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Rust v. Sullivan: The Supreme Court Upholds the Title X Abortion-Counseling Gag Rule

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RUST v. SULLIVAN: THE SUPREME COURT UPHOLDS THE TITLE X ABORTION-COUNSELING GAG RULE

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I. INTRODUCTION

On January 22, 1973, the United States Supreme Court decided the landmark case of *Roe v. Wade*.¹ In *Roe*, the Court held that the right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”² The Supreme Court’s legalization of abortion placed it at the center³ of the heated and emotional debate that surrounds the American abortion controversy.⁴

1. 410 U.S. 113 (1973).

2. *Id.* at 153.

3. Although the Supreme Court is the focus of the abortion debate in the United States, it is by no means the only branch of government dealing with this issue. *See, e.g.*, Planned Parenthood v. Sullivan, 913 F.2d 1492, 1501 n.3 (10th Cir. 1990) (citing Tamar Lewin, *Testing the Limits on Abortion*, N.Y. TIMES, April 2, 1990, at A14) (discussing the states’ legislative efforts to confront abortion). A compilation of state abortion laws is found in ABORTION IN THE UNITED STATES: A COMPILATION OF STATE LEGISLATION (Howard A. Hood et al. eds., 1991) (a two volume work that catalogs state abortion laws both by state and topic).

4. The highly contentious and divisive debate over abortion is easily understood, given the

During the 1990-91 term, the Supreme Court was again confronted with a case in which abortion played an integral role. This case, however, also required the Court to decide questions of statutory interpretation, administrative law, and free-speech rights. Accordingly, in *Rust v. Sullivan*,⁵ the Supreme Court had to address two major issues:

- (1) whether regulations promulgated by the Secretary of Health and Human Services barring recipients of certain federal funds from discussing abortion with their patients and requiring these recipients to be organized in a certain manner were facially valid under Title X of the Public Health Service Act, and;
- (2) if so, whether the regulations were permissible under the First and Fifth Amendments to the United States Constitution.⁶

By a sharply divided five to four vote, the Court held that the regulations were both facially valid and constitutionally permissible.⁷

This Comment will examine all the important aspects of the *Rust v. Sullivan* case in order to facilitate the reader's understanding of the confusing variety of questions *Rust* raised as well as the diverse reasoning the Justices applied in answering them. First, it will review the relevant parts of Title X of the Public Health Service Act.

positions taken by proponents on each side of the abortion dispute. Those who oppose abortion consider it nothing less than the premeditated murder of an innocent life which paves the way for a full-scale devaluation of humanity. Those who favor choice see abortion as an immediate and beneficial option for women facing crisis pregnancies and hold that the governmental regulation of abortion is an unjustifiable intrusion by the state into a woman's personal decision. 53 Fed. Reg. 2922 (1988).

For excellent background on the moral, social, historical, and legal issues that abortion raises, see generally MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987) (an examination of laws and perceptions about abortion in the Western world); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* (1985) (contains an excellent chapter on abortion in the nineteenth century, a fundamentally important period in American abortion history); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984) (an excellent work discussing the positions of opponents and supporters of abortion); JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* (1978) (a work of great value in the field of abortion history); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990) (a work written by the petitioner's counsel in the *Rust* case that does a good job of covering all aspects of abortion with particular emphasis on the law and abortion).

5. 111 S. Ct. 1759 (1991).

6. *Id.* at 1766-67.

7. Chief Justice Rehnquist, delivered the opinion of the Court, in which Justices White, Kennedy, Scalia, and Souter joined. Justice Blackmun filed a dissenting opinion, in which Justice Marshall joined and in which Justice O'Connor joined in Part I. Justice Stevens joined in Parts II and III. Justices Stevens and O'Connor filed dissenting opinions.

Second, it will examine the regulations at issue in the case. Third, it will exhaustively analyze the majority and dissenting opinions. Fourth, it will discuss the Congressional response to the *Rust* case. Finally, it will argue that the Court's decision in *Rust* was unsound and deeply disturbing.

II. TITLE X OF THE PUBLIC HEALTH SERVICE ACT

The Secretary promulgated the regulations at issue in *Rust* under the authority of Title X.⁸ Therefore, an examination of the relevant aspects of this legislation is crucial to an understanding of the *Rust* case.

Title X authorizes the Secretary to “make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods”⁹ These grants and contracts “shall be made in accordance with such regulations as the Secretary may promulgate.”¹⁰ Section 1008 of the Public Health Service Act (Section 1008) mandates that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.”¹¹ Title X does not, however, define the term “method of family planning.”

A. *Department of Health and Human Services Regulations Before 1988*

Prior to 1988, the rules governing Title X interpreted section 1008's prohibition on abortion as forbidding Title X institutions from using Title X money to perform abortions or funding activities

8. 42 U.S.C. § 300a (1988).

9. *Id.* Title X provides federal money for nearly 4,000 family planning programs in the United States. Every year these clinics provide family planning and medical services to more than 4.1 million American women. 137 CONG. REC. S10,129 (daily ed. July 16, 1991) (statement of Sen. Levin). In West Virginia, 71 Title X institutions provide family planning services to over 121,000 women. 137 CONG. REC. S10,192 (daily ed. July 17, 1991) (statement of Sen. Rockefeller).

10. 42 U.S.C. § 300a-4(a) (1988).

11. *Id.* § 300a-6.

that immediately promoted or encouraged abortion.¹² These regulations also permitted, and later required, Title X institutions to counsel their patients about their abortion option after the Title X clinic confirmed the pregnancy¹³ or when the patient specifically requested such information.¹⁴ Further, these regulations allowed fund recipients to operate abortion clinics provided they maintained separate accounts to assure that no Title X grantee was using Title X funds to finance abortions.¹⁵ In 1987, the federal government began a review of these regulations that eventually resulted in their demise.¹⁶

B. Department of Health and Human Services Regulations After 1988

In 1987 President Ronald Reagan directed the Department of Health and Human Services to establish new standards to assure that Title X recipients understood and were respecting Section 1008's ban on abortion as a means of family planning.¹⁷ On February 2, 1988, the Secretary published these new regulations¹⁸ which interpreted Section 1008 much more stringently than had the old regulations.¹⁹

12. Carole I. Chervin, Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401, 406 (1989).

13. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PROGRAM GUIDELINES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES § 8.6 (1981) [hereinafter PROGRAM GUIDELINES].

14. *Id.*

15. Chervin, *supra* note 12, at 406.

16. *Id.*

17. *Id.*

18. 53 Fed. Reg. 2922 (1988) (codified at 42 C.F.R. § 59 (1989)). Opponents of these regulations referred to them as the "gag-rule" since they "gagged" doctors with respect to their ability to discuss abortion with their patients. Major Garrett, *Senate Rejects "Gag" on Abortion*, WASH. TIMES, July 18, 1991, at A4. In order to distinguish these regulations from the prior regulations, this Comment will refer to them as either the new regulations or the post-1988 regulations.

19. These new regulations were the subject of immense controversy almost from the day of their inception. Compare Theodore C. Hirt, *Why the Government is Not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895 (1988) (supporting the new regulations under the Congressional spending power) with Janet Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916 (1988) (condemning governmental manipulation of abortion information as a violation of the First Amendment, but within the context of the Adolescent Family Life Act); C. Andrew McCarthy, Comment, *The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics*, 77 CALIF. L. REV. 1181 (1989) (also opposing the new regulations as violative of the First Amendment); Alexandra A.E. Shapiro, Note, *Title X, The Abortion Debate, and The First Amendment*, 90 COLUM. L. REV. 1737 (1990) (finding the regulations a violation of the First Amendment).

