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The Pregnant Silence: Rust v. Sullivan Abortion Rights and Publicly Funded Speech

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The Pregnant Silence: *Rust v. Sullivan*, Abortion Rights, and Publicly Funded Speech

The abortion debate has entered every level of discourse, from personal conversation to political speeches, in the nineteen years since the Supreme Court first declared that the right to choose abortion is constitutionally protected.[1] Opinions about whether the Constitution supports a right to abortion are strongly held by those with conservative, moderate, and liberal views.[2] In addition to legal questions, abortion implicates social values and philosophical and religious beliefs, which inspire its supporters and detractors to political action and even physical violence.[3] Given the politicized atmosphere surrounding the abortion issue, it is not surprising that the Supreme Court's 1991 ruling in *Rust v. Sullivan*[4] has received such attention from the popular press.[5]

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1. The Court first found a constitutional basis for the right to a legal abortion in Roe v. Wade, 410 U.S. 113, 153 (1973). See *infra* notes 112-75 and accompanying text for a discussion of *Roe* and subsequent cases that have defined further women's constitutional right to choose abortion.

2. L.W. SUMNER, ABORTION AND MORAL THEORY 4-5 (1981).

3. One recent study of the accessibility of abortion services reported that in the United States in 1988, 85% of facilities providing 400 abortions a year or more and 49% of smaller clinics had experienced harassment by antiabortion activists. Harassing activities included physical assaults, vandalism, death threats, and bomb threats. There was a high correlation between the number of incidents of harassment and the number of abortions the clinics performed. Stanley K. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 FAM. PLAN. PERSP. 246, 250 (1991) (citing NATIONAL ABORTION FEDERATION, INCIDENTS OF VIOLENCE AND DISRUPTION AGAINST ABORTION PROVIDERS (1991)). In addition, since 1991 at least seven cases have been brought in the federal courts by plaintiffs seeking injunctions against antiabortion protesters. Lucero v. Operation Rescue, No. 91-7685 (11th Cir. filed Feb. 5, 1992); Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 220 (6th Cir. 1991); Northeast Women's Ctr., Inc. v. McMonagle, 939 F.2d 57, 59 (3d Cir. 1991); Bench v. Lickteig, 778 F. Supp. 31, 31-32 (D. Kan. 1991); Upper Hudson Planned Parenthood, Inc. v. Doe, No. 90-CV-1084, (N.D.N.Y. filed Sept. 12, 1991); Women's Health Care Servs. v. Operation Rescue Nat'l, 773 F. Supp. 258, 260-61 (D. Kan. 1991); Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617, 619 (N.D. Cal. 1991).

4. 111 S. Ct. 1759 (1991).

5. *Rust* was one of the 1990 term's more highly visible decisions. During the three months following the Court's decision, articles about *Rust* appeared regularly in the popular press. *See, e.g.*, *Court Moves Closer to* Roe v. Wade *Showdown*, CHRISTIANITY TODAY, June 24, 1991, at 50; Philip Elmer-Dewitt, *The Doctors Take On Bush*, TIME, Aug. 5, 1991, at 52; *The First Goes To Rust*, THE PROGRESSIVE, July 1991, at 8; Barbara Kantrowitz, *Tipping the Odds On Abortion*, NEWSWEEK, July 8, 1991, at 23; David A. Kaplan, *Abortion: Just Say No Advice: The Supreme Court Upholds Limits on Counseling*, NEWSWEEK, June 3, 1991, at 18; Lewis H. Lapham, *Tyromancy*, HARPER'S MAGAZINE, Aug. 1991, at 6; *Planned Parenthood Prexy Blasts High Court Ruling On Abortion Information*, JET, June 17, 1991, at 6; Rust v. Sullivan: *A Better Debate*, AMERICA, June 8, 1991, at 611; Jill Smolowe, *Gagging the Clinics*, TIME, June 3, 1991, at 16. The case continues to inspire commentary. *See, e.g.*, *Abortion and Censorship—The Piper's Tune*, THE ECONOMIST, Nov. 16, 1991, at 31; David G. Savage, *The*

In *Rust* the Court declared constitutional a set of controversial federal regulations known colloquially as the Gag Rules,[6] which forbid health care providers at publicly funded family planning clinics from speaking with their patients about abortion.[7] The case posed the kind of questions that have been described as "the most vexing . . . in constitutional law," which ask to what extent the government can control the exercise of constitutional rights, particularly abortion and free speech, through its funding decisions.[8] *Rust*'s answers to these questions shed light on the future directions of the Court's abortion decisions. The *Rust* decision also sends a strong message about the limited extent to which the conservative Court will be willing to find constitutional protection for individual rights against the expansion of the federal regulatory state.

This Note focuses on the *Rust* plaintiffs' challenge to the abortion-counseling ban included in the Title X regulations. The issues raised in *Rust* lie at the nexus between several distinct areas of the Court's constitutional jurisprudence. Consequently, the Note analyzes *Rust* in light of the Court's abortion decisions and the law surrounding the federal government's obligations and responsibilities to preserve the constitutional rights of those who rely on the programs it funds. In particular, the Note explores *Rust*'s impact on the abortion choice rights of clinic clients, and the First Amendment rights of both clients and clinic employees when

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Rehnquist Court, RALEIGH NEWS & OBSERVER, Sept. 29, 1991, at J1; *Uncivil Rights*, THE NEW REPUBLIC, Dec. 16, 1991, at 9; *Who Decides?*, NEW WOMAN, Oct. 1991, at 18.

6. *See, e.g.*, Cory Richards, *Viewpoint: A Future for Title X?*, 23 FAM. PLAN. PERSP. 228, 228 (1991).

7. The full set of regulations contested in *Rust* are found at 42 C.F.R. §§ 59.1 to 59.17 (1991). In addition to the requirement that publicly funded clinics not counsel their patients about abortion, *id.* § 59.8, the regulations prohibit publicly funded clinics from engaging in any activities that "encourage, promote or advocate abortion." *Id.* § 59.10. The regulations have provoked commentary since they were first published in draft form in 1987. *See, e.g.*, Letter from Congressman John D. Dingell, Chairman, House Committee on Energy and Commerce, to Otis R. Bowen, Secretary, Department of Health and Human Services (Oct. 14, 1987), *in* Joint Appendix at 137, *Rust* (Nos. 89-1391 & 89-1392) (expressing disappointment and concern at the publication of the proposed regulations).

On March 20, 1992, the Health and Human Services Department issued guidelines for implementing the regulations, which lift the ban on abortion counseling for doctors only. This partial lifting of the gag rule will have little effect on clinic clients, however, because they generally receive advice from health care providers other than physicians. Philip J. Hilts, *White House Allows Some Advice At Public Clinics About Abortions*, N.Y. TIMES, Mar. 21, 1992, at 1.

8. Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 593 (1990); *see also* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6 (1988) (noting that questions about the constitutionality of government conditions on its spending power have "bedeviled courts and commentators alike" for more than 100 years).

federal funding is involved. These explorations make clear the importance of the decision, both for women who choose abortion and for the constitutional rights of all who are dependent on federally funded programs.

The Court in *Rust* held that the federal government has a great deal of discretion in making its funding decisions, even when those decisions affect the exercise of fundamental constitutional rights such as the right to choose abortion and the right to hear full information from a physician.[9] According to the *Rust* majority, such funding decisions need not be scrutinized against the government's purposes in enacting them because the indigent persons who rely on federal programs are made no worse off by the government's funding choice than they would have been in the absence of any governmental assistance.[10] The Court in *Rust* for the first time held that this is true not only when qualified fundamental rights such as the right to choose abortion are affected by a federal program, but also when First Amendment rights are implicated.[11]

The following exploration of the situation in *Rust* affirms the idea that the assumptions underlying the Court's decision are unsupported by the reality of the effects on the indigent women served by the Title X program. In addition, by analyzing the Court's jurisprudence in several areas of constitutional law, this Note demonstrates that the Court's decision also is not supported by precedent, and suggests an alternative approach. It concludes that when governmental funding choices bear on the exercise of fundamental constitutional rights, a compelling governmental purpose must support such decisions. That principle recognizes the reality that federal health care programs are often the only choice for those whose financial circumstances do not permit them to seek private treatment. The analysis employed by the *Rust* majority, on the other hand, improperly allows governmental funding choices to create and sustain inequities in the ability of wealthy and poor Americans to exercise their constitutionally guaranteed rights.

