibility requirements constituted viewpoint- and content-based discrimination subject to strict scrutiny and that the government established no compelling state interest in sustaining these requirements.¹⁹⁹ The District Court rejected the government's argument that the Spending Clause should control the case.²⁰⁰ The court observed that private donors were the "primary sources of DKT's funding."²⁰¹ This observation could have provided the basis for an analysis of dependence on various sources of funding and their implications for organizational autonomy, including the autonomy to pursue their own programs, but it did not. The court simply found that "[b]y mandating that DKT adopt an organizational-wide policy against prostitution, the government exceeds its ability to limit the use of government funds."²⁰² The District Court rejected the claim that strict scrutiny would not apply in the context of a Spending Clause analysis.²⁰³

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 12–14.

200. *Id.* at 14–17.

201. *Id.* at 16.

202. *Id.*

203. *Id.* at 16 n.4 ("The applicable level of review is not based on whether the claims implicate the Spending Clause, but whether the statute and its companion regulation in question operate to restrict expression.").

The D.C. Circuit reversed.²⁰⁴ The court found that opposition to prostitution and sex trafficking was a central goal of the statute at issue and that DKT received funding to implement the government's program, not its own program.²⁰⁵ The court found that "[o]ffering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message on pain of losing their public education . . . or access to public roads" ²⁰⁶ The D.C. Circuit observed that DKT could have established a subsidiary to comply with the government requirements, thereby availing itself of the alternate channel option of *Rust*.²⁰⁷ The court concluded:

The Act does not compel DKT to advocate the government's position on prostitution and sex trafficking; it requires only that if DKT wishes to receive funds it must communicate the message the government chooses to fund. This does not violate the First Amendment.²⁰⁸

The D.C. Circuit focused on whether the contract provided funding to implement a government program and to convey the government's agenda, or whether the contract simply provided funding for the organization to implement its own program and to convey its own message.²⁰⁹ Its reasoning and its result exist in sharp contrast to those of the Second Circuit in the second case involving the USAID program to eradicate HIV/AIDS.

In July 2011, the Second Circuit decided *Alliance for Open Society International v. USAID*, a Spending Clause case that raised important questions relating to the application of the alternative channels analysis of *Rust* and the scope of protection under the First Amendment.²¹⁰ The applicable statute and regulations required that all associations receiving federal funding for programs combating HIV/AIDS internationally adopt a policy expressly opposing prostitution.²¹¹ The plaintiffs, none of whom affirmatively supported prostitution, claimed that such a statement would undermine their

204. DKT Int'l v. USAID, 477 F.3d 758 (D.C. Cir. 2007), *rev'g* 435 F. Supp. 2d 5 (D.D.C. 2006).

205. *Id.* at 762.

206. *Id.* at 762 n.2 (citations omitted).

207. *Id.* at 763.

208. *Id.* at 764.

209. *Id.* at 762.

210. *Alliance for Open Society Int'l, Inc. v. USAID*, 651 F.3d 218 (2d Cir. 2011).

211. *Id.* at 223.

effectiveness in combating HIV/AIDS.²¹² The case was before the Second Circuit for review of a preliminary injunction granted to the plaintiffs by the district court on grounds that the required statement opposing prostitution was an unconstitutional condition as understood in Spending Clause jurisprudence.²¹³ The Second Circuit affirmed the District Court's grant of preliminary injunctive relief,²¹⁴ finding that the plaintiffs demonstrated a likelihood of success on the merits because the required statement of opposition to prostitution "likely violates the First Amendment by impermissibly compelling Plaintiffs to espouse the government's viewpoint on prostitution."²¹⁵

The Second Circuit distinguished *Alliance* from *Rust* based on the requirement "that recipients affirmatively *say* something"²¹⁶ The Second Circuit found that the required statement "is viewpoint-based, and it compels recipients, as a condition of funding, to espouse the government's position."²¹⁷ In this case, "silence, or neutrality, is not an option for Plaintiffs."²¹⁸ The Second Circuit concluded that "[c]ompelling speech as a condition of receiving a government benefit cannot be squared with the First Amendment."²¹⁹

The Second Circuit focused on the requirement that grantees make an affirmative statement expressly endorsing the government's position on a complex and contested issue.²²⁰ The government argued that the Supreme Court in *Rust* held that government speech was not an unconstitutional condition,²²¹ but the Second Circuit rejected characterization of *Alliance* as a government-speech case, concluding that the required statement in *Alliance* "goes well beyond the funding condition in [*Rust*] because it compels Plaintiffs to voice the government's viewpoint and to do so as if it were their own."²²² The Second Circuit noted language in *Rust* that permitted a doctor to remain si-

212. *Id.* at 225, 236.

213. *Id.* at 225–28.

214. *Id.* at 239–40.

215. *Id.* at 230.

216. *Id.* at 234. This was the point made by the dissent in *Rust*. *Rust v. Sullivan*, 500 U.S. 173, 209 (1991) (Blackmun, J., dissenting) ("While suppressing speech favorable to abortion with one hand, the Secretary compels antiabortion speech with the other.").