These new regulations required that Title X grantees abide by several restrictions. First, the new regulations forbid Title X recipients from providing counseling concerning the use of abortion as a means of family planning or providing abortion referral as a means of family planning.²⁰ Title X institutions must also refer all pregnant patients to “appropriate prenatal and/or social services by furnishing a list of appropriate providers that promote the welfare of the mother and the unborn child.”²¹ This providers list may not be utilized to indirectly promote or advocate abortion. Thus, the new regulations specifically prohibit

weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by ‘steering’ clients to providers who offer abortion as a means of family planning.²²

The regulations also forbid Title X institutions from discussing abortion even upon the patient’s specific request.²³

Second, the new regulations further prohibit Title X institutions from participating in activities that “encourage, promote or advocate abortion as a method of family planning.”²⁴ Among prohibited activities are: (1) lobbying for laws that increase the availability of abortion as a means of family planning; (2) procuring speakers who promote abortion as a means of family planning; (3) paying dues to groups which support abortion as a means of family planning; or (4) using legal redress to make abortion available in any way as a “means of family planning.”²⁵ Finally, the regulations require that Title X projects be organized so that they are “physically and financially separate” from forbidden activities.²⁶ To be deemed separate from forbidden activities, “a Title X project must

20. 42 C.F.R. § 59.8 (1989).

21. *Id.* § 59.8(a)(2).

22. *Id.* § 59.8(a)(3).

23. *Id.* § 59.8(b)(5). If a Title X patient requests abortion information, a Title X employee may respond that “the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion.” *Id.*

24. *Id.* § 59.10(a).

25. *Id.*

26. *Id.* § 59.9.

have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient.”²⁷ Several nonexclusive factors that the new regulations provide in order to determine if an “objective integrity” exists include: (1) the existence of separate accounting records and personnel; (2) the degree of physical separation between Title X facilities and facilities which conduct forbidden activities; (3) the extent to which signs and identifications of the Title X project are present; and (4) the extent to which signs and materials promoting abortion are absent.²⁸

These new regulations angered a large number of Title X recipients, family planning organizations, and medical groups. Consequently, widespread opposition to the new regulations arose.²⁹ This extensive opposition lead directly to the *Rust v. Sullivan* case.³⁰

III. STATEMENT OF THE CASE

In 1970 Congress passed Title X of the Public Health Service Act (Title X).³¹ This legislation authorizes federal funding for public and private non-profit family planning services.³² Title X empowers the Secretary of Health and Human Services to administer this program by promulgating the regulations governing the awarding of these funds.³³ Title X provides, however, that no funds appropriated under it shall be used where abortion is a method of “family planning.”³⁴

27. *Id.*

28. *Id.*

29. Lee May, *Groups Assail Rules on Abortion Advice*, LOS ANGELES TIMES, Feb. 3, 1988, at 4.

30. *Id.*

31. Title X of the Public Health Service Act is officially Subchapter VIII of the Public Health and Welfare laws, popularly named the Family Planning Services and Population Research Act, Pub. L. No. 91-572, 84 Stat. 1504 (codified as amended at 42 U.S.C. §§ 300-300a-8 (1988)). It is commonly referred to as Title X because of its designation as Title X of chapter 373 of Public Law No. 91-572. *New York v. Bowen*, 690 F. Supp. 1261, 1262 n.1 (S.D.N.Y. 1988), *aff'd sub nom.* *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989), *aff'd sub nom.* *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

32. 42 U.S.C. § 300a (1988).

33. *Id.*

34. *Id.* § 300a-6.

In 1988 the Secretary of Health and Human Services promulgated new regulations that severely restricted the ability of Title X funded institutions³⁵ to discuss the abortion option with their patients.³⁶ This change represented a marked departure from the previous regulations that, with some minor alterations, had been in force since the early 1970's.³⁷ The old regulations interpreted Title X's ban on abortion as a method of family planning as only prohibiting Title X institutions from *performing* abortions.³⁸ Moreover, unlike the new regulations, the old regulations allowed, and later actually required, Title X recipients to provide nondirective counseling to their patients who tested positive for pregnancy on all legal options including abortion.³⁹

Before the new regulations could take effect, Dr. Irving Rust, a supervisor at a private Title X institution in New York, and a number of New York State and City agencies that receive Title X funds (petitioners) brought two separate actions against the Secretary of Health and Human Services (Secretary). These actions, that were later consolidated, challenged the new regulations' facial validity under Title X and their permissibility under both the First and Fifth Amendments.⁴⁰

The District Court for the Southern District of New York issued a temporary injunction against the regulations, but then rejected petitioners' challenges and granted the Secretary's motion for summary judgment.⁴¹ The Court of Appeals for the Second Circuit af-

35. For the purposes of this Comment, Title X institutions, Title X grantees, and Title X recipients are all used interchangeably to refer to any entity receiving monies under the authority of Title X.

36. 42 C.F.R. § 59 (1989).

37. 42 C.F.R. § 59 (1972).

38. *Id.* § 59.5(a)(9).

39. See PROGRAM GUIDELINES, *supra* note 13.

40. Rust v. Sullivan, 111 S. Ct. 1759, 1766 (1991).

41. New York v. Bowen, 690 F. Supp. 1261, 1274 (S.D.N.Y. 1988). However, the cases of Massachusetts v. Bowen, 679 F. Supp. 137 (D. Mass. 1988), *aff'd sub nom.* Massachusetts v. Secretary of Health and Human Services, 899 F.2d 53 (en banc) (1st Cir. 1990) and Planned Parenthood Fed'n of Am. v. Bowen, 687 F. Supp. 540 (D. Colo. 1988), *aff'd sub nom.* Planned Parenthood Fed'n of Am. v. Sullivan, 913 F.2d 1492 (10th Cir. 1990) invalidated the new regulations on primarily constitutional grounds. The case of West Virginia Ass'n of Community Health Centers, Inc. v. Sullivan, 737 F. Supp. 929 (S.D. W. Va. 1990) invalidated only those regulations which interfered with the physician's ability to freely discuss all legal and medical options with her patients.

firmed the lower court's decision.⁴² After granting the petitioners' request for certiorari,⁴³ the United States Supreme Court affirmed the Circuit Court's ruling.⁴⁴

IV. ANALYSIS OF THE HOLDING

Writing for the majority, Chief Justice Rehnquist began the decision by examining the pertinent sections of Title X.⁴⁵ The Chief Justice then reviewed the post-1988 regulations at issue in the case.⁴⁶ After completing his inspection of the statute and regulations, he proceeded to summarize the Second Circuit opinion which upheld the post-1988 regulations.⁴⁷ The Chief Justice used his summary of the lower court's decision to frame the issues of statutory analysis and constitutional scrutiny that his opinion would address.⁴⁸ He began his inquiry into the permissibility of the new regulations (and foreshadowed the ultimate decision in the case) by quoting from *United States v. Salerno*:

A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.⁴⁹

A. *The Regulations' Facial Validity Under Title X*

In determining the facial validity of the regulations, the Chief Justice first observed that the language of Title X is ambiguous with regard to Section 1008's prohibition on abortion as a method of family planning.⁵⁰ He noted that Title X does not directly address

42. *New York v. Sullivan*, 889 F.2d 401, 414 (2d Cir. 1989).

43. *Rust v. Sullivan*, 110 S. Ct. 2559 (1990). The Supreme Court considered the validity of the new regulations through *Rust* because the petitioners in *Rust* were the first to file the paperwork to request a writ of certiorari from the Supreme Court.

44. *Rust*, 111 S. Ct. at 1778.

