Sign Here, Please: The First Amendment Implications of Requiring Loyalty Oaths for Admission to Political Events

John D. Castiglione
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Note

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Introduction

The 2004 presidential election was the first campaign to be significantly affected by a number of new forms of campaigning. Internet fundraising, blog journalism, and 527 organizations all burst onto the scene in the 2003–2004 election cycle. Yet, it was the most traditional campaign method—the rally—that gave rise to one of the most controversial events of the election season, an event that could portend a disturbing change in the way Americans interact with their elected officials.

On July 31, 2004, Vice President Richard Cheney spoke to a Republican National Committee-sponsored gathering in Rio Rancho, New Mexico, a small town outside Albuquerque. Following the rally, several people

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claimed that they were required to sign forms endorsing President George W. Bush in order to gain admission. As reported by a number of mainstream media outlets, those seeking tickets to the event who were not donors, volunteers, or registered Republicans were asked to sign a form stating that "I, (full name) . . . do hereby [sic] endorse George W. Bush for reelection of the United States." The form then states that signers "are consenting to use and release of your name by Bush-Cheney as an endorser of President Bush." A number of individuals, who identified themselves as Democrats or independents, refused to sign the oath and were denied admission to the event. According to the Albuquerque Journal, the newspaper that first reported the incident, a spokesman for the Republican Party said that the endorsement form was intended to prevent a "known Democrat operative group" from disrupting the event, and that tickets for the limited-seating event should have gone only to loyal Bush supporters.

Apparently, this was not an isolated event; the Boston Globe reported a similar incident in Dubuque, Iowa, in May 2004, where a Democrat with a valid ticket was turned away because he was not a registered Republican. There have also been reports that soldiers stationed in Iraq were required to sign forms indicating their support for the President before they were admitted to the Thanksgiving Day meal attended by the President at the Baghdad airport in 2003.

This Note focuses on the constitutionality of requiring, in effect, a loyalty oath for admission to an ostensibly privately organized campaign event attended by a high-ranking public official such as the President or Vice President of the United States, or other major-party candidate. Although the rally in Rio Rancho was ostensibly a private event, as all purely political campaign events are, this Note contends that the extensive entwinement between public and private actors, organizations, financing, and regulation requires that the actions of event organizers and participants be considered state action, which would thus subject those actions to the constraints of the United States Constitution. This Note posits that the practice of excluding potential audience members because of a refusal to sign a loyalty oath violates those individuals' constitutional right to be free from expression compelled by the government.

3 Jones, supra note 2; Milbank, supra note 2; Larese, supra note 2.
4 The text of the endorsement form was originally reported in Jones, supra note 2 (omission in original).
5 Id.
6 Id.
7 Id.
8 Larese, supra note 2.
10 In support of this Note's thesis, the author will refer to actions of political candidates in the context of loyalty oaths as "ostensibly private" because one might ordinarily think of them as private, if it were not for their significant entwinement with public individuals and institutions.
11 See U.S. CONST. ammd. 1.
The First Amendment Implications of Loyalty Oaths

Part I provides an examination of the modern "state action" doctrine, including an analysis of the Supreme Court's recent redefinition of the doctrine in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, a case that may expand situations in which ostensibly private action may be considered state action for purposes of constitutional review. Part II explores how requiring a loyalty oath for admission to a political rally (or other such event) can be considered state action under *Brentwood Academy*, and how such a practice consequently violates the First Amendment. Part III argues that—although it is preferable that, given modern theoretical understandings of the purposes underlying the First Amendment, such a practice be abandoned altogether—event organizers can avoid a constitutional violation by fully reimbursing the government for all public expenses related to events at which loyalty oaths are required of attendees.

I. The State Action Doctrine

Generally, the Constitution is a statement only of the powers, duties, and limitations of the government. In most circumstances, a complainant alleging a constitutional violation must, as a threshold matter, establish that the government, not simply a private entity, took an action that resulted in an alleged violation. In the context of First Amendment doctrine, this constitutional tenet protects against governmental infringement of the freedom of speech, including freedom from compelled speech. For the Constitution to apply where a loyalty oath is required for admission to a campaign event, a complainant must establish that the actions of the campaign organizers can fairly be described as state action.

A. Beginnings of the Modern State Action Doctrine

It was not until the middle of the twentieth century that the Supreme Court, in a series of cases dealing with the protection of civil rights under the Fourteenth Amendment, began to fully explicate what has come to be known

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15. *See The Civil Rights Cases, 109 U.S. 3, 17 (1883) ("[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 . . . .")*. 

16. *See Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against State action includes both the right to speak freely and the right to refrain from speaking at all." (citation omitted)).*
The "state action" doctrine.\textsuperscript{17} In those cases, three primary theoretical justifications arose from the Court for considering ostensibly private action to be state action for purposes of applying constitutional protections.\textsuperscript{18} First, the Court recognized the "public function" rationale, which held that if private actors perform traditionally public functions, constitutional prohibitions may be applied to the private actors in question.\textsuperscript{19} This situation arose most notably in the form of company towns, where private entities performed almost all significant functions of local government.\textsuperscript{20} Second, the Court recognized a "joint participation/symbiotic relationship" justification, which posited that private action endorsed by, or taken in concert with, the government may be subject to constitutional constraints.\textsuperscript{21} Finally, the Court recognized a somewhat more amorphous "nexus" rationale, holding that when state regulation or other involvement so pervades an ostensibly private action, "the action of the latter may fairly be treated as that of the State itself."\textsuperscript{22} It is this "nexus" rationale that would eventually come to be seen as something of a catch-all doctrine, although at the early stages of state action doctrinal development, its contours were not entirely clear.

