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CONSTITUTIONAL LAW—JUDICIAL DEFERENCE—SUPREME COURT WILL DEFER TO “REASONABLE” ABORTION RESTRICTIONS. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

On February 2, 1988, the Secretary of the Department of Health and Human Services (Secretary) issued amended regulations prohibiting projects funded by Title X of the public Health Services Act from providing abortion counseling or referrals and requiring that such projects be physically and financially separate from abortion-related activities.<sup>1</sup> In response to these regulations two separate actions were

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1. *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989), *aff'd*, 111 S. Ct. 1759 (1991). Title X was enacted by Congress in 1970 as part of the Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (codified at 42 U.S.C. §§ 300-300a-8 (1988)). Title X authorizes the Secretary to make grants to public or nonprofit private entities to assist in the establishment and operation of family planning projects. 42 U.S.C. § 300(a). Under 42 U.S.C. § 300a-4 all grants must be made in accordance with regulations promulgated by the Secretary. In 1988 the Secretary issued amended regulations for Title X projects which specifically addressed § 300a-6 of the Act. Section 300a-6 provides that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6. The amended regulations can be found at 42 C.F.R. § 59 (1991).

The following sections of the regulations are most relevant to this discussion:

A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

42 C.F.R. § 59.8(a)(1) (1991).

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and § 59.8 and § 59.10 of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (e.g. treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X projects are present and signs and material promoting abortion absent.

42 C.F.R. § 59.9 (1991).

A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions

filed against the Secretary in the United States District Court for the Southern District of New York,<sup>2</sup> seeking declaratory and injunctive relief to prevent the new regulations from being implemented.<sup>3</sup> The actions were consolidated,<sup>4</sup> and the district court subsequently enjoined enforcement of the regulations, with respect to the plaintiffs, until further order. On cross motions for summary judgment, the district court determined that the regulations were a permissible construction of the statute, and that they did not violate the constitutional rights of Title X grantees or their patients.<sup>5</sup>

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or increase the availability or accessibility of abortions for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

- (1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;
- (2) Providing speakers to promote the use of abortion as a method of family planning;
- (3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;
- (4) Using legal action to make abortion available in any way as a method of family planning; and
- (5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

42 C.F.R. § 59.10(a) (1991).

"Title X is the single largest source of federal funding for family planning services." Jerry V. McMartin, *Family Planning Means Never Having to say "Abortion": Analysis of Title X Anti-Abortion Regulations*, at \*4, October 1990, available in WestLaw, TP-All Database.

This Act is popularly known as Title X, referring to its designation as Title X of chapter 373 of Pub. L. No. 91-572 (currently codified at 42 U.S.C. § 300).

2. *New York v. Sullivan*, 889 F.2d at 406. The original two cases were *New York v. Bowen*, No. 88-0701 (S.D.N.Y.) and *Rust v. Bowen*, No. 88-0702 (S.D.N.Y.). The defendant in both lawsuits was Otis R. Bowen, the Secretary of the Department of Health and Human Services at that time.

The plaintiffs in *New York v. Bowen* were the State of New York (a grantee of Title X funds), the City of New York (a provider of services to Title X grantees in New York City), and the New York City Health and Hospitals Corporation (a provider of hospital services to the low income population of the City).

The plaintiffs in *Rust v. Bowen* were Dr. Irving Rust and Dr. Melvin Padawer (supervisors of Title X funded programs) and Planned Parenthood of New York City and Planned Parenthood of Westchester/Rockland (Title X grantees). *New York v. Bowen*, 690 F. Supp. 1261, 1263 (S.D.N.Y. 1988), *aff'd*, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989), *aff'd*, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

Plaintiffs contended that the regulations promulgated by the Secretary were not a proper construction of the Act and that they violated the First Amendment constitutional rights of Title X grantees and their patients and the Fifth Amendment constitutional rights of the Title X project patients. *New York v. Sullivan*, 889 F.2d at 404.

3. *New York v. Sullivan*, 889 F.2d at 406.

4. *New York v. Bowen*, 690 F. Supp. at 1263.

5. *Id.* at 1272-74. The district judge noted that two other district courts had reviewed the

Plaintiffs appealed to the Court of Appeals for the Second Circuit, which affirmed the district court's decision.<sup>6</sup> Once again, plaintiffs' statutory and constitutional arguments challenging the validity of the regulations were rejected.<sup>7</sup>

The Supreme Court granted certiorari<sup>8</sup> to hear this case in order to resolve a split among the circuits.<sup>9</sup> In a five-to-four decision the Supreme Court affirmed the decision of the Second Circuit holding that the regulations were a proper interpretation of the Act and that their interpretation did not violate the First or Fifth Amendment rights of Title X grantees or their patients.<sup>10</sup> *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

In *Rust v. Sullivan* the Supreme Court addressed an issue it has faced repeatedly since *Roe v. Wade*<sup>11</sup> in 1973: To what extent may state legislatures or the executive branch restrict the right to an abortion?<sup>12</sup> To understand *Rust v. Sullivan* in its proper context it is necessary to trace the evolution of the Supreme Court cases involving the regulation of abortion.

In *Roe v. Wade* the Supreme Court invalidated Texas' criminal abortion laws.<sup>13</sup> In *Roe* the Court held that a state's restrictions on

regulations and had not upheld them. *Id.* at 1265 & n.4. See *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988), *preliminary injunction granted*, 687 F. Supp. 540 (D. Colo. 1988), *permanent injunction aff'd*, 913 F.2d 1492 (10th Cir. 1990); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *injunction granted aff'd*, 899 F.2d 53 (1st Cir. 1990).

6. *New York v. Sullivan*, 889 F.2d at 404. Dr. Louis Sullivan became the defendant by succeeding Otis R. Bowen as Secretary of the Department of Health and Human Services. *Id.* at 401

7. *Id.* at 404. The court of appeals held that the regulations were authorized by the Act and that they did not violate the First Amendment or a woman's privacy right to an abortion. *Id.* at 407, 411-12.

8. *Rust v. Sullivan*, 110 S. Ct. 2559 (1990); *New York v. Sullivan*, 110 S. Ct. 2559 (1990).

9. *Rust v. Sullivan*, 111 S. Ct. 1759, 1764 (1991). The First and Tenth Circuit Courts of Appeal invalidated the regulations, principally on constitutional grounds. *Massachusetts v. Bowen*, 899 F.2d 53, 65 (1st Cir. 1990); *Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1492, 1498-1504 (10th Cir. 1990).

10. *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991). Chief Justice Rehnquist wrote the majority opinion. Justices White, Kennedy, Scalia, and Souter joined. Justice Blackmun filed a dissenting opinion in which Justices Marshall, O'Connor, and Stevens each joined in various parts. *Id.* at 1764.