45. *Id.* at 1764-65. See *supra* notes 20-23 and accompanying text.

46. *Rust v. Sullivan*, 111 S. Ct. 1759, 1765-66 (1991). See *supra* notes 31-40 and accompanying text.

47. *Id.* at 1766-67.

48. *Id.* at 1767.

49. *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

50. *Id.*

the issues of counseling, referral, advocacy, and program integrity at issue in the case.⁵¹ Because of the absence of this information, he applied the test the Supreme Court set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁵² This test states that when a statute is ambiguous or silent on a specific issue the Court must determine if the agency's interpretation of the statute is permissible.⁵³ A court may only invalidate an agency's interpretation of a statute as being impermissible when this interpretation clearly clashes with Congressional intent or when it does not represent a plausible construction of the statute.⁵⁴ Rehnquist further noted that a court usually accords an agency charged with the interpretation of an authorizing statute "substantial deference."⁵⁵

In applying the *Chevron* test, the Chief Justice found that Title X's own broad language supports the Secretary's interpretation of it.⁵⁶ Although Title X does not specifically define the term "method of family planning" or list what types of services are entitled to funding, it does specifically bar abortion as a means of family planning. Thus, the Court held that the Secretary's interpretation of Title X was permissible.⁵⁷ He further stated that the conflicting and highly generalized statements in the legislative history of Title X made it an unavailing avenue by which to arrive at a clearly demonstrable Congressional intent for enacting Title X.⁵⁸

He also rejected the petitioners' argument that the district court should not have paid the new regulations such traditional deference because the new regulations represented a reversal of a prior and long-standing agency interpretation.⁵⁹ Chief Justice Rehnquist noted that the Court rejected such an argument in *Chevron*.⁶⁰ He cited

51. *Id.*

52. 467 U.S. 837 (1984).

53. Rust v. Sullivan, 111 S. Ct. 1759, 1767 (1991) (citing *Chevron*, 467 U.S. at 842-43).

54. *Id.*

55. *Id.* (quoting *Chevron*, 467 U.S. at 844).

56. *Id.* at 1768.

57. *Id.*

58. *Id.*

59. *Id.* at 1768-69.

60. *Id.* at 1769 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 862 (1984)).

several cases to support the proposition that an agency must continually reevaluate its policies to meet the challenges of continually changing circumstances.⁶¹ He also found that the Secretary amply justified his altered interpretation of section 1008 with a "reasoned analysis."⁶² The Secretary changed his interpretation of Title X in the wake of reports written by the Office of the Inspector General and the General Accounting Office. These reports found that the old regulations had failed to properly implement Title X and that new and clear operative guidance was necessary to preserve the distinction between Title X institutions and institutions which use abortion as a method of family planning.⁶³ The Secretary also determined that the new regulations were more in keeping with the original spirit of Title X.⁶⁴ The changes were also justified both because of negative patient experience under the old regulations⁶⁵ and a shift in public opinion "against the elimination of unborn children by abortion."⁶⁶

The Secretary's reliance on this last point is debatable at best. A Wirthlin Group poll conducted after the *Rust* decision found that public opinion was split over the Court's decision.⁶⁷ After the respondents in this poll were told that money from banned clinics would go to other clinics that stress pregnancy prevention, sixty-nine percent voiced approval of the Court's decision.⁶⁸ However, a Harris poll found just the opposite result.⁶⁹ Over three-fourths

61. *Id.* (citing *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Motor Vehicles Mfrs. Ass'n of the United States v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)).

62. *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 42 (1983)). The full context of the quote is "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 42).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Joyce Price, *Foley Admits Veto of Abortion Bill Could Be "Impossible to Override,"* WASH. TIMES, June 25, 1991, at A1.

68. *Id.*

69. Elaine S. Povich, *Democrats Alter Tactics in Abortion Rights Fight,* CHI. TRIB., June 14, 1991, at 4.

of those who responded to the Harris poll favored passage of legislation allowing abortion discussion to occur at Title X institutions.⁷⁰

The opinion then turned to the “program integrity” requirement of the new regulations.⁷¹ The Chief Justice held that the legislative history of Title X is extremely ambiguous; therefore, he rejected the petitioners’ argument that the new regulations frustrate a Congressional intent to provide an integrated and comprehensive health care system.⁷² He noted that the only thing clear from Title X’s history is the Congressional desire that Title X programs be separate from abortion activities.⁷³ The Chief Justice failed to recognize that Congress passed and subsequently re-funded the Title X program six times under the old regulations.⁷⁴ Congress had also consistently voted down all attempts to legislatively alter the old regulations.⁷⁵ Indeed, after the promulgation of the new regulations, the Senate took up legislation specifically designed to codify the old regula-

70. *Id.*

71. *Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991).

72. *Id.* However, note the recent statement by Senator Hollings:

Mr. President, when I have voted to pass a law creating a health promotion program . . . I have not intended to provide second-class services I have not intended to exacerbate the balkanization of our health care system. Yet, those are the ends to which the current [Supreme] Court has bent my votes.

137 CONG. REC. S10,195 (daily ed. July 17, 1991).

73. *Rust*, 111 S. Ct. at 1770.

74. *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53, 60 n.3 (1st Cir. 1990) (en banc) (citing *amicus curiae* brief of Rep. Patricia Schroder).

75. *Id.* at 61 n.4 (citing *Planned Parenthood Fed’n of Am. v. Bowen*, 680 F. Supp. 1465, 1472 (D. Colo.) (granting a temporary injunction against the new regulations), *aff’d*, 687 F. Supp. 540 (D. Colo. 1988) (granting a permanent injunction against the new regulations on petitioners’ motion for summary judgment), *aff’d sub nom.* *Planned Parenthood Fed’n of Am. v. Sullivan* 913 F.2d 1492 (10th Cir. 1990)). See also 137 CONG. REC. S10,196 (daily ed. July 17, 1991) (statement of Sen. Glenn) (“Time and again efforts to legislate a gag rule have been voted down by Congress.”). A number of Senators and Representatives took the position in the Congressional debates to alter the *Rust* decision that the Congress had taken no steps to alter the old regulations because the Congressional intent in passing Title X was being fully carried out under them. See, e.g., 137 CONG. REC. S10,196 (daily ed. July 17, 1991) (statement of Sen. Glenn) (“The HHS regulations and the Supreme Court’s decision clearly misread the Congressional intent behind Title X.”); 137 CONG. REC. S10,077 (daily ed. July 16, 1991) (statement of Sen. Packwood) (“I think Congress fully understood what we intended [in passing Title X] That was the family planning clinic could say to a woman, you can carry the baby to term, [and] put it up for adoption . . . [or] keep it. You [also] have the right to [an] abortion. We thought that is what the law meant because if we did not think that is what it meant we would change it.”); 137 CONG. REC. H5126 (daily ed. June 26, 1991) (statement of Rep. Gephardt) (“The Supreme Court has misinterpreted federal law”).

tions.⁷⁶ Despite this evidence of Congressional support of the old regulations, the Court yielded to the Secretary's judgment that the "program integrity" requirement is necessary to implement Congressional intent.⁷⁷

B. Constitutional Challenges to the Regulations

Having disposed of the petitioners' challenges to the facial validity of the new regulations under Title X, the Chief Justice addressed the new regulations' constitutional permissibility.⁷⁸ Because

76. On September 25, 1990 (after the Secretary had promulgated the new regulations), the Senate voted 62 to 36 to alter the new regulations by codifying the old regulations through legislative action. 136 CONG. REC. S13,792 (daily ed. Sept. 25, 1990) (roll call vote on the Chafee amendment). This amendment, however, died when the Senate did not take action on the underlying bill to which the leadership attached this amendment. 137 CONG. REC. S10,072 (daily ed. July 16, 1991) (statement of Sen. Chafee).