B. The Blum Trilogy: Blum, Rendell-Baker, and Lugar

In 1982, the Supreme Court decided a trio of cases that refined and narrowed the definition of state action.\textsuperscript{23} In \textit{Blum v. Yaretsky},\textsuperscript{24} the Court held that private nursing homes receiving reimbursement from the state and subject to numerous state regulations were not state actors for purposes of a

\textsuperscript{17} See, e.g., Gilmore v. City of Montgomery, 417 U.S. 556, 574 (1974) (holding that state action to discriminate existed where city allocated exclusive possession and control over recreational facilities and parks to all-white private schools, which discriminated based on race); Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974) (holding that heavy regulation of a private entity by state does not in and of itself make entity's actions "state action"); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972) (holding that a private club's racial discrimination did not rise to the level of state action due to club's holding of a state liquor license; state action can be found when a "symbiotic relationship" exists between private actor and government); Evans v. Newton, 382 U.S. 296 (1966) (holding that private parties who render services that are "municipal in nature" may not discriminate based on race pursuant to the Fourteenth Amendment); Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961) (holding that state action exists where a symbiotic relationship exists between private party and public entity); Marsh v. Alabama, 326 U.S. 501 (1946) (holding that private performance of "public functions" can make Fourteenth Amendment restraints applicable).


\textsuperscript{19} See \textit{Marsh}, 326 U.S. at 506 ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.").

\textsuperscript{20} Id. at 508-09.

\textsuperscript{21} See Jackson, 419 U.S. at 357; Burton, 365 U.S. at 724.

\textsuperscript{22} Jackson, 419 U.S. at 351.


\textsuperscript{24} Blum v. Yaretsky, 457 U.S. 991 (1982).
Fourteenth Amendment claim. In his majority opinion, then-Justice Rehnquist stated that there must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." State action for purposes of constitutional review will only be found where the government has exercised "coercive power" over the private entity, or has provided "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." The Blum Court identified a number of nonexclusive factors that would tend to show state action: the funding of the private actor by the state, the regulation of the private actor by the state, the performance by the private actor of a public function, and the existence of a "symbiotic relationship" between the public and private entities.

In Rendell-Baker v. Kohn, the Court applied Justice Rehnquist's newly articulated state action framework to a § 1983 civil rights claim and held that a private school, regulated and funded primarily by the state, could not be considered as engaging in a state action when discharging employees. Chief Justice Burger, in an otherwise sparse opinion, analogized the schools to contractors who do most of their work through government contracts. He concluded that because contractors are not considered state actors when making employment decisions (i.e., need not be constrained by due process in their employment decisions), neither should private schools, even though those schools are heavily regulated and funded almost exclusively by the state.

Finally, in Lugar v. Edmondson Oil Co., the dissenters in Blum and Rendell-Baker joined with Justice White, who was in the majority of Blum and Rendell-Baker, to hold that a creditor who had attached a debtor's property pursuant to an ex parte proceeding could be considered a state actor for purposes of constitutional review. The Court held that the creditor had acted "under the color of state law," because it had attached property pursuant to a state-created system of attachment between private parties. The Court stressed that state action cases are necessarily fact-bound inquiries.

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25 Id. at 1012.
26 Id. at 1004 (quoting Jackson, 419 U.S. at 350).
27 Id.
28 Id. at 1005–12.
30 Id. at 838 ("In cases under § 1983, 'under color of law' has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment. . . . The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'" (citations omitted))).
31 Id. at 840–41.
33 Id. at 941 ("[W]e have consistently held," wrote Justice White, "that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment.").
34 Id. at 942.
35 Id. at 939 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961))).
as such, the Court specifically limited its holding to the context of prejudgment attachment.36

C. State Action Redefined: Brentwood Academy

Recently, the Court broadened its conception of state action in the “nexus” context. In Brentwood Academy v. Tennessee Secondary School Athletic Ass’n,37 a § 1983 enforcement action,38 the Court found an ostensibly private statewide athletic association, which had the authority to set binding rules in regard to interscholastic athletics for all public and private schools in Tennessee, to be a state actor for purposes of constitutional review under the First and Fourteenth Amendments.39 The plaintiff, a private parochial high school, sued the athletic association under 42 U.S.C. § 1983, claiming that its binding decision to sanction the school for football recruitment abuses violated the First and Fourteenth Amendments.40 The athletic association claimed that the action was not cognizable under § 1983 because it was not a state actor—a requisite for constitutional review under § 1983 and the Fourteenth Amendment.41 The Supreme Court found that an interscholastic athletic association was sufficiently entwined with the state to be considered a state actor for constitutional purposes when a large majority of member schools were public, representatives of the schools acting in their official capacities selected members of the association’s governing bodies, and it was largely financed by gate receipts from member-school tournaments.42

In Brentwood Academy, the Court held that, as in prior cases, the fundamental inquiry is whether the action in question is “fairly attributable” to the state.43 The Court’s cases “have identified a host of facts that can bear on the fairness of such an attribution,” including the coercive use of power by the state;44 significant encouragement, either overt or covert, by the state;45 or when a private actor operates as a willful participant in joint activity with the state or its agents.46 In a shift from the Blum-trilogy understanding of the state action doctrine, the Court specifically held that, by itself, “[e]ntwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards.”47