11. 410 U.S. 113 (1973).

12. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). See *infra* notes 18-65 and accompanying text.

13. 410 U.S. 113 (1973). The Court determined that the right to have an abortion is a fundamental right. *Id.* at 153.

"Abortion regulation was a matter exclusively for the state legislatures until 1973, when the United States Supreme Court brought medically indicated abortions within the protection of the

abortions are invalid unless they are justified by a compelling state interest.<sup>14</sup> In the years following *Roe* a pattern emerged. State legislatures enacted "abortion" legislation, a suit was brought to enjoin enforcement of the legislation, and the Supreme Court routinely invalidated the legislation.<sup>15</sup> Although those state laws were generally not attempts to prohibit abortion, they did place "conditions on their performance,"<sup>16</sup> which the Court felt "effectively impaired a woman's freedom of choice."<sup>17</sup>

One issue that *Roe v. Wade* did not address was the rights of third parties, such as spouses, parents, and putative fathers, in the abortion decision.<sup>18</sup> In *Planned Parenthood v. Danforth*<sup>19</sup> the Supreme Court considered a Missouri statute requiring written consent of a woman's spouse or of a parent of an unmarried woman under age eighteen before performing an abortion.<sup>20</sup> The Court invalidated the statute, concluding that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy."<sup>21</sup>

In *Colautti v. Franklin*<sup>22</sup> the Supreme Court examined the validity of the Pennsylvania Abortion Control Act, which required physicians to determine the viability of the fetus.<sup>23</sup> If viability was likely, the physician was required to exercise the same standard of care with respect to

fourteenth amendment in *Roe v. Wade* and *Doe v. Bolton*." B.J. George, Jr., *State Legislatures Versus the Supreme Court: Abortion Legislation in the 1980's*, 12 PEPP. L. REV., 427, 429 (1985) (footnotes omitted).

In *Doe v. Bolton*, 410 U.S. 179 (1973), the Court invalidated a Georgia criminal statute requiring, *inter alia*, that abortions be performed in hospitals, approved by an abortion committee, and confirmed as necessary by two doctors in addition to the performing doctor. *Id.* at 184.

14. *Roe v. Wade*, 410 U.S. at 163. The Court determined that in protecting the health of the mother, the state's interest becomes compelling at the end of the first trimester, and as to the interest in protecting the potential life of the fetus, the state's interest becomes compelling at the point of viability. *Id.*

15. "[S]tate efforts to regulate abortion rarely have survived the Court's scrutiny." Theodore C. Hirt, Commentary, *Why the Government is Not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895, 1897 (1988) (footnote omitted).

16. *Id.*

17. *Id.*

18. Mark E. Chopko, *Webster v. Reproductive Health Services: A Path to Constitutional Equilibrium*, 12 CAMPBELL L. REV. 181, 186 (1990) (footnote omitted).

19. 428 U.S. 52 (1976).

20. *Id.* at 58.

21. *Id.* at 74.

22. 439 U.S. 379 (1979).

23. *Id.* at 382.

the potentially viable fetus as he was required to exercise with respect to the mother.<sup>24</sup> This Act was struck down as unconstitutionally vague.<sup>25</sup>

The Supreme Court continued its strict review of "abortion" statutes in *Bellotti v. Baird*.<sup>26</sup> In *Bellotti* the Court invalidated a Massachusetts statute requiring minors seeking an abortion to obtain the consent of both parents or a superior court judge.<sup>27</sup> The Court applied the same reasoning used in *Planned Parenthood v. Danforth*<sup>28</sup> and determined that it was inappropriate to give a third party veto power over the decision of a physician and his patient to terminate a pregnancy.<sup>29</sup>

In *Akron v. Akron Center for Reproductive Health*<sup>30</sup> the Supreme Court invalidated an Ohio ordinance regulating abortion. The ordinance required that abortions after the first trimester be performed in a hospital,<sup>31</sup> that minors under the age of fifteen obtain parental consent for an abortion,<sup>32</sup> that information be disclosed regarding fetal development<sup>33</sup> and alternatives to abortion,<sup>34</sup> and that fetal remains be disposed of in a humane and sanitary manner.<sup>35</sup> The ordinance also required a twenty-four hour waiting period before the abortion could be performed.<sup>36</sup> The Court invalidated the informed consent portion of the ordinance, because it concluded that such requirements were designed to influence a woman's choice between childbirth and abortion.<sup>37</sup>

The Supreme Court in *Thornburgh v. American College of Obstetricians and Gynecologists*<sup>38</sup> invalidated the Pennsylvania Abortion Control Act which required: informed consent,<sup>39</sup> distribution of detailed printed state material regarding risks and alternatives,<sup>40</sup> a cer-

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24. *Id.*

25. *Id.* at 401.

26. 443 U.S. 622 (1979).

27. *Id.* at 643.

28. *See supra* notes 19-21 and accompanying text.

29. *Bellotti v. Baird*, 443 U.S. at 643.

30. 462 U.S. 416 (1983).

31. *Id.* at 422.

32. *Id.*

33. *Id.* at 423.

34. *Id.*

35. *Id.* at 424.

36. *Id.*

37. *Id.* at 444.

38. 476 U.S. 747 (1986).

39. *Id.* at 759-60.

40. *Id.* at 761.

tain standard of care with respect to the potentially viable fetus,<sup>41</sup> and the presence of a second doctor when an abortion was performed on a potentially viable fetus.<sup>42</sup> Again, the Court reasoned that the informed consent provisions were designed to influence a woman's choice between abortion and childbirth.<sup>43</sup>

The preceding cases demonstrate the Supreme Court's resistance to attempts by state legislatures to impose restrictions on abortions.<sup>44</sup> However, the Court has been more tolerant toward such restrictions in two areas.<sup>45</sup> The first is abortion funding. Here, the Court has "distinguished between *direct* interference with a woman's right to choose abortion and the *indirect* deterrence of the abortion choice"<sup>46</sup> by funding childbirth and not abortion.<sup>47</sup> For example, in *Maher v. Roe*,<sup>48</sup> the Court upheld a Connecticut welfare regulation which provided medicaid recipients with payments for medical services related to childbirth, but denied payments for nontherapeutic abortions.<sup>49</sup> Similarly, in *Harris v. McRae*<sup>50</sup> the Court upheld the Hyde Amendment which prohibits public funding of certain medically indicated abortions.<sup>51</sup> The Court also has upheld state laws requiring parental notification before a minor could receive an abortion, even though such laws have a restrictive effect on abortions.<sup>52</sup>

41. *Id.* at 768.

42. *Id.* at 769-72.