77. *Rust v. Sullivan*, 111 S. Ct. 1759, 1770-71 (1991).

78. *Id.* at 1771. Although unclear in his approach to this issue, it appears that in finding the new regulations constitutional the Chief Justice also meant to respond to the petitioner's argument that the regulations are of such dubious constitutionality that Congress could not have intended their promulgation. While the Chief Justice did state that this argument had some merit, he held that they did not "carry the day." *Id.*

Rehnquist appears to be concerned with avoiding the questions that the case of *Kent v. Dulles*, 357 U.S. 116 (1958), and its progeny, implicitly raise in *Rust*. In *Kent* the Supreme Court examined the validity of regulations the Secretary of State promulgated under statutory authority relating to the issuing of passports to American nationals. The Secretary's regulations denied passports to communists or to persons who would use them to further the communist movement. *Kent* challenged these regulations. In an opinion written by Justice Douglas, the Supreme Court held that the right to leave the United States was a personal right included within the meaning of the Fifth Amendment's guarantee of "liberty." *Id.* at 129. The Court held that when the Congress delegates to an agency the authority to regulate that right, the Court will narrowly construe all the delegated powers that dilute or curtail that right. *Id.* The Court hesitated to "find in this broad generalized power [that the Congress gave to the Secretary of State] an authority to trench so heavily upon the rights of the citizen." *Id.* If the Court had held the regulations facially permissible, the Court would have been faced with important constitutional questions. *Id.* at 130. Thus, absent specific Congressional provisions allowing the Secretary of State to issue these regulations, the Court held the regulations statutorily unauthorized. *Id.*; see also *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) (following the *Kent* approach). *But see Haig v. Agee*, 453 U.S. 280, 310 (1981) (Blackmun, J., concurring) (arguing for the Court to overrule *Kent*).

In *Rust* it appears that Rehnquist successfully sidestepped this line of cases. Apparently, he reasoned, if there was no doubt as to the new regulations' constitutionality, then no problem existed in regard to Congressional intent. If so, Rehnquist missed one of the major points of *Kent*, which was to assure that it would be the politically accountable Congress, and not the unelected Courts and agencies, which would be making policy, as compared to legal, determinations. *Cf. JERRY L. MASHAW & RICHARD A. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM* 209 (1975) (identifying that the *Kent v. Dulles* approach to delegation is similar to the type of approach that courts apply to legislation when fundamental rights are involved). *But see Chevron, U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 865-66 (1984) (arguing that agencies are politically accountable, albeit indirectly, through the President). See generally JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 82-83 (1978).

a Supreme Court decision to invalidate an act of Congress “is the gravest and most delicate duty that the Court is called on to perform.”⁷⁹ Rehnquist noted that, when a case compels the Court to pass upon the constitutionality of an act of Congress, well established canons of construction⁸⁰ require the Court to strive to find an interpretation of a statute under which the statute would be constitutional.⁸¹ The Chief Justice also noted that the corollary to this doctrine requires the Court to not only uphold a statute, but to do so in a manner that avoids casting serious doubt upon that constitutionality,⁸² since the Court assumes the Congress legislates within the light of constitutional limitations.⁸³ Applying the canon of construction he thus laid out, the Chief Justice found that the regulations do not raise the type of “grave and doubtful constitutional questions” that would convince the Court that Congress did not intend to authorize their promulgation.⁸⁴

The first constitutional issue that the majority dealt with was the petitioners’ argument that the new regulations violated the First Amendment.⁸⁵ The petitioners argued that the new regulations discriminated based on viewpoint because they prohibited all discussion about abortion in Title X institutions, but required these institutions to provide information about carrying a pregnancy to term.⁸⁶ In so doing, the regulations invidiously discriminate on the basis of viewpoint. The petitioners also argued that the new regulations are constitutionally impermissible since the government may not subsidize programs in a manner that is aimed at the suppression of ideas.⁸⁷ Rehnquist rejected both of these arguments.⁸⁸

The Chief Justice stated that the regulations do not violate the First Amendment by discriminating based on viewpoint.⁸⁹ Rehnquist

79. *Rust*, 111 S. Ct. at 1771 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* (citing *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924)).

84. *Id.* (quoting *United States v. Delaware and Hudson Co.*, 213 U.S. 366, 408 (1909)).

85. *Id.* at 1771-72.

86. *Id.*

87. *Id.* at 1772.

88. *Id.* at 1772-76.

89. *Id.* at 1772-73.

observed that the government may legitimately opt to effectuate a value judgment by subsidizing one program to the exclusion of opposite programs.⁹⁰ By providing these subsidies, the government has not discriminated based on viewpoint; it has simply elected to support one option to the exclusion of other, competing options.⁹¹ The new regulations, held the Chief Justice, are a perfectly reasonable vehicle for assuring that recipients of Title X funds do not participate in activities outside the scope of the Title X program.⁹²

A discussion then ensued over the argument that the new regulations are impermissible since they require a Title X patient to surrender her free-speech rights in order to receive the benefit of Title X assistance.⁹³ The Chief Justice dismissed this approach because the new regulations do not deny government benefits to anyone: they merely require that recipients of Congressionally allocated funds use those funds in the manner Congress intended.⁹⁴ The new regulations do not force Title X institutions to relinquish speech relating to abortion.⁹⁵ The new regulations only seek to keep such discussion "separate and distinct from Title X activities."⁹⁶ Rehnquist distinguished *FCC v. League of Women Voters*⁹⁷ from the present case since, in *League of Women Voters*, the governmental regulations the Court struck down would have prohibited recipients of governmental funds from exercising their free-speech rights outside the scope of their governmental funding.⁹⁸ He also found support for this proposition in *Regan v. Taxation with Representation*.⁹⁹ In *Regan* the Court held that the Congressional spending power allows the Congress to refuse to subsidize lobbying activities of tax-exempt organizations by forbidding them from utilizing tax-de-

90. *Id.*

91. *Id.* at 1772.

92. *Id.*

93. *Id.* at 1773-74.

94. *Id.* at 1774.

95. *Id.*

96. *Id.*

97. 468 U.S. 364 (1984) (holding Congress may not prohibit editorializing by public television and radio stations receiving public funds).

98. *Rust v. Sullivan*, 111 S. Ct. 1759, 1774 (1991).

99. 461 U.S. 540 (1983) (holding Congress may use tax money to allow some organizations, but not others, to lobby at taxpayer expense).

ductible contributions to support their lobbying.¹⁰⁰ Thus, the Chief Justice found that the First Amendment does not bar the regulations at issue in *Rust* since they do not deny Title X recipients the right to discuss abortion.¹⁰¹ They only require Title X institutions to spend Title X money in a manner Congress intended.¹⁰²

The Chief Justice also found such free-speech reasoning equally applicable to employees of Title X institutions.¹⁰³ When one chooses to accept employment at a Title X institution, one must accept all the restrictions that come with the job.¹⁰⁴ The restrictions on employees' free-speech rights are limited, of course, only to the period when actually engaged in their employment.¹⁰⁵ Such restrictions, however, are a direct result of the individual's choice to accept employment at a governmental funded project whose scope is permissibly limited by the authorizing authority.¹⁰⁶

The last First Amendment issue the *Rust* case addressed was the impact of the new regulations on the doctor-patient relationship.¹⁰⁷ Rehnquist determined that the new regulations did not significantly impact upon the doctor-patient relationship:¹⁰⁸ the doctor-patient relationship a Title X program establishes is not so all-encompassing as to evince on the part of a Title X patient the belief she is receiving comprehensive medical advice.¹⁰⁹ Since the Title X program does not provide any postconception services to its patients, it is unreasonable to think that a patient could believe that a Title X physician does not consider abortion an appropriate option for her.¹¹⁰ Fur-

100. *Rust*, 111 S. Ct. at 1774-75.

