AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights//Free Speech/ Public Property, Subsidies, Employees and Schools

**Agency for International Development v. Alliance for Open Society International, Inc. (II), \_\_\_ U.S. \_\_\_** (2020).

*The Alliance for Open Society International [AOSI]works to promote public health and democratic values in the United States and abroad. In 2013, the Supreme Court of the United States in* Agency for International development v. Alliance for Open Society International, Inc. *ruled that Congress could not condition funding for that organization on the condition that the AOSI adopt a policy “explicitly opposing prostitution and sex trafficking.” After that ruling was handing down, Agency for International Development [AID], the federal institution charged with providing humanitarian aid abroad, agreed to fund the AOSI, but not any of the AOSI’s foreign affiliates. AID claimed that the Supreme Court’s decision did not cover foreign affiliates because foreign citizens do not have First Amendment rights. AOSI returned to federal court, claiming that failure to fund foreign affiliates violated the First Amendment. The local federal district court declared the funding ban unconstitutional and that decision was affirmed by the Court of Appeals for the Second Circuit. The Agency for International Development appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5-3 vote reversed the lower federal courts. Justice Brett Kavanaugh’s majority opinion held that corporations incorporated outside the United States do not have constitutional rights. Justice Stephen Breyer’s dissent insisted that the case concerned the rights of American speakers to speak through foreign affiliates. Why do the justices dispute whose rights are at stake? Who has the better of the argument? Given that the First Amendment forbids Congress from abridging the freedom of speech, why should the identity of the person whose speech is being abridged matter? Justice Clarence Thomas insisted that Government had a right to control the use of Government funds. Why does he make this claim? Is his argument correct? Is his argument likely to carry the day as the Supreme Court becomes more conservative?*

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I2d6fb13eba0811ea8c24c7be4f705cad) delivered the opinion of the Court.

. . . .

. . . [I]t is long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution. As the Court has recognized, foreign citizens *in the United States* may enjoy certain constitutional rights—to take just one example, the right to due process in a criminal trial. And so too, the Court has ruled that, under some circumstances, foreign citizens in the U. S. Territories—or in “a territory” under the “indefinite” and “complete and total control” and “within the constant jurisdiction” of the United States—may possess certain constitutional rights. But the Court has not allowed foreign citizens outside the United States or such U. S. territory to assert rights under the U. S. Constitution. . . .

. . . [T]t is long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations. Plaintiffs’ foreign affiliates were incorporated in other countries and are legally separate from plaintiffs’ American organizations.

Those two bedrock principles of American constitutional law and American corporate law together lead to a simple conclusion: As foreign organizations operating abroad, plaintiffs’ foreign affiliates possess no rights under the First Amendment.

That conclusion corresponds to historical practice regarding American foreign aid. The United States supplies more foreign aid than any other nation in the world. Acting with the President in the legislative process, Congress sometimes imposes conditions on foreign aid. Congress may condition funding on a foreign organization’s ideological commitments—for example, pro-democracy, pro-women’s rights, anti-terrorism, pro-religious freedom, anti-sex trafficking, or the like. Doing so helps ensure that U. S. foreign aid serves U. S. interests. By contrast, plaintiffs’ approach would throw a constitutional wrench into American foreign policy. In particular, plaintiffs’ approach would put Congress in the untenable position of either cutting off certain funding programs altogether, or instead funding foreign organizations that may not align with U. S. values. We see no constitutional justification for the Federal Judiciary to interfere in that fashion with American foreign policy and American aid to foreign organizations.

. . . .

. . . [T]he United States is not forcing plaintiffs to affiliate with foreign organizations. Plaintiffs are free to choose whether to affiliate with foreign organizations and are free to disclaim agreement with the foreign affiliates’ required statement of policy. Any alleged misattribution in this case and any effect on the American organizations’ message of neutrality toward prostitution stems from their choice to affiliate with foreign organizations, not from U. S. Government compulsion. Because the First Amendment misattribution cases are premised on government compulsion to associate with another entity, those cases do not apply here.

. . . .

Stressing that their position is limited, plaintiffs emphasize that the Court could narrowly decide to protect the free speech rights of only those foreign organizations that are *closely identified* with American organizations—for example, those foreign affiliates that share similar names, logos, and brands with American organizations.. . . . But again, the First Amendment cases involving speech misattribution arose when the State forced one speaker to host another speaker’s speech. No compulsion is present here. Moreover, plaintiffs’ proposed line-drawing among foreign organizations would blur a clear rule of American law: Foreign organizations operating abroad do not possess rights under the U. S. Constitution. Plaintiffs’ carve-out not only would deviate from that fundamental principle, but also would enmesh the courts in difficult line-drawing exercises—how closely identified is close enough?—and leave courts without any principled basis for making those judgments. . . .

. . . .