The *Rust* litigation began on February 2, 1988, when a new set of federal regulations authorized by the Family Planning Services and Population Act of 1970 (Title X)[12] were issued in final form by the Secretary

9. *See Rust*, 111 S. Ct. at 1773, 1777-78, discussed *infra* notes 52-111 and accompanying text.

10. *Rust*, 111 S. Ct. at 1777-78; *see infra* notes 78-82 and accompanying text.

11. *Rust*, 111 S. Ct. at 1772; *see also infra* notes 214-34 and accompanying text (discussing previous First Amendment cases).

12. 42 U.S.C. §§ 300-300a-8 (1988). The Act's purpose was to provide federal financial support to "public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects . . . offer[ing] a broad range of acceptable and effective family planning methods and services." *Id.* § 300(a). Priority in the provision of such services

of Health and Human Services.[13] The regulations required health care providers in Title X project clinics[14] to counsel pregnant patients on

was to be given to "persons from low-income families." *Id.* § 300a-4(c). "Low-income family" is defined in the new regulations as "a family whose total annual income does not exceed 100 percent of the most recent Community Services Administration Income Poverty Guidelines." 42 C.F.R. § 59.2 (1991). The most recent Guidelines establish a before-tax annual income of $8,450.00 as the poverty level for a nonfarm family of four persons. 45 C.F.R. § 1060.2-2(d)(2) (1990). The Title X definition of poverty extends the program's services to "members of families whose annual family income exceeds this amount, but who, as determined by the Title X project director, are unable, for good reasons, to pay for family planning services." *Id.* § 59.2 (1991). In practice this means that Title X clinics provide free services to all clients with incomes below the poverty level, and charge minimal fees for those with incomes above that level. Patricia Donovan, *Family Planning Clinics: Facing Higher Costs and Sicker Patients*, 23 FAM. PLAN. PERSP. 198, 201-02 (1991). Title X's target client has an income that is 150% of the federal definition of poverty or less. The target population consists of approximately 14.5 million such women of childbearing age. New York v. Sullivan, 889 F.2d 401, 415 n.1 (2d Cir. 1989) (Cardamone, J., concurring) (citing Carol I. Chervin, Note, *The Title X Family Planning Gag Rule: Can the Government Buy up Constitutional Rights?*, 41 STAN. L. REV. 401, 408 (1989)), *aff'd sub nom. Rust*, 111 S. Ct. 1759 (1991).

Title X is the only federally funded program designed exclusively to provide family planning services for the poor. Donovan, *supra*, at 201. In 1983, 77% of all family planning clinics in the country received Title X support. Brief for Petitioners at 2 n.2, *Rust* (No. 89-1391) (citing Aida Torres, *The Effects of Federal Funding Cuts on Family Planning Services, 1980-1983*, 16 FAM. PLAN. PERSP. 134, 135 tbl. 1. (1984)). Annual appropriations to Title X are between one and two hundred million dollars; the figure was at least 122 million dollars in 1990, making Title X the second largest source of federal monies for family planning, behind Medicaid. *Id.* at 2; *see* Rachel B. Gold & Daniel Daley, *Public Funding of Contraceptive, Sterilization, and Abortion Services, 1990*, 23 FAM. PLAN. PERSP. 204, 207 tbl. 1, 211 tbl. 4 (1991). Estimates of the number of people served range from 4.3 million people annually in 1989 to "nearly five million" low-income persons in 1990. Brief for Petitioners at 2 n.2, *Rust* (No. 89-1391) (citing *Sullivan*, 889 F.2d at 415 n.1 (Cardamone, J., concurring) (citing Chervin, *supra*, at 408)).

13. 53 Fed. Reg. 2944 (1988) (codified at 42 C.F.R. §§ 59.1-.17 (1991)). The 1988 version was substantively different from the previous rules. *Rust*, 111 S. Ct. at 1768-69; *see also* Brief for Respondent at 3, *Rust* (Nos. 89-1391 & 89-1392) (quoting 42 C.F.R. § 59.5(a)(9) (1972); 36 Fed. Reg. 18,465-66 (1971); and citing 42 C.F.R. § 59.5(a)(5) (1986); 45 Fed. Reg. 37,433, 37,437 (1980)); Brief for Petitioners at C-1, exhibit C, *Rust* (No. 89-1391) (describing chronology of administrative interpretations between 1971 and 1988, and quoting from administrative memoranda and from the supporting guidance document UNITED STATES DEP'T OF HEALTH & HUMAN SERVS., PROGRAM GUIDELINES FOR FAMILY PLANNING SERVICES (1981) [hereinafter PROGRAM GUIDELINES]).

14. The terms "project," "program," "Title X project," and "Title X program" are defined in the regulations. 42 C.F.R. § 59.2 (1991). The general terms "project" and "program" are "used interchangeably and mean a coherent assembly of plans, activities and supporting resources contained within an administrative framework." *Id.* The more specific terms "Title X project" and "Title X program" also are used interchangeably, and mean "the identified program which is approved by the Secretary for support . . . . Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds." *Id.*

In this Note, to avoid confusion, the terms "project" and "Title X project" will be used only to describe the funded clinics, and the terms "program" and "Title X program" will be used to describe the parent organization receiving the federal funding, and having Title X clinics as its subsidiary parts.

proper prenatal care and to refer them to a prenatal care provider, but forbade them to discuss the option of abortion, even in response to a specific request.[15] The new rules replaced a previous set of regulatory guidelines, in effect since 1971, which permitted Title X health care providers to offer pregnant clients nondirective counseling[16] about abortion as well as childbirth.[17]

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15. The regulations provide:

> Prohibition on counseling and referral for abortion services; limitation of program services to family planning.
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> (a)(1) 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.
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> (2) Because title X funds are intended only for family planning, once a client served by a title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.
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> 3) A title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by 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 method of family planning.
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> (4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

42 C.F.R. § 59.8(a) (1991).

42 C.F.R. § 59.8(b) sets out examples of appropriate responses, under this rule, to client requests for information, including the following:

> A pregnant woman asks the title X project to provide her with a list of abortion providers in the area. The project tells her that it does not refer for abortion and provides her a list which . . . [includes] providers which provide pre-natal care and also provide abortions. None of the entries on the list are providers that principally provide abortions . . . . *Provision of the list is inconsistent with . . . this section.*

Id. § 59.8(b)(4) (emphasis added).

16. The phrase "nondirective counseling" is not defined in the regulations, but generally is used to describe an objective discussion of abortion as one option when a patient is faced with a decision about her pregnancy. "Nondirective counseling" does not point the patient toward one option or the other but rather lays out all of the facts involved in each, and allows the patient to choose her preferred course of action.

17. *See* 49 Fed. Reg. 38,118 (1984); 48 Fed. Reg. 3614 (1983); 45 Fed. Reg. 37,433 (1980); 36 Fed. Reg. 18,465 (1971). In addition to the regulations themselves, the Title X program was guided by a series of administrative memoranda and extra-regulatory guidance documents from 1971 to the issuance of the new regulations in 1988. Brief for Petitioners at C-1, exhibit C, *Rust* (No. 89-1391). All of these supporting materials consistently permitted the use of

On the date the new regulations were issued, several sets of institutional and individual plaintiffs independently brought suits in three federal districts, challenging them on three grounds.[18] The plaintiffs claimed that the regulations (1) were not authorized by either the text of the 1970 Act, or its supporting legislative history and congressional intent;[19] (2) violated the First Amendment by denying patients the right to receive full medical information, and by forcing on them one viewpoint while prohibiting the expression of another;[20] and (3) unduly burdened and interfered with Title X patients' Fifth Amendment rights to make informed reproductive choices.[21]

Plaintiffs questioned whether the regulations' ban on abortion counseling and referral was supported by the text of the 1970 Act. Section 1008 of the Title X statute provides that "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning."[22] While Title X funds never had been used

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Title X funds for nondirective counseling about abortion as well as about proper prenatal care and the health implications of carrying a child to term. *Id.* (excerpting relevant language from administrative memoranda, from an amicus brief filed by the Secretary of Health and Human Services in Valley Family Planning v. North Dakota, 661 F.2d 99, 100 (8th Cir. 1981), and from PROGRAM GUIDELINES, *supra* note 13). Administrative guidance prior to the 1988 regulations stated: " '[T]he provision of information concerning abortion services [and] mere referral of an individual to another provider of services for an abortion . . . are not considered to be proscribed by Section 1008,' " *id.* at C-2 (quoting Memorandum from Office of General Counsel, Department of Health Education and Welfare (the predecessor agency to the Department of Health and Human Services) (Apr. 14, 1978)). They also provided: "Women 'requesting information on options for the management of an unintended pregnancy are to be given nondirective counseling on the following alternative courses of action, and referral upon request: [p]renatal care and delivery[;] [i]nfant care, foster care, or adoption[;] [p]regnancy termination.' " *Id.* at C-4 (quoting PROGRAM GUIDELINES, *supra* note 13).