State action, the Court held, will be found if the private action is pervasively “‘entwined with government policies,’ or when government is ‘en-

36 Id. at 939 n.21.
39 Brentwood Acad., 531 U.S. at 305.
40 Id. at 293.
41 Id.
42 Id. at 298–300.
43 Id. at 295.
44 Id. at 296 (citing Blum v. Yaretsy, 457 U.S. 991, 1004 (1982)).
45 Id. (citing Blum, 457 U.S. at 1004).
46 Id. (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982)).
47 Id. at 302.
twined in [its] management or control.’”48 The standard given by the Court is twofold: state action will be found when “the nominally private character of the association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings,” and “there is no substantial reason to claim unfairness in applying constitutional standards to it.”49 Writing for the majority, Justice Souter observed that a state action analysis is “necessarily [a] fact-bound inquiry,”50 thus eschewing the more categorical approach embraced by the Court in Blum and endorsing the situation-specific view articulated by Justice White in Lugar.51

In his dissent, Justice Thomas (joined by Chief Justice Rehnquist, the author of Blum) maintained that the Court had never before found state action based solely on an “entwinement” theory.52 He contended that such an ad hoc standard unduly expands the doctrine of state action, potentially into public-private interactions heretofore immune from a finding of state action.53

II. The Unconstitutionality of Requiring a Loyalty Oath for Admission to Campaign Events

A. State Action Is Present

For First Amendment protections to apply to individuals seeking to attend a political rally or other event, the entity or entities that took actions resulting in an alleged constitutional violation must be state actors.54 Of the three basic state action doctrines, the entwinement doctrine laid down by the

48 Id. at 296 (alteration in original) (quoting Evans v. Newton, 382 U.S. 296, 299–301 (1966)).
49 Id. at 298.
50 Id. (citing Lugar, 457 U.S. at 939).
51 See Lugar, 457 U.S. at 939.
52 Brentwood Acad., 531 U.S. at 306 (Thomas, J., dissenting).
53 Id. at 314 (Thomas, J., dissenting). Justice Thomas, in his dissenting opinion, wrote: Because the majority never defines “entwinement,” the scope of its holding is unclear. If we are fortunate, the majority’s fact-specific analysis will have little bearing beyond this case. But if the majority’s new entwinement test develops in future years, it could affect many organizations . . . . Indeed, this entwinement test may extend to other organizations that are composed of, or controlled by, public officials or public entities, such as firefighters, policemen, teachers, cities, or counties.
54 Id. (Thomas, J., dissenting). In the four years since it was decided, the lower courts have not extended the reach of Brentwood Academy in any perceptible manner. See, e.g., Tomilolo v. Mallinoff, 281 F.3d 1, 11 (1st Cir. 2002) (declining to extend Brentwood Academy rationale to private “inducement” of public actions); Smith v. Nat’l Collegiate Athletic Ass’n, 266 F.3d 152, 160 (3d Cir. 2001) (holding that Brentwood Academy did not change “controlling authority” rationale for state action cases); Doe v. Harrison, 254 F. Supp. 2d 338, 343 (S.D.N.Y. 2003) (distinguishing Brentwood Academy on factual grounds); Koerner v. Garden Dist. Ass’n, No. 00-2206, 2002 WL 31886728, at *6–7 (E.D. La. Dec. 23, 2002) (declining to extend the Brentwood Academy rationale to “inducement” cases, where private actors allegedly encouraged state officials to issue contempt citation). Four years is too short a time horizon to make a completely competent evaluation of Justice Thomas’s prediction, but it can be concluded that lower courts appear reluctant to expand upon Brentwood Academy.
Court in *Brentwood Academy* is the only one that would potentially support a finding of state action under the circumstances reported of the Rio Rancho rally. Given the short period since the Supreme Court's enunciation of a distinct entwinement doctrine, and the paucity of lower court interpretation of that standard, it is difficult to predict how a court might decide on the constitutionality of requiring a loyalty oath for admission to a political event. As Justice Thomas alluded in his *Brentwood Academy* dissent, the fact-bound nature of the new entwinement standard necessarily makes prediction difficult; every set of facts is unique, and thus, every case presents a new application of the doctrine. As scholars have indicated, making a successful case of state action has historically been a difficult task; courts have long been reluctant to apply constitutional requirements to ostensibly private actors. Any plaintiff alleging state action must therefore make a strong case that an application of the doctrine is appropriate, even in the wake of *Brentwood Academy*.

Nevertheless, using the framework supplied by Justice Souter in *Brentwood Academy*, the actions of a private campaign committee during a political rally in which a major-party nominee is in attendance can properly be considered state action for purposes of constitutional review. In order to qualify as state action, (a) the actions in question must be pervasively entwined with public institutions, public officials, or government policies, and (b) there must be no substantial reason to claim unfairness in applying constitutional standards to the actions in question. Given the facts of the incident at the Rio Rancho, New Mexico rally outlined in the Introduction to this Note, it seems clear that a political rally for a major-party presidential candidate is pervasively entwined with the government, and that there would be no significant unfairness in applying constitutional standards to the admission of valid-ticket holders.

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55 The "public function" doctrine would be inapplicable here. The event organizers in question were not performing any function that traditionally belonged solely to the state. See Rendell-Baker, 457 U.S. at 842 ("We have held that the question is whether the function performed has been `traditionally the exclusive prerogative of the State.'") (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)). Similarly, the "joint participation/symbiotic relationship" doctrine would be inapplicable. Although the campaign organizations and the officials who run them are comprehensively regulated by the federal government, there is no symbiotic or interdependent relationship between the two entities such that the government is drawing any concrete benefit from the relationship. There is no joint character to the event such that the event's private organizers and the government could be said to be partners in the venture. See Burton v. Wilmington Parking Auth., 365 U.S. 715, 723–26 (1961).

