Notes

Agency for International Development v. Alliance for Open Society International: An Alternative Approach to Aid in Analyzing Free Speech Concerns Raised by Government Funding Requirements*

* Thank you to the members of the *Texas Law Review* and especially Kelsey Pfleger and the other members of the Notes Office, Sandra Andersson, Marissa Cohn, and Katie Kinsey, for their outstanding edits. I would also like to thank Kate Ergenbright and Steven Seybold for their leadership in continuing the tradition of excellence at the *Texas Law Review*, the other members of the Volume 93 editorial board for a memorable year, and especially Alex Cockerill for his friendship and his hard work with *Texas Law Review See Also*. Last, but most importantly, I would like to thank my family for their support and encouragement not only through law school but throughout my life.

Introduction

In 2013, the Supreme Court struck down a requirement that nongovernmental organizations combating HIV/AIDS must explicitly oppose prostitution to be eligible for government funding through a HIV/AIDS program created in 2003,[1] a program commonly referred to as the Leadership Act. Congress imposed this restriction as part of this "comprehensive" program to address HIV/AIDS, in part, by eradicating prostitution throughout the world.[2] The Court found that the requirement violated the right to free speech because an organization could be ineligible for certain funding due to its beliefs regarding the legalization of prostitution.[3]

This Note proposes a new approach to analyzing speech requirements imposed for potential recipients to be eligible for federal funding: the government should be allowed to enforce any such speech requirements as a condition for federal funding as long as the potential recipient has other opportunities to engage in that speech. This view protects the government's interest in ensuring that its money is spent in a manner that is not only in accord with Congress's purpose for the program but that also protects the public's free speech interest in hearing a multitude of viewpoints.

In discussing this new approach to analyzing speech requirements imposed on potential recipients for federal funding, this Note focuses heavily on the Court's recent decision in *Agency for International Development v. Alliance for Open Society International*.[4] While this new approach would be applicable to all cases in which Congress imposes some speech requirement as a condition for federal funding eligibility, *Alliance for Open Society International* provides a good framework—and one of the more recent examples—of how this new approach would work.

Part I of this Note summarizes basic background information regarding First Amendment jurisprudence on free speech and government conditions

1. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2322–23, 2332 (2013).

2. United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), Pub. L. No. 108-25, 117 Stat. 711 (codified as amended at 22 U.S.C. §§ 7601–7682 (2012)).

3. *Alliance for Open Soc'y Int'l*, 133 S. Ct. at 2332.

4. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2332 (2013).

on monetary grants. Part II examines the Supreme Court's decision in *Alliance for Open Society International*, explaining the majority's (and the dissent's) reasoning in the case. This Part also includes a discussion of the background and Congressional intent behind the Leadership Act. Part III criticizes the decision and examines an alternative approach to considering freedom of speech claims in circumstances where an organization claims the government violated its right to free speech by requiring the organization to affirm a particular belief.

I. The Right of Free Speech Can Restrict Congress from Imposing Restrictions on Government Funding

Under the First Amendment freedom of speech guarantee, Congress cannot pass a law "telling people what they must say."[5] Nonetheless, in some contexts, the government can impose "a condition on the receipt of federal funds" that requires an individual (or an organization) to engage in certain speech under the Spending Clause.[6]

Congress's ability to condition funds on an individual engaging in particular speech is limited: the requirement can become an "unconstitutional burden" on the individual's free speech rights.[7] The line between what is permitted and is not permitted is "hardly clear"[8]—in part, because the Supreme Court has never defined that line and gives contradictory rationales for the permissibility or impermissibility of such restrictions.[9]

II. *Agency for International Development v. Alliance for Open Society International*

Subpart A will discuss the background of the Leadership Act at issue in *Agency for International Development v. Alliance for Open Society International*. Subpart B discusses Congress's rationale for the pledge requirement that the Supreme Court subsequently struck down. In subpart C, the Note examines the private party's reasons—both from a policy standpoint and from a constitutional standpoint—for opposing the pledge requirement. Subparts D–F discuss the case itself and the reasoning of the Supreme Court.

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5. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 61 (2006).

6. *Alliance for Open Soc'y Int'l*, 133 S. Ct. at 2327–28.

7. *Id.* at 2328.

8. *See infra* note 67 and accompanying text.