101. *Id.* at 1777.

102. *Id.* at 1775.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* For a discussion of the interaction between government employment and the Constitution in a nonfunding context, see generally Mary E. Lathers, Comment, *Do You Abandon All Constitutional Protections by Accepting Employment with the Government?: Mandatory Drug Testing of Government Employees Violates the Fourth Amendment*, 28 SANTA CLARA L. REV. 169 (1988).

107. *Rust v. Sullivan*, 111 S. Ct. 1759, 1775-76 (1991).

108. *Id.* at 1776.

109. *Id.*

110. *Id.*

thermore, the Title X physician is always free to explain that abortion advice is outside the scope of the Title X program.¹¹¹

Rehnquist's reasoning here is flawed in a number of ways. The new regulations at issue in *Rust* allow Title X clinics to conduct general physical examinations, test for breast cancer, and treat both sexually transmitted diseases and gynecological problems.¹¹² Further, a woman who seeks the assistance of a Title X physician has every right to believe that her Title X physician will not withhold applicable medical advice regarding the very circumstances which have compelled her visit:¹¹³ to consider otherwise is to engage in "uninformed fantasy."¹¹⁴

The Chief Justice then proceeded to an examination of the permissibility of the new regulations under a woman's Fifth Amendment right to terminate her pregnancy.¹¹⁵ Rehnquist found that the government has no affirmative duty to fund an activity merely because that activity is constitutionally protected.¹¹⁶ In refusing to fund abortions, Congress has placed no governmental obstacle in the path of a woman seeking an abortion.¹¹⁷ Chief Justice Rehnquist observed that a long line of Supreme Court cases have led to the doctrine that the government's failure to fund abortions leaves indigent women with the same range of options available to them if the government had elected not to fund any health care at all.¹¹⁸

The petitioners then argued that the Supreme Court's decisions in *Akron v. Akron Center for Reproductive Health, Inc.*¹¹⁹ and

111. *Id.*

112. *Id.* at 1782 n.2 (Blackmun, J., dissenting).

113. *Id.* at 1782 n.3 (Blackmun, J., dissenting).

114. *Id.*

115. *Id.* at 1776.

116. *Id.*

117. *Id.* at 1776-77 (citing *Harris v. McRae*, 448 U.S. 297, 315 (1980)) (Congress has no duty to provide funding for abortions through the medicaid program even when these abortions are medically necessary).

118. *Id.* (citing *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)).

119. 462 U.S. 416 (1983) (holding regulations requiring physicians to repeat to patients a litany of governmentally authored statements about abortion in order to establish informed consent are constitutionally impermissible).

*Thornburgh v. American College of Obstetricians and Gynecologists*¹²⁰ forbid governmental interference with a woman's right to make a fully voluntary and informed choice on abortion through the creation of restrictions within the doctor-patient dialogue.¹²¹ The Chief Justice distinguished these two cases by noting that in both *Akron* and *Thornburgh* the governmental intrusion into the doctor-patient relationship was absolute.¹²² In both cases, the government required the doctor to provide certain information to the patient regardless of whether the patient requested the information or whether the doctor considered the transmission of the information to the patient medically necessary.¹²³ Rehnquist differentiated the regulations at issue in *Akron* and *Thornburgh* from those at issue in *Rust*, because the regulations at issue in *Rust* were not so totally pervasive as those in *Akron* and *Thornburgh*.¹²⁴ The new regulations do not deny a doctor the ability to discuss abortion with a patient; they only require that such discussion occur outside the environs of the Title X institution.¹²⁵

Rehnquist paid little heed to the petitioners' argument that this approach is unrealistic, since most Title X patients are too poor to secure such outside medical assistance.¹²⁶ The Chief Justice held that these Title X patients would still be in no worse a position than if the Congress had chosen not to fund any health care programs at all.¹²⁷ Therefore, it is the patient's indigence, rather than a gov-

120. 476 U.S. 747 (1986) (holding regulations similar to those in *Akron* are also constitutionally impermissible).

121. *Rust v. Sullivan*, 111 S. Ct. 1759, 1777 (1991).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* Title X programs have specifically targeted their services towards 14.5 million poor women who run the risk of unintended pregnancy everyday. (Even though Title X still only reaches about 4.1 million American women annually, 137 CONG. REC. S10,129, *supra* note 9, most commentators still consider it to be a successful program. See 136 CONG. REC. S13,781 (daily ed., September 25, 1990) (statement of Sen. Chafee)). All of these targeted women have incomes 150 percent below the poverty level. *New York v. Sullivan*, 899 F.2d 401, 415 n.1 (2d Cir. 1989) (Cardamone, J., concurring) (citing Carole I. Chervin, Note, *The Title X Family Planning Gag-Rule: Can the Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401, 408 (1989)). Most of these targeted women also lack the education to read beyond the fifth grade level. Lewis H. Lapham, *Tyromancy*, HARPER'S, Aug. 1991, at 6.

127. *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991).

ernmental policy, that precludes her from obtaining an abortion.¹²⁸

C. *The Dissenting Opinions*

In the final analysis, however, it is the dissenting opinions which are actually the most well-conceived and articulated. Justice Blackmun wrote the most persuasive of these dissents. Justices Stevens and O'Connor both joined in parts of Blackmun's dissent as well as authoring their own opinions.¹²⁹ Since all four dissenting Justices agreed with most of Justice Blackmun's ideas, this Comment will concentrate only on his opinion.

The dissent began its opinion by challenging the interpretation of the canon of statutory construction the Chief Justice enunciated.¹³⁰ Blackmun correctly stated that the duty of the Supreme Court not to unnecessarily pass upon important constitutional questions is strongest when statutory language appears ambiguous.¹³¹ Blackmun astutely observed that if Congress desires to push the limits of the constitutionality of its enactments, it would make that intention clear in certain and unambiguous terms.¹³² This argument is the best either side presented in the *Rust* case. Its logic is eminently sound and inescapable. When Congress passes legislation, it is initiating some public policy.¹³³ It usually does not wish the ju-

128. *Id.*

129. Justice Blackmun authored a dissenting opinion in which Justice Marshall joined. Justice Stevens wrote separately to argue that a closer study of Title X's wording and history would result in the conclusion that Title X only prohibits recipients from performing abortions and does not prohibit discussion of any legal options available to Title X patients. He joined Parts II and III of Blackmun's dissent (the Constitutional questions) because he agreed with Blackmun that the majority's reasoning warranted a challenge. Justice O'Connor wrote a separate opinion to emphasize that the regulations raise serious constitutional questions that should lead the Court to invalidate the new regulations on the grounds that they are not a reasonable interpretation of Title X. The Congress would still be free to push the issue if it was so inclined. She joined Part I of Blackmun's opinion (the statutory authorization question), but she declined to join Parts II and III because a finding that the regulations were facially invalid would render these issues moot.

130. *Rust*, 111 S. Ct. at 1778.

131. *Id.* at 1779.

132. *Id.* at 1779-80. (quoting Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2113 (1990)).