43. *Id.* at 762. Justice Blackmun, writing for the majority, said:

[O]ur cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government . . . . Few decisions are more personal and intimate . . . than a woman's decision whether to end her pregnancy. A woman's right to make that choice freely is fundamental.

*Id.* at 772 (citations omitted).

Justice Burger, in his dissent, stated, "[w]e have apparently already passed the point at which abortion is available merely on demand. If the statute at issue here is to be invalidated, the 'demand' will not even have to be the result of an informed choice." *Id.* at 783-84 (Burger, J., dissenting).

44. See *supra* notes 18-43 and accompanying text.

45. Chopko, *supra* note 18, at 183 n.5.

46. LAURENCE H. TRIBE, THE CLASH OF ABSOLUTES 16 (1990) [hereinafter TRIBE].

47. TRIBE, *supra* note 46, at 16.

48. 432 U.S. 464 (1977).

49. *Id.* at 465-66, 474.

50. 448 U.S. 297 (1980).

51. *Id.* at 322-23.

52. See, e.g., *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding a Utah statute requiring parental notification, if possible, prior to a minor getting an abortion). *Id.* at 399-400, 409-11. The Court distinguished this case from those cases invalidating parental *consent* requirements on the basis that a *notification* requirement does not give the parents a blanket veto power over the

Despite these two exceptions, the Court generally overturned direct restrictions on abortions<sup>53</sup> until *Webster v. Reproductive Health Services*.<sup>54</sup> The five-to-four decision in *Webster*, which upheld a Missouri statute regulating abortion,<sup>55</sup> marked a turning point in the Supreme Court's approach to abortion restrictions.<sup>56</sup> At the most basic level, *Webster* suggests that the Supreme Court is now more willing to uphold state laws regulating abortion.

Although the *Webster* opinion is badly fragmented,<sup>57</sup> it is apparent that the Justices did not reach their various conclusions through application of the traditional strict scrutiny standard of review.<sup>58</sup> Three Justices applied a rational basis standard to the viability portion of the regulations,<sup>59</sup> Justice O'Connor, in her concurrence, argued for application of the "undue burden" standard, and Justice Scalia in his concurrence rejected both standards of review and argued that this case provided the opportunity to reconsider and overturn *Roe*.<sup>60</sup> It is difficult to ascertain what standard the Supreme Court will use in assessing future

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physician and patient's decision. *Id.* at 411 & n.17.

53. TRIBE, *supra* note 46, at 16.

54. 492 U.S. 490 (1989).

55. *Id.* at 500-01. The statute: (1) sets forth "findings" that life begins at conception, unborn children have protectable interests, and all state laws shall be interpreted to provide unborn children with the same rights enjoyed by other persons; (2) requires a doctor who believes a fetus is twenty or more weeks old to perform a variety of tests to determine viability; (3) prohibits the use of public employees and facilities in performing or assisting with abortions not necessary to save the life of the mother; and (4) makes it unlawful to use public funds, employees, or facilities for the purpose of "encouraging or counseling" a woman to have a nontherapeutic abortion. *Id.*

56. Lynn D. Wardle, "Time Enough": *Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881, 883 (1989).

57. *Webster v. Reproductive Health Servs.*, 492 U.S. at 498-99, 522, 532, 537, 560. Chief Justice Rehnquist announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part II-C, the opinion of the Court with respect to Parts I, II-A, and II-B, in which Justices White, O'Connor, Scalia, and Kennedy joined, and an opinion with respect to parts II-D and III, in which Justices White and Kennedy joined. Justices O'Connor and Scalia filed opinions concurring in part and concurring in the judgment. Justice Blackmun filed an opinion concurring in part and dissenting in part, in which Justices Brennan and Marshall joined. Justice Stevens filed an opinion concurring in part and dissenting in part. *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

58. *Id.* at 520-21, 529-30 (O'Connor, J., concurring), 532-37 (Scalia, J., concurring).

59. *Id.* at 520-21. "The Missouri testing requirement here is reasonably designed to ensure that abortions are not performed where the fetus is viable . . . and that is sufficient to sustain its constitutionality." *Id.* at 520 (Rehnquist, C. J., White, J., Kennedy, J., plurality opinion).

60. *Id.* at 529-32 (O'Connor, J., concurring). Under the undue burden test, "an abortion regulation is subject to the deferential rational basis test unless it unduly burdens a woman's right to choose abortion, in which case it is subject to strict scrutiny." *Summary and Analysis*, 60 U.S.L.W. 1065 (Oct. 29, 1991).



abortion regulations.<sup>61</sup>

In 1990, *Hodgson v. Minnesota*<sup>62</sup> and *Ohio v. Akron Center for Reproductive Health*<sup>63</sup> gave the Court the opportunity to consider and uphold two more state abortion statutes. *Hodgson* and *Akron* both involved parental notification requirements,<sup>64</sup> and they stand for the proposition that as long as the state-enacted regulations are reasonable and are in response to a legitimate state interest the Court will uphold them.<sup>65</sup>

In *Rust v. Sullivan*<sup>66</sup> the Supreme Court was asked to determine the constitutionality of an action taken by a coequal branch of the political system, in this case the executive branch. The Court continued its recent trend by upholding the regulations promulgated by the Secretary construing Title X of the Public Health Services Act.<sup>67</sup> The regulations prohibit abortion-related activities by Title X funded clinics.<sup>68</sup> The Court systematically considered and rejected each of plaintiffs' arguments, concluding that the regulations were authorized by the Act<sup>69</sup> and could be implemented without infringing upon constitutionally pro-

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61. In *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991), the Third Circuit faced the question of whether it should apply strict scrutiny to the Pennsylvania Abortion Control Act after *Webster*. The Court reasoned that "the controlling opinion in a splintered decision is that of the justice[s] concurring on the 'narrowest ground.'" *Id.* at 693 (citing *Marks v. U.S.*, 430 U.S. 188, 193 (1977)). Because the narrowest concurring opinion in *Webster* was Justice O'Connor's undue burden standard, the Third Circuit concluded that the undue burden standard is the appropriate standard to apply in deciding abortion regulation cases. *Planned Parenthood v. Casey*, 947 F.2d at 694-97 (3d Cir. 1991).

The Eighth Circuit has also determined that Justice O'Connor's undue burden standard is the appropriate standard to apply when determining the constitutionality of an abortion regulation. *Coe v. Melahn*, No. 90-1552, 1992 WL 37328 (8th Cir. Mar. 2, 1992) (upholding the constitutionality of a Missouri statute regulating insurance coverage for elective abortions).

62. 110 S. Ct. 2926 (1990).

63. 110 S. Ct. 2972 (1990).