56 See Jones, supra note 2.

57 *Brentwood Academy* was decided in 2001.

58 See *Brentwood Acad.*, 531 U.S. at 314 (Thomas, J., dissenting).

59 Freeman, supra note 18, at 579 ("Thus scholars who seek to constrain the private exercise of authority through the extension of constitutional limits to nonstate actors face an uphill battle. The state action argument may succeed in extraordinary cases, but it cannot discipline the excesses—or facilitate the proper functioning—of the vast majority of arrangements in which private parties play a significant role.").

60 See *Brentwood Acad.*, 531 U.S. at 290.

61 Id.

62 Id.
1. Pervasive Entwinement with Public Institutions, Officials, or Policies

Presidential elections and campaigns are regulated by the Constitution, Congress, and the states at every stage, and anyone wishing to run for the presidency voluntarily submits himself to this regulation as a prerequisite. On a basic level, the presidential election process is regulated by the Constitution itself, which provides general strictures for the election of the President, such as the manner in which electors are to be chosen and the qualifications for the presidency. More specifically, presidential elections are regulated under the Federal Election Campaign Act (as amended by the Bipartisan Campaign Reform Act), the Presidential Election Campaign Fund Act, and the Presidential Primary Matching Payment Account Act, with enforcement power given to the Federal Election Commission ("FEC").

Millions of public dollars are given to presidential campaigns each year. Every dollar spent by officially sanctioned campaign organizations on behalf of the major-party candidates—and by extension every event held by those organizations—is regulated under the authority of the FEC. For better or for worse, every official act concerning a campaign for President is comprehensively regulated by the federal government.

Aside from the comprehensive formal regulation of presidential elections and campaign committees, federal, state, and local government institutions and officials are entwined with political events attended by the President or Vice President at all stages. To understand how much entwinement there is at any single campaign event, recall reports of the incident at Rio Rancho, New Mexico, presented in the Introduction to this Note. Follow the sequence of events that brought the Vice President to the event that day. The Vice President, perhaps the second-most important official in the executive branch, headlined the event. He was presumably transported to the

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63 See U.S. Const. art. II, § 1; id. amend. XII (revising the procedure to be followed in the electoral college for selecting the President and Vice President, in response to the disputed Jefferson/Burr election of 1800); id. amend. XXII (limiting Presidents to two full terms in office, or an absolute maximum of ten years); id. amend. XXIV (abolishing the poll tax for federal elections).
68 See 2 U.S.C. § 437(d).
69 The FEC estimates that for the 2003–2004 election cycle, the Bush-Cheney and Kerry-Edwards campaigns each received $74.62 million in general election matching funds, which are provided by the federal government. Federal Election Commission Campaign Finance Reports and Data, http://www.fec.gov/press/bkgrd/fund.shtml (last visited Oct. 13, 2005). The FEC estimates that the Republican National Committee and the Democratic National Committee each received $18.924 million in convention grants (for the summertime nominating conventions held in New York City and Boston). Id.
venue first by a government-owned plane, and then by government-owned automobiles—perhaps a motorcade. He was protected at all times by Secret Service agents and by local and/or state law enforcement officials. It is standard for local and state law enforcement officials, in conjunction with the Secret Service, to scout and secure event locations prior to the President or Vice President's arrival.  

The Vice President would also have been accompanied by numerous government-employed support staff, aides, and the like. All of these individuals were drawing government salaries during their time spent at, and in preparation for, the event.

All of the money spent on the event was regulated and monitored by the government, specifically the FEC. Any matching funds that may have been used for the event originated with the federal government, and any nomaatching-fund money spent by the Bush-Cheney campaign, the Republican National Committee, or any other group on the event was required to be raised in compliance with federal campaign finance laws. The focus of the event in question was for citizens to hear the Vice President speak about the government, its policies, and the administration's plans for the future.

In short, the event at Rio Rancho, and events like it throughout the country during the campaign season, fulfills the first criterion laid down in *Brentwood Academy* for a finding of state action: pervasive entwinement with public institutions, officials, and policies. At every stage of this event, every actor (excluding the audience members and the media) was a public official or affiliated in some way with a campaign organization that is comprehensively regulated by statute. Government-supplied and government-regulated funds and resources were used in the planning, coordination, and execution of the event, and the event was centered on the second-highest official in the executive branch. If such events do not constitute entwinement, then the word has no effective meaning. Such rallies, though organized by nominally private entities like campaign organizations, are so thoroughly subject to governmental controls, regulations, and funding, that the first portion of the *Brentwood Academy* standard is fulfilled.

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71 According to the Secret Service public website:

[T]he Secret Service calls upon other federal, state, and local agencies to assist on a daily basis. . . . When the President travels, an advance team of Secret Service agents works with the host city and state law enforcement and public safety officials to jointly establish the security measures needed to protect him.


72 Precise figures for staff costs are not available for the Rio Rancho event, but estimates based on the costs of other presidential-level trips are possible. The White House recently estimated that staff costs on presidential trips (such as those devoted to promoting the President's domestic policy initiatives) average between $22,000 and $59,000 per trip, excluding security and aircraft costs. Jonathan Weisman, *Cost of Social Security Drive Cited*, WASH. POST, Apr. 7, 2005, at A29.

