The Global Gag Rule: Undermining National Interests by Doing unto Foreign Women and NGOs What Cannot Be Done at Home

Nina J. Crimm

Follow this and additional works at: http://scholarship.law.cornell.edu/cilj

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.cornell.edu/cilj/vol40/iss3/1

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
The Global Gag Rule: 
Undermining National Interests by 
Doing unto Foreign Women and NGOs 
What Cannot Be Done at Home

Nina J. Crimm†

Introduction .................................................... 588

I. Key Political Actors and the Emergence and Evolution of 
the Global Gag Rule: 1960s–2006 ........................ 592
A. The 1960s ................................................ 592
B. The 1970s ............................................... 596
C. The 1980s ............................................. 598
D. The 1990s ............................................. 603
E. The New Millennium .................................. 604

II. U.S. National Interests .................................... 608
A. Concept .................................................. 608
B. Declared National Interests – WWII to Present .... 609
C. National Interests or Self-Interests? ......... 610
D. Harms That the GGR Produced ....................... 611
   1. Injuries to Foreign NGOs ......................... 611
   2. Adversities to Women ........................... 613
E. Presidents’ Actions Inconsistent with National 
   Interests .............................................. 614

III. Possible Unconstitutionality of the GGR Based on Equal 
Protection Principles .................................... 616

IV. Likely Unconstitutionality of the GGR Under the First 
Amendment ............................................. 617
A. The Unconstitutional Conditions Doctrine .... 618
B. Right to Freedom of Speech ......................... 619
   1. Rust v. Sullivan .................................. 619
   2. DKT International v. USAID and Alliance for Open 
      Society International v. USAID .......... 621
C. Right to Freedom of Expressive Association ... 627
D. How Foreign NGOs Would Likely Fare Under 
   Constitutional Principles ....................... 629
   1. Freedom of Speech .......................... 629

† Professor of Law, St. John’s University School of Law; LL.M. in Taxation, 
Georgetown University (1982); J.D. and M.B.A., Tulane University (1979); A.B., 
Washington University (1972). I wish to thank my research assistant, Bari Sittenreich, 
for her assistance.

Introduction

The United States embodies democratic principles founded on Judeo-Christian ideologies and sculpted by our founding fathers. The norms of our democracy have always permitted, and perhaps even encouraged, Americans to elect leaders they perceive as sharing their own religious moral ideals and as developing policies and laws that centrally feature their values. During the past several decades, candidates for the presidency and Congress increasingly have been elected largely as a result of the orchestrated support of particular religious groups. As our "American Theocracy" has evolved, consistent with the suggestion that Americans have a proclivity for exporting their personal moral virtuosity, these elected politicians intentionally have inculcated foreign policy and foreign assistance policy with their own religious moral values. Unfortunately, sometimes such designs can be fundamentally and unabashedly problematic.

A powerful vehicle through which a policymaker can inject morality into international affairs is the U.S. Agency for International Development (USAID), the government agency primarily responsible for distributing U.S. funds to foreign countries in furtherance of the U.S. government's for-
eign policy objectives. These goals are inextricably identified with, and guided by, the pursuit of "national interest." Although the U.S. Constitution provides Congress and the president shared powers over foreign affairs, for many years the two branches have contended for foreign policy primacy. In recent years, the president has been the dominant actor in setting national objectives with regard to the international sphere. Agencies such as the U.S. Department of State and USAID make available funds that Congress appropriates for governmental initiatives promoting national interests. USAID's role in this regard "has always had the twofold purpose of . . . expanding democracy and free markets while improving the lives of the citizens of the developing world." Therefore, when our elected policymakers formulate foreign policy and allocate funds to these agencies for its effectuation, their priorities must be entirely consistent with, and fully supportive of, these core national interests.

As a general matter, U.S. foreign aid historically "has never been an unconditional transfer of financial resources." Rather, the United States usually provides assistance subject to conditions and policies intended directly to serve national interests. Thus, U.S. foreign aid provided through USAID may attach conditions that ensure use of the resources exclusively for advancing the spread and stability of political democracies and free markets, or for enhancing the health, education, and economic well-being of populations in developing countries.

Nonetheless, the policy restrictions attached to some U.S. foreign

---

8. U.S. foreign aid has long been considered an instrument or tool of U.S. foreign policy. See, e.g., CURT TARNOFF & LARRY NOWELS, CRS REPORT FOR CONGRESS, FOREIGN AID: AN INTRODUCTORY OVERVIEW OF U.S. PROGRAMS AND POLICY 2 (2004) (describing U.S. foreign aid as a flexible means of promoting national interests, projecting U.S. values, solving problems, and influencing events through a "carrot and stick" approach); TERESA HAYTER, AID AS IMPERIALISM (1971) (discussing the imperialistic impact that international organizations, such as the World Bank, have on developing countries). Theoretically, U.S. foreign assistance is a strategy that also can be viewed as a part of U.S. foreign policy. See, e.g., President George W. Bush, Speech on the National Security Strategy of the United States of America at the White House (Sept. 17, 2002), http://www.whitehouse.gov/nsc/print/nssall.html (drawing together materials showing U.S. funding as foreign policy strategy).

9. For a discussion of the concept of national interest, see infra Part II.


11. See id. at 1081.

12. See id. at 1075.


14. HAYTER, supra note 8, at 15.

15. See id.

16. See TARNOFF & NOWELS, supra note 8, at CRS-2 (commenting on USAID's objectives).
assistance go beyond a direct tie to furthering national interests. One particular example is the Mexico City Policy, also known as the Global Gag Rule (GGR), which constrains USAID international development assistance for family planning. Despite USAID’s stated objectives and benefits of its family planning program, the GGR specifically prohibits foreign nongovernmental organizations (NGOs) from utilizing not just U.S. government funds but also their own money to provide abortion counseling to women, to lobby for or against legalized abortions, and to facilitate or offer abortions for women. These proscriptions have had enormous spillover effects on the ability of foreign NGOs to provide health services to a wide range of males and females.

In developing countries, the GGR has controlled operations of foreign NGOs and has oppressed women by controlling and restricting their access to information and health care. The reach of the GGR, however, has leaked beyond family planning programs and has adversely impacted a far wider range of health programs and human rights initiatives in which foreign NGOs have engaged. For example, the GGR has affected African

---

17. See, e.g., Hayter, supra note 8 (suggesting that aid often becomes subterfuge for imperialistic foreign policy strategies).
19. See, e.g., 22 U.S.C. § 2151 (2000). The GGR applies to funding, technical assistance, fellowships, and commodities, such as contraceptives and condoms. See generally WHAT YOU NEED TO KNOW, supra note 18 (discussing effects of GGR on family planning programs). According to USAID’s website, the objectives and benefits of its family planning program are:

- Enabling couples to determine whether, when, and how often to have children is vital to safe motherhood and healthy families. Voluntary family planning has profound health, economic, and social benefits for families and communities:
  - Protecting the health of women by reducing high-risk pregnancies
  - Protecting the health of children by allowing sufficient time between pregnancies
  - Fighting HIV/AIDS through providing information, counseling, and access to male and female condoms
  - Reducing abortions
  - Supporting women’s rights and opportunities for education, employment, and full participation in society
  - Protecting the environment by stabilizing population growth

20. WHAT YOU NEED TO KNOW, supra note 18, at 5-8.
21. See id.
22. This Article refers to foreign NGOs as those nonprofit organizations organized and operating abroad, including domestic NGOs and NGOs with international scope.
23. WHAT YOU NEED TO KNOW, supra note 18.
24. The GGR has precluded domestic and international NGOs from forming alliances with strategic foreign NGOs in countries affected by the GGR. See Mexico City Policy: Effect of Restrictions: Hearing Before the S. Comm. on Foreign Relations, 107th Cong. (2001) [hereinafter Mexico City Policy Hearing] (testimony of Aryeh Neier, President of the Open Society Institute). It has impacted the availability overseas of condoms for the prevention of HIV/AIDS and other sexually transmitted diseases. See Susan A.
and Middle East NGOs and their projects seeking to eliminate female genital cutting.\textsuperscript{25} distribute condoms, counsel individuals about safe sex, and offer other efforts to prevent and eradicate HIV/AIDS.\textsuperscript{26} This policy also has curtailed programs to maintain health clinics with broad ranges of medical services, including some that enable individuals to establish healthy pregnancies important for infant, child, and maternal health.\textsuperscript{27} Public opinions about each of these particular health and human rights matters, independent of the GGR, are highly charged. Public views about the GGR may be even more emotional, opinionated, and thorny because the rule elicits reactions, often religiously-based, about morality, abortion, women's rights to self-determination and dignity, NGOs' rights to freedom of speech and association, and NGOs' abilities to deliver essential health services.\textsuperscript{28}

This Article focuses on the GGR's grave harm to U.S. national interests. It suggests that the injury particularly is unwarranted because the GGR is purely a product of the legislation of personal morals by U.S. presidents (and a few congressional members) out of political and spiritual self-interest.\textsuperscript{29} Moreover, these politicians intentionally are forcing restraints on foreign NGOs that not only are not in our national interest but also likely would be unconstitutional if imposed on domestic NGOs.\textsuperscript{30} The


\textsuperscript{27} See, e.g., \textit{Mexico City Policy Hearing}, supra note 24 (testimony of Dr. Nirmal K. Bista).

\textsuperscript{28} See Dewey Memorandum, supra note 26; Rekha, supra note 26, at 1A.

\textsuperscript{29} See infra Part II (discussing the self-interested stances of past and present administrations).

U.S. Constitution embodies freedom of speech and association as overriding values that must be guaranteed. These fundamental principles are not just inconvenient technicalities of the Constitution to be accommodated. If we truly believe in the basic constitutional rights of free speech and association, we should want to promote them worldwide rather than to evade them outside our territorial boundaries.

Part I introduces the emergence and evolution of the GGR. This portion of the Article explores the self-interests of key actors and their religious convictions that were vital in the creation of the GGR. Part II begins with a brief discussion of foreign policy scholars' perspectives on the concept of "national interest." It then suggests that the GGR is not primarily a vehicle that serves national interests but rather an incompatible product of the moral and political self-interests of Presidents Ronald Reagan and George W. Bush. This section also reviews a variety of grave harms and injustices generated by the GGR that are contrary to our collective national interests. Among the problems discussed are unsatisfactory global public health conditions, injustices to women, and the negative image of our country abroad. This image arises in part from charges that the U.S. is a hypocritical democracy. Part III presents the possibility that as governmental regulation that co-opts foreign women's bodies for the self-interests of certain politicians, the GGR particularly discriminates against women and, if applied to U.S. women, possibly would be unconstitutional under equal protection principles. Part IV focuses on how the GGR restrictions imposed on foreign NGOs likely would not be constitutional if applied to domestic NGOs in the same position. The Article concludes that the GGR as a foreign assistance policy decision is a source of tremendous harm to the personal lives of residents of developing countries, has caused major international public health problems, has resulted in significant detriment to America's national interests, and is contrary to our basic notions of democratic processes and our fundamental constitutional values. It suggests that the Senate and House of Representatives, with their new Democratic majorities, should work together to enact legislation to nullify the GGR.


A. The 1960s

After approximately eight "silent decades," abortion emerged in the early 1960s as a public issue for Americans. Its appearance was partially

31. See U.S. CONST. amend. 1.
32. See Paula Tavrow, Undermining the AIDS Fight, BALT. SUN, Oct. 18, 2005, at 15A.
33. During the early years of our nation, no state had laws proscribing abortion. See JAMES C. MOHR, ABORTION IN AMERICA vii (1978). Until the mid-nineteenth century, Americans seldom publicly discussed the topic. See JEAN REITH SCHROEDER, IS THE FETUS A PERSON?: A COMPARISON OF POLICIES ACROSS THE FIFTY STATES 23, 27 (2000). By the mid-1800s, abortion had become a not uncommon medical procedure and disparate, limited clusters of individuals—physicians, feminists, anti-vice proponents, and others—with their own distinct financial, political, and social interests united in efforts to
the result of women's and physicians' open acknowledgement of the years of tragic pain and death endured as a result of numerous unsanitary and dangerous abortions performed illegally due to rigid state statutes banning abortion. At the same time, the media highly publicized thalidomide and German measles epidemic cases that resulted in the birth of deformed infants because of the inability of women to obtain legal abortions. These tragedies fueled public discourse and increased sentiment to liberalize abortion laws. Additionally, American social scientists and economists began to openly debate and urge attention to global population issues. Their concerns included the potential worldwide impact of a criminalize abortion. See id. at 27-29. In other words, the driving force to ban abortion was not widespread public opinion. See EVA R. RUBIN, ABORTION, POLITICS AND THE COURTS: ROE V. WADE AND ITS AFTERMATH 14 (1982).

By the early twentieth century, every state had enacted statutes banning abortion. See MOHR, supra, at vii; SCHROEDEL, supra, at 29. As a result of concerted efforts to "educate" the public on reasons to accept and embrace the new laws, public sentiment broadened its support. See MOHR, supra, at 171-199; SCHROEDEL, supra, at 29. Many physicians, who had willingly performed abortions before the anti-abortion statutes, readily abstained from undertaking the operations but not because of ethical considerations. See SCHROEDEL, supra, at 30. Judges and juries unhesitatingly convicted those who violated the abortion laws. See RUBIN, supra, at 14. Despite these changes, women of all economic groups, but perhaps especially the poor, sought illegal abortions for economic, health, and pregnancy-spacing reasons. See id. at 14-15.

During the late 1940s and early 1950s, as many as 1.2 to 1.3 million illegal abortions were performed annually in the United States, with an estimated 5,000 each year ending in the pregnant woman's death. See RUBIN, supra, at 15; Rickie Solinger, Chronology of Abortion Politics, in ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000 xi (Rickie Solinger ed., 1998).

34. See RAYMOND TATALOVICH & BYRON W. DAYNES, THE POLITICS OF ABORTION: A STUDY OF COMMUNITY CONFLICT IN PUBLIC POLICY MAKING 1 (1981). Social activist groups, such as the National Association for Repeal of Abortion Laws, founded in 1969, and the more conservative physician's group, the American Medical Association, were at the vanguard of change. See id. at 35, 51-62.