18. New York v. Bowen, 690 F. Supp. 1261, 1263 (S.D.N.Y. 1988) (*Bowen II*), *aff'd sub nom.* New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989), *aff'd sub nom. Rust*, 111 S. Ct. 1759 (1991); Planned Parenthood Fed'n of Am. v. Bowen, 687 F. Supp. 540, 542 (D. Colo. 1988) (*Planned Parenthood II*), *aff'd sub nom.* Planned Parenthood v. Sullivan, 913 F.2d 1492 (10th Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991); Planned Parenthood Fed'n of Am. v. Bowen, 680 F. Supp. 1465, 1466 (D. Colo. 1988) (*Planned Parenthood I*); Massachusetts v. Bowen, 679 F. Supp. 137, 140 (D. Mass. 1988) (*Bowen I*), *aff'd sub nom.* Massachusetts v. Secretary of Health & Human Servs., 899 F.2d 53 (1st Cir. 1990) (en banc) (*Secretary of Health & Human Servs.*), *vacated*, 111 S. Ct. 2252 (1991).

19. *See Bowen II*, 690 F. Supp. at 1265; *Planned Parenthood I*, 680 F. Supp. at 1466; *Bowen I*, 679 F. Supp. at 139; *see also* Brief for Petitioners at i, *Rust* (No. 89-1391) (describing the questions presented).

20. *See Bowen II*, 690 F. Supp. at 1265; *Planned Parenthood II*, 687 F. Supp. at 542; *Bowen I*, 679 F. Supp. at 144-47; *see also* Brief for Petitioners at i, *Rust* (No. 89-1391) (describing the questions presented).

21. *See Bowen II*, 690 F. Supp. at 1265; *Planned Parenthood II*, 687 F. Supp. at 542; *Bowen I*, 679 F. Supp. at 144-47; *see also* Brief for Petitioners at i, *Rust* (No. 89-1391) (describing the questions presented).

22. 42 U.S.C. § 300a-6 (1988). The statute originally was passed in 1970, *see* Family

to provide abortions, prior to the issuance of the 1988 regulations when a clinic patient became pregnant, Title X health care providers informed her about all of the choices legally available to her.[23] The Secretary justified the change from that interpretation to the counseling ban of the new regulations as a necessary clarification of the scope of section 1008 of the Act, in response to reports prepared in 1982 and 1988 calling for more clarity in the regulations.[24]

Plaintiffs also suggested that the legislative history of the Act did not support the ban on counseling.[25] Furthermore, they argued, evi-

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Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 6, 79 Stat. 1504, three years before the Supreme Court found a constitutionally protected right to legalized abortion in Roe v. Wade, 410 U.S. 113 (1973). At that time, a majority (30) of states still had statutes criminalizing the abortion procedure. *Roe*, 410 U.S. at 118-19 n.2. The legislative history of section 1008 suggests that the language was a compromise provision, intended to prevent the use of federal funding for the performance of abortions. *See* S. REP. NO. 1004, 91st Cong., 2d Sess. 9-12 (1970), *reprinted in* 116 CONG. REC. 24,095-96 (1970); H.R. CONF. REP. NO. 1667, 91st Cong., 2d Sess. 8-9 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5080, 5081-82.

23. Joint Appendix at 107-08, *Rust* (Nos. 89-1391 & 89-1392); *see also* Brief for Respondent at 3, *Rust* (Nos. 89-1391 & 89-1392) (quoting 42 C.F.R. § 59.5(a)(9) (1972); 36 Fed. Reg. 18,465, 18,466 (1971); and citing 42 C.F.R. § 59.5(a)(5) (1986); 45 Fed. Reg. 37,433, 37,437 (1980)). From 1981 to 1988, administrative interpretations required that pregnant Title X patients be informed about all their legally available choices. Planned Parenthood Fed'n of Am. v. Sullivan, 913 F.2d 1492, 1496 (10th Cir. 1990) (*Planned Parenthood III*), *vacated*, 111 S. Ct. 2252 (1991).

24. *Rust*, 111 S. Ct. at 1769; *see also* Brief for Respondent at 4-6, *Rust* (Nos. 89-1391 & 89-1392) (explaining the Secretary's attempt to clarify the proper use of Title X funds). At the request of Senators Orrin Hatch and Jeremiah Denton, the General Accounting Office (GAO) had audited fourteen Title X clinics in 1982. Joint Appendix at 96-97, *Rust* (Nos. 89-1391 & 89-1392). That audit found "no evidence that title X funds had been used to pay for abortions or to advise clients to have abortions," *id.* at 84, although a number of grant recipient organizations were:

> (1) providing both family planning services and separately funded, abortion-related activities at a single site; (2) providing family planning counseling that did not present alternatives to abortion; (3) engaging in referral practices that went beyond the [Department of Health and Human Services] referral policy; (4) providing literature that promoted abortion as a back-up method of family planning; and (5) engaging in [separately funded] abortion lobbying activities.

Brief for Respondent at 4, *Rust* (Nos. 89-1391 & 89-1392); *see also* Joint Appendix at 82-136, *Rust* (Nos. 89-1391 & 89-1392) (presenting UNITED STATES GENERAL ACCOUNTING OFFICE, RESTRICTIONS ON ABORTION AND LOBBYING ACTIVITIES IN FAMILY PLANNING PROGRAMS NEED CLARIFICATION (Sept. 24, 1982), and describing the audit and the inferences drawn from it by the GAO). The Office of the Inspector General (OIG) audited 32 Title X projects, and recommended that " 'more specific, formalized direction' " should be provided to Title X projects in order to clarify Section 1008's prohibition of abortion as a method of family planning. Brief for Respondent at 5, *Rust* (Nos. 89-1391 & 89-1392) (quoting 53 Fed Reg. 2923-24 (1988)).

25. Brief for Petitioners at 3 & n.6, *Rust* (No. 89-1391). Plaintiffs noted that "Congress repeatedly stressed that a central purpose of Title X was to enable 'all individuals . . . within the dictates of their conscience, to exert control over their own life destinies.' " *Id.* at 3 n.6 (quoting 116 CONG. REC. 24,092 (1970)).

dence presented in Title X reauthorization hearings between 1982 and 1988 indicated that Title X grant recipients were aware of and respected the statutory and regulatory prohibition on using Title X funds to perform abortions.[26] Congress also had considered and rejected a revision to the Act incorporating a counseling ban during that time period.[27] In light of that evidence, plaintiffs suggested that the long-standing administrative interpretation of the Act's language should be respected.[28]

Plaintiffs argued that the abortion counseling ban denied both Title X employees and clients their First Amendment rights in several ways. First, they asserted that prohibiting abortion counseling and referral while at the same time requiring prenatal counseling and referral promotes one viewpoint over another, which is impermissible federal conduct under the First Amendment.[29] They also asserted that the regulations directly violated health care providers' First Amendment rights to inform pregnant clients about all the choices available to them, and patients' First Amendment rights to hear that information.[30] Because the regulations denied Title X clients necessary information about abortion, their Fifth Amendment Due Process rights to choose that option also were infringed, according to plaintiffs.[31]

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26. Massachusetts v. Bowen, 679 F. Supp. 137, 142 (D. Mass. 1988) (*Bowen I*) (citing *Family Planning Act Reauthorization, 1985: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 189 (1985) (statement of Dr. James O. Mason, Acting Assistant Secretary of Health and Human Services), *aff'd sub nom.* Massachusetts v. Secretary of Health & Human Servs., 899 F.2d 53 (1st Cir. 1990) (en banc), *vacated*, 111 S. Ct. 2252 (1991); *Family Planning Act Reauthorization, 1985: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 472 (1984) (statement of Margaret M. Heckler, Secretary of Health and Human Resources)).