73 See 2 U.S.C. § 441(b)(1).

74 *Id.*

2. "Fairness" in Applying Constitutional Standards

In addition to the entwinement test, the Court in *Brentwood Academy* held that to find state action, there must be "no substantial reason to claim unfairness in applying constitutional standards to [the ostensibly private action]." The Court only briefly explained what it meant by "fairness":

What is fairly attributable [as state action] is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient.

The lower courts, in the few cases that have interpreted *Brentwood Academy*, have struggled with defining just how to make this normative judgment, perhaps because those courts have blended the fairness prong of the test into the entwinement prong. Obviously, if there is more entwinement between the government and the ostensibly private actor, it would naturally be more fair to hold the private actor to constitutional standards. The test in *Brentwood Academy*, however, seems to require a reviewing court to first look for evidence of significant entwinement, and, once that significant entwinement is established, then to determine whether holding the ostensibly private actor to constitutional standards would constitute significant unfairness.

This second prong of the *Brentwood Academy* test has a very specific role to play: the fairness requirement acts as a hedge against an undue expansion of the state action doctrine, just as Justice Thomas warned against in his *Brentwood Academy* dissent. The unfairness prong is essentially a safety valve to make sure that the state action doctrine does not go too far. The Court seems to want to make sure that, in situations where it is incontestable that significant entwinement exists, courts may still, in their discretion, find that it would be unfair to qualify the ostensibly private actor as a state actor. This could also be the reason that Justice Souter gives so little guidance in *Brentwood Academy* as to what criteria should be used to evaluate whether it would be unfair to apply the state action doctrine. The Court cannot foresee every potential situation in which a litigant will seek to apply

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76 Id.
77 Id. at 295.
78 See, e.g., Logiodice v. Tran. of Me. Cent. Inst., 296 F.3d 22, 28–29 (1st Cir. 2002) (citing *Brentwood*, 531 U.S. at 295–96) ([T]he reality is that some of the cases applying the state action label do not fit well into any established exception but are closer to ad hoc normative judgments. The difference is that the ad hoc cases have not yet concealed into formal categories.").
79 Some lower courts, in the few cases that have come under *Brentwood Academy*, have allowed the unfairness prong to bleed into the initial entwinement prong. The effect of this is that the more contact that exists between public and private entities, the more "fair" it is to classify the private entity as a state actor. See, e.g., Longmoor v. Nilsen, 312 F. Supp. 2d 352, 358 n.9 (D. Conn. 2004). Justice Souter's failure to fully and clearly explain the contours of the new "entwinement" test no doubt led to this confusion, but this almost certainly was not Justice Souter's intention when he crafted the two-part *Brentwood Academy* test.
80 See Horvath v. Westport Library Ass'n, 362 F.3d 147, 151 (2d Cir. 2004).
the state action doctrine, and the Court is ensuring that lower courts have the
flexible doctrinal tool necessary to prevent an ill-advised expansion of the
doctrine. For this reason, this Note will treat the *Brentwood Academy* test as
a true two-part test.\footnote{The two-part test is, obviously, more rigorous. For the purpose of determining whether
requiring loyalty oaths for admission to political events can be considered state action, this Note
will err on the side of the more rigorous interpretation of the *Brentwood Academy* test.}

Assuming that significant government entwinement has been shown,
there appears to be no significant unfairness in holding the actions of the
event organizers to be state actions for purposes of constitutional review.
The limited guidance of the courts in regard to this unfairness prong requires
that this analysis be, to some degree, speculative. Some basic conjectures,
however, are possible.

It is entirely fair that the actions of organizers of a rally to be attended
by public officials, support staff, and law enforcement agencies—all of whom
are drawing a salary and using the implements of government to expedite the
functioning of the rally—be subject to some constitutional scrutiny. The
organizers of events like these have taken advantage of the resources, reputa-
tion, and visibility of the federal government by virtue of the involvement of
the President, Vice President, or other major-party candidate. It is not unfair
to burden those organizers with minimal constitutional obligations.

The fact that the public officials at the Rio Rancho rally, such as the Vice
President and his support staff employed by the executive branch, were not
acting in their official capacity as members of the executive branch, but
rather as a candidate and his supporters, seems, at first glance, to militate for
a finding of unfairness.\footnote{For instance, in *Brentwood Academy*, the membership of the interscholastic
organization at issue included public schools that were represented by their officials acting in their official
capacity. *Brentwood Acad.*, 531 U.S. at 299; see also *Logiodice*, 296 F.3d at 28 (finding it significant
in a state action analysis that school officials acting as trustees to defendant institute were
serving in their capacity as private citizens).} Certainly, executive officials should be able to en-
gage in political activity, on behalf of themselves or others, without the con-
striction of constant constitutional oversight. The Constitution was never
meant to act as a straitjacket on private affairs.\footnote{See *The Civil Rights Cases*, 109 U.S. 3, 17 (1883).}
Yet, the fact that an official like the Vice President is actively taking advantage of his high position
in government, his media visibility, and the prestige of the executive
branch makes it more fair that constitutional restrictions, which apply to the
executive branch at all other times, apply during a campaign event—at least
to the extent that audience members are not discriminated against because of
their views.\footnote{It is not as if the audience members would have any right to speak at the event or
"participate" in any way. Apparently, the only concern of the event organizers in Rio Rancho
was to create an audience of individuals who "supported" the Vice President and who would
presumably be most receptive to his message. The individuals who refused to sign the loyalty
oath might well have been supporters, even adamant ones, albeit ones who refused to have their
admission conditioned on the signing of an "endorsement form."} Officials running for reelection constantly seek to remind their
audience that they are the incumbents and that the machinery of government
works best when they are at the controls. It is therefore not unfair to apply
the rules that govern that machine—i.e., those set forth in the Constitution—to the events that incumbents or other public officials use to return to or gain office.