35. Although the thalidomide tragedies were far greater in Europe than the United States, one case, that of Sherri Finkbine, an American actress, was highly publicized. Ms. Finkbine had taken thalidomide that she had obtained in Europe and then attempted to obtain an abortion in her home state of Arizona. See RUBIN, supra note 33, at 20-21. She was refused an abortion, and after unsuccessfully fighting the refusal in the courts, she was forced to travel to Sweden to obtain an abortion. See id. at 20-21; TATALOVICH & DAYNES, supra note 34, at 44-46. In the German measles epidemic of 1962-1965, approximately 15,000 babies with deformities were born to women, many of whom were denied abortions. See RUBIN, supra note 33, at 21-22. In 1967, three states broke the rigid ban on abortion and legalized therapeutic abortions. TATALOVICH & DAYNES, supra note 34, at 9.

36. See RUBIN, supra note 33, at 21-22.

37. Although the population explosion was perceived as most imminent and dangerous in underdeveloped countries, it was not viewed as confined only to them. Harold F. Dorn, World Population Growth, in THE POPULATION DILEMMA 7, 7-28 (Philip M. Hauser ed., 1963); Irene B. Taeuber, Population Growth in Underdeveloped Areas, in THE POPULATION DILEMMA, supra, at 29, 29-45. The United States had experienced rapid population growth since World War II, which led to concerns that America's resources and, therefore, Americans' standard of living and way of life would be threatened. See Donald J. Bogue, Population Growth in the United States, in THE POPULATION DILEMMA, supra, at 70, 70-93; Joseph L. Fisher & Neal Potter, Resources in the United States and the World, in THE POPULATION DILEMMA, supra, at 94, 94-103.
population explosion, particularly as a result of the high fertility rates of economically disadvantaged women, a decline in death rates, unease with countries' food supplies and other resources, the lack of economic self-sufficiency and development of underdeveloped and developing countries, the potential peril to standards of living, potential immigration patterns, and political forces.  

As attention focused on global population issues, the United States' Cold War mentality and general ambivalence toward providing foreign assistance began to disintegrate. Early in his term, President John F. Kennedy, in a special address to Congress, described U.S. aid concepts as "largely unsatisfactory and unsuited for our needs and for the needs of the underdeveloped world," and U.S. foreign aid programs as "[b]ureaucratically fragmented, awkward and slow . . . obsolete, inconsistent and unduly rigid and thus unsuited for our present needs and purposes." He considered it a priority for U.S. national interests to reach beyond U.S. borders and to address the worldwide population explosion because "[t]he economic collapse of those free but less-developed nations which now stand poised between sustained growth and economic chaos would be disastrous to our national security, harmful to our comparative prosperity and offensive to our conscience." He further asserted that moral principles, world peace, and security require that "our new [foreign aid] program should not be based merely on reaction to communist threats or short-term crises," and that "[w]e have a positive interest in helping less-developed nations provide decent living standards for their people and achieve sufficient strength, self-respect and independence to become self-reliant members of the community of nations." President Kennedy successfully

---


41. Id. at 203–204.

42. Id. at 203. President Kennedy suggested that "the fundamental task of our foreign aid program in the 1960's is not negatively to fight Communism: Its fundamental task is to help make a historical demonstration that in the twentieth century, as in the nineteenth . . . economic growth and political democracy can develop hand in hand." Id. at 205.

Neither President Kennedy's adherence to Catholicism nor the opposition of the Catholic Church prevented President Kennedy and members of his administration from commencing the first U.S. foreign policy initiatives regarding world population issues. See Teitelbaum, supra note 38, at 67.

43. Special Message to the Congress on Foreign Aid, supra note 40, at 208.
encouraged Congress to enact the Foreign Assistance Act of 1961 (FAA).\textsuperscript{44} One part of the FAA, 22 U.S.C. § 2151b, authorized research on international family planning and empowered the president to devise foreign policy on global population issues and health programs.\textsuperscript{45}

With the change of administration to President Lyndon B. Johnson, U.S. foreign aid policy closely mirrored that of President Kennedy.\textsuperscript{46} President Johnson expressed a strong commitment to have U.S. foreign assistance programs "yield the greatest benefit to our country and to the free world."\textsuperscript{47} He backed international family planning initiatives and population assistance through the FAA-authorized USAID.\textsuperscript{48} As during the Kennedy administration, President Johnson recognized the long-term benefits to our nation of helping to reduce the "incessant cycle of hunger, ignorance and disease . . . [as] the common blight of the developing world," and he urged, "this vicious pattern can be broken. It must be broken if democracy is to survive."\textsuperscript{49} To this end, women (and couples) must be given the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{44} Pub. L. No. 87-195, 75 Stat. 424 (1961). On signing the FAA on September 4, 1961, President Kennedy stated that "[t]he long-term commitment of development funds, which the bill authorizes, will assist the under-developed countries of the world to take the critical steps essential to economic and social progress." Statement by the President upon Signing the Foreign Assistance Act, 1 PUB. PAPERS 588 (Sept. 4, 1961). These objectives are reflected in Congress' goals in enacting the FAA: international family planning to accomplish stabilization of economies, education, health, food supplies, quality of life, and self-reliance, especially in developing and underdeveloped countries. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 88 101-02, 75 Stat. 424 (1961).
\item \textsuperscript{45} 22 U.S.C. § 2151b (2000). The concept of family planning dates from antiquity. Its objective is to enable individuals to foster their well-being and that of all family members through reproductive choice and self-determination. "The ethics of its practice is that of full information . . . and the making of a free and uncoerced, honest and responsible decision . . . ." M.C. Asuzu, Family Planning, Contraception and Natural Family Planning: What Place for Imperialism?, in FAMILY PLANNING, BIRTH CONTROL, AND WESTERN IMPERIALISM 8 (1992). This notion contrasts with population control, which is a program to achieve certain population patterns, distributions, or rates. Id. Population control programs can disregard the objectives of family planning and operate as a restriction on individuals' opportunities for freedom of reproductive choices. Id.
\item \textsuperscript{46} The Kennedy Legend & the Johnson Performance, TIME, Nov. 26, 1965, 30 30-31, available at http://www.time.com/time/magazine/article/0,9171,834704,00.html.
\item \textsuperscript{47} Statement by the President upon Appointing a Committee to Review Foreign Aid Programs, 1 PUB. PAPERS 84 (Dec. 26, 1963).
\item \textsuperscript{48} President Johnson and World Bank President Robert McNamara, among other world leaders, considered the population explosion one of the most serious world problems of the time. See Steven W. Sinding et al., Seeking Common Ground: Unmet Need and Demographic Goals, 20 INT'L. FAM. PLAN. PERSP. 23, 23 (1994).
\item \textsuperscript{49} Special Message to the Congress on the Foreign Aid Program, 1 PUB. PAPERS 117, 118 (Feb. 1, 1966). President Johnson repeated this sentiment on numerous occasions. See, e.g., Statement by the President upon Signing the Foreign Assistance Act, 1 PUB. PAPERS 978, 978 (Sept. 6, 1965).
\end{itemize}
\end{footnotesize}
means to voluntarily exercise control over their fertility.  

In 1969, the United States successfully spearheaded an initiative to create the United Nations Fund for Population Activities (UNFPA). Initially, the United States was its largest funding agent. U.S. support corresponded with a period of concern by other nations' governments about their abilities to provide adequate health, education, food, and social services to their residents and liberal reformation of abortion legislation abroad. Not surprisingly, by the late 1960s, the grassroots domestic and international reproductive rights movement had begun to expand and strengthen.

B. The 1970s

Although as a presidential candidate Richard Nixon strongly opposed abortion, as President he continued the 1960s trend of U.S. financial support for global population programs. During Nixon's administration, it became clear that abortion had evolved in America from a public health issue to a moral and a women's rights issue, with political action groups at the vanguard of the transformation. The American populace was clearly polarized in its opinions.

Pro-choice activists and other feminists hailed the January 22, 1973 U.S. Supreme Court decision in Roe v. Wade, which established American women's constitutional right to abortion access. The decision, however, was only a partial victory for women's self-determination. It acknowledged increasing state interests in protecting an unborn fetus as pregnancy progresses. The decision emboldened pro-life activists and many religious leaders and organizations to champion a massive move-

50. Sinding et al., supra note 48, at 23.
51. See Teitelbaum, supra note 38, at 67.
52. See id. For subsequent funding trends, see infra note 100.
55. See Tatalovich & Daynes, supra note 34, at 196. The National Organization of Women, which in 1967 had announced its interest in liberalizing state abortion statutes, lobbied for such reforms throughout the 1970s and also campaigned for and against candidates for Congress based on their positions on abortion. See id. at 153. Also, the National Abortion Rights Action League, founded in 1969 as the National Association for the Repeal of Abortion Laws, actively sought abortion law reformation. See id. The Roman Catholic Church and its allied interest groups were the most important contributors to the active pro-life movement during the 1970s. See id. at 155.
56. See Teitelbaum, supra note 38, at 67.
57. See Tatalovich & Daynes, supra note 34, at 83.
58. See id. at 197.
60. See Hooton, supra note 54, at 61-62.
61. See id.
62. See id. Commentators have suggested that the Roe decision would engender a "shift from dangerous to safe abortions," thus perhaps enabling a shift of moral debate from protecting fetal life to advancing women's health. See, e.g., Cass R. Sunstein, Why
ment, premised on the immorality of abortion, to undermine the Roe decision. They personally confronted and attempted to intimidate women seeking abortions and sought change through state and federal legislation. Indeed, in 1973 alone, eighteen constitutional amendments were introduced into Congress either to entirely prohibit abortion or radically restrict abortion rights.

In that same year, having failed domestically to legislatively reverse the impact of Roe v. Wade, pro-life groups took a path of lesser resistance and partially derailed the momentum of U.S.-supported international population assistance. They enlisted the aid of Senator Jesse Helms of North Carolina, a Southern Baptist whose pro-life stance was based on his ultra-conservative religious beliefs. Senator Helms, a politician who regularly wore his religion on his shirt sleeve and wanted the continued support of his pro-life constituents, successfully sponsored an amendment to the FAA to forbid NGOs from using federal governmental funding “for the performance of abortions as a method of family planning.” The Helms amendment did not forbid NGOs from utilizing money from other sources for these purposes. In 1974, despite President Nixon’s strong support

---


64. See TATALOVICH & DAYNES, supra note 34, at 84-85; Teitelbaum, supra note 38, at 68-70.

65. See TATALOVICH & DAYNES, supra note 34, at 191-94. In the years that followed 1973, ultra-conservatives, such as Senator Jesse Helms, introduced more constitutional amendments in Congress. See id. at 181-82.

66. Although Roe v. Wade was not legislatively overruled, Congress did enact the Hyde Amendment in 1976. Hyde Amendment of 1976, Pub. L. No. 94-439, 90 Stat. 1434 (1976). The amendment prohibited Medicaid-funded abortions except “where the life of the mother would be endangered.” Id. The Hyde Amendment was not a prohibition on the use of non-government funds for abortions.

67. See TATALOVICH & DAYNES, supra note 34, at 195.

68. Generally, Southern Baptists are considered evangelical, although some vocal Southern Baptists are considered fundamentalists. See Walter Russell Mead, God’s Country?, FOREIGN AFF., July/Aug. 2006, at 24, 27.


In proposing the 1973 amendment, after describing abortion as killing a “human being who has done no wrong and has made no choice,” Senator Helms suggested, in emotionally- and morally-laden language, that “[u]nless Congress [enacts the amendment] now, we will soon see the day when abortifacient drugs and techniques dominate [US]AIDS’s program, and the United States becomes the world’s largest exporter of death.” 119 CONG. REC. 32292, 32293-94 (1973). After congressional action, he stated that “[t]his is an important step forward . . . and one that will have international implications for a better world. . . . [T]his [means] . . . highlight the moral nature of the problem of abortion, and the repugnance with which Congress views any attempt to enlarge or expand the practice of abortion.” 119 CONG. REC. 39619, 39620 (1973).

71. The NGOs were required to maintain separate accounts for U.S. governmental aid and money from other sources to be able to prove compliance. See LARRY NOWELS,
for global population programs. USAID created policy (later promulgated as a regulatory prohibition) against providing U.S. funding for "information, education, training, or communication programs that seek to promote abortion as a method of family planning." As a result, over the subsequent three decades, no U.S. funding could be used to provide abortions abroad except to save a woman's life or in cases of rape or incest.

C. The 1980s

The remainder of the 1970s, during the presidencies of Gerald Ford and Jimmy Carter, resulted in continued but muted government support for international family planning initiatives. The tide changed under President Ronald Reagan. The Religious Right and pro-life constituency, which had actively and forcefully supported President Reagan's quest for the White House in 1980, made significant headway in the international

---

72. See Teitelbaum, supra note 38, at 67 (relating President Nixon's support for the 1974 U.N. World Population Conference in Bucharest, during which the American delegation pushed its agenda on a policy favoring immediate action worldwide to reduce high fertility).


74. Ernst et al., supra note 53, at 774.

75. As a presidential candidate, Jimmy Carter had refused to take a clear stand regarding abortion. See TATALOVICH & DAYNES, supra note 34, at 198-99; see also FREDERICK S. JAFFE ET AL., ABORTION POLITICS 118-19 (1981). President Carter entered office "arguing for restraint and morality in foreign policy," and he was known for connecting U.S. political support and foreign developmental aid to "basic human needs." James H. Lebovic, National Interests and U.S. Foreign Aid: The Carter and Reagan Years, 25 J. PEACE RES. 115, 116 (1988). President Carter's perception of national interests harbored some Cold War mentality, but humanitarian interests were a main component of his foreign aid policy. Id. (explaining that the "Carter aid policy was promoted as a means of achieving international agreement in areas of concern to the United States, 'to demonstrate... America's compassion for the poor and dispossessed around the world', and to help the US 'compete effectively with the Soviets in the Third World.'" (footnotes omitted)

76. See Teitelbaum, supra note 38, at 68. The debate on the impact of the population explosion evolved while President Reagan was in office. In 1977, the Carter administration considered high fertility a threat to economic development. See NOWELS & VIELLETTE, supra note 48, at CRS-3.

77. NOWELS & VIELLETTE, supra note 48, at CRS-3.

realm, where foreign individuals and entities were not only powerless to oppose them but also dependent on foreign aid. An important personality in this regard was James L. Buckley. After Roe v. Wade, then former U.S. Senator Buckley sponsored several unsuccessful constitutional amendments to ban abortion, suggesting that his actions were necessary because of "the ethical tradition of more than 2000 years of Western civilization" and a slippery slope toward convenience-based euthanasia. While serving in the Reagan administration as Under Secretary of State for International Security Affairs from 1981 to 1982, Buckley was unable to eradicate all U.S. funding for population assistance. Nonetheless, he persevered in his efforts to curtail funding for international family planning. Upon the urging of pro-life supporters, President Reagan named him as chairman of the U.S. delegation to the 1984 U.N. International Conference on Population in Mexico City. This appears to have been a tactical self-interested move by Reagan, who was running for reelection, to ensure enlarged support by the Religious Right, support which had been essential to his 1980 campaign for the presidency.