133. See generally CHRISTOPHER H. FOREMAN, JR., SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION 14-16 (1988); MICHAEL L. MEZEY, CONGRESS, THE PRESIDENT AND PUBLIC POLICY 28 (1989) ("[O]nce it was decided that a national government with significant policy-making authority would be established, there was never any question that the national legislature would play a central role in exercising that authority.").

dicial system to strike that legislation down (and with it, all the legislative time, effort, and energy Congress invested in its passage).¹³⁴ As such, the Congress normally keeps its enactments well within the parameters of the Constitution so no doubt can possibly exist over its intent.¹³⁵ On occasions, however, Congress may find it necessary to pass legislation that does push the outer boundaries of constitutionality. In this situation, Congress anticipates judicial challenges will arise.¹³⁶

In order to facilitate a court's scrutiny of the legislation in question *vis-a-vis* Congressional intent, Congress will specifically express its desire to stretch its enactments to the furthest reaches of the Constitution. In this way, Congress will not have to retread the same legislative ground twice by passing a second act that more clearly defines Congressional intent. The Congress will know in the first instance whether its act was constitutional.¹³⁷

Another strong policy consideration buttresses Blackmun's contention. Congress, as the people's representative institution, is directly responsible to the electorate.¹³⁸ The voters, as well as the courts, pass judgment upon its actions.¹³⁹ When a court allows an agency to implement constitutionally suspect regulations, the court permits a faceless, autonomous bureaucrat to annex Congressional

134. Cf. Charles O. Jones, *Congress and the Constitutional Balance of Power*, in CONGRESSIONAL POLITICS, 330-33 (Christopher J. Deering ed., 1989) (identifying that Congress normally has a number of avenues open to it to nullify a Supreme Court decision that invalidates one of its acts).

135. *Id.*

136. Cf. FREEDMAN, *supra* note 78, at 84 (within the context of examining the non-delegation doctrine, which states that there exists some point beyond which Congress may not delegate its authority to other institutions, Freedman observes, "[The non-delegation doctrine] serves the . . . purpose of preventing congressional abdication of responsibility — in this case the responsibility of the legislature in a constitutional system such as ours for presenting ultimate questions of legality to the courts only when searching deliberation and thoughtful exploration of the alternatives has presented none that is acceptable and of less constitutional moment.").

137. *Id.*

138. See generally THE FEDERALIST No. 52 (James Madison); JAMES R. BOWERS, REGULATING THE REGULATORS: AN INTRODUCTION TO THE LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULE MAKING 10 (1990) (discussing the problem of accountability of popularly elected branches of government with bureaucracies in the context of the people's consent to be governed).

139. See BOWERS, *supra* note 138; Cf. FREEDMAN, *supra* note 78, at 50-51 (discussing the role that popular elections play in the establishment and execution of public policy).

powers without giving the American people any recourse against this agency's unauthorized usurpation of the legislative function.¹⁴⁰ Such being the case, Blackmun argued that the Court should not have decided the constitutional issues that *Rust* presented because the Supreme Court's canons of construction required the Court to find that Title X did not authorize the regulations in question.¹⁴¹

Further, according to Blackmun, the majority opinion ignores reality in holding that the new regulations do not raise "serious constitutional questions."¹⁴² He argued that the Court would have been on much firmer constitutional ground if it had read Section 1008 as prohibiting Title X grantees from actually performing abortions.¹⁴³ This approach would have placed Section 1008 clearly within the purview of abortion restrictions the Court upheld in *Maher v. Roe*¹⁴⁴ and *Harris v. McRae*.¹⁴⁵ In finding the regulations permissible under Title X, however, the Court forced an unnecessary inquiry into the constitutionality of Title X itself.¹⁴⁶ For this reason, Blackmun also felt obliged to refute the majority opinion in respect to the constitutional issues this case raised.¹⁴⁷

Blackmun effectively refuted the majority's claim that these regulations do not violate the First Amendment. The government is clearly aiming to suppress what it considers a "dangerous idea" when it requires that Title X institutions refuse to answer a patient's inquiries about abortion and prohibit Title X recipients from participating in activities advocating abortion.¹⁴⁸

140. See FREEDMAN, *supra* note 78, at 80 ("Controverted issues of public policy are properly decided, as nearly as effective political and institutional arrangements will permit, in forums closest to the sources of popular representation."); See also Gary C. Bryner and Dennis L. Thompson, *Introduction to THE CONSTITUTION AND THE REGULATION OF SOCIETY 2* (Gary C. Bryner and Dennis L. Thompson eds. 1988) ("The discretionary authority of regulatory bureaucracies appears to violate the rule of law, individual rights, and other values that are at the heart of constitutional government.").

141. *Rust v. Sullivan*, 111 S. Ct. 1759, 1780 (1991).

142. *Id.* at 1778.

143. *Id.* at 1779 n.1.

144. 432 U.S. 464 (1977) (holding Congress has no duty to fund non-therapeutic abortions since *Roe v. Wade* only requires the government refrain from unduly interfering with a woman's right to an abortion).

145. 448 U.S. 297 (1980) (holding the government has no duty to fund abortions even when medically necessary).

146. *Rust v. Sullivan*, 111 S. Ct. 1759, 1780 (1991).

147. *Id.*

148. *Id.* at 1781.

The dissent next assaulted the majority's reasoning by addressing the regulation's effect on the free speech rights of Title X employees.¹⁴⁹ It cited *Abood v. Detroit Board of Education*¹⁵⁰ and *Ran-kin v. McPherson*¹⁵¹ to support its contention that restrictions on free-speech are as constitutionally offensive in the workplace as they are on main street.¹⁵² At the very least, that the communication under investigation occurred in a work environment requires the court to balance the speaker's interest in having his message heard against the government's interest in having that message suppressed.¹⁵³

Blackmun then applied the test he thus created to the *Rust* case.¹⁵⁴ He found that the interest in a physician in getting her message across to a patient is highly compelling both because it is of indispensable assistance to a patient in deciding what treatments to undergo as well as fulfilling the physician's ethical duty.¹⁵⁵ The government's interest in distorting this information is to assure that no Title X funds are being spent outside the scope of the program. Blackmun found this interest falls woefully short of that necessary to suppress the frank and full exchange of information relating to a constitutionally protected right.¹⁵⁶ He argued that less-restrictive alternatives can prevent Title X funds from being misspent.¹⁵⁷ The

149. *Id.* at 1782.

150. 431 U.S. 209 (1977) (holding state compelled speech as a condition of public employment is impermissible even when the state does not regulate an employee's speech outside the workplace).

151. 483 U.S. 378 (1987) (holding the state may not discharge an employee for making comments in the workplace that are of public concern).

152. *Rust v. Sullivan*, 111 S. Ct. 1759, 1783 (1991).

153. *Id.*

154. *Id.*

155. *Id.* (quoting THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS OF THE AMERICAN MEDICAL ASSOCIATION, CURRENT OPINIONS 8.08 (1989)) (also citing the PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS 70 (1982); AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, STANDARDS FOR OBSTETRIC-GYNECOLOGICAL SERVICES 62 (7th ed. 1989)). Currently over 50 organizations are on record supporting the removal of the new regulation's restrictions on abortion counseling and referral in Title X institutions. Prominent among these groups are a large number of medical and health care professional organizations such as the American Medical Association, the American College of Physicians and the American Public Health Association. 137 CONG. REC. H5121 (daily ed. June 26, 1991) (the list of opponents was entered in the *Congressional Record* by Rep. Meyers).

156. *Rust*, 111 S. Ct. at 1783.