B. Requiring a Loyalty Oath Violates the First Amendment

Assuming that the actions of event organizers qualify as state action, denying entry to those who refuse to sign a loyalty oath or “endorsement form” is a clear-cut violation of the First Amendment. Generally, “[r]egulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”85 Such actions are subject to “the most exacting scrutiny.”86 As such, the state actor must show “that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”87 “Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny.”88 "The right of freedom of [speech] . . . as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all . . .”89 In short, a government action that forces an individual to adopt a message not their own is at least as onerous and constitutionally suspect as a government action that prevents an individual from expressing himself.

Requiring loyalty oaths fails a First Amendment analysis. In many different contexts, the Court has come down strongly against any requirement that mandates individuals to adopt speech or expressive conduct as their own.90 It makes no difference to the constitutional analysis whether the message is that of the government or of another private speaker.91 "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such [a] message."92 The loyalty oath in question requires attendees to adopt a presidential endorsement as their own and to consent to the dissemination of their names as a supporter of the President by virtue of signing a paper to that effect. This certainly offends the

90 See Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group, Inc., 515 U.S. 557, 559 (1995) (striking down application of Massachusetts public accommodations law requiring private organizers of St. Patrick's Day Parade to allow the Gay, Lesbian, and Bisexual Group of Boston to march in the parade); Abod v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977) (holding that First Amendment rights of objecting union members were violated by labor union's use of mandatory members' dues for political speech); Barnette, 319 U.S. at 642 (holding that Jehovah's Witnesses may not be compelled to salute the flag in school).
principle against compelled expression. As Justice Jackson memorably stated in *West Virginia State Board of Education v. Barnette*:93

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what is to be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.94

The Supreme Court has held that an oath of loyalty95 may not be a prerequisite for public-sector employment,96 a state teacher's license,97 or other such public-sector employment or benefits. The same principle that applied in those cases applies here: government may not condition an individual's legal entitlement or expectation on the adoption of a message of loyalty or fealty to a particular person, message, or doctrine.98 Just as the government could not condition the entry to a public park on an individual's willingness to sign an oath of loyalty to the President, neither should campaign organizations, by virtue of the state action doctrine, be allowed to condition the entry to a rally on an individual's willingness to sign an oath of loyalty to the President, or anyone else.

In certain contexts, courts have sanctioned the practice of requiring an oath or affirmation as a condition to government employment. For example, the government may insist upon a cursory loyalty oath or affirmation during a swearing-in ceremony for public officials.99 These affirmations deal only with the individual's willingness to do the job for which he has been chosen, and do not force the individual to adopt a particular viewpoint that is not his own.

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94 Id. at 642 (emphasis added).
95 In one case, the Court considered an anti-Communist oath that stated the individual did not associate with any group advocating the violent overthrow of the government. See Elfbrandt v. Russell, 384 U.S. 11, 12–13 (1966).
96 Id. at 18–19.
98 See Baggett, 377 U.S. at 361, 366; Elfbrandt, 384 U.S. at 18–19.
99 The President himself must make an oath or affirmation before he assumes office. U.S. Const. art. II, § 1, cl. 7 (“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”). All other federal civil servants and elected officials take a similar oath of office:

I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

III. Solutions

A. Full Reimbursement for All Public Expenditures Would Preclude a Finding of State Action

Assuming the unconstitutionality of excluding valid-ticket holders from the audience of a campaign-run rally on the basis of their refusal to sign a loyalty oath, campaigns would not be powerless to exclude particular individuals from their events. Event holders would retain the right to immediately remove unruly or disruptive audience members, or to limit the audience to particular individuals based on nonprotected criteria.¹⁰⁰ Not all campaign events would qualify under Brentwood Academy as having the requisite governmental entwinement necessary to trigger constitutional protections of audience members. As Justice Souter observed in Brentwood Academy, each state action inquiry is fact-specific; the circumstances of each event would determine whether constitutional protections apply.¹⁰¹ If a particular campaign event did not sufficiently entwine itself with government officials or institutions, no state action would be found. This would apply to events where public officials do not appear, or where the public officials who appear do not require the security and expense of an incumbent President or major-party presidential candidate appearing before a large group of people.¹⁰²

I. Full Reimbursement Would Sufficiently Remove Entwinement

Campaign events that would trigger a finding of state action, like the rally in Rio Rancho, New Mexico,¹⁰³ could avoid constitutional scrutiny by fully reimbursing the various governmental entities involved for all public expenditures related to the event. As outlined above, a large portion of the entwinement that triggers state action comes from the sheer expense of providing security, transportation, staff salaries, and other logistical support for high-ranking public officials and candidates. Presidential campaigns are al-

¹⁰⁰ For instance, fundraising events could properly be limited to those who contributed the requisite amount. Under the hypothesis of this Note, a campaign could then not discriminate amongst donors based on their willingness to sign a loyalty oath, assuming the campaign event at issue is of the character necessary to qualify it as state action.