It was at that August 1984 conference in Mexico City that the U.S. delegation, led by Buckley, took a position contrary to that of delegations from many developing countries and to that of the United States during the previous decades. The delegation contended—with the approval of President Reagan—that population growth was a neutral, rather than a negative, force in economic development.

79. For example, the Religious Right supported the Reagan administration's channeling of aid to the Nicaraguan contras. See, e.g., SARA DIAMOND, SPIRITUAL WARFARE: THE POLITICS OF THE CHRISTIAN RIGHT 151-52 (1989).

80. Although the domestic pro-life movement supported the notion of a constitutional amendment banning abortion, there was not sufficient nationwide support. Instead, the pro-life movement turned its attention to limiting domestic funding for abortion and contraceptive services and to eliminate governmental funding for international population assistance. See Teitelbaum, supra note 38, at 68-69.


82. See id. at 52; Rubin, supra note 33, at 139-43 (explaining that Senator Buckley attempted several constitutional amendments).

83. See Teitelbaum, supra note 38, at 69.

84. See id.

85. The Religious Right strongly supported President Reagan's re-election in 1984. See Diamond, supra note 78.

86. See id. At the time of the 1984 presidential election, exit polls indicated that only 8% of Americans considered abortion as a top issue for them in choosing a president. See Lydia Saad, Public Opinion about Abortion—An In-Depth Review: Abortion as a Voting Issue, GALLOP POLL, Jan. 22, 2002.

87. See NOWELS & VEILLETTE, supra note 48, at CRS-3.

stance, the delegation announced a new U.S. policy, the "Mexico City Policy," later dubbed the Global Gag Rule (GGR). This new policy prohibited foreign NGOs receiving U.S. funds from performing or actively promoting abortions "as a method of family planning" regardless of whether the money used for those purposes was from the U.S. government or other sources. USAID began applying the GGR on January 1, 1985. In the months that followed, USAID adopted regulatory rules for eligibility for U.S. funding. These eligibility rules required an international or foreign NGO to certify, by signing a financial assistance agreement, the "Standard Provision," that it would refrain from using U.S. aid for: (1) procurement or distribution of equipment intended for use in abortions as a method of family planning, (2) fees or payments intended to coerce or motivate women to have abortions, (3) payments to persons to perform abortions or to solicit persons to undergo abortions, (4) information, education, training or communication programs that seek to promote abortion as a family planning method, (5) grassroots and legislative lobbying for abortion, and (6) biomedical research relating to abortions or involuntary sterilizations.

Opponents of the GGR attempted judicially and legislatively to have the USAID rules altered. Three domestic NGOs brought separate law-


89. See NOWELS & VEILLETTE, supra note 48, at CRS-3.

90. To accommodate foreign governments' sovereign prerogative, the policy did not apply to overseas governments. See id. at CRS-4-5. Nonetheless, recipient foreign governments were required to maintain separate accounts for U.S. aid that USAID could monitor. See id.

91. THE MEXICO CITY POLICY, supra note 71, at CRS-3. According to USAID, abortion is considered a "method of family planning when it is for the purpose of spacing births, including (but not limited to) abortions performed for the physical or mental health of the mother. To perform abortions is defined as the operation of a 'facility where abortions are performed as a method of family planning.'" Id. at CRS-2. Promoting abortion is the commitment of resources "'in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.'" Id. at CRS-3.

92. See id. at CRS-4.

93. Id. at CRS-4 n. 7.

94. If the direct funding recipient were a domestic NGO that sub-granted U.S. funds to a foreign NGO, the direct recipient organization was required to certify that it would obtain the proper certifications from the sub-grantee. See id. at CRS-4. Specifically, the NGO was required to sign a statement that it "will not furnish assistance for family planning under this grant to any foreign non-governmental organization which performs or actively promotes abortion." DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 278 (D.C. Cir. 1989). On the other hand, if the direct funding recipient were a foreign NGO, such as the International Planned Parenthood Foundation of London (IPPF), it was required to sign the full certification itself, whether or not it would sub-grant the funds to another foreign NGO. See THE MEXICO CITY POLICY, supra note 71, at CRS-4.

suits constitutionally challenging the eligibility requirements applied to U.S. NGOs, which, unlike the Standard Provision for foreign NGOs, did not contain the prohibition against utilizing private financial resources for abortion-related activities. Rather, the challenged Standard Provision applicable to domestic NGOs provided that they must certify that they neither would provide aid for family planning under the grant to a participating foreign NGO nor would grant financial support to a foreign NGO for abortion-related activities. None of the lawsuits were successful. Despite numerous attempts over the following six years, Congress was una-

---

97. See DKT Mem'l Fund, 887 F.2d at 278.

In DKT Memorial Fund, the majority held that the certification requirement did not restrict the domestic NGO from using its private funds for abortion or its promotion and did not require the NGO to be a mouthpiece for government policy with its own funds. 887 F.2d at 275. Therefore, despite the passionate partial dissent of Justice Ginsburg, the majority did not find the NGO’s First Amendment free speech rights infringed. Id. Moreover, the majority concluded that it had no jurisdiction to decide the NGO’s assertion that the GGR infringed its First Amendment right of freedom of association when it used its own funds, rather than USAID money, to make grants to foreign NGOs. Id. at 296. The majority dismissed this claim on ripeness grounds and not on the merits. Id. It noted, however, that neither it nor the Supreme Court has held that the U.S. Constitution protects rights of association between organizations. Id. at 293.

In Planned Parenthood Federation of America, the domestic NGO alleged that the GGR infringed on its First Amendment rights. 915 F.2d 59. It asserted that the GGR prevented it from associating and collaborating with foreign NGOs, such as Planned Parenthood’s foreign affiliates. Id. at 60–61. This constraint thwarted the foreign NGOs from satisfying their missions regarding reproductive rights advocacy. The court rejected the assertion, finding “no constitutional rights implicated” by the statute or the Standard Provision because domestic NGOs are free under the GGR to use their own funds to pursue abortion-related activities in foreign countries and that any harm is the result of foreign NGOs choosing to take USAID funds. Id. at 66. Additionally, responding to the assertion by Planned Parenthood that the Standard Provision imposes an unconstitutional condition on the domestic recipient of a government benefit, the court determined that the Standard Provision did not prevent Planned Parenthood from acting as a funding agent in any particular country in two capacities: (1) as a conduit of U.S. funds to foreign NGO subcontractors whose activities are not abortion-related, and (2) as a grantor of non-U.S. funds to foreign NGOs having abortion-related activities. Thus, the court held that the Standard Provision did not impose an unconstitutional condition. Id.

In Pathfinder Fund, the court addressed the issue left undecided by the Court of Appeals in DKT International. 746 F. Supp. 192. Specifically, it considered whether the First Amendment right of expressive association of Pathfinder Fund and two other domestic NGOs was infringed by the GGR. Id. at 193. The court held that the NGOs’ right of expressive association was not infringed because (1) the domestic NGOs were free to use private funds to carry out abortion-related projects abroad and free to associate with non-certifying foreign NGOs to perform abortion-related initiatives, (2) the domestic NGOs were not prevented from associating with foreign NGOs for abortion in certain circumscribed circumstances, and (3) six of the eight foreign NGOs with which Pathfinder Fund et al. desired to associate were not subject to the Standard Provision. Id. at 195–99. Thus, the court held that the Standard Provision did not impose a “substantial burden” on Pathfinder Fund et al. Id. at 199. The court determined that the Standard Provision was rationally related to the government’s interests and found the Standard Provision constitutional as applied to Pathfinder Fund et al. Id.
ble to enact any measures to alter the GGR.99

USAID withdrew funding from foreign NGOs that refused to sign the Standard Provision.100 For example, International Planned Parenthood Foundation (IPPF), London, a large and visible NGO dedicating less than 1% of its budget, approximately $400,000 annually, to abortion-related work, was quickly affected.101 For years, it had received approximately $11-$12 million annually (25% of its budget) from USAID; now USAID declined to appropriate this entire amount to IPPF.102 IPPF was not alone in suffering severe financial consequences;103 records indicate that numerous foreign NGOs were financially unable to support staff or even to con-

99. See THE MEXICO CITY POLICY, supra note 71, at CRS-12.
101. See THE MEXICO CITY POLICY, supra note 71, at CRS-5.
102. See id. at CRS-6.
103. USAID withdrew $10 million of aid earmarked for UNFPA. See id. at CRS-7. The money was withheld not because UNFPA practiced or promoted abortion but rather because of its commitments in China, a country that the U.S. government considered to coerce family planning through sterilization and abortion practices. See id. at CRS-7 n. 16; Susan A. Cohen, The United States and the United Nations Population Fund: A Rocky Relationship, 2 GUTTMACHER REP. ON PUB. POL'Y 1 (1999), available at http://www.guttmacher.org/pubs/tgr/02/1/gr020101.pdf; U.S. Support for Family Planning Overseas, supra note 100. China's perceived coerciveness was clearly contrary to the Supreme Court's long-standing acknowledgement of our constitutional values prohibiting coercive sterilization. See Skinner v. Oklahoma, 316 U.S. 535 (1942). The Population Institute, along with other NGOs, filed a lawsuit in federal court seeking to enjoin the USAID Administrator from withholding the $10 million. See Population Inst. v. McPherson, 797 F.2d 1062 (D.C. Cir. 1986). After many twists and turns and an appeal, the circuit court ultimately upheld the USAID Administrator's decision to deny the funding to UNFPA. See id. at 1074. For a description of the lawsuit, see Tobey E. Goldfarb, Abstinence Breeds Contempt: Why the U.S. Policy on Foreign Assistance for Family Planning Is Cause for Concern, 33 CAL. W. INT'L L.J. 345, 360-61 (2003). The year after President Clinton removed the GGR, see infra note 109-11 and accompanying text, Representative Christopher Smith and several Chinese nationals filed a lawsuit against the new USAID Administrator to enjoin disbursement of USAID grant monies to UNFPA. Smith v.
continue their work after some period of fiscal deprivation. Although USAID alleged that it reallocated governmental funds from non-certifying NGOs to certifying NGOs, opponents of the GGR suggested that the most experienced, connected, and effective of the former foreign NGOs were excluded from USAID funding.

D. The 1990s

To the chagrin of the Religious Right, the United States officially changed its position on tying foreign aid grants to the GGR when President Bill Clinton took office. One of President Clinton's first acts in office on his inaugural day, January 22, 1993, was to abolish the GGR and to issue instructions to the Administrator of USAID to remove the Standard Provision from USAID grant documentation. In his memorandum on the policy withdrawal, President Clinton explained that the GGR was excessively broad, was not mandated by the FAA, and "had seriously undermined much needed efforts to promote safe and efficacious family planning programs in foreign nations." In public remarks that same day, President Clinton stated that reversal of the GGR would "allow us to once again provide leadership in helping to stabilize world population." Opponents in Congress attempted to legislate modifications to President Clinton's removal of the policy, but, under threat of presidential veto, they


105. In 1991, Representative Smith reported that 400 NGOs had signed the Standard Provision. See The Mexico City Policy, supra note 71, at CRS-5. Skeptics have suggested that many NGOs signed the certification statement in order to ensure their survival, whether or not they actually complied with the GGR. See, e.g., The Mexico City Policy, supra note 71, at CRS-5; Patty Skuster, Advocacy in Whispers: The Impact of the USAID Global Gag Rule upon Free Speech and Free Association in the Context of Abortion Law Reform in Three East African Countries, 11 Mich. J. Gender & L. 97 (2004).

106. See The Mexico City Policy, supra note 71, at CRS-9.

107. The Religious Right did not support President Clinton's candidacy and demonized him while in office, even seeking his impeachment. See, e.g., Chip Berlet, Clinton, Conspiracism, and the Continuing Culture War, PUB. EYE, Spring 1999, at 1, available at http://www.publiceye.org/magazine/v13n1/PE_V13_N1.pdf. Throughout his tenure as president, they were unable to influence President Clinton's foreign policy and foreign assistance policy decisions.


109. Id. The changed position resulted in IPPF applying anew for USAID grants, unlike numerous other foreign NGOs that the GGR previously affected. See The Mexico City Policy, supra note 71, at CRS-9.