9. For a discussion of the inconsistency of the Supreme Court's decision in this area, see *infra* subpart III(A).

A. Congress Provides Federal Funds to Nongovernmental Organizations Combating HIV/AIDS

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 to provide a plan from the federal government to combat HIV/AIDS internationally.[10] Finding that "HIV/AIDS has assumed pandemic proportions, spreading from the most severely affected regions, sub-Saharan Africa and the Caribbean, to all corners of the world, and leaving an unprecedented path of death and devastation,"[11] Congress passed the Act to provide for a "comprehensive, long-term, international response focused upon addressing the causes, reducing the spread, and ameliorating the consequences of the HIV/AIDS pandemic."[12]

Congress also noted that prostitution and other forms of "sexual victimization" contribute significantly to the HIV/AIDS pandemic—up to 40% of victims of sex trafficking contracted HIV/AIDS—and established that one of the goals of the "comprehensive" program is to eradicate prostitution throughout the world.[13]

The Leadership Act also included congressional findings that nongovernmental organizations (NGOs) had "proven effective in combating the HIV/AIDS pandemic"[14] and fashioned the *comprehensive* international response to include a program in which the federal government would give aid to NGOs to combat HIV/AIDS.[15] To be eligible for such aid, an NGO must, among other requirements, meet two requirements dealing with prostitution: first, the NGO could not use any funds from the program to "promote or advocate the legalization or practice of prostitution or sex trafficking,"[16] and second, the NGO must have a policy "explicitly opposing prostitution and sex trafficking."[17] The Supreme Court refers to the second requirement as the "Policy Requirement."[18]

B. Congress Imposes the "Policy Requirement" as Part of a "Comprehensive" HIV/AIDS Message

The key to understanding the rationale for the Policy Requirement is that the HIV/AIDs program created by the Leadership Act is a

10. 22 U.S.C. § 7601(22) (2012).
11. *Id.* § 7601(1).
12. *Id.* § 7601(21).
13. *Id.* § 7601(21), (23).
14. 22 U.S.C. § 7601(18) (2012).
15. *Id.* § 2151b-2(c)(2).
16. *Id.* § 7631(e).
17. *Id.* § 7631(f).
18. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2324–25 (2013).

comprehensive approach to the United States' international policy to combat HIV/AIDs.[19] As part of the *comprehensive* approach, the United States was attempting to send an "educational message[]" that the international community must fight HIV/AIDS by attempting to eradicate prostitution throughout the world.[20]

Congress viewed recipients of funding from the program as an "integrated" part of the overall United States strategy in opposing HIV/AIDS;[21] Congress did not view recipients as merely a recipient of funds with no link to the message that Congress was attempting to promote.[22] By requiring recipients of funds from the HIV/AIDS program to explicitly oppose prostitution,[23] Congress intended to ensure that any recipient of funding did not undermine the United States' uniform foreign policy message of eradicating prostitution around the world.[24]

Members of Congress who were responsible for including the pledge in the legislation also noted that verifying the use of the funds once the funds were sent out of the country could be difficult.[25] Congress thus required NGOs to sign the pledge to reduce the likelihood that the NGO would channel any funds from the program to "pimps and brothel owners" and thus "unwittingly fund or promote commercial sex activities," reasoning that NGOs that oppose prostitution would be more likely to ensure that the funds in no way assisted prostitution.[26]

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19. *See supra* note 12 and accompanying text.

20. 22 U.S.C. § 7611(a)(4) (2006) (amended 2008).

21. *Id.* § 7611(a) (2012).

22. *Id.* § 7631(e).

23. *Id.* § 7631(f).

24. The Supreme Court recognized that the success of a government program often depends on the message sent by the operation of the program as a whole; for example, in the context of pregnancy help centers, the Supreme Court allowed Congress to require that a pregnancy help center have a certain mission or hold certain beliefs because "selectively fund[ing] a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way" does not constitute a violation of the right to free speech. Rust v. Sullivan, 500 U.S. 173, 193 (1991).

25. *See, e.g.*, Cheryl Wetzstein, *Supreme Court Strikes Down Obama-backed 'Prostitution Pledge' in AIDS Funding*, WASH. TIMES, June 20, 2013, http://www.washingtontimes.com/news/2013/jun/20/supreme-court-nixes-prostitution-pledge-aids-funds/, *archived at* http://perma.cc/8GK9-JV58 (noting that one motivation behind the requirement was to ensure the U.S. government did not "unwittingly fund or promote" prostitution).

26. *Id.*

C. Some NGOs Opposed the Pledge Because the Requirement Would Discourage Victims of Sex Trafficking from Seeking Help[27]

A group of NGOs opposed the pledge requirement because they believed that the requirement would discourage sex-trafficking victims—who, as Congress noted, are far more likely to suffer from HIV/AIDS—from seeking help from the organizations.[28] According to these NGOs, the pledge puts organizations combating HIV/AIDS in an impossible position: either they are denied aid from the federal program, which "they need" to effectively operate or they are, in practice, banned from supporting sex-trafficking victims because these victims will not seek aid from the NGO.[29]

If this policy disagreement constituted the sole reason for opposing the pledge, the Supreme Court likely would have never heard the case.[30] The NGOs, however, also argued that the pledge requirement violated the Free Speech Clause of the First Amendment, arguing that mandating the NGO to *explicitly* oppose prostitution to qualify for funding forced the NGO to engage in certain speech and hold certain views.[31]