¹⁰² Much of the entwinement posited in this Note leading to a finding of state action is created as a consequence of the attendance of a high-ranking public official, in this case the Vice President, at a public event: security and transportation costs, time and salary of public officials and staff, use and exploitation of the intrinsic authority and notoriety of the officeholder's position in government, etc. Events that do not require such measures, either because they lack the appearance of any high-visibility public official (like the President, Vice President, major-party presidential nominee, or other high-ranking public official), or because the public officials that are involved do not require such measures, would presumably not qualify as state action under the Brentwood Academy test because the requisite level of entwinement would no longer be present.

This is also true for most minor-party candidates, because they do not receive public financing, generally do not generate the public interest necessary to require high-level security, do not require special transportation needs, and are not accompanied by a large public staff. Based on these distinctions, such rallies and gatherings would presumably not be subject to constitutional constraints.

¹⁰³ The rally is described in the Introduction to this Note.
ready responsible for reimbursing the government for some expenses related to campaigning, but reimbursement for all such expenditures would result in an event that, although regulated heavily by the federal government and headlined by a high-ranking official, was no longer being significantly underwritten by various governmental entities and no longer appearing to be a quasi-public undertaking.

Accordingly, if campaign organizations were to fully reimburse the various governmental entities for public expenditures on events like these, the first portion of the Brentwood Academy test, requiring sufficient entwinement, would go unfulfilled, and state action would not be implicated. Various governmental entities would no longer be directly or indirectly underwriting the event. Campaigns would be responsible for reimbursing the federal, state, or local governments involved for any security costs (including any expenditures by law enforcement agencies specially incurred for the event), any transportation costs not already reimbursable, prorated salaries drawn by public officials (at the state, local, and federal levels) who are either attending or providing special services for the event, and any other expenditure incurred by public entities in connection with the event.

That the event, even after full reimbursement, was still heavily regulated by the state would not, in and of itself, support a finding of entwinement. The Supreme Court has made clear that the mere fact that a private entity is regulated by the government does not make it a state actor. If that were the case, the state action doctrine would have few limits. The mere fact that public officials are in some way participating in an otherwise private event or private action does not in and of itself classify the event as public for purposes of the state action doctrine—although it remains a relevant factor.

104 Congress and the FEC have recognized that there are certain officeholders, the President and Vice President in particular, for whom adherence to strict rules prohibiting the use of public resources while campaigning would be impractical, if not impossible. Given the day-to-day job demands of the presidency, as well as issues of physical security, the President must be able to use at least some of the resources of the federal government in order to mount a competent reelection campaign. The FEC has adopted regulations allowing the President's authorized campaign committee to reimburse the government for certain campaign-related expenses. For example, 11 C.F.R. § 100.93(e)(1) provides that “a campaign traveler [using] an airplane provided by the Federal government, or by a State or local government,” must reimburse the particular governmental entity for use of the conveyance. 11 C.F.R. § 100.93(e)(1) (2005); see also id. § 9034.7(b)(1) (governing allocation of travel expenditures for campaign trips).

These regulations only cover the use of governmental expenses at the margins. There are more fundamental expenditures not covered by FEC regulations, and thus not reimbursed: multiple levels of security, including state and local police; salaries drawn by public officials attending the event, including the President or Vice President, staff, support personnel, etc. It is these unreimbursed expenses that form a significant portion of the “entwinement” between the public and private actors.

2. Full Reimbursement for All Public Expenditures Would Make a Finding of State Action Unfair

Fully reimbursing the government for its public expenses would seem to make a finding of state action unfair. Unfairness is the second prong of the state action test laid down by the Court in Brentwood Academy.\footnote{Id. at 295.} Fully reimbursing the government for all expenditures would make it clear to the public that the campaign organization did not consider itself a quasi-extension of the White House, the executive branch, or the government in general. A large part of why it does not seem unfair to apply constitutional standards to these types of events, in the absence of full reimbursement, is that the attendance of the President or Vice President—with all the pomp and circumstance surrounding their every public appearance and their reliance on government protection, conveyance, and convenience—gives the event an official character. Sending the powerful signal of complete financial disassociation with government at all levels would make it clear to attendees and observers alike that the candidate and his various campaign organizations saw themselves as completely separate from the government in the context of what is a purely political appearance. As a result, it would seem unfair to apply the state action doctrine in that instance.

B. Requirement of a Loyalty Oath Offends the Purposes Underlying the First Amendment

[Free speech] is put forward as a prescription for attaining a creative, progressive, exciting and intellectually robust community. It contemplates a mode of life that, through encouraging toleration, skepticism, reason, and initiative, will allow man to realize his full potentialities. It spurns the alternative of a society that is tyrannical, conformist, irrational, and stagnant.\footnote{Thomas L. Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 886 (1963).}

Illegality or unconstitutionality aside, the President, Vice President, or any other candidate for national office should not implicitly condone compelled speech. By forcing potential audience members to sign a loyalty oath to gain admission to a rally, a candidate undermines the core principles upon which the First Amendment was founded. Even if no state action were found (either because a situation similar to the Rio Rancho event did not constitute state action under the Brentwood Academy standard, or because a campaign had fully reimbursed the government for all public expenditures), the organizers of a rally should not condition admission to the event on the signing of a loyalty oath, endorsement form, or any other form of compelled speech.

Neither the President, nor anyone else, is under an affirmative duty to effectuate the exercise of free speech, or to allow free speech to flourish in venues where the courts have found that it does not exist in a given form. Given the status of the President as a "defender" of the Constitution,\footnote{U.S. Const. art. II, § 1, cl. 7 ("Before [the President] enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I...").} and
given the ubiquity of presidential oratory extolling the virtues of liberty and freedom at home and abroad, it is vastly preferable that the President (or anyone connected to a presidential campaign) not take any action that unnecessarily restricts an individual's ability to hold a private thought or opinion or to be free from endorsing a view that they do not wish to endorse.