110. Memorandum on the Mexico City Policy, supra note 108, at 10–11.

111. Remarks on Signing Memorandums on Medical Research and Reproductive Health and an Exchange with Reporters, 1 PUB. PAPERS 6, 8 (January 22, 1993).
were unsuccessful at that time.\textsuperscript{112}

Abortion opponents continued to exert political pressure on President Clinton to reinstitute the GGR.\textsuperscript{113} Finally, in 1999, President Clinton made a political compromise.\textsuperscript{114} In exchange for congressional support to permit U.S. payment of nearly $1 billion that it owed the United Nations, Congress enacted legislation, expiring at the end of fiscal year 2000. This legislation restricted eligibility for USAID funding to foreign NGOs agreeing to three certification restrictions that were slightly more limited than the certification requirements instituted under President Reagan.\textsuperscript{115} Entitlement to USAID funds was predicated on an NGO certifying that it would refrain from using funds, regardless of their source, for: (1) performing abortions in a foreign country, except in cases of incest, rape, or where pregnancy endangered the life of the mother, (2) violating a foreign country's laws regarding abortion, or (3) attempting to alter foreign nations' laws or governmental policies concerning abortion restrictions, regulations, or entitlement.\textsuperscript{116} In a concession to President Clinton, Congress legislatively enabled the President to have the certification requirement waived for up to $15 million in USAID grants to foreign NGOs, but his election of this waiver would trigger the penalty of reducing population aid appropriation to child health programs by $12.5 million.\textsuperscript{117} President Clinton exercised his waiver election on November 30, 1999, one day after signing the legislation.\textsuperscript{118} The beneficiaries of this waiver were the IPPF, one of the organizations denied USAID funding during President Reagan's administration due to its refusal to sign the certification, the World Health Organization, and seven other NGOs.\textsuperscript{119}

E. The New Millennium

In 2001, President George W. Bush won his first term in office in a contentious battle that did not give him the majority of the American popular vote.\textsuperscript{120} Although exit polls showed that nationwide only 14% of voters considered abortion a top issue in their choice,\textsuperscript{121} some analysts consider

\textsuperscript{112} See Nowels & Veillette, supra note 48, at CRS-6.
\textsuperscript{113} Id.
\textsuperscript{114} See Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000, 2 Pub. Papers 2156, 2159-60 (Nov. 29, 1999) (stating that despite the bill's inclusion of the contested provision on international family planning, President Clinton instructed USAID to implement the new restrictions "in such a way as to minimize to the extent possible the impact on international family planning efforts").
\textsuperscript{116} Id.
\textsuperscript{117} Id. See Issues for Congress, supra note 100, at CRS-5.
\textsuperscript{118} See id.
\textsuperscript{119} See id. at CRS-5-6.
\textsuperscript{120} See Infoplease, Presidential Election of 2000, Electoral and Popular Vote Summary, http://www.infoplease.com/ipa/A0876793.html (last visited Aug. 8, 2007) (showing that President Bush received 47.87% of the popular vote and Al Gore, Jr. received 48.38% of the popular vote).
\textsuperscript{121} See Saad, supra note 86.
the issue to have been pivotal in Bush's victory.\footnote{122}{See id.}

President Bush, a devoutly conservative "born again" Methodist and ardently pro-life\footnote{123}{President Bush was raised as an Episcopalian but after "a life-changing conversion[ ] around the age of forty," in which he went "from being a nominal Christian to a born-again believer," he joined the United Methodist Church. \textit{Jim Wallis, God's Politics} 139 (2005).} politician, quickly found a symbolically potent means of repaying his crucial pro-life constituency, mainly composed of solidly conservative Roman Catholics, fundamentalist Christians, and evangelical Christians.\footnote{124}{See \textit{Peter Singer, The President of Good & Evil: The Ethics of George W. Bush} 34–114 (2004). President Bush has repeatedly expressed opposition to abortion and stem-cell research. He made one illustrative broad pro-life statement on August 9, 2001: "I worry about a culture that devalues life, and believe as your President I have an important obligation to foster and encourage respect for life in America and throughout the world." See \textit{id.} at 34. Furthermore, at the second presidential debate on October 8, 2004 at Washington University, President Bush stated: "[W]e're not going to spend taxpayers' money on abortion. This is an issue that divides America, but certainly reasonable people can agree on how to reduce abortions in America. I signed the partial-birth — the ban on partial-birth abortion. It's a brutal practice. It's one way to help reduce abortions." Transcript: Second Presidential Debate, Wash. Univ., Oct. 8, 2004, available at http://www.washingtonpost.com/wp-srv/politics/debatereferee/debate_1008.html.} On January 22, 2001, as one of his first official

\begin{enumerate}
\item \footnote{122}{See id.}
\item \footnote{123}{President Bush was raised as an Episcopalian but after "a life-changing conversion[ ] around the age of forty," in which he went "from being a nominal Christian to a born-again believer," he joined the United Methodist Church. \textit{Jim Wallis, God's Politics} 139 (2005).}
\item \footnote{124}{See \textit{Peter Singer, The President of Good & Evil: The Ethics of George W. Bush} 34–114 (2004). President Bush has repeatedly expressed opposition to abortion and stem-cell research. He made one illustrative broad pro-life statement on August 9, 2001: "I worry about a culture that devalues life, and believe as your President I have an important obligation to foster and encourage respect for life in America and throughout the world." See \textit{id.} at 34. Furthermore, at the second presidential debate on October 8, 2004 at Washington University, President Bush stated: "[W]e're not going to spend taxpayers' money on abortion. This is an issue that divides America, but certainly reasonable people can agree on how to reduce abortions in America. I signed the partial-birth — the ban on partial-birth abortion. It's a brutal practice. It's one way to help reduce abortions." Transcript: Second Presidential Debate, Wash. Univ., Oct. 8, 2004, available at http://www.washingtonpost.com/wp-srv/politics/debatereferee/debate_1008.html.}


A follow-up Gallup poll showed that in November 2004, 17.45% of the 1,016 participants identified themselves as part of the Religious Right and 73.49% stated that they definitely did not identify as such. The Gallup Org., Gallup Brain, Question D26, http://brain.gallup.com/documents/question.aspx?question=151320 (last visited Oct. 3, 2006). John Green suggests that 88% of Traditionalist Evangelicals (the Religious Right) voted for President Bush in 2004, and that they represented 15% of the total electorate. See John Green & Steven Waldman, \textit{Twelve Tribes: 2004 and 2000 Comparison: How Did the Votes of the Twelve Tribes in 2004 Compare to 2000?}, BeliefNet, http://www.beliefnet.com/story/161/story_16168.html (last visited Aug. 8, 2007); \textit{Twelve Tribes Electorate Percentages, supra.} This group represented 26% of President Bush's support in his 2004 election. See \textit{Twelve Tribes Electorate Percentages, supra.}


A follow-up Gallup poll showed that in November 2004, 17.45% of the 1,016 participants identified themselves as part of the Religious Right and 73.49% stated that they definitely did not identify as such. The Gallup Org., Gallup Brain, Question D26, http://brain.gallup.com/documents/question.aspx?question=151320 (last visited Oct. 3, 2006). John Green suggests that 88% of Traditionalist Evangelicals (the Religious Right) voted for President Bush in 2004, and that they represented 15% of the total electorate. See John Green & Steven Waldman, \textit{Twelve Tribes: 2004 and 2000 Comparison: How Did the Votes of the Twelve Tribes in 2004 Compare to 2000?}, BeliefNet, http://www.beliefnet.com/story/161/story_16168.html (last visited Aug. 8, 2007); \textit{Twelve Tribes Electorate Percentages, supra.} This group represented 26% of President Bush's support in his 2004 election. See \textit{Twelve Tribes Electorate Percentages, supra.}

Walter Russell Mead asserts that forty percent of the vote supporting Bush for reelection came from evangelicals. \textit{God’s Country? A Conversation with Walter Russell Mead}}
acts on his first day in office, President Bush restored all restrictive measures of the original GGR that President Reagan instituted in 1984.\textsuperscript{126} His action ignored the preferences of the 80\% of Americans who supported U.S. assistance for foreign family planning initiatives that would enable women overseas to control the spacing and number of their children\textsuperscript{127} and for “voluntary family-planning programs in developing nations.”\textsuperscript{128} He pushed ahead, commenting at the time that it “is my conviction that taxpayer funds should not be used to pay for abortions or advocate or actively promote abortion, either here or abroad.”\textsuperscript{129} His directive to the Administrator of USAID prohibited foreign NGOs receiving U.S. funds, either directly or as sub-recipients through domestic NGOs, from performing or actively promoting abortions “as a method of family planning” regardless of whether the money used for those purposes was from the U.S. government or other sources.\textsuperscript{130} Furthermore, his directive added language in the Standard Provision for grant eligibility that, under threat of penalty, required any domestic or foreign recipient of USAID family planning aid to certify that it would not pass along such USAID funds to foreign NGOs that engage in such prohibited activities.\textsuperscript{131} USAID materials for

---


\textsuperscript{127} See E. Dana Neacsu, \textit{Imposing Sexual Restraint Abroad}, 11 MICH. ST. L. REV. 885, 887 (2002) (reporting that a 1999 Rand study revealed that four-fifths of Americans supported U.S. assistance for foreign family planning initiatives that would enable women overseas to control the spacing and number of their children).

\textsuperscript{128} See id. at 886. Critics have repeatedly cited the GGR as evidence that President Bush ignores or manipulates science for his own ideological or political purposes. See, e.g., Pramilla Senanayake & Susanne Hamm, \textit{Sexual and Reproductive Health Funding: Donors and Restrictions}, 363 LANCET 70, 70 (2004); Representative Henry A. Waxman, \textit{Science, Politics, and Reproductive Rights: Politics and Science Reproductive Health}, 16 HEALTH MATRIX 5, 5 (2006).

\textsuperscript{129} See Neacsu, supra note 127, at 886.

\textsuperscript{130} Restoration of the Mexico City Policy, 66 Fed. Reg. 17,301 (Mar. 28, 2001).

\textsuperscript{131} Id. The memorandum defines abortion as a “method of family planning” as: “[A]bortion for the purpose of spacing births. This includes, but is not limited to, abortions performed for the physical or mental health of the mother, but does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape or incest (since abortion under these circumstances is not a family planning act).” \textit{Id.} at Definition (10)(i). Operating a hospital, clinic, or other facility where abortions are performed as a method of family planning is included in the definition of acts that constitute performing abortions. \textit{Id.} at Definition (10)(ii). The definitions provide that to “actively promote abortion” means the commitment of financial or other resources “in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.” \textit{Id.} at Definition (10)(iii). The active promotion of abortion includes, but is not limited to, counseling services, providing advice that abortion is an available option, and lobbying a foreign government to legalize or make available abortion. \textit{Id.} at Definition (10)(iii)(A)(I-III).
grantees comported with the President’s directives.\textsuperscript{132}

Despite repeated reports of the negative impact of the GGR on women in developing countries and on foreign NGOs,\textsuperscript{133} on August 29, 2003, President Bush, looking toward a reelection campaign where the Religious Right would be important,\textsuperscript{134} expanded the GGR’s application to U.S. State Department initiatives.\textsuperscript{135} With this expansion, the GGR’s reach now affects numerous State Department-managed programs,\textsuperscript{136} many of which are implemented by NGOs.\textsuperscript{137} Although President Bush announced in 2003 that foreign NGOs receiving assistance authorized under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (USLA) are not subject to the GGR with respect to funds allocated in fiscal years 2004–2008,\textsuperscript{138} NGOs remain subject to the GGR if they otherwise receive, through USAID or the State Department, U.S. funds for family planning and health programs under § 2151b of the FAA.\textsuperscript{139} This means that despite their attempts to provide healthcare treatment and to save lives in developing countries, any non-certifying foreign NGO whose activities include both family planning and HIV/AIDS prevention initiatives actually

\begin{thebibliography}{9}
\footnotesize
\item 133. See, e.g., \textit{Mexico City Policy Hearing}, supra note 24 (testimony of Dr. Nirmal K. Bista) (speaking on behalf of the Family Planning Association of Nepal (FPAN), a Nepalese NGO committed to reproductive health care services, education, and counseling, testifying about FPAN’s decision to refuse to sign the Standard Provision and lose approximately $250,000 in USAID that would jeopardize the existence of three reproductive health care clinics in densely populated areas of Nepal having high maternal mortality rates); \textit{Id.} (testimony of Aryeh Neier, President of the Open Society Institute) (explaining the critical role of foreign NGOs in advocating for women’s rights and in drafting legislative reform, the GGR’s undemocratic chilling impact on speech of foreign NGOs, and the GGR’s spillover effect in impeding domestic NGOs’ efforts to bring representatives of gagged foreign NGOs to brief Congress); \textit{Id.} (testimony of Susana Galdos Silva) (stating that the GGR has prevented Peruvian NGOs, such as Movimiento Manuela Ramos, which has over 20 years experience in advocacy for women’s well-being, from advocating and lobbying for legalization of abortion despite Peru’s high rates of unwanted pregnancy (60% of all pregnancies), illegal abortions (30% of all pregnancies), and maternal deaths caused by unsafe illegal abortions (22% of all maternal deaths).
\item 134. See \textit{supra} note 125 (discussing 2000 and 2004 electorate polls).
\item 136. See Dewey Memorandum, \textit{supra} note 26.
\item 137. See \textit{POPULATION ACTION INT’L}, \textit{supra} note 26.
\item 138. \textit{Id}.
\item The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (USLA) has a new gag rule. It provides that the recipients of funds under USLA may not use the funds to promote or advocate the legalization or practice of prostitution or sex trafficking or to provide assistance to “a group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.” \textit{Id.} § 302(f). This new gag rule neither permits fund recipients to take a neutral nor a silent stance. See \textit{infra} notes 234–285 and accompanying text (discussing cases involving USLA and the constitutionality of its gag rule.)
\end{thebibliography}
is prohibited from receiving U.S. funds under USLA. Moreover, this directive effectively precludes a wide range of domestic and international NGOs from creating coalitions and networks with non-certifying foreign NGOs important to the delivery of reproductive and other healthcare services. For the most part, the language of the Standard Provision implementing the GGR for the new millennium remained substantively identical to its pre-2000 wording. Slight modifications have not cured the underlying defects of the GGR.

II. U.S. National Interests

A. Concept

Critical components of foreign affairs are the result of foreign policy, the allocation of foreign assistance, and the imposition of foreign assistance policy restrictions. All of these facets are inextricably identified with and guided by the pursuit of "national interests." This guiding concept, U.S. "national interests," abstractly consists of those objectives that directly or indirectly further the collective welfare of the U.S. government and

---

140. CTR. FOR REPRODUCTIVE RIGHTS, BREAKING THE SILENCE: THE GLOBAL GAG RULE'S IMPACT ON UNSAFE ABORTION (2003), available at http://www.reproductiverights.org/pdf/bo_ggr.pdf [hereinafter CRR, BREAKING THE SILENCE]. This outcome is an expansion of the August 6, 2003 decision of the U.S. State Department to fund a $1 million HIV/AIDS program of UNFPA that supports African and Asian refugees only on the condition that the implementing NGO consortium did not include Marie Stopes International, a non-certifying NGO that provides family planning services, including abortion counseling, and that does not receive U.S. assistance. See ISSUES FOR CONGRESS, supra note 100, at CRS-11.

141. USAID, supra note 132.

142. Subparagraph (e)(II)(1) provides that any non-U.S. NGO recipient "certifies that it does not now and will not during the term of this award perform or actively promote abortion as a method of family planning in USAID-recipient countries or provide financial support to any other foreign nongovernmental organization that conducts such activities." Id. at 56. Subparagraph (e)(I)(10) supplies definitions applicable to paragraph (e). Id. at 53. Abortion "is a method of family planning when it is for the purpose of spacing births. This includes, but is not limited to, abortions performed for the physical or mental health of the mother." Id. Pursuant to subparagraph (e)(I)(10)(i), "[t]o perform abortions means to operate a facility where abortions are performed as a method of family planning." Id. Pursuant to subparagraph (e)(I)(10)(iii),

To actively promote abortion means for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.