The dissent emphasizes that this case concerns “the First Amendment rights of American organizations.”  We respectfully disagree with that characterization of the question presented. The Court’s prior decision recognized the First Amendment rights of American organizations and held that American organizations do not have to comply with the Policy Requirement. This case instead concerns foreign organizations that are voluntarily affiliated with American organizations. Those foreign organizations are legally separate from the American organizations. And because foreign organizations operating abroad do not possess constitutional rights, those foreign organizations do not have a First Amendment right to disregard the Policy Requirement.

. …

Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I2d6fb13eba0811ea8c24c7be4f705cad) took no part in the consideration or decision of this case.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I2d6fb13eba0811ea8c24c7be4f705cad), concurring.

I agree with the Court that the Policy Requirement does not violate the First Amendment as applied to respondents’ foreign affiliates, and I agree that nothing about this Court’s decision in *Agency for Int’l Development v. Alliance for Open Society Int’l, Inc.*, (2013) ([*AOSI I*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816551&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))), suggests otherwise. I write separately to note my continued disagreement with [*AOSI I*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816551&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))and to explain that the Policy Requirement does not violate the First Amendment for a far simpler reason: It does not compel anyone to say anything.

In *Agency for Int’l Development v. Alliance for Open Society Int’l, Inc.* (2013) ([*AOSI I*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816551&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))), the Court erred by holding that the Policy Requirement violated respondents’ First Amendment rights by conditioning their receipt of Leadership Act funds on the affirmation of certain program objectives. “The First Amendment does not mandate a viewpoint-neutral government.”  Thus, the Government may require those who seek to carry out federally funded programs to support the Government’s objectives with regard to those programs. . . .

Moreover, the mere conditioning of funds on “ ‘the affirmation of a belief’ ” tied to the purpose of a government program involves “no compulsion at all.” Such a condition is “the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject.”  Just as respondents are not compelled to associate with their foreign affiliates, they are not compelled to participate in the Leadership Act program.

. . . .

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I2d6fb13eba0811ea8c24c7be4f705cad), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I2d6fb13eba0811ea8c24c7be4f705cad) and Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I2d6fb13eba0811ea8c24c7be4f705cad) join, dissenting.

. . . .

[W]e observed in *Agency for Int’l Development v. Alliance for Open Society Int’l, Inc.* (2013) ([*AOSI I*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816551&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))), that “the Policy Requirement would plainly violate the First Amendment” if it operated “as a direct regulation of speech.”  Commanding someone to speak a government message contravenes the “basic First Amendment principle that ‘freedom of speech prohibits the government from telling people what they must say.’”

That the Policy Requirement is a funding condition, rather than a direct command, complicated the analysis in [*AOSI I*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816551&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) but did not change the outcome. True, Congress’ Article I spending power “includes the authority to impose limits on the use of [federal] funds to ensure they are used” as “Congress intends,” even conditions that “may affect the recipient’s exercise of its [First Amendment rights.”](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816551&pubNum=0000780&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RP&fi=co_pp_sp_780_213&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_213). . . Congress may not, however, “leverage funding to regulate speech outside the contours” of the program it has chosen to subsidize. . . . The constitutional line is whether a funding condition helps “specify the activities Congress wants to subsidize” or instead seeks to “reach [speech] outside” the federal program. . . .

. . .

The road has been long, but we have arrived at the specific question now before us: whether enforcing the Policy Requirement against respondents’ clearly identified foreign affiliates violates respondents’ own First Amendment rights. Like the District Court and the Court of Appeals, I believe the answer is yes.

. . . .

Respondents should prevail here for the same reasons they prevailed in [*AOSI I*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816551&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). When respondents speak through legally separate but clearly identified affiliates, we held, that speech is attributed to respondents for First Amendment purposes.  So when the Government demands as a condition of federal funding that their clearly identified affiliate “espouse a specific belief as its own,” respondents may express a contrary view through some other corporate channel only on pain of appearing hypocritical.  Leveraging Congress’ Article I spending power to distort respondents’ protected speech in this way therefore violates *respondents’* First Amendment rights—whatever else might be said about the affiliate’s own First Amendment rights (or asserted lack thereof).

These principles apply with full force to the dispute now before us. Respondents and their affiliates receive federal funding to fight HIV/AIDS *overseas*. What has been at stake in this case from the beginning, then, is protected speech often aimed at audiences abroad. Our decision in [*AOSI I*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816551&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) shielded respondents’ global message from government-compelled distortion in the eyes of those foreign audiences, as well as listeners here at home. . . . True, respondents’ international mission sometimes requires that they convey their message through affiliates incorporated in far-off countries, rather than registered here at home. But so what? Audiences everywhere attribute speech based on whom they perceive to be speaking, not on corporate paperwork they will never see. What mattered in [*AOSI I*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816551&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was thus how “clearly identified” the affiliates were with respondents, not the fact that the affiliates were incorporated as separate legal entities.  And what matters now is once again how “clearly identified” the affiliates are with respondents, not the fact that the affiliates were incorporated as *foreign* legal entities.