27. Planned Parenthood Fed'n of Am. v. Bowen, 680 F. Supp. 1465, 1472 (D. Colo. 1988) (*Planned Parenthood I*), *aff'd sub nom.* Planned Parenthood Fed'n of Am. v. Sullivan, 913 F.2d 1492 (10th Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991). In 1978 Congress rejected by a margin of two-to-one a proposed amendment to the Title X statute, forbidding Title X funding for " 'an entity which directly or indirectly provides abortion, abortion counseling, or . . . abortion referral services.' " *Id.* (quoting 124 CONG. REC. 37,045 (1978)).

28. Brief for Petitioners at 48, *Rust* (No. 89-1391). Plaintiffs cited INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), for the proposition that an agency's interpretation that conflicts with its own earlier interpretation is due less deference than a consistent interpretation. *Id.* at 446 n.30.

29. Brief for Petitioners at 13-39, *Rust* (No. 89-1391). See *infra* text accompanying notes 214-34 for a discussion of the Court's First Amendment jurisprudence when speech is federally funded.

30. Brief for Petitioners at 15-16, 19-20, 22 n.35, *Rust* (No. 89-1391); *see also id.* at 47 n.85 (quoting Letter from Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs, HHS, to Hilary H. Connor, M.D., Regional Health Administrator (Nov. 16, 1976), for the proposition that "[a] counselor working under . . . a physician . . . has not only a First Amendment right but [a] duty to inform a patient of all legal options.").

31. *Id.* at 31-36.

In 1988 two of the three district courts, in Massachusetts and Denver, agreed with plaintiffs and enjoined the implementation of the new Title X regulations as unconstitutional and unsupported by the statute's language and congressional intent.[32] In examining the rules under the First and Fifth Amendments, both courts employed a strict scrutiny analysis to reach their conclusions.[33] Neither court found a sufficiently compelling governmental purpose to support the regulations' direct speech restrictions.[34] Title X patients' Fifth Amendment rights also were violated by the regulations, said the two district courts, because the lack of information about abortion burdened their decision about whether to carry a child to term or to have an abortion.[35] In addition, the Massachusetts court declared that the regulations imposed an unconstitutional penalty on clinics that counsel patients about the abortion option, which is speech protected by the First Amendment, by denying them Title X funding on that basis.[36]

Meanwhile, a district court in New York upheld the regulations, granting summary judgment to the defendant Department of Health and Human Services, in *New York v. Bowen*.[37] The court declared that the statute reasonably supported the federal regulations and the regulations simply did not violate the constitutional rights of health care providers or clinic patients.[38] Unlike the district courts in Massachusetts and Colo-

32. Planned Parenthood Fed'n of Am. v. Bowen, 687 F. Supp. 540, 542 (D. Colo. 1988) (*Planned Parenthood II*), *aff'd sub nom.* Planned Parenthood Fed'n of Am. v. Sullivan, 913 F.2d 1492 (10th Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991); Massachusetts v. Bowen, 679 F. Supp. 137, 147 (D. Mass. 1988) (*Bowen I*), *aff'd sub nom.* Massachusetts v. Secretary of Health & Human Servs., 899 F.2d 53 (1st Cir. 1990) (en banc), *vacated*, 111 S. Ct. 2252 (1991).

33. *Planned Parenthood II*, 687 F. Supp. at 543; *Bowen I*, 679 F. Supp. at 144-47.

34. *Planned Parenthood II*, 687 F. Supp. at 544; *Bowen I*, 679 F. Supp. at 145-47.

35. *Bowen I*, 679 F. Supp. at 147; Planned Parenthood Fed'n of Am. v. Bowen, 680 F. Supp. 1465, 1474 (D. Colo. 1988) (*Planned Parenthood I*).

36. *Bowen I*, 679 F. Supp. at 144-45 ("The government may not penalize an individual for exercising his or her First Amendment rights, even if the penalty is the denial of a government benefit . . . .") (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

37. New York v. Bowen, 690 F. Supp. 1261, 1272-74 (S.D.N.Y. 1988) (*Bowen II*), *aff'd sub nom.* New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989), *aff'd sub nom. Rust*, 111 S. Ct. 1759 (1991). This case consolidated two separate actions, one brought by the State of New York through its Department of Health (a Title X grantee) and the second brought by Dr. Irving Rust and several other Title X project clinic supervisors. Brief for Petitioners at 13-14, *Rust* (No. 89-1391).

38. *Bowen II*, 690 F. Supp. at 1266-74. The court found "no explicit guidance, or even illumination" regarding congressional intent from the statute's 1970 legislative history or debates about subsequent amendments. *Id.* at 1267-69. The regulations were found constitutional because they "do not prohibit or compel speech." *Id.* at 1274. Furthermore, the regulations represent only " 'a [governmental] value judgment favoring childbirth over abortion.' " *Id.* at 1272 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)). As such, the district court held them acceptable, without analyzing the extent to which they were supported by any compelling or rational governmental purpose, noting that "[t]he condition that federal funds

rado, the New York court made no attempt to weigh the government's interest in the regulation against the speech rights of Title X health care providers and patients or the pregnant patients' right to choose between the options of abortion and childbirth.[39]

On appeal, the United States Courts of Appeals for the First and the Tenth Circuits found the regulations supported by the enabling statute and within the Secretary's authority to enact.[40] Both appellate courts, however, after closely analyzing the regulations under the First and Fifth Amendments, found them unconstitutional and therefore invalid.[41] The First Circuit held that the regulations "force all Title X projects to provide incomplete and skewed information and to withhold requested, possibly even medically advisable, information,"[42] thereby "wholly subordinating constitutional . . . interests . . . in an effort to deter a woman from making a decision that, with her physician, is hers to make."[43] The Tenth Circuit concurred with this analysis.[44]

A split panel of the United States Court of Appeals for the Second Circuit, however, upheld the New York district court's decision finding the regulations constitutional.[45] Like the district court, the Second Cir-

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will be given only to those who support particular views does not violate constitutional rights." *Id.* at 1273.

39. *See id.* at 1272-74. At no point in its analysis of the constitutionality of the regulations did the court employ a balancing test, either at the rational-basis or strict level of scrutiny. Presumably, although not explicitly, the court relied on the Supreme Court's holding in Regan v. Taxation with Representation, 461 U.S. 540 (1983), that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan*, 461 U.S. at 549 (citing Buckley v. Valeo, 424 U.S. 1, 93-97 (1976)).

40. Planned Parenthood Fed'n of Am. v. Sullivan, 913 F.2d 1492, 1497-98 (10th Cir. 1990) (*Planned Parenthood III*), *vacated*, 111 S. Ct. 2252 (1991); Massachusetts v. Secretary of Health & Human Servs. (*Secretary of Health & Human Servs.*), 899 F.2d 53, 57-64 (1st Cir. 1990) (en banc), *vacated*, 111 S. Ct. 2252 (1991).

41. *Planned Parenthood III*, 913 F.2d at 1501-04; *Secretary of Health & Human Servs.*, 899 F.2d at 72-75.

42. *Secretary of Health & Human Servs.*, 899 F.2d at 66.

43. *Id.* (paraphrasing Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986)).

44. *Planned Parenthood III*, 913 F.2d at 1495, 1501. The court rejected the government's argument that the regulations represented only a decision to fund childbirth over abortion. *Id.* at 1499. The court noted that the government does not control all clinics and hospitals through the regulations, but it suggested that the Title X program is large enough to have cornered the market on reproductive health care provision to low-income women. *Id.* This point, coupled with the fact that the regulations require that pregnant patients receive prenatal counseling and referral, supported the court's opinion that the regulations affected low-income women's rights to choose an abortion. *Id.* at 1499-501.