64. The statute in *Hodgson* required the performing physician to give notice to both living parents at least forty-eight hours before an abortion is performed on a minor. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2930-31 (1990). The statute at issue in *Ohio v. Akron Center for Reproductive Health* required an unemancipated minor's physician to give notice to one of her parents before performing an abortion. *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972, 2977 (1990). Both statutes have a judicial bypass provision. *Hodgson v. Minnesota*, 110 S. Ct. at 2933; *Ohio v. Akron*, 110 S. Ct. at 2977-78.

65. Sue G. Graziano, *Parental Notification and a Minor's Right to an Abortion After Hodgson & Akron II*, 17 OHIO N. U. L. REV. 581, 597 (1990).

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

67. *Id.* at 1764.

68. *Id.* at 1765-66.

69. *Id.* at 1767-71.

tected rights.<sup>70</sup>

The Court initially considered whether the regulations exceeded the Secretary's authority under Title X and whether they were arbitrary and capricious.<sup>71</sup> First, the Court addressed the regulations prohibiting abortion counseling, referral, and advocacy,<sup>72</sup> and second, the regulations requiring separate facilities, personnel, and records.<sup>73</sup>

The Court began by looking to the plain language of the Act.<sup>74</sup> The majority of the courts which have considered the plain language of 42 U.S.C. § 600a-6 have agreed that the language is ambiguous and does not address the issues of counseling, referral, advocacy, or program integrity.<sup>75</sup>

The Court then analyzed whether the regulations were authorized by the Act under the *Chevron* standard.<sup>76</sup> The Court looked to the legislative history to determine if the regulations pertaining to counseling, referral, and advocacy were based on a permissible construction of the Act.<sup>77</sup> It found that the history was ambiguous as to those issues and

70. *Id.* at 1771-78. "[T]he 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." *Id.* at 1767 (quoting *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)).

71. *Rust v. Sullivan*, 111 S. Ct. at 1767.

72. *Id.*

73. *Id.* at 1769.

74. *Id.* at 1767. The statute states that, "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 600a-6 (1988).

75. *Rust v. Sullivan*, 111 S. Ct. at 1767. *See, e.g.*, *Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1492, 1497 (10th Cir. 1990); *Massachusetts v. Bowen*, 899 F.2d 53, 59 (1st Cir. 1990); *New York v. Bowen*, 690 F. Supp. 1261, 1265-66 (S.D.N.Y. 1988).

76. *Id.* *See* *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). In *Chevron* the Court upheld the Environmental Protection Agency's construction of the term "stationary source" in the Clean Air Act Amendments. *Id.* at 841-42. The Court articulated the following test for determining if an agency's construction of a statute, which it administers, is authorized: (1) Did Congress speak directly to the question at issue? If Congress' intent is clear, then the agency and the Court must abide by that intent. *Id.* at 842-43. (2) If Congress is silent or ambiguous as to the specific issue, then the Court must determine whether the agency's interpretation of the Act is based on a permissible construction of the act. *Id.* at 843. (3) The agency's interpretation is considered permissible unless it is "arbitrary, capricious or manifestly contrary to the Statute." *Id.* at 844.

77. *Rust v. Sullivan*, 111 S. Ct. at 1768. The plaintiffs relied on portions of the legislative history to support their arguments that the regulations promulgated by the Secretary did not represent congressional intent:

The committee does not view family planning as merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices . . . . [A] successful family planning program must contain . . . [m]edical services, including consultation, examina-

failed to "shed light on relevant congressional intent."<sup>78</sup> This was consistent with the findings of lower courts which also analyzed the legislative history of the Act.<sup>79</sup> After concluding that the statutory language and legislative history were ambiguous as to Congress' intent, the Court indicated that under *Chevron* it would normally defer to the interpretation of the agency administering the Act.<sup>80</sup>

The Court rejected petitioners' arguments that the Secretary's "regulations are entitled to little or no deference because they 'reverse

tion, prescription, and continuing supervision, supplies, instruction, and referral to other medical services as needed.

*Id.* at 1768 n.3 (quoting S. REP. NO. 1004, 91st Cong., 2d Sess. 10 (1970)).

The defendants also relied on portions of legislative history to support their contentions that the regulations promulgated by the Secretary do reflect congressional intent.

This legislation is designed to make comprehensive, voluntary family planning services, and information relating thereto, readily available to all persons in the United States desiring such services; to provide greatly increased support for biomedical, behavioral, and operational research relevant to family planning and population; to develop and disseminate information on population growth; and to coordinate and centralize the administration of family planning and population research programs conducted by the Department of Health, Education and Welfare.

New York v. Sullivan, 889 F.2d at 408 (quoting S. REP. NO. 1004, 91st Cong., 2d Sess. 10 (1970)).

It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent. The legislation does not and is not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation.

New York v. Bowen, 690 F. Supp. at 1266 (quoting S. CONF. REP. NO. 1667, 91st Cong., 2d Sess. 8-9 (1970), reprinted in U.S.C.A.N. 5068, 5081-82 (1970)).

"[T]his legislation does not provide for abortions contrary to some of the rumors apparently circulating concerning it." *Id.* at 1266 n.5 (quoting 116 CONG. REC. 37,367 (1970) (remarks of Rep. Nelson)).

"[I] strongly support . . . the provision in the House version of this legislation that prevents this bill from being construed as support for abortion." *Id.* (quoting 116 CONG. REC. 37,371 (1970) (remarks of Rep. Pickle)).

Congress "wisely prohibited the use of any Federal funds in the bill from being used for abortion." *Id.* at 1266 n.5 (quoting 116 CONG. REC. 37,375 (1970) (remarks of Rep. Broyhill)).

"With the 'prohibition of abortion' amendment—title X, section 1008—the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." *Id.* at 1265 n.5 (quoting 116 CONG. REC. 37,375 (1970) (remarks of Rep. Dingell)).

78. Rust v. Sullivan, 111 S. Ct. at 1768.

79. See *Massachusetts v. Sullivan*, 899 F.2d 53, 62 (1st Cir. 1990); *Planned Parenthood v. Sullivan*, 913 F.2d 1492, 1497 (10th Cir. 1990); *New York v. Sullivan*, 889 F.2d 401, 407 (2d Cir. 1989).