The First Amendment question therefore hinges, as it did before, on what an objective observer sees, hears, and understands when respondents speak through their foreign affiliates. As to that, not even the Government meaningfully disputes that respondents and their foreign affiliates are clearly identified with one another. Their appearances are the same. Their goals are the same. Their values are the same. *Their message* is the same. Leveraging Congress’ spending power to demand speech from respondents’ foreign affiliates distorts that shared message—and violates respondents’ First Amendment rights. So while respondents and their clearly identified foreign affiliates may be technically different entities with respect to such matters as contracts, taxes, and torts, they are constitutionally the same speaker when it comes to the protected speech at issue in this case.

. . . .

The First Amendment protects speakers from government compulsion that is likely to cause an audience to mistake someone else’s message for the speaker’s own views. . . . Corporate separation makes no meaningful difference in this speech-misattribution context, either.

. . . .

So far as I am aware, we have never before held that an American speaker forfeits First Amendment protection when it speaks though foreign affiliates to reach audiences overseas. It is easy to understand why. Many American news networks operate through clearly identified foreign affiliates when speaking abroad. Viewers attribute that speech to an American speaker: the network. That is the whole point of using *clearly identified* foreign affiliates. . . . But does that corporate structure mean that CNN—*i.e.*, the American parent organization—has no First Amendment protection against a Government effort to, say, prevent CNN Mexico from covering the fatal shooting of a Mexican child by a U. S. Border Patrol agent? . . . .

The upshot is: (1) The messages at issue here belong to American speakers; (2) clearly identified foreign affiliates are a critical means of conveying those messages overseas; and (3) enforcing the Policy Requirement against those affiliates distorts respondents’ own protected speech—and thus violates respondents’ own First Amendment rights.

The first “bedrock principle” on which the majority relies is the supposedly long-settled, across-the-board rule “that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution.”  That sweeping assertion is neither relevant to this case nor correct on the law.

It is not relevant because, as I have said, this case does not concern the constitutional rights of foreign organizations. . . . Even taken on its own terms, the majority’s blanket assertion about the extraterritorial reach of our Constitution does not reflect the current state of the law. The idea that foreign citizens abroad *never*have constitutional rights is not a “bedrock” legal principle. At most, one might say that they are unlikely to enjoy very often extraterritorial protection under the Constitution. Or one might say that the matter is undecided. But this Court has studiously avoided establishing an absolute rule that forecloses that protection in all circumstances. . . . .

. . . .

There is wisdom in our past restraint. Situations where a foreign citizen outside U. S. Territory might fairly assert constitutional rights are not difficult to imagine. Long-term permanent residents are “foreign citizens.” Does the Constitution therefore allow American officials to assault them at will while “outside U. S. territory”? Many international students attend college in the United States. Does the First Amendment permit a public university to revoke their admission based on an unpopular political stance they took on social media while home for the summer? . . .

. . ..

The majority’s second supposedly “bedrock principle” is that “separately incorporated organizations are separate legal units with distinct legal rights and obligations.”  Sometimes true, sometimes not. This baseline rule gives way in many contexts, and our First Amendment precedents (including [*AOSI I*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816551&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))) refute any suggestion that a workaday principle of corporate law somehow resolves the constitutional issue here in dispute.

. . . .

. . . . [O]ur First Amendment precedents leave no doubt that corporate formalities have little to say about the issue now before us. We have made clear again and again (and again) that speech may be attributed across corporate lines in the First Amendment context—including in our previous opinion in this very case. . . . The majority also attempts to distinguish the facts before us now from the facts that were before us last time. It asserts that, in contrast to the affiliations we addressed in [*AOSI I*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816551&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), respondents’ “current affiliations with foreign organizations are their own choice.” . . . [T] the description is not accurate. Foreign governments—and increasingly, the U. S. Government—often require respondents to work through foreign affiliates. . . .

The majority . . . says that a ruling in respondents’ favor would disrupt American foreign policy by requiring the Government to fund “organizations that may not align with U. S. values.”  We dismissed this same concern in [*AOSI I*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030816551&originatingDoc=I2d6fb13eba0811ea8c24c7be4f705cad&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The Policy Requirement, we explained, does not merely help the Government “enlist the assistance of those with whom it already agrees.”  It pressures funding recipients “*to adopt* a particular belief.”  All that is at stake here, in other words, is whether the Government may leverage the power of the purse to win converts to its cause. . . . . The majority also fears that determining whether Government action creates a risk of speech misattribution (and with it speech distortion) is a “legally unmoored” standard rife with “difficult line-drawing exercises.”  But we have drawn just this kind of line many times. . . .

. . . .