217. *Alliance for Open Society Int'l*, 651 F.3d at 234.

218. *Id.*

219. *Id.*

220. *Id.* at 234–36.

221. *Id.* at 236–37.

222. *Id.* at 237.

lent.²²³ In *Alliance*, the Second Circuit found that the “Plaintiffs do not have the option of remaining silent or neutral. Instead, they must represent as their own an opinion—that they affirmatively oppose prostitution—that they might not categorically hold.”²²⁴

The Second Circuit did, however, reference the relatedness analysis that the majority in *Dole* refused to consider and that formed the core of Justice O’Connor’s dissent.²²⁵ The Second Circuit limited its compelled speech analysis by stating that “[w]e do not mean to imply that the government may never require affirmative, viewpoint-specific speech as a condition of participating in a federal program.”²²⁶ Although the reasoning is somewhat oblique, the Second Circuit appears to take the position that conditions with an appropriate nexus to the statute under which funding was authorized would be constitutional conditions even though they might well require that grantees affirmatively endorse a government position that they may or may not hold themselves. At the same time, the Second Circuit recognized that if Congress could require all funding recipients to express a viewpoint on every issue subsumed within a federal spending program, “the exception would swallow the rule.”²²⁷ This observation deserves further consideration in any effort to craft a jurisprudence of association that incorporates the Spending Clause and includes the concept of germaneness and the concept of constitutional conditions.

The Second Circuit also addressed the alternative channel analysis from *Rust*.²²⁸ It found that an alternative channel does not cure the First Amendment problems in cases involving compelled speech because it does not alleviate the burden to say that an organization may “engage in privately funded *silence*,” which is the equivalent of not speaking at all.²²⁹ The Second Circuit’s observations provide further support for the idea that a jurisprudence of association based on the Spending Clause will necessarily take account of the terms of the particular statute, regulations, and contracts at issue in each case.

223. *Id.* (“Nothing in [the challenged regulations] requires a doctor to represent as his own any opinion that he does not in fact hold.”) (quoting *Rust v. Sullivan*, 500 U.S. 173, 200 (1991)) (emphasis added by Second Circuit).

224. *Alliance for Open Society Int’l*, 651 F.3d at 237.

225. *Id.*; see also *South Dakota v. Dole*, 483 U.S. 203, 212–18 (O’Connor, J., dissenting) (arguing that conditions on spending must be reasonably related to the expenditure of federal funds).

226. *Alliance for Open Society Int’l*, 651 F.3d at 237.

227. *Id.* at 238 (emphasis in original) (citation omitted).

228. *Id.* at 239.

229. *Id.* (emphasis in original).

The dissent began with an extended discussion of the terms of the statute designed to highlight the attention that the statute devoted to efforts to end both prostitution and sex trafficking.²³⁰ This statutory analysis sets the stage for the dissent's argument that the case should be analyzed as a Spending Clause case using the framework set forth in *Dole*.²³¹ Claiming that the majority opinion failed to engage in the analysis appropriate to a Spending Clause case, the dissent took the position that Congress is permitted to place limits on spending, and that organizations are always free to decline funds if they disagree with the limits.²³² This reading of the Spending Clause explains why the dissent repeatedly cited statutory and regulatory language that it regarded as establishing the importance of stopping both prostitution and sex trafficking.²³³ Consistent with its focus on the nexus between the statute and the condition, the dissent concluded that the requirement was clearly related to Congress' policy goals.²³⁴ This is the kind of analysis that Justice O'Connor called for in her dissent in *Dole*.²³⁵ This is not to suggest that O'Connor would have agreed with the dissent in *Alliance* or to take a position on the substantive issue in *Alliance*, but rather to suggest that both engaged in the kind of nexus analysis that the *Dole* majority found unnecessary in that case.

Judge Jose Cabranes dissented from the Second Circuit's opinion rejecting USAID's petition for a rehearing en banc, noting the reasoning of the D.C. Circuit in *DKT*.²³⁶ In contrast, he described the Second Circuit's majority opinion as based "on a newly uncovered constitutional distinction between 'affirmative' and 'negative' speech restriction[s]." ²³⁷ He emphasized the absence of any such distinction in other cases decided under the Spending Clause jurisprudence considering unconstitutional conditions.²³⁸ Judge Cabranes described the issue as "the interaction of the unconstitutional conditions doctrine with af-

230. *Id.* at 240–42 (Straub, J., dissenting).

231. *Id.* 242–43 (Straub, J., dissenting).

232. *Id.* at 254–55 (Straub, J., dissenting).

233. *Id.* at 240–42, 257, 259, 262–63, 265 (Straub, J., dissenting).

234. *Id.* at 265 (Straub, J., dissenting).

235. *South Dakota v. Dole*, 483 U.S. 203, at 212–18 (1987) (O'Connor, J., dissenting) (arguing that conditions on spending must be reasonably related to the expenditure of federal funds).

236. *Alliance for Open Society Int'l v. USAID*, 2011 U.S. App. LEXIS 26155 (2d Cir. Feb. 2, 2012).