(A) This includes, but is not limited to, the following:

(I) Operating a family planning counseling service that includes, as part of the regular program, providing advice and information regarding the benefits and availability of abortion as a method of family planning;

(II) Providing advice that abortion is an available option in the event other methods of family planning are not used or are not successful or encouraging women to consider abortion . . . ;

(III) Lobbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning; and;

(IV) Conducting a public information campaign in USAID-recipient countries regarding the benefits and/or availability of abortion as a method of family planning.
broad American populace and that are achieved by domestic or international acts.143

B. Declared National Interests - WWII to Present

From the end of World War II through President Reagan's tenure and into the early 1990s, U.S. foreign policy, foreign aid policy, and foreign assistance programs were designed to support national interests, including the defeat of communism, the encouragement of global economic development and stability, the reduction of high rates of population growth, and the promotion of broader access to health care.144 In 1984, in a radio address to the nation on U.S. foreign policy, President Reagan declared that regional stability and security, peacemaking in troubled countries, the reduction of the risk of nuclear war, and the expansion of opportunities for economic development and personal freedom were national challenges.145 By 1988, President Reagan had added to his list something akin to championing the cause of people's right to self-determination.146

Post-Cold War, President Clinton considered the promotion of "sustainable development" to be a "national interest" and his U.S. foreign assistance policy and programs were crafted to foster "achievement of broad-based economic growth; development of democratic systems; stabilization of world population and protection of human health; ... building human capacity through education and training; and meeting humanitarian needs."147 President Bush redesigned U.S. foreign assistance policy initially around three "strategic pillars": economic growth, agriculture, and

---

Id. at 53-54.

143. See, e.g., Felix E. Oppenheim, National Interest, Rationality, and Morality, 15 POL. THEORY 369, 369-70 (1987). Policy can be structured either to directly benefit the United States and its citizens or to vicariously accrue to them while targeting another nation and its citizens as the direct beneficiaries. ALEXANDER L. GEORGE, PRESIDENTIAL DECISIONMAKING IN FOREIGN POLICY: THE EFFECTIVE USE OF INFORMATION AND ADVICE 221 (1980). The subset of national interests that directly accrue to the U.S. government and its citizens has been labeled "self-regarding." Id. Those national interests that indirectly benefit the U.S. government and its citizens have been labeled "other-regarding." Id. Both types of national interests can seek to attain, enhance, or preserve Americans' security, health, and economic stability, but the means utilized are different for each category. See id.

144. See Tarnoff & Nowels, supra note 8, at CRS-3; supra notes 39-50 and accompanying text (discussing the declared national interests and foreign assistance policies of Presidents Kennedy and Johnson); supra notes 77-94 and accompanying text (discussing the declared national interests and foreign assistance policies of President Reagan).

145. Radio Address to the Nation on United States Foreign Policy, 1 PUB. PAPERS 487 (Oct. 20, 1984); see also Letter to Prime Minister Menachim Begin of Israel on United States Military Assistance Policies for the Middle East, 1 PUB. PAPERS 177 (Feb. 16, 1982); Radio Address to the Nation on Free and Fair Trade, 1986 Book, 2 PUB. PAPERS 1037-38 (Sept. 13, 1986); Remarks and a Question and Answer Session with Reporters on the Pentagon Report on the Security of United States Marines in Lebanon, 2 PUB. PAPERS 1748 (Dec. 27, 1983); Statement on the Strategic Arms Reduction Talks, 1 PUB. PAPERS 818-19 (June 25, 1982).


147. Tarnoff & Nowels, supra note 8, at CRS-3.
trade; global health; and democracy, conflict prevention, and humanitarian assistance. In 2004, Bush modified and expanded the pillars to include five broad interests: promoting transformational development, strengthening fragile states, providing humanitarian assistance, supporting U.S. geo-strategic interests, and mitigating global and international ills, including HIV/AIDS.

C. National Interests or Self-Interests?

Clearly, these various sets of national interests and foreign assistance policy objectives are inherently value-laden. Their unmistakable goals are in contradistinction to aims intended primarily to advance egotistic, political, ideological, moral, or other self-interests of an individual or a narrow group of individuals. This is not to say that each policymaker can or should eliminate personal values in the decision-making processes. Nonetheless, where a policymaker elevates moral or political self-interests above prudent policies and practical measures that otherwise could promote national interests, that governmental representative not only fails to make a high-quality decision that promotes national objectives but also neglects fiduciary duties to the electorate.

As architects of foreign policy and foreign assistance policy, the actions of President Kennedy, in encouraging Congress to enact the FAA, and President Johnson, in authorizing USAID to fund international family planning and population initiatives without GGR restrictions, clearly promoted three then official national interests: the encouragement of global economic development and stability, the reduction of high rates of population growth, and the promotion of broader access to health care. Consequently, their political, moral, and ideological self-interests are not called into question. In stark contrast, as the discussion on the harms produced by the GGR below highlights, it is impossible to reconcile the effects of the GGR with those official national objectives.

President George W. Bush campaigned on the suggestion that his foreign policy decisions would be guided by national interests, stating during the second presidential debate at Wake Forest University on October 11, 2000, "The first question is, what's in the best interests of the United States? What's in the best interests of our people? When it comes to foreign policy, that'll be my guiding question. Is it in our nation's inter-

148. Id.
149. Id.
150. See GEORGE, supra note 143, at 221.
151. See id. at 3.
153. See GEORGE, supra note 143, at 3.
154. See id.
155. See supra notes 40-50 and accompanying text.
Despite his rhetoric, President Bush's restoration and expansion of the GGR is at odds with the "strategic pillars" that he declared as national interests. The effects of the original or expanded version of the GGR as instituted by Presidents Reagan and Bush cannot be squared with USAID's long-standing national objectives of "expanding democracy and free markets while improving the lives of the citizens of the developing world." As a result, the motives of President Reagan in imposing the GGR and of President George W. Bush in restoring and expanding the GGR are implicated. Did these two presidents neglect their fiduciary duties to U.S. citizens by unwisely acting primarily to further their personal religious and moral agendas and to win the crucial support of the Religious Right? Did these presidents create a chasm between their expressions of moralistic ideologies and their actual deeds? Were the outcomes substantially diluted, rendered ineffective, or made inappropriate at unacceptable human, financial, political, and security costs?

D. Harms That the GGR Produced

The literature and media are peppered with numerous studies and anecdotal information of the extensive negative consequences that the GGR has wrought. These sources have given particular attention to the hardships imposed on foreign NGOs and women living in developing countries. Therefore, this Article only briefly recaps their findings.

1. Injuries to Foreign NGOs

In developing countries across the globe, the GGR has hampered or even barred the efforts of foreign NGOs and their healthcare workers in the delivery of reproductive health and family planning services as well as HIV/AIDS related care. It has financially threatened the existence of NGOs or has caused their demise. It also has precluded alliances of NGOs essential for solving public health crises. In countries that either legally permit abortions in all situations or under circumstances of fetal impairment or where pregnancy poses risks to a woman's mental health or socioeconomic well-being, such as Nepal, Kenya, Ethiopia, Zimbabwe, Zambia, Uganda, and Romania, the loss of USAID funding by non-certifying NGOs has been devastating. The GGR has resulted in those NGOs laying off doctors and nurses essential to the delivery of reproductive and child healthcare services and HIV/AIDS prevention programs, curtailing or discontinuing mobile clinics and other outreach services in hard-to-reach rural areas, terminating community-based distributions of condoms and other contracep-

---

158. See GEORGE, supra note 143, at 3-4, 218.
159. For a list of the countries that permit abortions in all situations and under limited circumstances, see CTR. FOR REPRODUCTIVE RIGHTS, THE WORLD'S ABORTION LAWS (2007), http://www.reproductiverights.org/pub_fac_abortion_laws.pdf.
tive supplies, refraining from disseminating health information, and, in some instances, closing because of their inability to financially sustain themselves without U.S. funding.160

The GGR has silenced efforts to reform abortion and reproductive health laws in developing countries.161 The GGR has chilled NGOs' speech and stifled their attempts, either independently or in conjunction with approving foreign governments,162 to raise awareness of and provide improved access to safe abortion services in countries with high levels of maternal mortality and morbidity resulting from unsafe abortions.163 Moreover, despite the legality of abortion without restriction in eighteen of the fifty-six countries in which USAID family planning funds are allocated, no foreign NGO medical care provider that receives any amount of USAID assistance can counsel women on the full range of reproductive health options or provide abortion referrals, even if supported by non-U.S. governmental funds.164 As will be discussed in Part IV, these various limitations on speech and association likely would be unconstitutional under the First Amendment if applied to domestic NGOs in the same position.165

160. See Hoodbhoy et al., supra note 104, at 32-83; Rekha, supra note 26, at 1A.

161. See Mexico City Policy Hearing, supra note 24 (testimony of Aryeh Neier, President of the Open Society Institute). Several sources have reported that domestic NGOs are also impacted in their ability to advocate for safer abortion services and for legalization of abortion abroad. See CRR, BREAKING THE SILENCE, supra note 140, at 12; CTR. FOR REPRODUCTIVE RIGHTS, THE BUSH GLOBAL GAG RULE: ENDANGERING WOMEN'S HEALTH, FREE SPEECH AND DEMOCRACY (2003), available at http://www.crlp.org/pub_fac_ggrbush.html [hereinafter CRR, BUSH GLOBAL GAG RULE]; Skuster, supra note 105, at 121-22; Melissa Upreti, The Impact of the "Global Gag Rule" on Women's Reproductive Health Worldwide, 24 WOMEN'S RIGHTS L. REP. 191, 195-96 (2003).

162. See Mexico City Policy Hearing, supra note 24 (testimony of Dr. Nirmal K. Bista) (discussing the desires of Nepal's Ministry of Health and the Family Planning Association of Nepal for reforms); Skuster, supra note 105, at 108-09. In eighteen countries where abortion is legal in all situations, the GGR can prevent foreign NGOs from implementing their governments' reproductive healthcare policies through discussions of reproductive health options with women. See CTR FOR REPRODUCTIVE RIGHTS, THE GLOBAL GAG RULE'S EFFECTS ON NGOs IN 56 COUNTRIES (2003), available at http://www.reproductiverights.org/pub_fac_ggereffects.html [hereinafter CRR, GLOBAL GAG RULE'S EFFECTS]. In addition, abortion is legal in seventeen other countries under limited circumstances, including the protection of a woman's physical health, mental health, life, or socioeconomic well-being. See id. However, the abortions available in these countries are often performed under unsanitary and unsafe conditions, perhaps exacerbated by the GGR's ban on foreign NGOs providing counseling and safe services in countries with reproductive healthcare policies that permit abortion for the mental health and socioeconomic well-being of women. See id.

163. See id.; Skuster, supra note 105, at 106-07. The legalization of abortions in such countries as the United States and Poland in the past several decades has contributed to lower abortion-related mortality rates of women in these countries. In Poland, the legalization of abortions has also contributed to the elimination of infanticide and suicides of pregnant women. Jodi Jacobson, The Global Politics of Abortion, 97 WORLDWATCH PAPER 8 (1990). Thus, the capacity to lobby for reformation of abortion laws to permit legal and safe abortions can have a tremendous positive impact on public health. I would suggest that where other nations have chosen a set of moral values that permits abortion without restriction, the U.S. needs to scrutinize the rationale and justification for U.S. policies that actively interfere with that decision.

164. See CRR, GLOBAL GAG RULE'S EFFECTS, supra note 162.

165. See generally infra Part IV.
2. **Adversities to Women**

Seventy percent of the world's one billion poorest people are women. The are the women for whom "the most dangerous thing . . . [they] can do is to become pregnant." They invariably live in developing countries where their access to health services depends exclusively or to a large extent on foreign NGOs whose programs are supported by FAA §2151b funds. In other words, these women are relegated to incomplete family planning counseling and thereby are denied full information, self-determined control over their fertility, and self-dignity. They can receive neither abortion referrals nor safe abortions from these NGOs. Their lives are endangered.

Numerous statistics attest to the harm to these women. These women have a likelihood of dying from pregnancy complications at a rate more than 500 times that of women in the United States. Even in the 61% of the world's nations where abortions are legal, such as South Africa and Nepal which permit abortions upon a woman's request during the first twelve weeks of pregnancy, complications from unsafe abortions continue. These complications result from the persistence of substantial

168. CRR, BREAKING THE SILENCE, supra note 140, at 9.
169. See id. at 28.
170. See CRR, GLOBAL GAG RULE'S EFFECTS, supra note 162.
171. Ruth Levine et al., Contraception, in Disease Control Priorities in Developing Countries 1075, 1078 (Dean T. Jamison et. al. eds., 2006), available at http://files.dcp2.org/pdf/DCP/DCP57.pdf (stating that developing countries account for 95% of all illegal abortions worldwide and that between 100 and 600 deaths occur for every 100,000 unsafe, commonly illegal, abortions, whereas 0.6 deaths occur for every 100,000 legal abortions); Nicholas D. Kristof, Prudence's Struggle Ends, N.Y. TIMES, Sept. 24, 2006, at D12 (indicating that women in Africa have a 20% lifetime risk of dying in childbirth); Reproductive Equality, supra note 166 (asserting that one in 3,750 American women die from pregnancy complications).
174. See, e.g., N. Ojha et al., Post-Legalization Challenge: Minimizing Complications of Abortion, 2 KATHMANDU UNIV. MED. J. 131, 131 (2004) (study providing data on abortion complications); Post Legalization Challenges and Initiatives, supra note 173, at 1-2 (stating challenges to the availability of safe abortion); Reproductive Health, supra note 173 (reporting that Nepal suffers from one of the highest maternal mortality rates globally and that a study of five hospitals found more than 50% of maternal deaths were the
barriers to abortion information and services,\textsuperscript{175} extremely high rates of maternal deaths,\textsuperscript{176} and long-term physical and mental health problems.\textsuperscript{177} Although it is difficult to obtain accurate data on illegal abortions, in 2003, the World Health Organization estimated that between twenty and twenty-five million abortions annually (half of all abortions) are performed illegally under unsafe conditions.\textsuperscript{178} Nearly 97\% of all unsafe abortions occur in developing countries.\textsuperscript{179} Complications from these unsafe abortions cause approximately 13\% of all maternal deaths and tens of thousands of long-term health problems in women worldwide,\textsuperscript{180} including serious or permanent disabilities.\textsuperscript{181} Additionally, because NGOs fear jeopardizing their USAID funding by providing healthcare services to women who undergo abortion that technically is permitted under the GGR, women may receive inferior healthcare after pregnancy.\textsuperscript{182} Moreover, the male and female children born from these pregnancies often face increased risks of living unhealthy lives as well as shortened life spans.\textsuperscript{183}