D. NGOs Challenge the Pledge Requirement

In 2006, two NGOs, the Alliance for Open Society International and Pathfinder International, challenged the pledge requirement in the U.S. District Court of the Southern District of New York arguing that the Policy Requirement violated the organizations' right to free speech.[32] Alliance for Open Society International channeled money from the HIV/AIDS program to local NGOs in foreign countries, some of which did not have a policy explicitly opposing prostitution.[33] The district court granted a preliminary injunction against the enforcement of the pledge requirement.[34]

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27. The validity or reasonableness of this underlying policy argument against the pledge requirement is beyond the scope of this Note. While I have—as I imagine many of my readers will have—thoughts on the policy arguments behind the pledge, this Note simply addresses the free speech issues in this controversy.

28. Sex workers are 13.5 times more likely to have HIV than women of the same income level and the same age. *US Supreme Court Strikes Down Policy Requiring AIDS Groups to Oppose Prostitution in Order to Receive US Government Funds*, UNAIDS (June 21, 2013), *available at* http://www.unaids.org/en/resources/presscentre/featurestories/2013/june/20130621us supremecourtdecision, *archived at* http://perma.cc/7ST7-YBQY.

29. *Id.*

30. *See* Petition for Writ of Certiorari at 22, Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321 (2013) (No. 12–10) (citing a circuit split as one of the reasons that the Supreme Court should grant review).

31. *Agency for Int'l Dev.*,133 S. Ct. at 2326–27.

32. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 430 F. Supp. 2d 222, 228–29 (S.D.N.Y. 2006).

33. *About the Plaintiffs*, USAID v. AOSI, http://www.pledgechallenge.org/about-plaintiffs/, *archived at* http://perma.cc/7A87-3Y6T ("AOSI makes and receives grants to support and cooperates with other charitable organizations for the foregoing purposes.").

34. *Alliance for Open Soc'y Int'l*, 430 F. Supp. 2d at 278.

The government appealed the district court's injunction to the Second Circuit Court of Appeals.[35] After the appeal, the United States Agency for International Development (USAID) issued guidelines on whether an NGO (like Alliance for Open Society International or Pathfinder International) could receive funding from the HIV/AIDS program and channel the money to an "affiliated organization" (such as the local NGOs in the foreign country).[36] The guidelines stated that the USAID would consider the "totality of the facts" to ensure that the recipient had "objective integrity and independence" from an affiliate organization "that engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking."[37] If the NGO had "objective integrity and independence" from such an affiliate organization, the NGO could still receive funding from the HIV/AIDS program even if the affiliate organization did not explicitly oppose prostitution.[38]

The Second Circuit remanded the case to the district court to consider whether this new guideline alleviated the alleged free speech violation.[39] On remand, the district court again granted a preliminary injunction against the Policy Requirement.[40] The government appealed the district court's injunction to the Second Circuit, which affirmed the district court's decision and found the pledge requirement unconstitutional.[41] The government appealed the Second Circuit's decision to the Supreme Court, which granted certiorari.[42]

E. The Supreme Court Holds that the Pledge Requirement Violates Free Speech

In a six-to-two decision, the Supreme Court affirmed the Second Circuit, with Justice Elena Kagan recused from the case.[43] Justice Antonin Scalia wrote the dissenting opinion, which Justice Clarence Thomas joined.[44]

The majority opinion ignored the government's interest in ensuring that the NGOs sent a consistent message in opposing prostitution as part of

35. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 254 F. App'x 843, 845 (2d Cir. 2007).

36. U.S.A.I.D. Organizational Integrity of Recipients, 45 C.F.R. § 89.3 (2010).

37. *Id.*

38. *Id.*

39. *Alliance for Open Soc'y Int'l*, 254 F. App'x at 846.

40. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 570 F. Supp. 2d 533, 550 (S.D.N.Y. 2008).

41. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d. 218, 223–24 (2d Cir. 2011).

42. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 928 (2013).

43. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2324 (2013).

44. *Id.* at 2332 (Scalia, J., dissenting).

its integrated effort to combat HIV/AIDS and instead focused solely on the government's interest in ensuring that the funds from the program did not promote the legalization of prostitution.[45] The Court found that this interest did not justify a restriction on free speech because the Leadership Act already prohibited the use of funds from the program to promote prostitution or the legalization of prostitution.[46] In addition, the condition that an NGO must explicitly oppose prostitution was outside the scope of the HIV/AIDS program, which the Court narrowly defined as reducing the occurrence of HIV/AIDS internationally instead of developing a *comprehensive* response to HIV/AIDS to include eradicating practices that increased the likelihood of HIV/AIDS[47]—like prostitution—as stated by Congress and summarized above in subpart A.