45. New York v. Sullivan, 889 F.2d 401, 410-14 (2d Cir. 1989), *aff'd sub nom. Rust*, 111 S. Ct. 1759 (1991). The court found the regulations to be a "construction of the statute that legitimately effectuates Congressional intent." *Id.* at 407 (citing Chevron U.S.A., Inc. v. Natu-

cuit found that the regulations represented only a governmental choice to fund one activity (childbirth) and not another (abortion).[46] The court distinguished that choice, which in its view only encouraged childbirth, from an affirmative governmental action to block abortion.[47] Agreeing that the regulations would "hamper or impede" Title X patients seeking abortions, the court nevertheless said that they did not present any "affirmative legal obstacle" to the abortion decision.[48] The actual effects of the funding decision, said the Second Circuit, were therefore "constitutionally irrelevant."[49] Similar reasoning supported the court's determination that the rules infringed no First Amendment rights.[50] Characterizing the counseling ban as a permissible funding choice, the

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ral Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)). Discussing the scope of the regulations and the statute, the court carefully stated its interpretation that the regulations "allow a [Title X health care] provider to respond to a client's inquiry for information about abortion by furnishing the name of abortion providers, but only in a prescribed fashion." *Id.* at 405. Referral lists were required to be weighted towards providers of prenatal care, but could include facilities providing abortion-related services, according to the court. *Id.* The Second Circuit went on to discuss at length its view that the rules permit a Title X clinic to have a copy of the Yellow Pages in its offices, and that they do not preclude clinic employees from giving the Yellow Pages to a client who asks for help in finding a health care provider who is able to counsel on or perform abortions. *Id.* at 406 & n.1 (citing 53 Fed. Reg. 2922, 2941-42 (1988) (codified at 42 C.F.R. § 59 (1991)). A dissenting opinion noted that counsel for the defendant Secretary of Health and Human Services had stated at oral argument that the regulations would not permit Title X clinics to provide the Yellow Pages to their clients. *Id.* at 417 (Kearse, J., dissenting in part). The concurring opinion in *Sullivan* left the door open for future plaintiffs to challenge the implementation of the rules. *Id.* at 414-15 (Cardamone, J., concurring).

46. *Id.* at 410-11. The court prefaced this conclusion by noting that the government is not obligated constitutionally to subsidize fundamental rights. *Id.* at 410 (citing Maher v. Roe, 432 U.S. 464, 474-75 (1977); Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)).

47. *Id.* (quoting *Maher*, 432 U.S. at 475).

48. *Id.* at 411. The dissent strongly disagreed, finding that "[b]y damming the flow of information from physician to patient, the . . . regulations impermissibly impede a woman's exercise of her constitutional privacy right [to choose abortion]." *Id.* at 417 (Kearse, J., dissenting in part). "Time and time again the Supreme Court has emphasized that governmental regulation violates a woman's right to choose between childbirth and abortion when it interferes with the information and advice she may be given by her physician." *Id.* (citing Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 762 (1986); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 463 U.S. 416, 429-30 (1983)).

49. *Id.* at 411 (relying on Webster v. Reproductive Health Servs., 492 U.S. 490, 509-10 (1989)).

50. *Id.* at 412 (relying on Regan v. Taxation with Representation, 461 U.S. 540, 549-50 (1983), to support the conclusion that the regulations represented only a legitimate governmental decision not to subsidize the right to speech, thereby requiring no judicial weighing of the impact of that decision against the government's interest). The court qualified this finding, suggesting that First Amendment questions might be raised if the regulations were interpreted to limit the availability of abortion counseling to a private patient whose "regular" physician practiced out of a Title X funded institution. *Id.* at 413-14. The court made it clear that, in its view, the regulations require the health care providers only to state that clinics do not offer

court again supported its decision with the view that the government is under no obligation to subsidize constitutional rights.[51]

It was the Second Circuit case that the Supreme Court agreed to hear, as *Rust v. Sullivan*.[52] By a five-to-four vote, the Court held that the regulations were a permissible construction of the statute, did not represent an unconstitutional condition on a federal subsidy, and did not otherwise violate the First or Fifth Amendments.[53] Chief Justice Rehnquist wrote for the majority; three justices filed dissenting opinions.[54]

The majority's two-part analysis first reviewed the doctrines of statutory construction and administrative law that the Court declared allowed it to consider issues related to the regulations' substance.[55] When a statute is ambiguous, a long-standing doctrine requires federal courts to read its language so as " 'to avoid serious doubt of [its] constitutionality.' "[56] The *Rust* majority declared that because the regulations did not raise any " 'grave and doubtful constitutional questions,' " this doctrine did not apply.[57] While acknowledging that plaintiffs had raised constitutional challenges, the majority reasoned that they were inspired by the controversial political nature of the abortion issue, and not by the con-

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abortion counseling, and for that reason, the regulations do not promote unconstitutionally childbirth over abortion. *Id.* at 414.

51. *Id.* at 412.

52. 111 S. Ct. 1759 (1991).

53. *Id.* at 1768-78. Chief Justice Rehnquist and Justices White, Scalia, Kennedy, and Souter were in the majority; Justices Blackmun, Marshall, Stevens, and O'Connor constituted the dissent. One observer of the oral argument has expressed surprise at Justice Souter's vote, given the tenor and direction of his questions to the Solicitor General. Justice Souter pressed the Solicitor General for information about whether a physician could counsel a Title X patient about abortion when there was potential risk of a health problem. Telephone Interview with Walter Dellinger, Professor of Law, Duke University (Sept. 24, 1991); *see also* Official Transcript of Oral Argument at 38-42, *Rust* (Nos. 89-1391 & 89-1392) (documenting questions Justices Scalia, Souter, and Stevens asked Kenneth W. Starr, Solicitor General); *infra* note 203 (describing the Solicitor General's response to this line of questioning).

54. Justice Blackmun filed a dissenting opinion in which Justice Marshall joined and in which Justices O'Connor and Stevens joined in part. *Rust*, 111 S. Ct. at 1778-86 (Blackmun, J., dissenting). Blackmun's dissent was divided into three sections: first, a discussion of statutory construction and administrative law doctrines, which allowed the Court to reach the constitutional issues raised by plaintiffs; second, an analysis of the First Amendment claims; and third, an analysis of the Fifth Amendment challenge. *Id.* (Blackmun, J., dissenting). Justice O'Connor joined only the first part, while Justice Stevens joined only the last two parts of the dissent. *Id.* at 1778 (Blackmun, J., dissenting).

55. *See id.* at 1767-71.

56. *Id.* at 1778 (Blackmun, J., dissenting) (quoting Machinists v. Street, 367 U.S. 740, 749 (1961) and citing United States v. Security Indus. Bank, 459 U.S. 70, 78 (1982); Crowell v. Benson, 285 U.S. 22, 62 (1932); Hooper v. California, 155 U.S. 648, 657 (1895)); *id.* (Stevens, J., dissenting); *id.* at 1788-89 (O'Connor, J., dissenting).

57. *Id.* at 1771 (quoting United States v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

tent of the new Title X regulations.[58]

Chief Justice Rehnquist next analyzed the case under the administrative law doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[59] which grants substantial deference to agency interpretations of ambiguous statutes.[60] Because of the Title X statute's ambiguity, the majority held that the regulations were due substantial deference under *Chevron*,[61] even though the new Title X regulations were significantly different from the administrative interpretations that had been in place for seventeen years.[62] The Court noted that it found the regulations to be a permissible statutory construction, supported by "reasoned analysis" in response to a "shift in attitude against . . . abortion."[63]

By so analyzing the doctrines of statutory construction and *Chevron*, the majority was able to reach the constitutional questions. Addressing the First Amendment challenges, the Court declared that the new Title X regulations were not viewpoint-discriminatory constraints on protected speech even though the rules prohibit abortion counseling while mandating prenatal counseling for Title X clients.[64] Again, the majority followed the Second Circuit's analysis, declaring the regulations an acceptable exercise of the government's funding authority: a choice to "subsidize family planning services which will lead to conception and childbirth,"[65] not an attempt to suppress ideas.[66] Chief Justice Rehn-

58. *Id.*

59. 467 U.S. 837 (1984).

60. *Rust*, 111 S. Ct. at 1767 (citing *Chevron*, 467 U.S. at 844). The *Chevron* doctrine has been described by one noted commentator as "a pillar in administrative law . . . a kind of *Marbury*, or counter-*Marbury*, for the administrative state," and as "one of the very few defining cases in the last twenty years of American public law." Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990) (finding an analogy between *Chevron* and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

61. *Rust*, 111 S. Ct. at 1767-69. In addition to noting the ambiguity of the underlying statute, the majority also agreed with the Second Circuit's conclusion that the legislative history was ambiguous because Congress had not grappled directly with or spoken on the questions of abortion counseling, referral, or advocacy. *Id.* at 1768.

62. *Id.* at 1768-69. The previous administrative policy was in effect between 1971 and the date of issuance of the new regulations in 1988. *See supra* note 17 and accompanying text.