E. Presidents' Actions Inconsistent with National Interests

It is horrendous that the GGR exacerbates the harm to a large, vulnerable audience of women and children about whom this nation should be concerned. Moreover, on a broader scale, the multitude of deficiencies does not end with individualized tragedies. The magnitude of serious health problems and deaths suffered by women and children has produced
public health crises in developing countries, many of which are unable to cope with these crises.184 Women disabled and ill from unsafe abortions, women who give birth to children they cannot feed or support financially, and children of these tragedies who cannot attain a decent quality of life due to poverty, hunger, ill health, and lack of education all add to their countries' economic frailties.185 These results undermine the economic and political stabilities of these countries, as well as nations globally, and contradict what the United States has declared to be its national interests over the past fifty years.186

If national interests are viewed more expansively than those officially declared, then we find other injuries to them engendered by the acts of Presidents Reagan and Bush. The Judeo-Christian principles embedded in our nation and supposedly embraced by Presidents Reagan and Bush in their official capacities and in their personal lives importantly encompass two non-negotiable imperatives. First is the biblical teaching that each individual must respect and act morally and justly toward all other human beings born in this world, according them their self-dignity and helping those in need.187 Second is the principle that "ethical relationships between individuals have priority over political and cultic values."188 A president's unjustified compromise189 or disregard of these sacrosanct tenets can mean the failure of reason to check self-interest and personal concerns,190 the loss of ethical and political proportionality,191 a distortion of

188. Rubenstein, supra note 187, at 259.
189. There is inherent tension between the inner-life of an individual and politics. Every effective U.S. foreign policy and foreign assistance policy is tinged with U.S. self-interest (as distinguished from the president as its governmental agent). Nevertheless, when viewed from the outside, decisions laced with moral compromises are judged by their consequences, rather than the moral motives behind them. See Michael Walzer, Can There Be a Moral Foreign Policy?, in Liberty and Power: A Dialogue on Religion and U.S. Foreign Policy in an Unjust World 34, 36, 45-47 (E. J. Dionne Jr. et al. eds., 2004); see also Robert Endicott Osgood, Ideals and Self-Interest in America's Foreign Relations: The Great Transformation of the Twentieth Century 14 (1953).
191. See Morgenthau, supra note 187, at 326.
perspectives on power, the failure of the civilizing influence of morality, and the breakdown of justice as a key moral ideal of society. Therefore, even if these presidents viewed themselves as doing good with noble intentions, in actuality they produced—contrary to national interests—ghastly consequences to fellow humans and to the world’s image of the United States as a highly moral democracy.

III. Possible Unconstitutionality of the GGR Based on Equal Protection Principles

Although the GGR is harmful both to males and females, like any other restriction on abortion, it especially burdens women. Legislation directly grounded upon “a biological correlate of being female,” can be a form of sex discrimination. In the United States, where such legislation involuntarily co-opts a woman’s body in the service of third parties, commentators have suggested that, under principles of equal protection, legislation restricting abortion should be considered constitutionally suspect. In a recent Supreme Court case, Gonzales v. Carhart, Justice

---

192. See id. at 13, 326 (stating that the “self-esteem engendered by power, which equates power and virtue, in the process loses all sense of moral and political proportion”).

193. See id. at 319. Michael J. Perry has quoted R. H. Tawney as having written about this same notion: “The essence of all morality is this: to believe that every human being is of infinite importance, and therefore that no consideration of expediency can justify the oppression of one by another. But to believe this it is necessary to believe in God.” Perry, supra note 1, at 109 (quoting and citing R.H. TAWNEY’S COMMONPLACE BOOK (J.M. Winter & D.M. Joslin eds., 1972)).

194. See REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS 257 (1960) (recognizing, as an academic theologian and philosopher, the tension between ethics and politics, but stating that the highest moral ideal is justice).

195. Lefever, supra note 4, at 27. Hans J. Morgenthau, reflecting on Reinhold Niebuhr’s perspective, has commented aptly that to permit morality to clothe politics with undeserved dignity merely transforms morality into an instrument of domination.

196. See OSGOOD, supra note 189, at 15.

197. See supra notes 24–28 and accompanying text (noting the spill-over effects of the GGR include inadequate health services for adult males and females as well as male and female children).

198. See supra notes 166–183 and accompanying text.

199. Sunstein, supra note 62, at 617–18.


201. The Supreme Court has generally taken the tact that reproductive distinctions between genders does not prohibit differing legislation. See Siegel, supra note 200, at 264.

202. See, e.g., Sunstein, supra note 62, at 617–19. For more than 60 years, it has been recognized that the equal protection right is one of freedom from invidious discrimination in statutory classification and other governmental action. See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954) (where classification was based on race). Here, the argument is based on defining the disadvantaged class as composed of all women, not
Ruth Bader Ginsburg, in a heartfelt dissent, emphasized this principle. She stated that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." Justice Ginsburg then noted that historically, "[W]e have . . . ruled that a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion." Even Justice Anthony Kennedy's majority opinion in Gonzales, which takes a paternalistic approach toward women and their health, does not deny that legislative restrictions on abortion could be unconstitutional where they impose "significant health risks" to women, particularly where alternative safe abortion procedures are unavailable.

The GGR, as legislation of presidents (and a few congressional members), effectively co-opts foreign women's bodies for the political and moral self-interests of those politicians. It incontrovertibly forces women to resort to less safe, often illegal, methods of abortion harmful to their health. That the GGR involves restrictions on funding for abortion and abortion counseling, as opposed to directly criminalizing those activities, should not matter. As one scholar has suggested, "A refusal to fund is merely another form of government cooptation." Therefore, the GGR not only is a contentious regulatory action but also would be constitutionally suspect under equal protection principles if it applied to U.S. women.

IV. Likely Unconstitutionality of the GGR Under the First Amendment

Another reason that the GGR is controversial is that it likely would be unconstitutional based on First Amendment grounds if the "Standard Provision" restrictions that are imposed on foreign NGOs were imposed on domestically formed NGOs. The concept that organizations are free to speak about and engage in association for the "advancement of [their own] beliefs and ideas is embedded in U.S. democratic principles and has been long upheld by the Supreme Court." With the GGR, the government
coercively controls and fully obstructs foreign NGOs' content-based speech and related activities, punishing foreign NGOs that depart from a U.S. government-approved viewpoint. The United States holds itself up to the world as a model democracy based on fundamental and equal rights for individuals and organizations. Accompanying this role is the responsibility to permit abroad what must be permitted at home. As this Article will demonstrate, recent case law is supportive.

A. The Unconstitutional Conditions Doctrine

Eminent legal scholars have suggested courts' application of the unconstitutional conditions doctrine is hopelessly confused and confusing. Professor Kathleen Sullivan has described the doctrine as providing that:

\[
\text{[G]overnment may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.}^{[211]} \text{ It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.}^{[212]}
\]

Professor Sullivan's comments reflect that embedded in the doctrine is a concern that the government not be permitted to coerce an individual or entity to surrender a constitutionally protected right. To be an unconstitutional condition, however, the governmental condition need not be inher-
ently coercive.\textsuperscript{213} Professor David Cole has explained:

[The doctrine] seeks to identify those conditions on funding that have a coercive effect on the recipient's freedom to exercise her constitutional rights on her own time and with her own resources. . . . Where the government seeks to prohibit speech directly, the [F]irst [A]mendment demands that it maintain neutrality toward content, viewpoint, and speaker identity. This neutrality mandate is designed to curb government action that threatens to skew the marketplace of ideas or to indoctrinate the citizenry. Because government funding of speech raises similar concerns, the neutrality mandate also has a role to play in reviewing government funding of speech.\textsuperscript{214}

B. Right to Freedom of Speech

I. \textit{Rust v. Sullivan}

The unconstitutional conditions doctrine was at the core of the 1991 Supreme Court decision in \textit{Rust v. Sullivan},\textsuperscript{215} which involved a First Amendment challenge by Title X private grantees to regulations promulgated by the Department of Health and Human Services.\textsuperscript{216} The regulations conditioned grantees' entitlement to Title X funding on their refraining from providing abortion counseling and from directly or indirectly encouraging, promoting, or advocating abortion as a method of family planning, including lobbying for legislation to increase its availability.\textsuperscript{217} The entitlement conditions were tied exclusively to Title X monies and not to the manner in which a grantee utilized its own non-Title funds.\textsuperscript{218}

Chief Justice Rehnquist, writing for the five-justice majority, admitted that their position "is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression."\textsuperscript{219} Nonetheless, the majority held that the regulations justifiably restricted the speech of grantees without violating their First Amendment rights or those of their women clients.\textsuperscript{220} Drawing upon \textit{Regan v. Taxation with Representation of Washington},\textsuperscript{221} Chief Justice Rehnquist reasoned that eligible grantees conti-
ued to have another avenue—their non-Title X funds—by which to perform abortions, provide abortion counseling, and engage in abortion advocacy, as long as objective indicia showed that those activities were conducted separately and independently from the project that Title X monies supported.\textsuperscript{222} He distinguished this case from "our 'unconstitutional conditions' cases,"\textsuperscript{223} such as \textit{FCC v. League of Women Voters of California},\textsuperscript{224} explaining that the latter category of cases involved "situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the [First Amendment] protected conduct outside the scope of the federally funded program."\textsuperscript{225}

Utilizing broad unconstitutional conditions language and other far-reaching rhetoric,\textsuperscript{226} the majority rejected the claim that, by permitting the anti-abortion acts and speech of other entities, the regulations impermissibly discriminated against and chilled the speech of the group of organizations that present pro-abortion viewpoints.\textsuperscript{227} Justice Rehnquist acknowledged and reaffirmed the well-established principle that the government cannot "discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas.'"\textsuperscript{228} He stated that there is a distinction, however, between direct governmental interference in an organization's conduct with respect to a U.S. funded project and governmental encouragement of alternative activity within a U.S. funded project.\textsuperscript{229} In several subsequent statements, Justice Rehnquist strongly implied that the government would have been constrained constitutionally under the First Amendment from imposing the Title X eligibility restrictions on grantees that, independent of the governmentally funded project, conduct full family counseling programs, abortion referrals, and otherwise promote abortion by utilizing non-governmental funds.\textsuperscript{230}

\textsuperscript{222} Rust, 500 U.S. at 196–97. 42 U.S.C. § 300a-4(a) provided that "none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." \textit{Id.} 42 CFR § 59.9 (1991) required what the Supreme Court referred to as "program integrity." \textit{Id.} at 187.

\textsuperscript{223} \textit{Id.} at 197.

\textsuperscript{224} 468 U.S. 364 (1984) (invalidating federal law that barred noncommercial radio and television stations receiving federal grants from editorializing because they could not segregate their activities according to the sources of funding).

\textsuperscript{225} Rust, 500 U.S. at 197; see Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (distinguishing \textit{Rust} and concluding that attorney's First Amendment free speech and expressive association rights were infringed by the funding restriction in the legal aid statute because the legal aid services attorney had no nongovernmental source of financial support for consultation with clients).

\textsuperscript{226} See Cole, supra note 214, at 686–87.

\textsuperscript{227} \textit{Rust}, 500 U.S. at 194.

\textsuperscript{228} \textit{Id.} at 192 (citing \textit{Regan v. Taxation with Representation of Wash.}, 461 U.S. at 548 (1983)); \textit{Cammarano v. United States}, 358 U.S. 498, 513 (1959)).

\textsuperscript{229} \textit{Id.} at 193 (citing \textit{Maher v. Roe}, 432 U.S. 464, 475 (1977)).

\textsuperscript{230} Chief Justice Rehnquist stated:

The regulations prohibiting abortion counseling and referral are of the same ilk [encouraging family planning within the intent of Title X]; "no funds appropriated for the project may be used in programs where abortion is a method of family planning," and a doctor employed by the project may be prohibited in the course
The Rust majority clearly does not hold that the government can place a condition on recipients of governmental subsidies that will infringe on the recipients' First Amendment rights to act and speak outside of the particular governmentally funded program.\textsuperscript{231} It also does not conclude that the "selective subsidization of speech can never infringe the First Amendment, nor that the government is free to impose any substantive speech restrictions it chooses on the use of funds."\textsuperscript{232} Rust does not support constraints on an organization's First Amendment speech and associational rights where it has legal ability only to obtain governmental funding to carry out its governmentally mandated mission.\textsuperscript{233}

2. **DKT International v. USAID and Alliance for Open Society International v. USAID**

Two recent U.S. district court cases, **DKT International v. U.S. Agency for International Development\textsuperscript{234}** and **Alliance for Open Society International v. U.S. Agency for International Development,\textsuperscript{235}** distinguished Rust.\textsuperscript{236} Both cases involved domestically incorporated NGOs that actively participate in international efforts to curtail the spread of HIV/AIDS. These NGOs claimed that the eligibility requirement of 22 U.S.C. § 7631(f), enacted as part of USLA,\textsuperscript{237} for obtaining USAID funding for their work in

of his project duties from counseling abortion or referring for abortion. This is not a case of the Government "suppressing a dangerous idea," but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope [with Title X funds]."

\textit{Id.} at 193-94. He further commented that in the current case the government refused "to fund activities, including speech, which are specifically excluded from the scope of the project funded." \textit{Id.} at 194-95 (emphasis added). \textit{See also} Cole, \textit{supra} note 214, at 686 (asserting that the government should not be able to freely determine whatever content-based or viewpoint-based restrictions it desires when designing funding subsidies).