The majority was particularly concerned that the pledge requirement required an organization seeking funding to hold a particular belief: namely, that prostitution should not be legalized.[48] The Court held that Congress cannot require an organization to hold any particular belief as a prerequisite to receiving funding, quoting *West Virginia Board of Education v. Barnette*[49] :"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[50]

By requiring an NGO to oppose prostitution, Congress prescribed an "orthodoxy" in politics, and by requiring an NGO to *explicitly* oppose prostitution forced citizens to "confess by word or act their faith therein."

F. The Dissent Urges the Constitution Does Not Mandate a "Viewpoint-Neutral Government"

Justice Scalia's dissent notes that the majority ignored the government's interest in developing a *comprehensive* HIV/AIDS strategy and selecting NGOs that would not undermine the United States' message in addressing HIV/AIDS internationally.[51] The Policy Requirement, Justice Scalia argued, constituted "nothing more than a means of selecting suitable agents to implement the Government's chosen strategy to eradicate HIV/AIDS."[52] The Constitution does not mandate a "viewpoint-neutral government"; Congress should be allowed to both explicitly state a

45. *Id.* at 2331–32 (majority opinion).

46. *Id.* at 2330–32.

47. *Id.* at 2332–33 (Scalia, J., dissenting).

48. *Id.* at 2327 (majority opinion).

49. 319 U.S. 624 (1943).

50. *Alliance for Open Soc'y Int'l*, 133 S. Ct. at 2332 (quoting *Barnette*, 319 U.S. at 642) (internal quotation marks omitted).

51. *Id.* at 2332–33 (Scalia, J., dissenting).

52. *Id.* at 2332.

particular policy goal that is a matter of judgment (such as opposing prostitution) and be allowed to select agents who will not seek to undermine such an objective.[53]

In fact, prohibiting the government from only giving money to organizations that support the goal of the program would lead to absurd results. Justice Scalia hypothesizes about a federal program whose purpose is to explicitly promote *only* healthy eating programs (similar to the HIV/AIDS program at issue in *Alliance for Open Society* whose purpose is to reduce HIV/AIDS, in part, by fighting against the legalization of prostitution).[54] Similar to the NGOs that challenged the HIV/AIDS program but did not completely fit the qualifications of the program, an organization like the American Gourmet Society may have "nothing against healthy food" but does not promote only healthy eating habits—in fact, many of its products are not necessarily healthy food choices.[55]

Justice Scalia's concern—while not directly expounded upon in his dissent—seems to be that, under the majority's analysis, Congress could not prohibit an organization like the American Gourmet Society from receiving funds from the program because its decision not to explicitly promote *only* healthy eating habits would be viewpoint discrimination in violation of the First Amendment. In a similar way, denying funding to the NGOs in this case constituted viewpoint discrimination because of their view on the legalization of prostitution. Obviously, giving money to any food society—regardless of its commitment to the goals of the program—would make the program completely useless.

In the international context, the government has a special interest in ensuring that NGOs that receive funding under a particular program hold views similar to the government's view in the context of the program.[56] Again, Justice Scalia resorts to a hypothetical scenario.[57] He asks whether the United States be required to give funding to Hamas, an organization which is involved in terrorism and which opposes Israel, solely because only giving weapons to NGOs that supported Israel constitutes an impermissible violation of the organization's right to free speech?[58] According to Justice Scalia's reasoning, the majority's analysis would require giving funding to Hamas because the only reason the government would deny funding to Hamas would be because the government disagreed with Hamas's viewpoint.

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53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

Justice Scalia next addresses the majority's arguments. The dissent would not have rejected the government's interest in ensuring that funds do not support prostitution: the dissent viewed the prohibition on spending the money from the HIV/AIDS program for prostitution as ineffective because money is fungible—the government is still supporting an organization that supports prostitution.[59]

The dissent also rejects the majority's appeal to *Barnette*: the government, as explained above, does not have to be viewpoint neutral, and holding that the government must not discriminate based on a relevant ideological commitment will lead to absurd results.[60] "One can expect, in the future, frequent challenges to the denial of government funding for relevant ideological reasons."[61]

Ironically, the Constitution itself requires certain viewpoints in some circumstances: for example, all legislators and the President must take an oath to support the Constitution, indicating that these government officials must hold a certain viewpoint—namely, some level of support for the U.S. Constitution—as a precondition for holding office.[62]

G. After the Supreme Court's Decision

After the Supreme Court's decision, Pathfinder International and Alliance for Open Society International filed an action against USAID for a permanent injunction against USAID, claiming USAID continued to apply the Policy Requirement.[63] The U.S. District Court for the Southern District of New York converted the preliminary injunction at issue in the Supreme Court decision to a permanent injunction enjoining the government from enforcing the Policy Requirement based on the Supreme Court's determination that it violated the First Amendment.[64]

During the hearing for the permanent injunction, the government argued that it should be allowed to enforce the Policy Requirement against applicants for funding that were not named parties in the case.[65] The Court rejected this argument finding "no constitutional application of the Policy Requirement . . . . For the same reasons that the Policy Requirement cannot be applied to the Plaintiffs without violating their constitutional rights, applying it to other NGOs or their affiliates would likewise violate their constitutional rights."[66]

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59. *Id.* at 2334.