63. *Rust*, 111 S. Ct. at 1769 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983)). The Court did not clarify whether the changed circumstances in *Rust* were due to a shift in public attitude or in the administration's policy toward abortion. *Id.*

64. *Id.* at 1771-73. The First Amendment doctrine of viewpoint-discriminatory speech specifies that regulation of speech that excludes one viewpoint while promoting another is unconstitutional, unless the regulation serves a compelling state interest and is narrowly tailored to achieve that interest. Boos v. Barry, 485 U.S. 312, 319-21 (1988); *see also infra* notes 221-26 and accompanying text (describing the treatment of viewpoint-discriminatory speech regulations under the First Amendment).

65. *Rust*, 111 S. Ct. at 1772 (citing Harris v. McRae, 448 U.S. 297, 316-17 (1980); Maher

quist stated expressly that "when the government appropriates public funds to establish a program it is entitled to define the limits of that program."[67] The Court further maintained that the regulations would not "significantly impinge upon the doctor-patient relationship," and concluded that there was no need to consider whether that relationship should be specially protected against indirect governmental regulation through funding decisions.[68]

In its First Amendment analysis, the majority, like the Second Circuit, did not balance the government's interest in the speech restriction against the Title X employees' right to speak or the Title X patients' right to listen. By describing the abortion counseling ban as the result of a funding choice *between* types of speech (between abortion counseling and prenatal counseling) and not a content- or viewpoint-based restriction *within* a type of speech (counseling), the Court declared that it was unnecessary to scrutinize the speech restriction at all.[69]

Having dismissed plaintiffs' First Amendment challenge, the major-

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v. Roe, 432 U.S. 464, 474-77 (1977)). Chief Justice Rehnquist also found support in a quotation from Regan v. Taxation with Representation, 461 U.S. 540 (1983): " 'a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.' " *Rust*, 111 S. Ct. at 1772 (quoting *Regan*, 461 U.S. at 549).

66. According to the majority, because Congress intended Title X to have only a limited scope, not extending to serving pregnant patients, a Title X health care provider could properly also be prohibited from offering or providing prenatal advice and care to a patient. *Rust*, 111 S. Ct. at 1772.

67. *Id.* at 1773. The majority did go on to note, however, that government funding is not "invariably sufficient to justify government control over the content of expression." *Id.* at 1776. The content of speech expression in a public forum cannot be infringed, for example. *Id.* (citing United States v. Kokinda, 111 S. Ct. 3115, 3119 (1990)).

68. *Id.* at 1776. The Court reasoned that because nothing in the regulations *requires* a doctor to say anything to a patient that she or he does not believe, the regulations do not encroach upon or negatively affect the physician-patient relationship. *Id.* The Court contrasted the doctor-patient relationship with that between professors and students, which is specially protected against indirect regulation through subsidy. *Id.* (citing Keyishian v. Board of Regents, 385 U.S. 589, 603, 605-06 (1967)). The majority declared that because the doctor-patient relationship established under Title X is a limited one, a Title X patient will not be misled by the absence of dialogue about abortion. *Id.*

69. *See id.* at 1774-75. The Court relied on Regan v. Taxation with Representation, 461 U.S. 540 (1983) for this analysis. *Rust*, 111 S. Ct. at 1774-75. *Regan* upheld sections of the Internal Revenue Code, 26 U.S.C. § 170(c)(2) (1988), that denied income tax deductions for private contributions to nonprofit corporations engaging in political lobbying, while allowing the deduction if the nonprofit corporation did not lobby. *Regan*, 461 U.S. at 545-46 (citing Cammarano v. United States, 358 U.S. 498, 513 (1959), for the proposition that the government constitutionally can choose whether to fund a particular type of speech, in this instance lobbying). The *Regan* Court found no need to apply strict scrutiny to the statute. *Id.* at 548-50. In *Rust* the majority declared that funding speech about childbirth but not about abortion was analogous to the congressional decision not to fund all nonprofit lobbying upheld in *Regan*. *Rust*, 111 S. Ct. at 1774-75.

Direct regulatory restrictions on the fundamental right to free speech are (with limited

ity proceeded to reject the contention that the regulations imposed an unconstitutional condition on the receipt of federal funding.[70] Again the majority characterized the regulations as merely an instance of an acceptable governmental funding choice, noting that "the government is not denying a benefit to anyone."[71] To support this analysis Chief Justice Rehnquist defined the "benefit" as the grant to the Title X organization, not the medical services provided by that organization to the Title X clients.[72] By distinguishing between the *grantee* organization as the recipient of the benefit (Title X dollars) and the Title X *project*, the subsidiary of the grantee organization employing the health care provider, the majority avoided the unconstitutional-conditions issue by declaring the doctrine applicable only when the recipient of the funds is the entity on which the condition is placed.[73] Here, the majority said, the benefit ac-

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exceptions) subject to strict judicial scrutiny. *See infra* notes 223-26 and accompanying text (describing the strict-scrutiny requirement in First Amendment cases).

70. *Rust*, 111 S. Ct. at 1774. The doctrine of unconstitutional conditions "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). The doctrine stems from a line of cases that protect such fundamental rights as free speech, free association, religion, and privacy. *Id.* at 1416 & nn.4-6; *see* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-46 (1987) (religious freedom); FCC v. League of Women Voters, 468 U.S. 364, 398-99 (1984) (free speech); Thomas v. Review Bd., 450 U.S. 707, 718-19 (1981) (religious freedom); Elrod v. Burns, 427 U.S. 347, 371 (1976) (freedom of association); Pickering v. Board of Educ., 391 U.S. 563, 574-75 & n.6 (1968) (free speech); Sherbert v. Verner, 374 U.S. 398, 409-10 (1963) (religious freedom); Speiser v. Randall, 357 U.S. 513, 528-29 (1958) (free speech). Because the doctrine is "riven with inconsistencies," Sullivan, *supra*, at 1415 (noting the *Maher-McRae* line of cases, *infra* text accompanying notes 142-68, as an example), its usefulness as an analytical tool is limited. The doctrine seems likely to fall further from favor; now-retired Justice Brennan was its champion, *id.*, and Chief Justice Rehnquist's opinions reflect his desire to reject the doctrine completely, *id.* at 1417, 1441-42 (citing *Regan*, 461 U.S. at 549; *League of Women Voters*, 468 U.S. at 403-05 (Rehnquist, J., dissenting)). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8, at 681-85 (2d ed. 1988) (explaining the doctrine and describing it as "now somewhat eroded"); Epstein, *supra* note 8, at 7-14 (describing the doctrine); Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 323-58 (1935) (describing the early history of the doctrine); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1352-59 (1984) (describing the doctrine); Sunstein, *supra* note 8, at 597-620 (declaring that the traditional view of the doctrine is rooted in the *Lochner* era, and therefore obsolete, but suggesting that analysis of constitutional questions in publicly funded contexts is valid and necessary).

71. *Rust*, 111 S. Ct. at 1774.

72. *Id.*

73. *Id.* at 1774-75. By holding that the grantee could engage in abortion-related speech so long as it was segregated from the Title X project, the majority implicitly interposed that petitioners had failed to show sufficient similarity between the Title X case and the facts of *League of Women Voters*, 468 U.S. at 398-99 (1984), which invalidated a statute requiring federally funded radio and television stations not to engage in editorializing. *Rust*, 111 S. Ct. at 1774.

crues to the grantee as a whole, and the condition is imposed only on the grantee's subsidiary project.[74] According to the Court, the regulations did not force the entire grantee organization to give up abortion-related speech, but only to segregate it to the portions of its operations that did not receive Title X funding.[75]

To illustrate the Court's reasoning, suppose that a Title X grant is made to the regional offices of an organization such as Planned Parenthood, which then distributes the money to various neighborhood Title X clinics which are its subsidiaries. According to the *Rust* majority's analysis, governmental control over abortion-related speech at the neighborhood clinics was not an unconstitutional condition on receipt of a subsidy because it was the *parent* organization that benefitted from the federal grant, not the subsidiary clinic, while the speech restriction would occur only at the clinic. The Court did not analyze fully whether the requirement that Title X patients give up their rights to hear abortion-related information to obtain the benefit of the Title X services was an unconstitutional condition on receipt of a subsidy.[76] Although the majority did not ignore this problem completely, it held the question inapposite to the Title X situation, because the regulations do not deny Title X clients other opportunities to receive abortion counseling.[77]

The Court analyzed plaintiffs' Fifth Amendment claims just as it had the First Amendment and unconstitutional-conditions questions.[78] First, the majority framed the issue as a mere governmental funding decision, having no impact on constitutional rights.[79] Because the government has no duty to subsidize even fundamental rights, the majority reasoned, regulations denying funding to abortion-related speech did not infringe directly on a woman's right to choose abortion.[80] In the Court's opinion, Title X patients were no worse off under the new rules than they would have been in the absence of any federally financed program,[81] and

74. *Rust*, 111 S. Ct. at 1774.