Three primary theoretical justifications for free speech, and thus the First Amendment, have been advanced in the modern era: the “marketplace” model, which posits that a competition of ideas will eventually lead to the “truth”; the “citizen-participant” model, in which free speech, fostered by an informed electorate, is essential to good governance; and the “individual liberty” model, in which speech has intrinsic value to the intellectual and spiritual actualization of an individual. The practice of requiring a loyalty oath for admission to a political event of the type described above offends all three justifications. It restricts the flow of the information imparted by the speakers at the rally to those willing to endorse those views before the fact. It hinders the ability of certain individuals to see their President or Vice President in person and limits the ability of those individuals to make a more informed choice as a voter. Most important, it forces individuals who wish to attend the event to adopt speech that is not their own, a pathology in and of itself.

Although it must be emphasized that there is absolutely no legal obligation for the President or anyone else to affirmatively effectuate the principles underlying the First Amendment when they are not required to do so under the Constitution or by law, given the unique role of the President as head of state, head of government, and singular national symbol, it is highly preferable that neither he, nor his Vice President, be in the position of requiring a loyalty oath to himself, or anyone else, as a condition of attending a political rally. It is the First Amendment that ensures that those seeking the presidency are allowed to spread their message and convince the public that they are right for the job; candidates should not then turn around and trample the spirit of the First Amendment by conditioning entry to their events on a person’s willingness to pledge their loyalty.

will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”). 111 See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).


113 See id. For an extended discussion of the rationales underlying the concept of free speech and expression, see Emerson, supra note 109.

114 It is the opposed or undecided voters that are most seeking to become informed by attending a rally and who are therefore harmed the most by the requirement of a loyalty oath.

115 One scholar noted:

The protection against compelled expression is grounded primarily in concerns for individual liberty underlying freedom of speech. . . . The prohibition on government-compelled expression or support of private expression protects these interests in personhood and individual liberty by prohibiting government interference with individual thought, conscience, or belief through a requirement that one adopt, present, or support any message or idea that she does not wish to adopt, present, or support.

Wasserman, supra note 91, at 190–91.
Conclusion

The presidential campaign process has grown exponentially in the past few decades. From the first town hall meetings in New Hampshire to the first Tuesday in November, millions of public dollars and countless man-hours are spent picking the next President of the United States. For good or ill, the government has become inextricably involved with this process—pervasively regulating all stages of the campaign and providing, among other things, public financing, security for candidates, and salaries to incumbents and their staffs during the long campaign season. The American people, who as taxpayers play a large role in financing this grand spectacle, should be able to fully participate in it. The government should not, and constitutionally must not, be in the position of excluding valid-ticket holders to political events based on their desire not to sign what amounts to a loyalty oath in support of the President, or anyone else.

Event organizers must always be able to exclude unruly or disruptive audience members. They must also be allowed to screen out potential audience members who have expressed an intention to disrupt the proceedings. In contrast to these situations, however, there is no compelling reason to exclude paying ticket holders who simply seek to sit and watch their President or Vice President speak. If campaigns insist on resorting to loyalty oaths, any constitutional violation could be avoided by fully reimbursing the government for all funds used to support the event—including federal, state, and local security expenditures, prorated salaries of public employees participating in the event, and the like—in order to avoid a finding of pervasive governmental entwinement. Given the prodigious amounts available to presidential campaigns, this would most likely not be a prohibitive expense.\footnote{In the 2003–2004 election cycle, the Bush-Cheney campaign (including all official Bush-Cheney campaign committees, corporations, and organizations) raised a total of $374,659,453. See Federal Election Commission Campaign Finance Reports and Data, http://www.fec.gov/finance/disclosure/erseea.shtml (select “2003–2004” — search “Bush”) (last visited Dec. 5, 2005). The Kerry-Edwards campaign (including all official Kerry-Edwards campaign committees, corporations, and organizations) took in a total of $346,203,404. See id. (select “2003–2004” — search “Kerry”). Each campaign ended the election season with over $15,000,000 in cash-on-hand. See id. (select “2003–2004” — search “Bush” or “Kerry”). These figures do not include the hundreds of millions of dollars raised by the respective national committees and used on behalf of the candidates, or the hundreds of millions of dollars raised and spent in connection with the presidential campaign by unaffiliated private organizations. See id.} Although this would still place the government (or at least, elements of it) in the position of sanctioning the practice of administering a loyalty oath, it would, under current jurisprudence, effectively remove the state action necessary to trigger First Amendment protections.

Preferably, the President, the holder of an office dedicated to upholding and defending the Constitution in its own right,\footnote{U.S. Const. art. II, § 1, cl. 7.} would instruct his campaign organization and related entities to refrain from requiring loyalty oaths for admission to campaign events. Although the courts are the ultimate arbiters of the constitutionality of government action, the President (indeed, any public official) should be sensitive enough to recognize that this practice is at
odds with the commonly accepted principles underlying the First Amend-
ment—open debate, the right to hold one's own opinion and not be discrimi-
nated against for doing so, the right to hear and decide on questions of public
interest, and, most important, the right not to be compelled to endorse a
message that is not one's own. The President, for better or worse the ultim-
ate symbol of the federal government, should foster such principles, both
while in office and on the campaign trail.