60. *Id.* at 2335.

61. *Id.*

62. *Id.*

63. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., No. 05 Civ. 8209, 2015 WL 706668, at *1 (S.D.N.Y. Jan. 30, 2015).

64. *Id.* at *18–19.

65. *Id.* at *18.

66. *Id.*

III. Criticism of the Supreme Court's Decision

Subpart A examines the current case law on the permissibility of speech restrictions the government may place on a potential recipient of funding before the recipient can receive the funding. Subpart B outlines a proposed new approach to analyzing such restrictions to solve the "mess" in this area of the law.

A. Current Case Law Is "Hardly Clear" as to What Speech Conditions the Government May Impose

Chief Justice John Roberts, in the majority opinion in *Alliance for Open Society International*, acknowledges that the entire line of case law on when the government can impose restrictions on an organization receiving funds is "hardly clear."[67] One commentator has noted: "If there is any consensus with respect to the doctrine of unconstitutional conditions, it is that the doctrine is a mess."[68]

Generally, Congress can only pass laws that fall under one of the enumerated powers—one of the powers listed under Article I, Section Eight of the U.S. Constitution.[69] If the Constitution does not explicitly grant Congress the authority to pass a certain piece of legislation, Congress cannot enact the legislation constitutionally.[70] Of course, in the context of international HIV/AIDS assistance, without even considering the potential free speech violation, Congress clearly could not require that any organization that helps HIV/AIDS victims to explicitly oppose prostitution—Congress is not granted the authority to pass such a regulation.[71]

Nonetheless, the spending power in Article I of the U.S. Constitution allows Congress to spend money for purposes not specified by the enumerated powers.[72] By establishing conditions for a group's eligibility for grants of federal money, Congress can attempt to attain objectives that may not be enumerated in Article I, Section Eight of the Constitution.[73] In

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67. *Alliance for Open Soc'y Int'l.*, 133 S. Ct. at 2328.

68. Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1047 (2014).

69. U.S. CONST. art. I, § 8.

70. *See* U.S. CONST. art. 1, § 8 (describing the powers that Congress has and excluding the powers that Congress does not have by negative implication); United States v. Lopez, 514 U.S. 549, 552 (1995) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." (quoting THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961)) (internal quotation marks omitted).

71. U.S. CONST. art. I, § 8 (presenting a list of Congress's powers which does not include such regulation of private organizations).

72. South Dakota v. Dole, 483 U.S. 203, 207 (1987).

73. *Id.* at 207.

fact, this practice of establishing conditions on grants of federal money has been "repeatedly employed" by Congress "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[74] The limitations on Congress's ability to impose conditions, however, are far from clear.

Indeed, the Supreme Court has only held that imposing conditions on government funding could violate the free speech clause relatively recently: the Court never held that conditions on government funding to NGOs could constitute a violation of free speech until the 1940s.[75] In the past, the Court simply recognized that a person had no "right" to government funding, and thus, the government could impose any restriction on such funding.[76] The Court eventually held that the government could not "deny a benefit to a person because of his constitutionally protected speech or associations."[77]

The problem with a rule that Congress cannot deny funding to a person or organization because of the organization's speech or activities is that *every* condition for funding is essentially a restriction on the organization's speech or activities in some way. For example, a requirement that government funding be used to combat HIV/AIDS means that the organization cannot use the funding for another purpose, thereby restricting the organization's activities.

As the Court attempted to grapple with its new rule, the permissible restrictions that Congress could impose on an organization receiving funds became "hardly clear," as Justice Roberts put it.[78] The Court has engaged in a case-by-case analysis to determine whether, in the Court's eyes, the restriction the government places on the recipient's speech in exchange for the funds is reasonable in light of the purpose of the government program.

A brief overview of the Supreme Court's decisions over the past seventy-five years confirms the Chief Justice's statement that what is permissible in the context of imposing speech restrictions as a requirement for eligibility for government funding is far from clear.[79] Much of this confusion stems from the fact that the Supreme Court has given conflicting rationales in different cases.

1. Cases in Which the Court Held That the Restrictions on Speech as a Condition for Receiving Government Funds Violated Free Speech.—In

74. *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (plurality opinion)) (internal quotation marks omitted).

75. Nicole B. Cásarez, *Public Forums, Selective Subsides, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 505–07 (2000).

76. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

77. *Id.*

78. *See supra* note 67 and accompanying text.

79. *See supra* note 67 and accompanying text.

some contexts, the Court seems to impose a blanket rule that the government can *never* refuse to give funding to an individual or a group because of the person's or group's viewpoint. Below is a summary of some of the major cases in which the Court seems to impose this blanket rule.

For example, in *Rosenberger v. Rector & Visitors of the University of Virginia*,[80] the Supreme Court held that if the government provides funds for one viewpoint, the government must provide funding for *all* opposing viewpoints.[81] The University of Virginia would generally subsidize the cost of publications by extracurricular groups at the school but refused to fund a Christian student group's newspaper because the group "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[82] The Court held that the University, as a government entity, *must* provide funding to the Christian group because it "may not discriminate based on the viewpoint of private persons whose speech it [subsidizes]."[83]

Congress cannot prohibit a lawyer from arguing for changes to welfare laws when government funds pay the attorney. In the program at issue in *Legal Services Corp. v. Velazquez*,[84] Congress created the Legal Services Corporation to provide financial support for legal assistance in civil proceedings to people who cannot afford legal assistance.[85] One of the conditions for an attorney to receive funding from the program was that the attorney could not use the funds to "amend or otherwise challenge existing welfare law."[86] Relying on the *Rosenberger*[87] decision discussed above, the Court held that the funding condition violated the right to free speech because the Court viewed the restriction on the attorney's ability to speak out in favor of reforms to the welfare system as unreasonable and unnecessary.[88] The Court viewed the restriction as unreasonable because Congress formed the Legal Service Corporation to "facilitate private speech, not to promote a governmental message"[89]—in direct contrast to *Alliance for Open Society International*, where the Court held that the government could not promote a message against prostitution through a requirement that NGOs held that view.[90]

The Court has held that a state school cannot refuse to renew a professor's contract because of the views that he expressed in *Perry v.*

80. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).
81. *Id.* at 834.
82. *Id.* at 823.
83. *Id.* at 834.
84. Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).
85. *Id.* at 536.
86. *Id.* at 537.
87. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).
88. *Id.* at 542, 549.
89. *Id.* at 542.
90. *See supra* Part II.

Sinderman.[91] A professor at a state junior college in Texas, employed under successive one-year contracts, became involved in public disputes with the college's Board of Regents.[92] The professor began to advocate that the junior college make a transition to becoming a full four-year university—in direct opposition to the Board of Regents.[93] The board voted not to offer the professor a new contract after his contract expired.[94] The Court found that an issue of material fact existed as to whether the professor was dismissed for criticism of the school and remanded for trial while proclaiming, in passing, that dismissing for such a reason was a violation of free speech.[95] As a state institution, the college could not restrict the professor's free speech rights, and thus, the board could not refuse to renew the professor's contract on this basis.[96]

2. Cases in Which the Court Held That the Government Could Impose Restrictions on Speech as a Condition for Receiving Government Funds.—At other times, the Court seems to grant Congress considerable leeway in imposing restrictions on the use of government funds—even if those restrictions impose on a recipient's right to free speech.

Congress can refuse to fund libraries that do not block pornography on library computers according to the Court in *United States v. American Library Association*.[97] Under the Children's Internet Protection Act, a public library cannot receive federal funds to provide Internet access in the library unless the library installs software to block obscene images or child pornography.[98] Holding that the government was allowed "to define the limits of that program," the Court found that the requirement that libraries block internet access to pornography fell within the government's "broad limits" to place restrictions on speech.[99] Nonetheless, the Court never gave a rationale—or a limit—for these "broad limits,"[100] and thus, squaring this cause with the cases mentioned in Part II becomes practically impossible. As the dissent points out—correctly in light of the other cases in this area—the government cannot impose a restriction that "impose[s] controls" on a medium of expression.[101]

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91. 408 U.S. 593, 596–97 (1972).
92. *Id.* at 594–95.
93. *Id.* at 595.
94. *Id.*
95. *Id.* at 597–98.
96. *Id.*
97. 539 U.S. 194, 211–12 (2003).
98. *Id.* at 198–99.
99. *Id.* at 211 (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991)) (internal quotation marks omitted).
100. *Id.* at 211–12.
101. *Id.* at 227–28 (Stevens, J., dissenting).