80. Rust v. Sullivan, 111 S. Ct. at 1768.

a longstanding agency policy that permitted nondirective counseling and referral for abortion.’<sup>81</sup> The Court relied on the Secretary’s assertions that reports from the General Accounting Office and the Office of the Inspector General indicated that the new regulations were necessary because the prior policy failed to properly implement the statute, “the new regulations [were] more in keeping with the original intent of the statute, [were] justified by client experience under the prior policy, and [were] supported by a shift in attitude against the ‘elimination of unborn children by abortion.’”<sup>82</sup>

The Court took a similar analytical approach in considering whether the program integrity requirements—separate facilities, personnel, and records—were a permissible construction of the Act.<sup>83</sup> The Court determined that the program integrity requirements were not inconsistent with the plain language of Title X,<sup>84</sup> and the legislative history was unclear as to Congress’ intent in that regard.<sup>85</sup>

Because neither the plain language of the Act nor the legislative history was determinative, the Court considered whether the amended regulations were necessary to assure proper implementation of the Act.<sup>86</sup> The Court relied on the Secretary’s contention that it is necessary for nonapproved activities to take place in facilities separate from

81. *Id.* (quoting Brief for Petitioners at 20, *New York v. Sullivan*, 111 S. Ct. 1759) (No. 89-1392). In *Chevron* the regulations at issue were promulgated in 1981 by the Environmental Protection Agency (“EPA”) when a new administration took office. *Chevron*, 467 U.S. at 840-41. The regulations constituted a change from the regulations put in effect in 1980. *Id.* The Court rejected respondent’s argument “that the EPA’s interpretation is not entitled to deference because it represents a sharp break with prior interpretation of the Act.” *Chevron*, 467 U.S. at 862. The Court held that “an initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rule making, must consider varying interpretations and the wisdom of its policy on a continuing basis.” *Id.* at 863-64.

82. *Rust v. Sullivan*, 111 S. Ct. at 1769. The prior regulations directed in part, that:

[p]regnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action and referral upon request:

- Prenatal care and delivery
- Infant care, foster care or adoption and
- Pregnancy termination

*New York v. Bowen*, 690 F. Supp. at 1270 (citing U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES GUIDELINES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES § 8.6 (1981)).

83. *Rust v. Sullivan*, 111 S. Ct. at 1770-71.

84. *Id.* at 1769.

85. *Id.* at 1769-70. “[L]egislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining the regulations.” *Id.* at 1770. See *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto. Ins.*, 463 U.S. 29, 42 (1983).

86. *Rust v. Sullivan*, 111 S. Ct. at 1769-70.

the personnel and records of approved activities.<sup>87</sup> The Secretary contended that separation is necessary to prevent the use of federal funds for abortion-related activities or the appearance that federal funds are being used for abortion-related activities.<sup>88</sup> Therefore, the Court concluded that the Secretary's decision to promulgate new regulations was based on a "reasoned determination that the program integrity requirements [were] necessary to implement the prohibition."<sup>89</sup>

The Court then addressed the petitioners' final statutory construction argument, namely that the regulations should be invalidated because they raise questions of constitutional law.<sup>90</sup> The Court noted that any regulations the Secretary might have issued would have been challenged on constitutional grounds.<sup>91</sup> Although the Court admitted that the petitioners' constitutional arguments had some validity, it concluded that "they [did] not carry the day."<sup>92</sup>

Turning to the petitioners' constitutional arguments against the regulations, the Court considered whether the regulations violated the First Amendment<sup>93</sup> and the Fifth Amendment to the Constitution.<sup>94</sup> Petitioners asserted that the regulations violated the First Amendment by compelling viewpoint-based suppression of speech.<sup>95</sup> In rejecting this argument, the Court found the Act itself constitutional,<sup>96</sup> being a permissible exercise of the government's authority under *Maher*<sup>97</sup> and *Mc-*

87. *Id.*

88. *Id.* at 1769.

89. *Id.* at 1770-71.

90. *Id.* at 1771. "[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Id.* (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)). "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Id.* (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1915)).

91. *Rust v. Sullivan*, 111 S. Ct. at 1771.

92. *Id.*

93. *Id.* U.S. CONST. amend. I provides, "Congress shall make no law . . . abridging the freedom of speech . . ."

94. *Rust v. Sullivan*, 111 S. Ct. at 1776. U.S. CONST. amend. V provides, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

95. *Rust v. Sullivan*, 111 S. Ct. at 1772. "The regulations prohibit all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term." *Id.* at 1771-72 (quoting Brief for Petitioner at 11, *Rust v. Sullivan*, 111 S. Ct. 1751 (1991) (No. 89-1391)).

96. *Id.* at 1772.

97. *Id.* See *supra* note 48 and accompanying text.

*Rae*.<sup>98</sup> It is not a constitutional violation to fund a program that deals with a situation in one way and not to fund a program that deals with it in an alternative way.<sup>99</sup> The regulations promulgated by the Secretary are simply an implementation of the prohibitions within the Act.<sup>100</sup> They are necessary to ensure that Title X grantees and their staffs do not engage in activities outside the scope of the program.<sup>101</sup> In addition, the Court asserted that "when the government appropriates public funds to establish a program it is entitled to define the limits of that program."<sup>102</sup>

The Court then dismissed as inaccurate plaintiffs' claim that the regulations would prohibit a Title X project from referring a woman whose pregnancy placed her life in danger to a provider of abortion services.<sup>103</sup> The Court reasoned that in those cases the potential abortion would not serve as a "method of family planning," and therefore the Act would not apply.<sup>104</sup> In addition, the Court pointed out that two provisions in the regulations specifically provide for "referral" when medically necessary.<sup>105</sup>

Continuing its First Amendment analysis, the Court next considered the petitioners' argument that the proposed regulations "condition the receipt of a benefit, in this case Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling."<sup>106</sup> The Court rejected this argument, stating that Title

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98. 111 S. Ct. at 1772. *See supra* note 50 and accompanying text.

99. 111 S. Ct. at 1772. In *Maher* the Court held that the government may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Id.* (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

100. *Rust v. Sullivan*, 111 S. Ct. at 1772. "The Title X program is designed not for prenatal care, but to encourage family planning." *Id.*

101. *Id.* at 1772-73. "A doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such service is outside the scope of the federally funded program." *Id.* at 1772.

102. *Id.* at 1773.

103. *Id.*

104. *Id.*

105. *Id.* "Section 59.8(a)(2) provides a specific exemption for emergency care and requires Title X recipients 'to refer the client immediately to an appropriate provider of emergency medical services.' 42 C.F.R. § 59(a)(2) (1989). Section 59.5(b)(1) also requires Title X projects to provide 'necessary referral to other medical facilities when medically indicated.'" *Rust v. Sullivan*, 111 S. Ct. at 1773 (footnotes omitted).