237. *Id.* at *3.

238. *Id.* at *8.

firmative speech restriction.”²³⁹ He did not address other elements of the Spending Clause, including nexus.²⁴⁰

An amicus brief filed by Independent Sector in an earlier hearing in the series of cases comprising the Alliance for Open Society litigation argues forcefully that nongovernmental organizations should be autonomous from government even when they receive government funding.²⁴¹ The Independent Sector brief, relying on *Rust*, argues that the requirements imposed on the organizations are unconstitutional conditions because they are imposed on the entities, not simply on projects.²⁴² This is not the core argument, however. Instead, the amicus focuses its claims and its analysis on “[t]he robust right to associate for expressive purposes.”²⁴³ The Independent Sector brief did not contend that “there should be no laws governing [the third] sector.”²⁴⁴ Rather, it objected to describing exempt organizations that receive government funding as government contractors.²⁴⁵ Claiming that “[t]he government’s brief attempts to obscure the independent nature of the third sector,”²⁴⁶ the amicus brief states that the government “characterizes [nongovernmental organizations] that receive funds from defendants as government contractors or employees paid to carry out a ‘public service’ of the government, and then argues that consequently, the pledge requirement should be subject to the less stringent balancing test for restrictions on government employee speech.”²⁴⁷ The Independent Sector brief vigorously and at some length rejected claims that programs operated by organizations funded by government will be mistaken for government programs²⁴⁸ and claimed that “it is not permissible for the government to use funding to co-opt the entities with which it partners, many of which receive much of their funding from other sources.”²⁴⁹ In effect, the Independent Sector brief

239. *Id.* at *13.

240. *Id.* at *1–13.

241. Brief for Indep. Sector as Amici Curiae Supporting Plaintiffs-Appellees, *Alliance for Open Society Int’l v. USAID*, 254 Fed.Appx. 843 (2d Cir. 2007) (No. 06-4035-cv), 2006 WL 5428288, available at http://brennan.3cdn.net/177d537315b5cfadbb_rjm6bxac4.pdf.

242. *Id.* at 9.

243. *Id.* at 14.

244. *Id.* at 16.

245. *Id.* at 20.

246. *Id.*

247. *Id.*

248. *Id.* at 20–24.

249. *Id.* at 16. In the accompanying footnote, Independent Sector finds that receiving twenty-five percent of their funding in the aggregate is not significant. This could have been the beginning of an important analysis of dependency, but this analysis was not developed in the brief.

rejected the relevance of the Spending Clause and focused solely on rights of expressive association, the avatar of the state action doctrine. The Independent Sector amicus brief is important for its formulation of autonomy claims in terms of what amounts to the state action doctrine updated by expressive association claims. It did not in this instance contribute to a meaningful consideration of the terms of organizations' intersection with government.

The defense of autonomy offered by the Independent Sector amicus brief is unlikely to prove persuasive as the relationships between government and the tax-exempt organizations it funds become the subject of more searching and systematic scrutiny. The kinds of questions raised in Part I, above, relating to the meaning and nature of dependency, are likely to become more important than are simple denials that the organizations are government contractors. These cases demonstrate that issues of accountability are likely to become at least as important as claims of autonomy.

CONCLUSION

Whether associations dependent on government grants and contracts can or will continue to speak truth to power remains, for now, a question without an answer. What one can say is that the terms on which associations interact with government will be a crucial factor shaping the eventual resolution. Answers to the question of whether government is funding its own program or an organization's program will vary. These questions about government contracts have not yet engaged the sustained attention of scholars or the courts. It is not possible to develop a jurisprudence of the relationship between contracting entities and the government without such analyses of the actual terms of the contracts that define their roles. This kind of analysis will be crucial to the development of a rational, stable jurisprudence of association applicable to tax-exempt organizations that are government contractors and it is consistent with a jurisprudence of association based on the Spending Clause.

This article suggests that the state action doctrine is ineffective in shaping or understanding the terms of associations' intersections with government. The state action doctrine presents a claim for autonomy from government, not a framework for defining the terms of intersection with government. This article also argues that Spending Clause jurisprudence can be adapted to preserve sufficient opportunity for advocacy while relying in part on government funding.

This is not to say that Congress or executive agencies may not push at the limits defined under this approach. In some, and perhaps

many, instances, associations dependent on government financing may make tactical calculations on the risks posed by taking advocacy positions that might put their government funding in jeopardy. This is unavoidable and, in the end, not necessarily a constitutional issue. Managing a relationship with a government funder implicates politics, political skills, and political alliances.

Unlike a jurisprudence of autonomy based on the state action doctrine and its contemporary avatars, a jurisprudence of intersection based on the Spending Clause does not privilege the managers of an organization at the expense of the organization's members and it does not entrench violations of constitutionally protected rights in the name of organizational autonomy. A jurisprudence of association based on the Spending Clause and a more fully elaborated concept of constitutional conditions protects the democratic value of association more effectively than does any jurisprudence based on the state action doctrine.