In a highly controversial case, *Rust v. Sullivan*,[102] the Supreme Court held that Congress can require publicly funded institutions to refrain from engaging in abortion-related activities using federal funds.[103] Under Title X of the Public Health Service Act, family planning centers that receive federal funds cannot use those funds in programs where "abortion is a method of family planning."[104] Some family planning centers argued that this restriction prevented them from engaging in speech to promote abortions.[105]

Nonetheless, despite the fact that the Title X requirements restricted speech, the Court held "[t]here is *no question* but that the statutory prohibition contained in [the statute] is constitutional."[106] The government "may make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds."[107] Requiring the government to fund activities without considering the beliefs of those receiving the funds "would render numerous Government programs constitutionally suspect."[108]

Congress permissibly imposed viewpoint restrictions on grants for the arts when Congress required that any person receiving a grant from the National Endowment for the Arts only use the grant to create artwork that meets "standards of decency" and shows a "respect for diverse beliefs and values."[109] According to the Court in *National Endowment for the Arts v. Finley*,[110] the "nature of arts funding" requires the government to consider the content of the art.[111] The government may deny certain art for a "wide variety of reasons" and considering the content of the art is constitutionally permissible.[112] "Favoritism" for "decency and respect for [diverse] beliefs and values" does not "abridge" anyone's freedom of speech as the artist is still allowed to create such art—though without government funding.[113]

The dissent, again, points out the arbitrariness of allowing Congress to impose viewpoint-based restrictions in some instances while prohibiting such restrictions in others.[114] Neither the government nor the majority

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102. 500 U.S. 173 (1991).

103. *Id.* at 177–78.

104. 42 U.S.C. § 300a-6 (2012).

105. *Rust*, 500 U.S. at 180, 192.

106. *Id.* at 192 (emphasis added).

107. *Id.* at 192–93 (quoting Mayer v. Roe, 432 U.S. 464, 474 (1977)) (internal quotation marks omitted).

108. *Id.* at 194.

109. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572–73 (1998) (quoting 20 U.S.C. § 954(d)(1) (1994)) (internal quotation marks omitted).

110. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

111. *Id.* at 585.

112. *Id.*

113. *Id.* at 598 (Scalia, J., concurring).

114. *Id.* at 600–01 (Souter, J., dissenting).

provided any reason why the "decency and respect proviso" differed from the government firing an employee because of the employee's speech against the board or requiring the government to fund speeches of all viewpoints as the Court held was required in other cases discussed above.[115]

3. The Bottom Line: The Case Law Is Inconsistent.—The inconsistency of the case law in this area is evidenced by the statements of the Court in two cases. In one case, the Court states that the government may "make a value judgment"[116] as to which viewpoints it will provide funding, and in another case, the Court holds that the government "may not discriminate based on [] viewpoint"[117] in determining who is eligible for funding. Because the Court engages in a case-by-case analysis of what is "reasonable" and "just," the case law is, as the Chief Justice says, "hardly clear" as to what conditions on funding are permissible.[118] A new approach is required to resolve the inconsistency of the law.

B. An Alternative: A Funding Condition Is Permissible as Long as the Potential Recipients Can State Their Views in Some Other Way

This Note suggests that Congress should be allowed to impose a condition requiring a recipient of government money to engage in certain "speech" *as long as the potential recipient can state its views without participating in the government program*.

To give an example of this approach in practice: suppose the government banned any organization from giving funding to combat HIV/AIDS unless the organization received its funding from the federal government.[119] Then assume that the government then, as in the Leadership Act, required an organization to explicitly oppose prostitution. In such a hypothetical scenario, an organization would have no possible way to operate *and* to state its support for the legalization of prostitution. In such a case, the potential recipient of government funds *cannot* state its views at all *and* engage in HIV/AIDS relief—the organization would have to shut down its HIV/AIDS relief operation. Under the proposed test, *because no practical way exists for the potential recipient to state its views*, the restriction on speech would be unconstitutional.

On the other hand, in the actual scenario dealt with in *Alliance for Open Society International*, NGOs had ample opportunity to engage in any speech the organization chose regarding prostitution because the NGO

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115. *Id.*

116. Rust v. Sullivan, 500 U.S. 173, 192–93 (1991) (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)) (internal quotation marks omitted).

117. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995).

118. *See supra* note 67 and accompanying text.

119. Such a provision would likely violate numerous other provisions of the U.S. Constitution. This example assumes, for the sake of illustration, that such a provision would be constitutionally enforceable.

could refuse to accept the government funding.[120] These organizations had operated before 2003 without government funding from the Leadership Act, which did not exist until 2003—in fact, Pathfinder International had existed since 1957 and provided international aid for HIV/AIDS since the 1990s.[121] If an NGO did not agree with the *comprehensive* government policy to eradicate prostitution globally—or would not care to agree explicitly—the NGO could continue to operate like Pathfinder International had for over forty-five years. Because the organization had another option—namely, to refuse to accept the funding and still hold their beliefs regarding the legalization of prostitution—no free speech violation would exist under the approach outlined above.