106. *Id.* at 1774. Petitioners relied on *Perry v. Sindermann*, 408 U.S. 593 (1972), which states that "even though the government may deny [a] benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. at 597. Petitioners also relied on *FCC v. League of*

X grantees<sup>107</sup> and their staffs were not required by the regulations to relinquish their constitutional right to engage in abortion advocacy and counseling; "they merely require that the grantee keep such activities separate and distinct from" the Title X program.<sup>108</sup>

For support, the Court relied on its ruling in *Regan v. Taxation with Representation*.<sup>109</sup> In *Regan* the Court upheld an Internal Revenue Service statute which grants tax exemption to certain charitable organizations as long as "no substantial part of the activities of which is . . . attempting to influence legislation."<sup>110</sup> The Court determined that this did not infringe on the First Amendment rights of the affected organizations; they simply chose not to pay for lobbying.<sup>111</sup> The organizations were free to form a nonlobbying subsidiary which would then be eligible for tax exempt status.<sup>112</sup> Similarly, in *Rust* the Court asserted that Congress had not denied Title X grantees the right to perform abortion-related activities; it simply chose not to fund them.<sup>113</sup> The Court acknowledged that there are limits on the government's right to inhibit expression within subsidized activities,<sup>114</sup> but, in the Court's judgment, those limits would not be reached by application of the Secretary's regulations.<sup>115</sup>

Women Voters, 468 U.S. 364 (1984), in which the Court refused to uphold the Public Broadcasting Act of 1967, which prohibited noncommercial educational broadcasting stations that receive federal grants from engaging in editorializing. *FCC v. League of Women Voters*, 468 U.S. at 402.

"The doctrine of unconstitutional conditions holds that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold the benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

107. "'Grantee' means the organization to which a grant is awarded . . ." 42 C.F.R. § 59.2 (1991).

"'Program' and 'project' are used interchangeably and mean a coherent assembly of plans, activities and supporting resources contained within an administrative framework." *Id.* See also *Rust v. Sullivan*, 111 S. Ct. at 1774.

108. *Rust v. Sullivan*, 111 S. Ct. at 1774. The Court distinguishes *Rust* from unconstitutional conditions cases on the basis that in the latter a condition is placed on the recipient which prohibits the recipient from engaging in the activity inside or outside the scope of the federally funded program, while in *Rust* the constitutionally protected activity is only prohibited within the narrow scope of the Title X program. *Id.*

109. 461 U.S. 540 (1983).

110. *Id.* at 542 n.1.

111. *Id.* at 546.

112. *Id.*

113. *Rust v. Sullivan*, 111 S. Ct. at 1775.

114. *Id.* at 1776. Areas where the Court recognized a limited right to condition speech include areas traditionally open to the public for expressive activity, areas expressly dedicated to speech activities and universities. *Id.*

115. *Id.*

The Court next considered petitioners' claim that the proposed regulations violated a woman's Fifth Amendment right to choose whether to terminate her pregnancy,<sup>116</sup> her right to medical self-determination, and her right to make informed medical decisions free of governmental-imposed harm.<sup>117</sup> The Court first observed that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual."<sup>118</sup> Applying this principle, the Court reasoned that since the government is under no duty to fund a woman's constitutional right to an abortion,<sup>119</sup> the government's decision not to fund abortions did not place an obstacle in a woman's path to an abortion.<sup>120</sup> Thus, a woman still has all of the alternatives she would have if the government did not provide any funded health care clinics.<sup>121</sup>

Finally, the Court concluded that a woman's Fifth Amendment rights to medical self-determination and to make informed medical decisions free of governmentally imposed harm were not violated by the restrictions placed on the doctor-patient relationship and the flow of medical information.<sup>122</sup> The Court reasoned that "a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remained unfettered."<sup>123</sup> The Court acknowledged the petitioners' argument that many of the women using the services of Title X clinics will be financially constrained from going to a health care pro-

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116. *Id.*

117. *Id.* at 1777.

118. *Id.* at 1776 (quoting *Webster v. Reproductive Health Servs.* 109 S. Ct. 3040, 3042 (1989)). See *Harris v. McRae*, 448 U.S. at 315 (1980).

119. *Rust v. Sullivan* 111 S. Ct. at 1776. See *Webster v. Reproductive Health Servs.*, 109 S. Ct. at 3052.

120. *Rust v. Sullivan*, 111 S. Ct. at 1776. See *Harris v. McRae*, 448 U.S. at 315.

121. *Rust v. Sullivan*, 111 S. Ct. at 1777.

122. *Id.* Petitioners argued that under *Akron v. Akron Center for Reproductive Health Services*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), the "government cannot interfere with a woman's right to make an informed and voluntary choice by placing restrictions on the patient/doctor dialogue." *Rust v. Sullivan*, 111 S. Ct. at 1777.

123. *Rust v. Sullivan*, 111 S. Ct. at 1777. The majority argued that the facts in *Rust* were not analogous to *Akron* or *Thornburgh* on this point because the restrictions in those cases applied to all doctors and pregnant patients in the controlling jurisdictions. The proposed regulations at issue in *Rust* were only applicable to doctors and patients within the context of Title X projects. *Id.*



vider that provides abortion-related services.<sup>124</sup> However, the Court concluded that if indigent women are restricted from exercising their constitutionally protected rights it is because of their indigency, rather than governmental restrictions.<sup>125</sup>

Justice Blackmun wrote a strongly worded dissent which was joined by Justice Marshall and joined in part by Justices Stevens and O'Connor.<sup>126</sup> He concluded that the regulations of referral, advocacy, and counseling activities exceeded the Secretary's authority and violated the First and Fifth Amendments to the Constitution.<sup>127</sup>

In making his determination that the regulations exceeded the Secretary's statutory authority,<sup>128</sup> Justice Blackmun looked to the rule of statutory construction that statutes should be construed in a way to avoid raising questions regarding their constitutionality.<sup>129</sup> It was obvious, in Justice Blackmun's view, that the regulations raised doubts regarding their constitutionality. The regulations raised the question of the extent to which the government can impose otherwise unconstitutional conditions on the receipt of public funding. He concluded that they imposed viewpoint-based suppression of speech and that they were directed at a woman's choice regarding abortion.<sup>130</sup> The significant implications of these issues, and "the fact that two of the three Courts of Appeal that have entertained challenges to the Regulations have invalidated them on constitutional grounds," makes the argument that they do not raise constitutional questions implausible.<sup>131</sup>

Justice Blackmun observed that viewpoint-based and content-based suppression of speech are not proper conditions of government funding.<sup>132</sup> Justice Blackmun rejected the majority's contention that the restrictions on speech are necessary to keep the activities of the Title X grantees and their staffs within the scope of the Title X program, which is family planning and therefore pre-conception.<sup>133</sup> Justice Blackmun pointed out that Title X clinics are encouraged to engage in

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124. *Id.* at 1778.

125. *Id.* (citing *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

126. *Id.* at 1778 (Blackmun, J., dissenting).

127. *Id.*

128. *Id.*

129. *Id.* See also *United States v. Security Indus. Bank*, 459 U.S. 70 (1982); *Machinists v. Street*, 367 U.S. 740, 749 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Hooper v. California*, 155 U.S. 648, 657 (1895).