75. *Id.*

76. *See id.* at 1774-76.

77. *Id.* at 1777. *But see infra* notes 268-70 and accompanying text (noting that the regulations effectively deny indigent patients other opportunities for counseling).

78. Plaintiffs claimed that by denying pregnant Title X patients full information about their legal options, the regulations impermissibly interfered with their Fifth Amendment right to choose an abortion. See *supra* notes 19-31 and accompanying text for a discussion of plaintiffs' claims.

79. *See Rust*, 111 S. Ct. at 1776-78.

80. *Id.* at 1776 (citing Webster v. Reproductive Health Servs., 492 U.S. 490, 511 (1989)).

81. *Id.* at 1777-78. This "no worse off" analysis differed from the view taken by the Second Circuit in the case below, which was that because a funding decision was involved, the actual effects of the regulation were irrelevant. *See supra* text accompanying note 49 (discussing the Second Circuit's analysis on this point).

therefore the abortion counseling ban did not impermissibly burden patient's Fifth Amendment rights to choose an abortion.[82]

Furthermore, the majority pointedly declared that it did not read the regulations as prohibiting a Title X employee from counseling or referring for abortion a patient whose pregnancy places her life in "imminent peril."[83] In that situation, neither the statutory language nor the regulations would apply, according to the Court, because counseling abortion to save a woman's life is not the same as counseling abortion as " 'a method of family planning.' "[84] The majority did not state how serious the health-threatening situation must be in order to avoid the regulations' ban on abortion counseling.[85]

Finally, the majority argued that patients' rights to informed medical self-determination would not be affected by the abortion counseling ban.[86] The Court found that patients would not be denied completely the information necessary to make an informed choice between abortion and childbirth, because it still would be available from other sources.[87] The majority distinguished the Title X regulations from the local and state abortion regulations found unconstitutional in *City of Akron v. Akron Center for Reproductive Health*[88] and *Thornburgh v. American College of Obstetricians & Gynecologists*.[89] The critical issue in those cases, said the majority, was that all physicians and all women would have been affected by the challenged restrictions, not just employees or patients of federally funded clinics.[90] In this case only Title X patients and employees would be affected, and would remain free both to seek counseling from other sources and to speak about abortion outside the Title X context.[91]

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82. *Rust*, 111 S. Ct. at 1777. In Belotti v. Baird, 428 U.S. 132 (1976), the Court held that an abortion regulation is not unconstitutional unless it "unduly burdens the right to seek an abortion." *Id.* at 147. Maher v. Roe, 432 U.S. 464, 473-74 (1977), and Harris v. McRae, 448 U.S. 297, 314 (1980) upheld this standard. For a discussion of these cases, see *infra* text accompanying notes 142-68.

83. *Rust*, 111 S. Ct. at 1773.

84. *Id.* at 1772 (quoting 42 U.S.C. § 300a-6 (1988)).

85. *See id.* at 1773. Solicitor General Kenneth W. Starr, at oral argument, offered the view that the Title X regulations prohibit a project physician from recommending that a patient consider abortion even when the doctor's examination reveals the likelihood that an emergency will occur if the patient continues the pregnancy to term. Rather, under Solicitor General Starr's reading, the physician must be confronted directly with an emergency to avoid the abortion counseling ban. Official Transcript of Oral Argument at 41-43, *Rust* (Nos. 89-1391 & 89-1392).

86. *Rust*, 111 S. Ct. at 1777-78.

87. *Id.*

88. 462 U.S. 416 (1983). *Akron* is discussed *infra* notes 176-88 and accompanying text.

89. 476 U.S. 747 (1986).

90. *Rust*, 111 S. Ct. at 1777-78.

91. *Id.* at 1777.

Each of the *Rust* dissenters strongly disagreed with the Court's statutory construction analysis and noted that the majority had narrowed the doctrine significantly.[92] Indeed, Justice O'Connor looked no further than this issue in rejecting the majority's holding.[93]

Justice Blackmun, joined by Justices Marshall and Stevens, dissented vehemently from the majority's analysis of the regulations' constitutionality.[94] Justice Blackmun argued that the speech restrictions in the Title X counseling provisions violated the First Amendment because they were content- and viewpoint-based, and insufficiently justified by governmental interest.[95] He distinguished the Court's holding in *Regan v. Taxation with Representation*,[96] on which the majority had relied, as permitting a governmental funding decision based only on the type of speech involved, rather than its content or the viewpoints expressed.[97]

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92. *Id.* at 1778 (Blackmun, J., dissenting) ("Casting aside established principles of statutory construction and administrative jurisprudence, the majority in these cases today unnecessarily passes upon important questions of constitutional law.") (quoting Machinists v. Street, 367 U.S. 740, 749 (1961), and citing United States v. Security Indus. Bank, 459 U.S. 70, 78 (1982); Crowell v. Benson, 285 U.S. 22, 62 (1932); Hooper v. California, 155 U.S. 648, 657 (1895)); *id.* at 1788 (Stevens, J., dissenting); *id.* at 1788-89 (O'Connor, J., dissenting) (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). Having thus noted the doctrine, Justice Blackmun (joined in this portion by Justices Marshall and O'Connor) concluded that the Second Circuit's decision should be reversed in favor of a plainly constitutional regulatory construction of the statute. *Id.* at 1780 (Blackmun, J., dissenting). He reached an analysis of the constitutional questions in his dissent only because he so strongly disagreed with the majority that he felt compelled to respond to its analysis. *Id.* (Blackmun, J., dissenting).

93. *Id.* at 1788 (O'Connor, J., dissenting). Justice O'Connor noted that her deference to the doctrine would not permit her to join the portions of Justice Blackmun's dissent in which he analyzed the constitutional questions surrounding the regulations. *Id.* (O'Connor, J., dissenting). In her view, the regulations raised significant First Amendment questions, particularly concerning their "content-based restrictions on the speech of Title X fund recipients." *Id.* (O'Connor, J., dissenting). While not reaching the question herself, Justice O'Connor suggested that were she to analyze the regulations under the First Amendment, she might well accept Justice Blackmun's view that the regulations were unconstitutional. *See id.* (O'Connor, J., dissenting).

94. *See id.* at 1778-86 (Blackmun, J., dissenting).

95. *Id.* at 1780-81, 1784 (Blackmun, J., dissenting). Justice Blackmun found the counseling regulations to be content-based restrictions because they permit Title X health care providers to talk about "any of a wide range of family planning and other topics, save abortion," and so represent a prohibition of discussion of an entire topic. *Id.* at 1781 (Blackmun, J., dissenting) (citing Boos v. Barry, 485 U.S. 312, 319 (1988); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980)). Further, in his belief the regulations are viewpoint-based because they not only prohibit abortion-related speech, but compel speech about maternal and fetal health, and because they prohibit only prochoice speech, not speech in favor of the alternative position. *Id.* at 1781-82 (Blackmun, J., dissenting).

96. 461 U.S. 540 (1983).

97. *Rust*, 111 S. Ct. at 1782 (Blackmun, J., dissenting) (noting that "if the . . . Regulations were confined to non-ideological limitations upon the use of Title X funds for lobbying activities, there would exist no violation of the First Amendment").