The judiciary should be especially reluctant to strike down acts of Congress because Congress represents the most democratic unit of the federal government—it is directly elected by the people—while the judiciary is far removed from the democratic process—judges are unelected and unthreatened by removal through elections.[122] When the (unelected) judiciary strikes down a law, the judges are essentially prohibiting a policy option and thereby restricting the democratic process.[123] The proposed approach expands Congress's power by solely focusing on the original intent of the right to free speech to maximize *Congress's*—and not the judiciary's—power to decide (instead of the judiciary) on a case-by-case basis the permissibility of speech requirements for eligibility for federal funding.

Such an approach satisfies the original intent behind the free speech protection in the First Amendment. The Supreme Court has long recognized that the interest protected by the First Amendment is to provide for an "unfettered interchange of ideas for the bringing about of political and social changes."[124] In other words, the right to free speech only intends to ensure that a "multitude of tongues"—an exchange of ideas in the marketplace of ideas—can be heard in the United States.[125]

Current case law, in view of the original intent of the right to free speech, errs by using the right to free speech to limit permissible government conditions in funding NGOs. The approach to free speech proposed in this Note ensures that the purpose of the right to free speech is met by refocusing the analysis of any restriction on an organization's

120. *See supra* subparts II(A)–(B).

121. *About Us*, PATHFINDER INT'L, http://www.pathfinder.org/about-us/our-history, *archived at* http://perma.cc/UY8C-MVRM.

122. Lino A. Graglia, Essay, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1020–21 (1992).

123. *Id.*

124. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548 (2001) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)) (internal quotation marks omitted).

125. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

speech on whether the *idea could be heard* in the United States rather than the "hardly clear" line on whether the restriction on speech impermissibly burdens the organization.

The proposed approach also recognizes that a government often has to "speak" in order to administer a program effectively: the government, in order to address a problem, often must take a specific approach that generates dissent.[126] The government's approach to addressing HIV/AIDS internationally provides a perfect example: the government had to determine the root causes of HIV/AIDS and take a (at least partially) subjective approach to *how* the government should go about *comprehensively* dealing with the issue. Part of the approach, as discussed in Part I, included eradicating prostitution around the world and educating people on HIV/AIDS through the help of previously successful NGOs. The First Amendment should not provide a "heckler's veto" of the "government's power to speak . . . [t]o govern."[127]

In fact, although the Supreme Court has never adopted this approach as the rule for speech requirements as a condition for government funding, the reasoning in past Second Circuit decisions has hinted that no free speech violation can occur when the recipient has "adequate alternative channels of protected expression."[128]

Such an approach is in line with the Supreme Court's decision in *Rust v. Sullivan*, in which the Supreme Court held that a federal prohibition on pregnancy centers performing abortions with federal funds did not violate the right to free speech because the pregnancy centers could still engage in abortion-related activities as long as the pregnancy center did not use federal funds for those activities.[129] Mere ineligibility for federal funds is not a restriction on a right to free speech because an organization has no constitutional right to government money.[130] A party, "[a]s a general matter[,]" can "decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights."[131]

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126. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting).

127. *Id.*; *see also* Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens.").

128. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 430 F. Supp. 2d 222, 249 (S.D.N.Y. 2006) (quoting Velazquez v. Legal Servs. Corp., 164 F.3d 757, 766 (2d Cir. 1999)) (internal quotation marks omitted).

129. *See supra* notes 102–08 and accompanying text.

130. *See* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2327–28 (2013) (stating that Congress has "broad discretion to tax and spend" without "affect[ing] the recipient's exercise of its First Amendment rights").

131. *Id.* at 2328.

In keeping with the reasoning of past free speech decisions, as well as the original intent of the right to free speech, the Supreme Court should refocus its analysis of speech requirements. The Court should determine whether the condition for receiving funding *blocks* a particular viewpoint from being heard.

Such an approach would provide clarity by replacing the "hardly clear" line created by the Court in determining whether the restriction on speech is reasonable on a case-by-case basis. Thus, the government should be allowed to impose a condition requiring a recipient of government money to engage in certain "speech" *as long as the potential recipient can state their views in another way.*

Conclusion

The Court's *Agency for International Development v. Alliance for Open Society International* decision struck down a requirement that NGOs combating HIV/AIDS internationally must explicitly oppose prostitution to be eligible for government funding through a new HIV/AIDS program. This decision ignored the original intent behind the First Amendment, which was to ensure that people had the *opportunity* to express their viewpoints and beliefs—not to restrict the policy choices Congress could make.

Congress should be allowed to impose conditions on government funding under its Spending Clause power—regardless of free speech concerns—in order to further the government's interest in restricting spending.

The Court should adopt a new approach to analyzing speech requirements imposed for an organization to be eligible for federal funding. The government should be allowed to enforce any such speech requirements as long as the potential recipient of the funds has other opportunities to engage in that speech. That view protects government's interest in restricting its spending and ensuring that the money is spent in a view in accord with the government purpose for the program and protects the public's free speech interest in hearing a multitude of viewpoints.

—Nicholas Bruno