130. *Rust v. Sullivan*, 111 S. Ct. at 1778-79 (Blackmun, J., dissenting).

131. *Id.* at 1779 (Blackmun, J., dissenting). See *supra* note 9.

132. 111 S. Ct. at 1780 (Blackmun, J., dissenting).

133. *Id.* at 1781 (Blackmun, J., dissenting).

many postconception activities,<sup>134</sup> while being prohibited from engaging in the postconception activities related to abortion.<sup>135</sup>

Justice Blackmun also rejected the majority's argument that the First Amendment rights of Title X grantees and their staffs were not violated because the prohibitions on their freedom of expression were limited to the context of their Title X employment.<sup>136</sup> He reasoned that the logical extension of that reasoning would be to uphold *any* governmental restriction as long as it was limited to a federally funded work place.<sup>137</sup> "[I]t 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.'"<sup>138</sup> Conditions such as those imposed by the Secretary's regulations require the Court to balance the speaker's interest in uninhibited speech against the government's interest in suppressing speech.<sup>139</sup> To Justice Blackmun, the interest of Title X counselors in providing complete information to their clients far outweighs the government's interest in using federal funds for Title X approved purposes.<sup>140</sup> In addition, the government's interest

134. *Id.* at 1781-82 (Blackmun, J., dissenting).

Title X projects are required to facilitate access to prenatal care and social services, including adoption services, that might be needed by the pregnant client to promote her well-being and that of her child, while making it abundantly clear that the project is not permitted to promote abortion by facilitating access to abortion through the referral process.

*Id.* at 1781 (quoting 53 FED. REG. 2927 (1988)).

Justice Blackmun noted that the regulations command that a project refer for prenatal care each woman diagnosed as pregnant, irrespective of the woman's expressed desire to continue or terminate her pregnancy. *Id.* at 1781 (citing 42 C.F.R. § 59.8(a)(2) (1991)).

"In addition to requiring referral for prenatal care and adoption services, the regulations permit general health services such as physical examinations, screening for breast cancer, treatment of gynecological problems, and treatment for sexually transmitted diseases." *Id.* at 1781 n.2 (citing 53 FED. REG. 2927 (1988)).

135. *Rust v. Sullivan*, 111 S. Ct. at 1781 (Blackmun, J., dissenting). "If a client asks directly about abortion, a Title X physician or counselor is required to say, in essence, that the project does not consider abortion to be an appropriate method of family planning." *Id.* (citing 42 C.F.R. § 59.8(b)(4) (1991)).

136. *Id.* at 1782 (Blackmun, J., dissenting).

137. *Id.* at 1783 (Blackmun, J., dissenting) (emphasis added).

138. *Id.* at 1782 (Blackmun, J., dissenting) (quoting *Abood v. Detroit Board of Educ.*, 431 U.S. 209, 234 (1977)).

139. *Id.* at 1783 (Blackmun, J., dissenting). See *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

140. *Rust v. Sullivan*, 111 S. Ct. at 1783 (Blackmun, J., dissenting). "The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice." *Id.* (quoting CURRENT OPINIONS, THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS OF THE AMERICAN MEDICAL ASSOCIATION 8.08 (1989)). See also PRESI-

could have been satisfied by more narrow means, such as stringent bookkeeping rules to ensure financial separation or "content neutral rules for the balanced dissemination of family-planning and health information."<sup>141</sup>

Justice Blackmun concluded by arguing that the regulations violated the Fifth Amendment rights of Title X clinic patients, specifically the "right of a pregnant woman to be free from affirmative governmental *interference* in her decision" whether to terminate her pregnancy.<sup>142</sup> By limiting or distorting the abortion-related information available to a pregnant woman entering a Title X clinic, in Justice Blackmun's view, the majority abandoned the longstanding principle that a woman's decision whether to continue her pregnancy to term should be free from coercion,<sup>143</sup> thus placing "formidable obstacles" in her path when she is contemplating whether to continue her pregnancy.<sup>144</sup> Justice Blackmun rejected the majority's attempt to distinguish the facts of this case from those in *Akron* and *Thornburgh*, which struck down regulations placing restrictions on the doctor-patient relationship between all doctors and their patients in their controlling jurisdictions.<sup>145</sup> He asserted that "for the individual woman, the deprivation of liberty by the Government is no less substantial because it affects few rather than many."<sup>146</sup>

Justice Stevens, in a separate dissent, joined Justice Blackmun's constitutional arguments against the validity of the regulations.<sup>147</sup> Justice Stevens added that the majority did not pay "sufficient attention to the language of the controlling statute or to the consistent interpretation accorded the statute by the responsible cabinet officers during four different Presidencies and 18 years."<sup>148</sup> He said that the statute never authorized the Secretary to restrict the provision of information or advice.<sup>149</sup> On the contrary, the Act is directed at the prohibition of con-

DENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS 70 (1982); AMERICAN COLLEGE OF OBSTETRICS & GYNECOLOGISTS, STANDARDS FOR OBSTETRICS-GYNECOLOGIC SERVICES 62 (7th ed. 1989).

141. *Rust v. Sullivan*, 111 S. Ct. at 1783-84 (Blackmun, J., dissenting). See *Massachusetts v. Secretary of Health and Human Servs.*, 899 F.2d 53, 74 (1st Cir. 1990).

142. *Rust v. Sullivan*, 111 S. Ct. at 1784 (Blackmun, J., dissenting).

143. *Id.*

144. *Id.* at 1784-85 (Blackmun, J., dissenting).

145. *Id.* at 1786 (Blackmun, J., dissenting). See *supra* notes 122-23 and accompanying text.

146. *Rust v. Sullivan*, 111 S. Ct. at 1786 (Blackmun, J., dissenting).

147. *Id.* at 1788 (Stevens, J., dissenting).

148. *Id.* at 1786-87 (Stevens, J., dissenting).