231. Rust, 500 U.S. at 197-98.
236. Additionally, the Center for Reproductive Law and Policy, a domestic NGO, filed a lawsuit challenging the GGR on First Amendment grounds. Ctr. for Reprod. Law & Policy v. Bush, 304 F.3d 183 (2d Cir. 2002). Specifically, the suit alleged that the GGR restrictions interfered with its right to lobby and globally promote abortion and that foreign NGOs and governments were unwilling to associate with it for fear that the United States would revoke their aid. \textit{Id.} at 189. The Second Circuit dismissed all claims, including the First Amendment claims without reaching the constitutional standing issue. \textit{Id.} at 195. The Court found that Plaintiff alleged only indirect, abstract, and conjectural harms and, therefore, did not satisfy the injury-in-fact requirement for standing. \textit{Id.} Furthermore, the Court held that the NGO's freedom of association was not violated because foreign NGOs were free to associate with Plaintiff as long as they did not receive U.S. funding. \textit{Id.} 196-98. The Court found that this incidental effect on Plaintiff's freedom to associate did not amount to a constitutional violation. \textit{Id.}

237. \textit{See supra} note 139. The overarching congressional purpose of USLA was to "strengthen United States leadership and the effectiveness of the United States response to" HIV/AIDS. 22 U.S.C. § 7603 (2003). The Act enables the president to establish programs "to treat individuals infected with HIV/AIDS, . . . and to prevent the further spread of HIV infections . . . " \textit{Id.} § 7611(a)(1). Additionally, it provides that "the reduc-
preventing, treating, and monitoring the spread of HIV/AIDS, was an unconstitutional infringement on their First Amendment rights. That statutory provision prohibits the use of USLA funds by a recipient "to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." In both cases, the NGOs further challenged USAID's implementing policy. Pursuant to USAID Policy AAPD 05-04, eligibility is predicated on a recipient organization's completion of a written certification by a Standard Provision that specifically confirms that the organization has a policy explicitly opposing prostitution and sex trafficking.

In DKT International, DKT brought an action for declaratory and injunctive relief against USAID, constitutionally challenging the USLA statute and USAID's enforcement of the statutory provision pursuant to its Policy AAPD 05-04. Judge Emmet Sullivan held that, although Congress can place limits on the manner in which recipients of governmental funds can utilize those monies, the Spending Clause of the U.S. Constitution does not prevent, treat, and monitor the spread of HIV/AIDS behavioral risks shall be a priority of all prevention efforts in terms of funding, educational messages, and activities by promoting abstinence from sexual activity and substance abuse, encouraging monogamy and faithfulness, promoting the effective use of condoms, and eradicating prostitution, the sex trade, rape, sexual assault and sexual exploitation of women and children." 

USAID AAPD 05-04 provides:

The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. . . .

Except as noted in the second sentence of this paragraph, as a condition of entering into this agreement or any sub-agreement, a non-governmental organization or public international organization recipient/subrecipient must have a policy explicitly opposing prostitution and sex trafficking. The following organizations are exempt from this paragraph: the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations Agency.


239. AAPD 05-04 requires all recipients of FY04-FY08 USLA funds to provide to the USAID Agreement Officer a certification substantially as follows: "[Recipient's name] certifies compliance as applicable with the standard provision entitled . . . "Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking" included in the referenced agreement." Id. at 6.

240. DKT International is a qualified charity under 26 U.S.C. § 501(c)(3). DKT provides international family planning and HIV/AIDS prevention programs, and it receives approximately 16% of its budget from USAID grants. See DKT Int'l, Inc. v. U.S. Agency for Int'l Dev. (DKT Int'l II), 477 F.3d 758, 760 (D.C. Cir. 2007). The funds at issue involve DKT's operations as a sub-grantee of Family Health International in Vietnam. Id. The sub-agreement provided that the certification that DKT has a policy explicitly opposing prostitution and sex trafficking "is an express term and condition of the agreement." Id.
give Congress unlimited power to impose restrictions.241 Illustrating one such impermissible limitation, he relied on Justice Rehnquist's opinion in Rust for the principle that the unconstitutional condition doctrine prevents the government from prohibiting the recipient of a government subsidy from engaging in speech and conduct protected under the First Amendment.242

Judge Sullivan proceeded to explain that by “mandating that DKT adopt an organizational-wide policy against prostitution, the government exceeds its ability to limit the use of government funds. The government effectively is precluding DKT from taking any other position on the issue of prostitution [e.g., neutral or for its legalization] in any other context, even with wholly private funds.”243 The court found key that, unlike in Rust, a domestic NGO seeking USLA funding could not adopt a policy other than one explicitly denouncing prostitution and sex trafficking,244 not even a neutral policy.245 As a result, Judge Sullivan determined that 22 U.S.C. § 7631(f) and AAPD 05-04 were not tailored sufficiently narrowly to further a compelling state interest in a specific project to which the government contributed funds.246 Instead, he concluded, the scope of these provisions impacted not only the specific USLA-funded program but also, more broadly, the recipient's First Amendment protected speech and conduct outside that project.247 Judge Sullivan held, therefore, that the statutory provision and the USAID “Standard Provision” certification requirement could not survive constitutional scrutiny.248 Rather, they constituted inappropriate viewpoint-based restrictions on the domestic NGOs' speech.249

On February 27, 2007, a three-judge panel of the Circuit Court for the District of Columbia (D.C. Circuit) overturned Judge Sullivan's decision.250 In essence, the circuit court interpreted Rust and other Supreme Court precedents to constitutionally permit the government to restrain potential private entity grantees' speech where the objective of the governmentally subsidized program is to promote a legitimate governmental pol-

---

241. DKT Int'l v. U.S. Agency for Int'l Dev. (DKT Int'l I), 435 F. Supp. 2d 5, 14-15 (D.D.C. 2006), rev'd, 477 F.3d 758 (D.C. Cir. 2007). In South Dakota v. Dole, 483 U.S. 203, 209-10 (1987), the Court indicated that Congress can achieve through its spending power what it might not have power otherwise to do directly. Nonetheless, this does not mean that Congress can exercise its spending power in a manner that contravenes the First Amendment of the U.S. Constitution. Id.
243. Id. at 16.
244. The statute and the USAID policy do not permit adoption of a policy either that is neutral or favorable toward prostitution and sex trafficking. Id.
246. See DKT Int'l I, 435 F. Supp. 2d. at 17.
247. See id. at 18.
248. See id. at 17.
249. See id. at 17.
icy rather than to encourage a private entity’s own speech.\textsuperscript{251} In this regard, the D.C. Circuit noted that a primary policy objective of the government in adopting USLA was to reduce HIV/AIDS behavioral risks, including prostitution, and that a grant issued under USLA constitutes a subsidy to a spokesperson for the government.\textsuperscript{252} Therefore, the circuit court held that the government constitutionally can compel its agent, here considered by the court to be DKT, to “communicate a particular viewpoint . . . and require those agents not to convey contrary messages.”\textsuperscript{253} The D.C. Circuit stated that constraining agents’ private speech to ensure the clarity of the government’s message is particularly important “on matters with foreign policy implications.”\textsuperscript{254} The circuit court further suggested that if DKT does not want to embrace the government’s anti-prostitution policy and comply with the certification procedure, DKT has an alternative: the formation of a separate subsidiary that itself would adopt a certifiable policy opposing prostitution and thus could qualify as a potential grant recipient under USLA.\textsuperscript{255} According to the court, such a structure would not compel DKT itself to advocate the government’s position, and therefore, there would be no unconstitutional infringement of DKT’s free speech rights.

Several days before Judge Sullivan released his opinion in \textit{DKT International}, the U.S. District Court for the Southern District of New York released its opinion in \textit{Alliance for Open Society International}.\textsuperscript{256} In that case, the plaintiffs included three separate domestically incorporated non-profit entities, Open Society International (OSI), a private foundation, Alliance for Open Society International (AOSI), an affiliate of OSI, and Pathfinder International (Pathfinder), which operates internationally.\textsuperscript{257} AOSI sought clarification of the certification requirements of the USAID policy; all three requested a preliminary injunction against USAID’s enforcement of its “Standard Provision” requirement for eligibility and sought a preliminary injunction barring the Government from discontinuing their funding based on enforcement of 22 U.S.C. § 7631(f) and AAPD 05-04.\textsuperscript{258} OSI claimed that the statute and USAID policy compelled it to monitor its own speech for fear of endangering AOSI.\textsuperscript{259} AOSI asserted that USAID’s policy requirements violated its internal governance rules, compelled it to engage in speech against its will, forced it to monitor its speech, and coerced it into refraining from certain activities financed only

\begin{itemize}
  \item \textsuperscript{251} Id. at 761-62 (citing Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Rust v. Sullivan, 500 U.S. 173 (1991); FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984)).
  \item \textsuperscript{252} Id. at 760; see also supra note 237.
  \item \textsuperscript{253} DKT Int’l, Inc. v. U.S. Agency for Int’l Dev. (DKT Int’l II), 477 F.3d 758, 762 (D.C. Cir. 2007).
  \item \textsuperscript{254} Id.
  \item \textsuperscript{255} Id. at 763 (citing Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983)).
  \item \textsuperscript{257} Id. at 230.
  \item \textsuperscript{258} Id. at 237-39.
  \item \textsuperscript{259} Id. at 238.
\end{itemize}
by its private funds. Pathfinder alleged that compliance with USAID policy forced it to avoid utilizing its private funding to advocate legal reforms in Brazil and India.

Judge Victor Marrero viewed the court's task as one of "determining where in the murky borderlands between Congress's Spending Clause power and the unconstitutional conditions doctrine the instant case lies." Using a heightened scrutiny standard of review for injunctive relief, he concluded that "in the instant case, the Court is persuaded that [the Government's] interpretation of the statute [AAPD 05-04] as applied to Plaintiffs' privately funded speech activities falls squarely beyond what the Supreme Court has permitted to date as conditions of government financing."

Judge Marrero rejected the notion that governmental conditions on public benefits must be inherently coercive to constitute an impermissible burden on constitutional rights. He asserted instead that it is the systemic burden and effect of the governmentally imposed condition that must be the central focus. In support of this proposition, Judge Marrero noted that the protective role of the First Amendment is the maintenance of an appropriate and balanced power relationship between a strong government "entrusted with vast resources" and the people whose free speech and choice rights, whether in accord or discord with the government, must be safeguarded against governmental overreach. He summarized this perspective by stating:

In sum, the government should not throw its immense delegated weight into the public arena through strategies and means that improperly arrogate or shift public power, in particular when the net consequence may be to promote the government's own view at the expense of other perspectives, to distort political ties as between the state and each individual, or to upset the societal standings of particular individuals or groups relative to one another. In this context, conditions on receipt of government funds, even if recipients remain free to accept or reject the grants, become constitutionally suspect, and demand enhanced scrutiny, if the purpose or effect of the allocation of the public resources and benefits would substantially alter choice of private speech and materially disrupt the power equilibrium of which the First Amendment functions as centerpoint.

---

260. Id.
261. Id. at 238–39.
262. Id. at 254–55.
263. See id. at 260. Judge Marrero determined that the statute's effect on international affairs does not provide a basis for applying a rational basis standard of review. Id. at 265–67.
264. See id. at 239.
265. Id. at 256.
266. See id. at 257.
267. Id.
268. See id. at 257–58. Judge Marrero states, "For the so-called 'marketplace of ideas' that is vital for a free society to function properly and to flourish, sustaining the people-to-government power equilibrium as constitutionally calibrated demands a number of checks long recognized in First Amendment jurisprudence." Id. at 258.
269. Id. at 258.
Judge Marrero determined that, contrary to those government restrictions that the Supreme Court had held as constitutionally permissible, the government's power disequilibrium resulting from 22 U.S.C. § 7631(f) and AAOD 04-05 completely altered the choice of private speech by AOSI and Pathfinder. Eligibility for government funding absolutely precluded a grantee from utilizing its private funds to engage in protected expression through unregulated alternative activities. A grantee had no means of disseminating information of its choice, advocating its positions on matters of public concern, and engaging in other non-governmentally funded activities on controversial issues. These communication activities "rest on the highest rung of the hierarchy of First Amendment values."

Judge Marrero found cavalier the Government's argument of its entitlement to adopt a policy that compels Plaintiffs' speech to exclusively espouse the government's preferred message and therefore act as de facto mouthpieces for the government's viewpoint. He considered troublesome the Government's notion that its interest in disseminating a particular ideology, "no matter how acceptable to some," should outweigh organizations' First Amendment rights to avoid "becoming the courier for such message." He shunned the Government's position that Plaintiffs' ability to decline government aid precludes their claim of compulsion to advocate a government stance. Judge Marrero noted that even though the policy at issue arises out of a Spending Clause enactment and therefore does not constitute a direct regulation of speech, the Supreme Court established an overriding principle "in keeping with the expectations our society derives from First Amendment freedoms and how government would respond to their invocation." That tenet provides that "the government cannot compel speech in exchange for participation in a government program, even a program to which there is no direct entitlement." Consequently, he concluded the statute and the Standard Provision undermined this nation's democratic principles and constitutionally guaranteed liberties.

271. See Alliance for Open Soc'y Int'l, 430 F. Supp. 2d at 263.
272. Id. at 274-76.
273. Id. at 261-62.
274. Id. at 262 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 893 (1982)).
275. Id. at 274-76.
276. Id. at 276.
277. Id. (quoting Wooley v. Maynard, 430 U.S. 705, 717 (1977)). The court considered the Government's position of special concern because it would strengthen NGOs willing to convey the government's viewpoint over those unwilling to do so. See id.
278. See id.
279. Id. at 275.
280. Id.
281. See id.
Judge Marrero further concluded that the statutory and policy condition impermissibly discriminated against organizations "that may have qualms over endorsing the government's viewpoint or encounter other risks to their private use of such [non-government] funds" but "[a]t the same time, the condition would favor organizations that conceptually supported the government's position, have no private funds to put in jeopardy or otherwise do not have the financial or programmatic strength to resist the government's inducement." Based on these irreparable harms that would result to AOSI and Pathfinder absent injunctive relief, Judge Marrero entered a preliminary injunction enjoining the government from enforcing as an eligibility requirement under 22 U.S.C. § 7631(f) that NGOs have a policy "explicitly opposing prostitution." Moreover, the government agencies cannot terminate, suspend, refuse to enter into, or deny funding under any direct or indirect grant, cooperative agreement, or contract with Pathfinder, AOSI, or another entity that provides funding to these two organizations.