157. *Id.* at 1783-84.

government, for example, could impose strict bookkeeping standards to preserve financial separation between permissible and prohibited activities,¹⁵⁸ or it could adopt content-neutral rules for the balanced distribution of health and family planning information.¹⁵⁹

The most impassioned attack on the majority opinion occurred when Blackmun explained how the new regulations impede the doctor-patient relationship.¹⁶⁰ Blackmun thoroughly rejected the majority opinion that the new regulations do not infringe on the doctor-patient relationship.¹⁶¹ He argued the regulations in question undeniably have an effect on this relationship because they manipulate the very words doctors may exchange with patients.¹⁶² Such regulation is unconscionable given the special significance that American society places on this relationship.¹⁶³ Because of the importance of this special association, Blackmun noted that the Court had taken extreme pains to protect it up to this case.¹⁶⁴ He argued that the majority's *imprimatur* upon the new regulations at issue in this case flies directly in the face of the Supreme Court's oft-repeated warnings against regulations that tend to "'confine the . . . physician in an undesired . . . straight jacket'" which the profession cannot endure.¹⁶⁵

Lastly, Blackmun condemned these regulations because they are designed to dissuade women from undergoing abortions.¹⁶⁶ He correctly identified that each of us places an immense amount of faith in our doctor. The doctor-patient relationship is not just about the prescription of treatment and medication, but the whole experience of help, assistance, guidance, and emotional support we seek from our health care providers when we are ill or injured.¹⁶⁷ In barring Title X funded physicians from discussing abortion with their pa-

158. *Id.*

159. *Id.* at 1784.

160. *Id.* at 1785.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 1786 (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

166. *Id.*

167. *Id.* at 1785.

tients, the regulations in question are clearly a governmental endeavor to enlist physicians in an illicit program designed “to deter a woman from making a decision that, with her physician, is hers to make.”¹⁶⁸

V. CONGRESSIONAL RESPONSE TO *RUST V. SULLIVAN*

The Congressional response to the *Rust* decision was swift and forceful. Both the House of Representatives and the Senate took immediate steps to overturn the Court's opinion.

On June 26, 1991, the House of Representatives overwhelmingly passed¹⁶⁹ the Department of Health and Human Services Appropriation Act (H.R. 2707).¹⁷⁰ As a stop-gap measure designed to gain more time for anti-*Rust* forces in the House to pass permanent legislation overturning *Rust*, H.R. 2707 included a section 514 which denies funding to the Secretary to enforce the new regulations ban on abortion counseling upheld by the Supreme Court in *Rust*.¹⁷¹ The House Energy and Commerce Committee has also approved¹⁷² a bill¹⁷³ that would codify the pre-1988 regulations' interpretation of Title X.¹⁷⁴ The Senate responded to *Rust* by first passing¹⁷⁵ the Title X Pregnancy Counseling Act of 1991 (S. 323)¹⁷⁶ which codifies

168. *Id.* at 1786 (quoting *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986)).

169. 137 CONG. REC. H5131 (daily ed. June 26, 1991) (roll call vote). The overwhelming support this legislation garnered in the House was due in no small part to the fact that a large number of professional organizations opposed the new regulations. One of the groups expressing strong support of H.R. 2707 was the American Bar Association. See Henry J. Reske and Mark Hanson, *House Reacts to Rust Decision*, A.B.A. J., Oct. 1991, at 108. See also *supra* note 155.

170. H.R. 2707, 102d Cong., 1st Sess. (1991).

171. 137 CONG. REC. H5113 (daily ed. June 26, 1991) (“No funds shall be available under this Act to enforce or otherwise implement the regulations of the Secretary of Health and Human Services published at 42 C.F.R. 59.8 or to promulgate any other regulation having the same substance.”). Section 514 would not alter the regulations codified at 42 C.F.R. §§ 59.9 and 59.10. Thus, the Department of Health and Human Services could still require physical and financial separation between Title X and non-Title X institutions. Also, those institutions that provide a wide range of medical services in addition to abortion could continue to receive funds. Those institutions that only provide abortions would not be eligible to receive Title X funding. See *infra* note 177.

172. Laura L. Fritz, *Bill to Revoke Ban on Abortion Counseling at Federally Funded Clinics Advances*, States News Service, Aug. 1, 1991, available in LEXIS, Nexis Library, Wires File.

173. H.R. 3090, 102d Cong., 1st Sess. (1991).

174. *Id.*

175. 137 CONG. REC. S10,196 (daily ed. July 17, 1991) (passed by a voice vote).

176. S. 323, 102d Cong., 1st Sess. (1991).

the old regulations that dealt with abortion counseling.¹⁷⁷ The Senate has also agreed to H.R. 2707 by a substantial vote.¹⁷⁸

The future of these efforts remains uncertain. President Bush has threatened to veto all these pieces of legislation.¹⁷⁹ Whether the House and Senate can override these promised vetoes remains a question. The 353 to 74 House vote to deny funding for the enforcement of the counseling-ban regulation was in an appropriations bill that a number of Representatives voted for because they supported everything in the bill save section 514's ban on enforcement funding for the new regulations.¹⁸⁰ These Representatives are hoping that the Congressional Conference Committee will eliminate section 514 from H.R. 2707.¹⁸¹ If not, they are committed to sustaining the President's veto.¹⁸²

Equally questionable is the Senate's ability to override the President's threatened vetoes. The Senate passed S. 323 *viva voce*¹⁸³ so

177. 137 CONG. REC. S10,196-97 (daily ed. July 17, 1991) (S. 323 also contains a number of provisions relating to parental notification for minors seeking abortions at Title X projects. The page references cited above refer only to those sections of S. 323 codifying the pre-1988 regulations). As in the case of § 514 of H.R. 2707, the regulations relating to the program integrity requirement and the ban on encouraging, advocating, or promoting abortion would still be in force, as would the funding ban on abortion-only clinics. 137 CONG. REC. 10,126 (daily ed. July 16, 1991) (statement by Sen. Nickles). See *supra* note 171.

178. Gwen Ifill, *Senate Votes Bill to Let Clinics Give Abortion Counsel*, N.Y. TIMES, Sept. 13, 1991, at A1.

179. Major Garrett, *Senate Votes to Quash Abortion-Advice Ban*, WASH. TIMES, July 17, 1991, at A1. During his administration, President Bush has successfully defended four vetoes on legislation that allowed federal funds to be used for abortion related activities. *Id.* The abortion issue is a consistent bone of contention between the President and the Congress. It is interesting to note that this Presidential-Congressional conflict has a tendency to occur in the most unlikely arenas. See, e.g., Michael Ross, *Senate Defies Veto Threat, Passes Foreign Aid Bill, 74-18*, LOS ANGELES TIMES, July 27, 1991, at A2 (discussing the House and Senate passage of foreign aid legislation that alters Bush administration policy by reversing the Mexico City Policy, which forbids federal funding to assist private family planning organizations operating overseas, and reauthorizes American participation in the United Nations Population Fund); Helen Dewar, *Senate Approves Foreign Aid Bill That Reverses Antiabortion Policy*, WASH. POST, July 27, 1991, at A13 (also discussing this legislation).

180. 137 CONG. REC. H5123 (daily ed. June 26, 1991) (statement of Rep. Weber).

181. *Id.*

182. *Id.* At press time, the House had failed to override the President's veto by twelve votes. See Kurt Shillinger, *Win on Abortion Gives Bush Boost*, CHRISTIAN SCI. MONITOR, Nov. 22, 1991, at 7.