149. *Id.* at 1787 (Stevens, J., dissenting).

duct, that is, abortion, and not the provision of information and advice. He noted that in 1971 and 1986 the Secretary issued regulations pursuant to the Act that prohibited conduct, not speech.<sup>150</sup> In his view, the new regulations "represent[] an assumption of policymaking responsibility that Congress [has] not delegated to the Secretary."<sup>151</sup>

Justice O'Connor also joined Justice Blackmun's dissent as to the invalidity of the regulations on the grounds that they raise constitutional questions,<sup>152</sup> but stopped short of concluding that the regulations were unconstitutional. She stated that "[i]t is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them."<sup>153</sup> Justice O'Connor believed it was necessary only to decide that the regulations were not a reasonable interpretation of the statute; the constitutional questions should not have been decided until Congress raised them.<sup>154</sup>

The Supreme Court's decision in *Rust v. Sullivan* is significant on several fronts: its impact on *Roe v. Wade*, the expansion of the government's right to condition funding on the restriction of First Amendment rights, the effect on the doctor-patient relationship, and the role of the current Supreme Court majority in American jurisprudence. For everyone, prolife and prochoice advocates alike, this is a decision with potentially far-reaching effects.<sup>155</sup>

This decision further erodes the fundamental right to abortion established in *Roe*. Although the majority characterizes *Rust* as nothing more than a funding case, and therefore merely an application of the rules previously set forth in *Maher* and *McRae*, such a characterization is an oversimplification. *Rust* is another demonstration of the current majority's willingness to apply something less than strict scrutiny in its review of restrictive abortion measures.<sup>156</sup>

Abortion cases will continue to reach the Supreme Court, and the current majority likely will continue to defer to the restrictions promul-

150. *Id.* at 1787-88 (Stevens, J., dissenting).

151. *Id.* at 1788 (Stevens, J., dissenting).

152. *Id.* (O'Connor, J., dissenting).

153. *Id.* (quoting *Three Affiliated Tribes v. Wold Eng'r*, 467 U.S. 138, 157 (1984)). *See also* *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *Burton v. United States*, 196 U.S. 283, 295 (1905); *Liverpool v. Commissioners of Emigration*, 113 U.S. 33, 39 (1895).

154. *Rust v. Sullivan*, 111 S. Ct. at 1789 (O'Connor, J., dissenting).

155. "I think this goes beyond an issue of abortion, pro-life, pro-choice controversy, and involves elements of freedom of speech and medical practice as well." Julie Rovner, *Abortion Counseling Stalled by Parental Notification*, CONG. Q., June 15, 1991, at 1586 (quoting House Speaker Thomas S. Foley).

156. *See supra* notes 54-65 and accompanying text.

gated by legislatures and executive agencies, as it did here. As long as such restrictions are "reasonably" designed to affect a "compelling state interest," such as in this case, the compelling interest of the government to spend its money in a particular way, the Court likely will uphold them. Justice Blackmun in his dissent in *Webster*, argued that this standard is nothing more than a rational basis test, which is the most lenient level of scrutiny.<sup>157</sup> Although, *Roe* may or may not officially be overruled in the future, the right the Court articulated in *Roe* as fundamental may be placed back into the hands of the states.<sup>158</sup>

In this case the Supreme Court found it permissible to restrict expression in a government-funded program<sup>159</sup> because the prohibition was limited to Title X programs, and the parties affected, that is, the Title X grantees and their staffs, can exercise all of their constitutionally protected rights outside of the narrowly-defined Title X program.<sup>160</sup> While this is true, *Rust* is still an extension of the restrictions the government has placed on speech in the past.<sup>161</sup> "It [is] difficult to predict the ruling's implications" for other programs dependent on government funding.<sup>162</sup> "Under the majority's reasoning, the First Amendment could be read to tolerate *any* governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past."<sup>163</sup>

Historically, the doctor-patient relationship has been considered a privileged relationship. *Rust* permits a significant invasion of this relationship. The Court offered two primary justifications for the intrusion: (1) the doctor can communicate freely outside of the Title X project,<sup>164</sup> and (2) the doctor-patient relationship established by Title X is not "all-encompassing;" therefore, the patient is aware of the restriction when she goes to a Title X clinic, or she will be told of the restriction if

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157. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 555 (1989) (Blackmun, J., dissenting).

158. "While technically leaving intact the fundamental right protected by *Roe v. Wade*, the Court . . . once again has rendered the right's substance nugatory." *Rust v. Sullivan*, 111 S. Ct. at 1786 (Blackmun, J., dissenting) (citing *Webster v. Reproductive Health Servs.*, 492 U.S. at 537, 560).

159. *Id.* at 1775-76.

160. *Id.*

161. See Joan Biskupic, *Power of the Purse*, CONG. Q., May 25, 1991, at 1376.

162. *Id.*

163. *Rust v. Sullivan*, 111 S. Ct. at 1783 (Blackmun, J., dissenting).

164. *Id.* at 1777-78 (Blackmun, J., dissenting).

she asks.<sup>165</sup>

The proposed regulations state that the government does not consider abortion an appropriate method of family planning. The government pays for part of the doctor's services; therefore, the doctor cannot discuss abortion with his patients.<sup>166</sup> Each time a person goes to the doctor, does he or she have to ask: "Is this clinic, hospital, or doctor federally subsidized?" If the answer is yes, does the individual need to determine what methods of treatment the government or current Supreme Court finds unacceptable, so that the patient will know that the medical information conveyed may not be a complete reflection of the doctor's knowledge?<sup>167</sup> That is a ludicrous proposition, but it is exactly the proposition that a pregnant woman who enters a Title X clinic is faced with as a result of the *Rust* decision.

When people see a doctor, they assume that the doctor will fully inform them. Where is that trust now? Could the Court's reasoning be extended to other federally funded privileged relationships such as the attorney-client relationship in a federal agency? Can the government tell an attorney that he cannot fully inform a client of his or her legal rights regarding a matter the government does not find appropriate?

Apart from the abortion issue, this decision is significant as another indication of the judicial philosophy of the current Supreme Court majority.<sup>168</sup> In the name of judicial restraint, the Court is taking a more passive stance in deferring to other branches. It no longer sees itself as an active force set to shape public policy, but rather as a moderator or a peacekeeper to ensure that the executive and legislative branches do not go too far astray. *Rust* is an indication of the Court's now almost routine way of finding the interests of the executive and

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165. *Id.* at 1776 (Blackmun, J., dissenting).

166. *Id.* On March 20, 1992, William R. Archer III, deputy assistant secretary of Health and Human Services, issued a memorandum to regional administrators of the family planning program which states that doctors in federally funded clinics may discuss abortion with patients in limited circumstances. This directive will not affect most clinics because non-physicians provide most of the health care to clinic patients under a physicians supervision. The directive also stated that Health and Human Services will begin enforcing the amended regulations which were issued on February 2, 1988. Julie Rovner, *Counseling Memo Nothing New, But Rules No Longer in Limbo*, CONG. Q., March 28, 1992, at 807.

167. "[T]he government policy, if left unchallenged could lead to further interference in the doctor-patient relationship." Henry J. Reske & Mark Hansen, *House Reacts to Rust Decision*, ABA JOURNAL, October 1991, at 108 (quoting Dr. Daniel Johnson, Speaker of the American Medical Association's House of Delegates).

168. See generally Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

judicial branch sufficiently compelling to survive constitutional challenges. This shift in emphasis will continue to affect the outcome of every case the Court hears.

*Marti S. Toennies*