C. Right to Freedom of Expressive Association

The fundamental purpose of the First Amendment is "to protect private expression." Nonetheless, whether private organizations have a right of freedom of association with one another is unclear. The long history of Supreme Court First Amendment decisions is based on the rights of individuals and of organizations themselves. Although the Supreme Court has recognized that expressive associational rights extend to several membership organizations to ensure the exercise of freedom of expression between such organizations and their members, it has not specifically applied this protection among several non-membership organizations. Thus, the Supreme Court has not ruled on non-membership-based NGOs' right of freedom of expressive association. The question has come before the D.C. Circuit and the U.S. District Court for the District of

282. Id. at 261.
283. Id. at 261, 276.
284. See id. at 229.
285. See id. at 237, 278.
288. See id.
289. See e.g., Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (confirming that the Boy Scouts organization itself has the First Amendment right of expressive association).
290. See, e.g., id. (protecting right of expressive associations to control own membership and membership criteria); Lyng v. Int'l Union, 485 U.S. 360, 367 (1988) (recognizing, in a case where union members asserted rights to associate together to conduct a strike, that the right of association "encompasses the combination of individual workers together in order better to assert their lawful rights"); NAACP v. Button, 371 U.S. 415 (1963) (holding right to engage in litigation project by NAACP on behalf of its membership is a constitutional right of "political association").
291. See Button, 371 U.S. at 431.
Columbia.292

In Pathfinder Fund v. U.S. Agency for International Development,293 three domestic NGOs contended that the GGR infringed their First Amendment rights of association by effectively preventing them from associating with foreign NGOs on abortion-related family planning projects.294 The U.S. District Court for the District of Columbia recognized that the First Amendment protects "two distinct concepts, the right to 'enter into and maintain certain intimate human relationships' called 'freedom of intimate association,' and the right to 'associate for the purpose of engaging in those activities protected by the First Amendment - speech, assembly, petition for redress of grievances, ... called 'freedom of expressive association.'"295 In applying the right of expressive association to the domestic NGOs' claim, the court determined that there must be a "substantial interference" of such right for a constitutional violation.296 Because under the GGR as applicable to domestic NGOs, domestic NGOs could utilize their own funds to engage in abortion-related family planning projects with foreign NGOs, the court found no violation of the right of expressive association.297 The court's analysis implies that had the government prohibited these non-membership organizations from utilizing their own private funds to engage in abortion-related activities, their First Amendment right of expressive association would have been violated.298

In DKT Memorial Fund Ltd v. U.S. Agency for International Development,299 the D.C. Circuit acknowledged that the Supreme Court has not yet extended to multiple organizations the right to associate in order to engage in constitutionally protected activities.300 Nonetheless, the court "assume[d] for purposes of this opinion that the combination of the NGOs in the ... [abortion-related family planning] project is entitled to freedom of association."301 The court concluded that the GGR applicable to domestic NGOs, which prohibits the use of governmental funds but not private funds for separate abortion-related activities, did not infringe rights of association. The court reasoned that the GGR's "restriction on subgranting creates no obstacle in the way of DKT's association with the FNGOs [foreign NGOs] that would not be there absent the existence of the grant program in the first place."302 In other words, without government aid, the domestic NGO could engage in an abortion-related family planning project with foreign NGOs by utilizing its own money; with government aid, the...

293. See Pathfinder Fund, 746 F. Supp. 192.
294. See id. at 193.
295. Id. at 194.
296. Id. at 195-96 (explaining that a "slight" burden on the right of association would not infringe the U.S. Constitution).
297. Id. at 199.
298. See id. at 196, 199.
300. Id. at 292.
301. Id.
302. Id.
D. How Foreign NGOs Would Likely Fare Under Constitutional Principles

1. Freedom of Speech

The GGR implemented by the current Standard Provision predicates eligibility of a foreign NGO for U.S. family planning aid on such NGO refraining from all abortion-related counseling and referrals, as well as lobbying, whether for or against abortion rights, even if funded solely by non-U.S. government sources.\footnote{See USAID, MANDATORY STANDARD PROVISIONS FOR NON-U.S., NONGOVERNMENTAL RECIPIENTS 19 (2006), available at http://www.usaid.gov/policy/ads/300/303mab.pdf.} Certainly, under the unconstitutional conditions doctrine as expressed by Chief Justice Rehnquist for the majority in \textit{Rust},\footnote{Rust v. Sullivan, 500 U.S. 173, 197 (1991).} such conditions if applied to a domestic NGO would involve "situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the [First Amendment] protected conduct outside the scope of the federally funded program."\footnote{See supra note 240 and accompanying text.} As in \textit{DKT International},\footnote{DKT Int'l v. U.S. Agency for Int'l Dev. (DKT Int'l I), 435 F. Supp. 2d 5, 16 (D.D.C. 2006), rev'd, 477 F.3d 758 (D.C. Cir. 2007).} the government is not merely suppressing "dangerous ideas," but is essentially banning foreign NGOs from "taking any . . . position on the issue of . . . [abortion] in any . . . context, even with wholly private funds,"\footnote{Laird v. Tatum, 408 U.S. 1, 11 (1972).} an act that the federal district court found to violate the free speech rights of a domestic NGO. The Supreme Court long ago noted that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [acts even if they] . . . fall short of a direct prohibition against the exercise of First Amendment rights."\footnote{Dkt Int'l v. USAID (DKT Int'l II), 610 F. Supp. 2d 209 (D.D.C. 2009).} Certainly, if the GGR's funding eligibility requirements do not constitute a direct proscription on a foreign NGO's exercise of its chosen speech, the government's effective ban on such NGO's ability to counsel about abortion, make abortion referrals, or otherwise assert a position on abortion far exceeds this accepted standard.

Additionally, for several reasons, the D.C. Circuit's justifications for its holding in \textit{DKT International} unquestionably clash with this recognized standard. Its interpretation of Supreme Court precedents, including \textit{Rust}, to entitle the government to treat private entity grantees and sub-grantees as its agents and to restrain their speech if the governmentally-funded program's objective is other than encouraging private speech is unduly broad. Chief Justice Rehnquist's majority opinion in \textit{Rust} is considerably narrower and does not make such a claim. That opinion does not hold the government constitutionally free to impose a restraint on the private speech of an eligible recipient of a government subsidy where that private speech relates
to its own activities funded from non-governmental sources. That the D.C. Circuit in *DKT International* ignores the governmental scheme requiring DKT to adopt an organization-wide policy against prostitution amounts to coercive restraint on DKT's ability either to be silent or to state a neutral position on prostitution and, accordingly, to offer non-governmental programs consistent with that position where funded exclusively by private sources. If DKT were to assume such an organization-wide silent or neutral stance and use private funds to help prostitutes obtain condoms for family planning and the prevention of HIV/AIDS, certainly it would not be operating inconsistently with USLA's objectives. Unquestionably, the government is exercising power over the organization in a way that cannot solve prostitution, sexual exploitation, or HIV/AIDS.

Furthermore, the circuit court's suggestion that DKT itself maintain a neutral policy regarding prostitution but form a wholly-owned subsidiary that explicitly opposes prostitution to receive and utilize USAID funds cannot adequately remedy the effect of such coercive power. As noted in Appellee's brief, contrary to a lesson of *West Virginia Board of Education v. Barnette*, such a maneuver amounts to the government doing indirectly what it cannot do directly. Surely *Rust* and *Barnette* prohibit the government from coercing DKT itself to adopt an anti-prostitution policy to obtain USLA funding and from compelling DKT to form a separate subsidiary to obtain such funding. And, contrary to that which *Rust* holds acceptable, wouldn't the necessity of establishing such a subsidiary be an admission by the government that USLA places an unconstitutional restraint on a parent entity, an otherwise eligible recipient of a subsidy, that has private resources and seeks only to supplement its privately-funded projects with government-funded projects? Finally, it is not financially or otherwise costless to form such a subsidiary. It would place DKT in a position of being perceived by its clients, other entities, and foreign govern-

---

308. See supra notes 215–33 and accompanying text.

309. See supra note 237–38 and accompanying text.


312. 319 U.S. 624, 642 (1943).

313. See supra notes 222–33 and accompanying text. Chief Justice Rehnquist clearly states in *Rust* that the unconstitutional conditions doctrine prohibits "situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the [First Amendment] protected conduct outside the scope of the federally funded program." 500 U.S. at 197.

314. The plurality of the Supreme Court, in a portion of its decision written by Justice Roberts and joined by Justice Alito, recently admitted in the context of "electioneering communications" under section 203 of the Bipartisan Campaign Reform Act of 2002 that "well-documented and onerous burdens, particularly on small nonprofits" make it unreasonable to require a § 501(c)(4) organization to form and utilize a separate "PAC [political action committee] alternative" to engage in speech constitutionally protected by the First Amendment. Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2671 n.9 (2007). So too, in the context of the GGR, the formation of an alternative subsidiary imposes "well-documented and onerous burdens, particularly on small nonprofits."
ments as hypocritical and disingenuous, perhaps ultimately resulting in its inability altogether to engage in all family planning and HIV/AIDS prevention activities abroad. Therefore, the USLA certification requirement is a restraint on the private speech of DKT that substantially penalizes DKT. A less restrictive constitutional alternative exists to the requisite organization-wide anti-prostitution certification: permitting a potential recipient either to be silent or to adopt a neutral policy. The infirmities of the circuit court's opinion in *DKT International* are numerous and significant. They clearly demonstrate that the opinion cannot be relied on as legitimate support for the government's GGR stance.

Applying Judge Marrero's analysis in *Alliance for Open Society International,* if the government's interpretation of 22 U.S.C. § 2151b were applied to privately funded speech activities of domestic NGOs, it would fall "squarely beyond what the Supreme Court has permitted to date as conditions of government financing." As Judge Marrero noted, governmental conditions on public benefits need not be inherently coercive to constitute an impermissible burden on domestic NGO's constitutional rights. Focusing on the systemic burden and effect of the governmentally imposed conditions, the government's power disequilibrium resulting from the statute, USAID interpretations, and the absolute alteration of the choice of private speech, it appears that under Judge Marrero's analysis, the GGR as applied to foreign NGOs would be considered unconstitutional if domestic NGOs were subjected to the same eligibility conditions. As a consequence, the GGR inappropriately holds foreign NGOs to a "higher" standard than domestic NGOs. This discrepancy both undermines fundamental constitutional values that the United States seeks to promote worldwide and to have other countries adopt, and it presents the United States as two-faced.

2. Freedom of Association

Crucial in both *DKT Memorial Fund Ltd.* and *Pathfinder Fund* is the possibility that non-membership organizations may indeed have a right of expressive association and that, pursuant to the GGR, domestic NGOs could utilize private financial resources, but not U.S. government aid, to pursue abortion-related family planning projects. There is no such possibility under the GGR as it applies to foreign NGOs. To be eligible to receive U.S. assistance under the GGR as set forth in the Standard Provision, a foreign NGO must certify that it does not engage in abortion-related activities, whether utilizing its own funds or U.S. aid. Because there is no alternative means to engage in abortion-related expressive conduct, this requirement is a "substantial infringement" on such activities by foreign NGOs.

315. See supra notes 256-85 and accompanying text.
317. Id. at 256 (relying on U.S. v. Jackson, 390 U.S. 570, 583 (1968)).
Assuming that domestic NGOs have expressive associational rights under the First Amendment, such an eligibility standard would unconstitutionally infringe those rights. This result is particularly bad for the United States' image because it appears that the country is hypocritical in its notions of democracy, applying one standard to domestic NGOs and another to foreign NGOs engaging in the same abortion-related activities. If the U.S. Constitution is truly to embody freedom of speech and association as overriding values that must be guaranteed, rather than as mere inconvenient constitutional technicalities to be accommodated, this discrepant treatment cannot be permitted. These fundamentally valued rights should be promoted worldwide and should not be evaded outside our territorial boundaries.

Conclusion

Although the U.S. government was in no sense founded upon any religion, the electorate expects foreign policymakers to rely on basic moral principles, including fundamental Judeo-Christian precepts, when designing and effectuating foreign policy and foreign assistance policy. American foreign policies that are not true to the best U.S. traditions adopted from Judeo-Christian mores, however, have little support at home and little credibility abroad. Thus, abusing voters' appropriate expectations, the foreign policy architects of the GGR unwisely disregarded these basic moral values. The GGR is purely a product of politicians' imprudently legislating their excessively moralistic attitudes and unpardonable self-indulged power, and it is a toxic symbol of their allegiance to the select constituency of the Religious Right over the majority of U.S. voters.

The GGR has a ghastly impact on the personal lives of the residents of foreign nations. It denigrates women's inherent right to dignity and denies women's inviolability, is bereft of ethical benefit, and is incompatible with universally accepted ideals that our nation's foreign assistance policy must embrace. It co-opts foreign women's bodies to serve U.S. politicians' self-interests, which, if imposed on U.S. women, arguably would be unconstitutional under equal protection principles.

Also, unsatisfactory public health conditions in developing countries underlie the conclusion that the GGR does not appropriately serve U.S. national interests. Reports show that the GGR has created major international public health problems. It has compromised women's health and welfare by denying access to legal abortions. It has been associated with a failure to reduce the market for and the harm caused by illegal abortions in foreign countries. Additionally, its universal application to USAID population planning and health programs has resulted in adverse health impacts to victims of HIV/AIDS. Absent the GGR, many collective benefits could have accrued to our nation and our citizens from opportunities to improve

health abroad and to enhance and stabilize educational, economic, political, labor, and environmental conditions in developing countries.

In addition to the unconscionable human tolls abroad, the GGR detrimentally and unfairly has affected foreign NGOs and inexcusably tarnished America's positive image abroad. The GGR actually restricts political advocacy and civil participation by foreign NGOs, contrary to America's basic notions of democratic processes and, in reality, it imposes limitations and higher standards on foreign NGOs than likely could be constitutionally inflicted on domestic NGOs in similar positions. This variation in standards and constraints raises conceptual and real problems. Of great importance, the disparity appears hypocritical to the world and calls into question the legitimacy of U.S. values and ideals. Moreover, documentation shows that the GGR strictures not only have jeopardized the missions but also the very existence of numerous foreign NGOs that have sought to better the health and welfare of foreign countries' residents. These notable results of the GGR have caused significant damage to the respect that foreign individuals, NGOs, and governments have for the United States. This policy is an inexcusable international symbol of the spoiling of a positive U.S. image abroad. Installation in January 2007 of new Democratic majorities in the House of Representatives and Senate provides Congress with an opportunity to legislatively reject the executive-based GGR. Such congressional action would benefit foreign individuals and NGOs and would promote U.S. national interests.

319. Indeed, one can argue that the GGR is a symbol of the rise, once again in the history of the United States, of the wealth of particular religious bodies and encroachment of religious groups into private rights of conscience and democratic processes through alliances with governmental officials.

320. See Skuster, supra note 105, at 100. See supra Parts IV.D.1-2.

321. On January 22, 2007, the sixth anniversary of President Bush's reinstatement of the GGR, Representatives Nita Lowey (D-NY) and Christopher Shays (R-CT) introduced a bill to overturn the policy. On May 3, 2007, President Bush warned that he would veto any such legislation. See Bush Threatens Veto Over Any Abortion Rights Measure, NAT'L J. CONG. DAILY, May 4, 2007.