183. 137 CONG. REC. S10,196 (daily ed. July 17, 1991) (voice vote on S. 323).

an accurate tally of votes is impossible at this time. Other indications of the Senate's ability to override these possible vetoes are also unavailing. While the Senate did pass H.R. 2707 by a veto proof 78 to 22 vote,¹⁸⁴ the Senate has voted on two other pieces of legislation relating directly to the regulations at issue in *Rust* with less spectacular margins of victory.¹⁸⁵ The Senate rejected an administration backed compromise bill on the counseling question by a vote of 64 to 35 the day before it passed S. 323.¹⁸⁶ The Senate had also passed a measure similar to S. 323 in 1990 by a 62 to 34 vote.¹⁸⁷ In both cases, the vote tally fell short of the 67 votes the Senate needs to overturn the President's veto.¹⁸⁸

VI. CONCLUSION

The decision of the Supreme Court in *Rust v. Sullivan* is unsound and deeply disturbing. The Supreme Court's zeal to ignore basic and established canons of construction¹⁸⁹ indicates it is now willing to violate traditional tenets of judicial restraint to impose its personal sense of moral and political ideology upon the American people. Furthermore, the substantive ramifications of the *Rust* decision are even more disturbing. They have the potential to directly and adversely affect all Americans.

Those most immediately affected are doctors and their patients. *Rust* forces physicians into a "Hobson's choice": They face the prospect of obeying the dictates of the new regulations and ignoring their ethical duty and committing malpractice¹⁹⁰ or ignoring the re-

184. Ifill, *supra* note 178, at A1.

185. See *infra* notes 186 & 187.

186. 137 CONG. REC. S10,103 (daily ed. July 16, 1991) (roll call vote on the Durenberger Amendment).

187. 136 CONG. REC. S13,792 (daily ed. Sept. 25, 1990) (roll call vote on the Chafee amendment).

188. See U.S. CONST. art. I, § 7, cl. 2 (requiring a two-thirds vote to reverse a presidential veto).

189. *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991) (Blackmun, J., dissenting).

190. Barbara Dolan et al., *The Doctors Take on Bush*, TIME, Aug. 5, 1991, at 52-53. See also *Rust v. Sullivan*, 111 S. Ct. at 1785 n.5 (Blackmun, J., dissenting) (footnotes omitted) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984)) (identifying that when a doctor accepts a charity patient, that doctor is still liable for her failure to use all reasonable care to protect that patient's interests).

gulations and risking the loss of their desperately needed federal funding.¹⁹¹

Moreover, this type of governmental interference with the doctor-patient relationship adversely affects a poor patient's health and well-being in a very direct way. In the midst of serious illness and injury, patients must now worry if their governmentally funded physician is basing his recommendations upon sound medical science or political ideology.¹⁹²

Further, the Supreme Court's reasoning in *Rust* is not necessarily limited to the medical profession. This reasoning is equally applicable to all advice-giving professionals.¹⁹³ For example, a court could interpret the reasoning in *Rust* to allow the government to dictate what advice a public defense lawyer may give a client.¹⁹⁴ Thus, the *Rust* decision cannot help but erode those essential trust relationships that must exist between governmentally funded advice-givers and the poor Americans who depend upon their services everyday. In so doing, *Rust* could easily destroy many excellent and worth-

191. The new regulations at issue in *Rust* were, at least partially, the result of the Bush administration's opposition to abortion. See 42 C.F.R. § 59.2 (1989) ("Family Planning, as supported under this subpart, should reduce the incidence of abortion."). See also *supra* notes 62-66 and accompanying text and *supra* note 179.

Paradoxically, by driving these Title X clinics out of operation, these new regulations could well result in an increased number of unwanted pregnancies and, consequently, a dramatic rise in unsafe and life threatening self-induced abortions. This outcome is exactly what resulted in Romania due to former Premier Nicolae Ceaucescu's ban on contraception and abortions. Currently in Romania, the dearth of contraceptives and family planning services has caused an inordinately large number of women to undergo abortions because they lack the resources necessary to avoid pregnancy or care for offspring.

In Romania, doctors usually perform three abortions for every live birth. This is almost the opposite ratio of the United States and Western European nations. Chuck Sudetic, *Romania Seeks to Reduce Abortions*, N.Y. TIMES, Jan. 17, 1991, at A3. See also Judy Mann, *Gagging Women's Clinics*, WASH. POST, May 29, 1991, at D3 (observing that the United States is twenty years behind Western Europe in contraceptive research and has one of the highest nonintended pregnancy rates in the world).

192. See Dolan, *supra* note 190, at 53 ("We are convinced that political medicine is harmful to the health of all Americans.") (quoting American Medical Association Executive Vice President James Todd).

193. *Dangerous Gag*, NAT'L L. J., Nov. 5, 1990, at 14.

194. See *id.* At its 113th annual convention, the American Bar Association's House of Delegates unanimously voted to support Congressional efforts to overturn the *Rust* decision. See *ABA Rejects Ancillary Business, Inroads on Client Confidences*, 60 U.S.L.W. 2121, 2123 (1991).

while programs that are a hallmark of the government's commitment to help its most isolated and vulnerable citizens.

Yet another disquieting result of *Rust* is that those who look to the government for employment and assistance must now face the prospect of choosing between their hard won constitutional rights or their jobs and governmental benefits. The decision in *Rust* which sanctions this governmental extortion is nothing less than the Supreme Court's stamp of approval on the old (and up to this decision, discredited)¹⁹⁵ idea that when "you take the king's shilling, you speak the king's language."¹⁹⁶

The most chilling aspect of the *Rust* decision, however, is the Court's implicit rejection of the foundation of American democratic theory. The strength and vitality of the American system is drawn from the willingness of its citizens to question every aspect of life and to honestly and openly express their ideas and beliefs.¹⁹⁷ For over two hundred years, our constitutional and political system has rested upon the premise that through this continual and on-going process, the American people would acquire the information they needed to be able to make the correct choices for themselves.¹⁹⁸ This fundamental principle of democratic philosophy has nearly always assured¹⁹⁹ that no one would ever consider governmental censorship of information sound public policy.²⁰⁰ The Justices who voted

195. See *Rust v. Sullivan*, 111 S. Ct. 1759, 1782 (Blackmun, J., dissenting) ("It is beyond question 'that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.'" (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977)) (citing *Elrod v. Burns*, 427 U.S. 347, 357-60 (1976) and cases cited therein). See also 137 CONG. REC. H5124 (daily ed. June 26, 1991) (statement of Rep. Boxer) ("I thought we had a revolution about that [*i.e.*, governmentally compelled speech].").

196. 137 CONG. REC. H5124 (daily ed. June 26, 1991) (statement of Rep. Boxer).

197. Lapham, *supra* note 126, at 8.

198. See 137 CONG. REC. H5120 (daily ed. June 26, 1991) (statement of Rep. Johnson) ("Mr. Chairman, democracy rests on two assumptions: First, that men and women are good, and second, that given knowledge, they will do the right thing — they will act responsibly.").

199. This is not to say that other types of "gag-rules" have not existed in American history. For example, between 1836 and 1844, the United States House of Representatives had parliamentary rules that banned the House from accepting any petitions dealing with slavery. ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 260-61 (6th ed. 1983).

200. See 137 CONG. REC. H5120 (daily ed. June 26, 1991) (statement of Rep. Johnson). See also 137 CONG. REC. H5125 (daily ed. June 26, 1991) (statement of Rep. Matsui) ("It is contrary to the values of our society to deny individuals information necessary in order to make a well thought

in the majority in *Rust* voted for nothing less than the subversion of this most basic and vital premise of the American experience. They would have done well to remember the eloquent and prophetic words of Montesquieu: "The deterioration of every government begins with the decay of the principles on which it was founded."²⁰¹

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out decision."'). For a discussion of government funding and free speech considerations, see generally Georges Nahitchevansky, Note, *Free Speech and Government Funding: Does the Government Have to Fund What It Doesn't Like?*, 56 BROOK. L. REV. 213 (1990).

201. Quoted in Lapham, *supra* note 126, at 6.

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