Because the Title X speech restrictions were content-based, the dissent argued, the regulations represented a clearly unconstitutional condition on the receipt of federal funding.[98]

After concluding that the counseling restrictions were content- and viewpoint-based, Justice Blackmun balanced the governmental interest in the regulations against the interest of those whose speech rights they infringed.[99] Justice Blackmun pointed out that a health professional's interests include an ethical obligation to provide patients with complete information,[100] and that patients have interests in receiving complete information from which to make an intelligent health care decision.[101] The government's *stated* purpose, according to the dissent, was to ensure that Title X funds were "not spent for a purpose outside the scope of the program,"[102] and that was hardly sufficient to justify the regulations' constraints on the interests of the health care providers and their patients.[103] According to Justice Blackmun, even had this purpose been

98. *Id.* at 1782-84 (Blackmun, J., dissenting). Justice Blackmun noted that "[w]hatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech." *Id.* at 1780 (Blackmun, J., dissenting) (citing Speiser v. Randall, 357 U.S. 513, 518-19 (1958)). Speech restrictions attached to a subsidy, he said, act effectively as an indirect penalty on speech, which is no more constitutionally acceptable than a direct penalty. *Id.* at 1782-83 (Blackmun, J., dissenting) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

99. *Id.* at 1783-84 (Blackmun, J., dissenting).

100. *Id.* at 1783 (Blackmun, J., dissenting) (citing THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS OF THE AMERICAN MEDICAL ASSOCIATION, CURRENT OPINIONS ¶ 8.08 (1989); PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS 70 (1982)).

101. *Id.* (Blackmun, J., dissenting). Defining the government's objectives and assessing their importance relative to the importance of the affected parties' rights are the first steps in the two-part test for determining the constitutionality of viewpoint-based restrictions on speech set out in Boos v. Barry, 485 U.S. 312, 321 (1988). See *infra* notes 221-26 for a discussion of this analysis.

102. *Rust*, 111 S. Ct. at 1783 (Blackmun, J., dissenting).

103. *Id.* (Blackmun, J., dissenting). He noted: "[T]he speech the Secretary would suppress is truthful information regarding constitutionally protected conduct of vital importance to the listener. One can imagine no legitimate government interest that might be served by suppressing such information." *Id.* (Blackmun, J., dissenting). Justice Blackmun was impressed especially by the fact that it is the relationship between a health care provider and his or her patient that is affected by the regulations. As the author of Roe v. Wade, 410 U.S. 113 (1973), he had emphasized the importance of consultation between physician and patient, *see id.* at 153, 163-66, and he continued that emphasis in his *Rust* dissent. *See Rust*, 111 S. Ct. at 1783, 1785-86 (Blackmun, J., dissenting). Justice Blackmun noted that:

> In our society, the doctor/patient dialogue embodies a unique relationship of trust. The specialized nature of medical science and the emotional distress often attendant to health-related decisions requires that patients place their complete confidence, and often their very lives, in the hands of medical professionals. . . . It is for this reason

more compelling, the regulations were not tailored narrowly to serve it and would fail on that basis.[104] Justice Blackmun then contrasted the stated governmental objective with the government's actual motive, which he characterized as an attempt to distort the doctor-patient dialogue and thereby reduce the incidence of abortion.[105]

Justice Blackmun reserved his strongest criticism for the majority's Fifth Amendment analysis.[106] He chastised the majority for missing the critical Fifth Amendment point: that the right in question was not an indigent woman's right to a subsidy, but rather her right "to be free from affirmative governmental *interference* in her decision."[107] Characterizing the new rules as coercive, Justice Blackmun argued that their viewpoint bias and the fact that they "suppress[ ] medically pertinent information" create an obstacle to Title X patients' exercise of their Fifth Amendment rights to choose whether to continue pregnancies to term.[108] Because that right is *personal* to every indigent pregnant woman, he argued, the fact that the rules keep critical information from even one patient makes them unconstitutional with respect to her, regardless of their effects on other women, wealthy or poor.[109] Finally, Justice Blackmun commented that the majority's interpretation of the rules as allowing abortion referral when the woman's life is endangered by the pregnancy was essential to keep the regulations from violating the Fifth Amendment's Due Pro-

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> that we have guarded so jealously the doctor/patient dialogue from governmental intrusion. "[I]n *Roe* and subsequent cases we have 'stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out.' "

Id. at 1785-86 (Blackmun, J., dissenting) (quoting City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 447 (1983) (quoting Colautti v. Franklin, 439 U.S. 379, 387 (1979))).

104. *Rust*, 111 S. Ct. at 1783-84 (Blackmun, J., dissenting). With this analysis, Justice Blackmun applied the second part of the two-part test for determining the constitutionality of viewpoint-based restrictions on speech set out in *Boos*, 485 U.S. at 321. See *infra* notes 223-26 and accompanying text for a discussion of the test. The majority opinion had, in a footnote, declared the regulations to be "narrowly tailored" to fit congressional intent that Title X monies not be "used in a program where abortion is a method of family planning," *Rust*, 111 S. Ct. at 1773 n.4, but had not analyzed the sufficiency of the governmental purpose. Justice Blackmun noted that "[b]y failing to balance or even to consider the free speech interest claimed by Title X physicians against the Government's asserted interest in suppressing the speech, the Court falters in its duty to implement the protection that the First Amendment clearly provides for this important message." *Id.* at 1784 (Blackmun, J., dissenting).

105. *Rust*, 111 S. Ct. at 1785 (Blackmun, J., dissenting) (noting that the definition of family planning in 42 C.F.R. § 59.2 (1991) states that family planning "should reduce the incidence of abortion").

106. *See id.* at 1784-86 (Blackmun, J., dissenting).

107. *Id.* at 1784 (Blackmun, J., dissenting) (citing Roe v. Wade, 410 U.S. 113, 153 (1973)).

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

109. *Id.* at 1786 (Blackmun, J., dissenting).

cess Clause.[110] He also pointed out that the Solicitor General's oral argument had not supported such a lenient interpretation, but had advocated a position inconsistent with the basic holding in *Roe v. Wade*.[111]

THE LAW BEFORE *RUST*: ABORTION, SPEECH, AND FEDERAL FUNDING

The history of the Court's decisions on abortion generally, and on federally funded abortion in particular, are obviously important in understanding *Rust*, and this section will first focus on those areas of the law. To the extent that *Rust* upholds regulatory language that refuses abortion referral to women whose health is threatened seriously by continuing a pregnancy, the decision has a significant impact on abortion law.

Beyond the abortion context, *Rust* has important implications for the government's ability to control other fundamental rights, particularly free speech rights, which are enabled by publicly funded programs. In order to gauge the extent to which *Rust* changes that body of law, the Note discusses the Court's decisions concerning the First Amendment, especially in publicly funded contexts, and analyzes *Rust* in light of this jurisprudence.

Three lines of cases concerning the right to abortion are critical to a complete understanding of *Rust*'s effect on abortion law: cases that define and describe the right; cases that indicate the government's responsibility to enable the exercise of the right; and finally, cases that specify the government's role in the physician-patient dialogue.

WOMEN'S RIGHT TO CHOOSE ABORTION FREE OF STATE INTERFERENCE

In *Roe v. Wade*[112] a seven-to-two majority of the Court established that "the right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . encompass[es] a woman's decision

110. *Id.* at 1786 n.6 (Blackmun, J., dissenting) (citing City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244-45 (1983) (analyzing due process under the Fourteenth Amendment); Youngberg v. Romeo, 457 U.S. 307, 314-15 (1982) (same)).

111. *Id.* (Blackmun, J., dissenting) (citing Official Transcript of Oral Argument at 44-47, *Rust* (Nos. 89-1391 & 89-1392)); *see infra* notes 112-36 and accompanying text for a discussion of Roe v. Wade, 410 U.S. 113 (1973).

112. 410 U.S. 113 (1973). *Roe*, like its companion case Doe v. Bolton, 410 U.S. 179 (1973), involved a challenge to a state statute criminalizing abortion. *Roe*, 410 U.S. at 116. Both cases were decided over a dissent by then-Justice Rehnquist. *Id.* at 171-78 (Rehnquist, J., dissenting); *Doe*, 410 U.S. at 223 (Rehnquist, J., dissenting).

whether or not to terminate her pregnancy."[113] A privacy right previously had been found to protect "activities relating to marriage; procreation; contraception; family relationships; and child rearing and education."[114] The Court declared that whether the privacy right was grounded in the Fourteenth Amendment or implicit in the language of other constitutional amendments, including the Fifth Amendment, it included the right to decide to have an abortion.[115]

Roe defined the privacy right in the abortion context as "not unqualified."[116] Specifically, the *Roe* Court held that a state could regulate a woman's right to choose whether to carry her pregnancy to term only if it had a compelling reason.[117] The state's dual interest—protecting maternal health and the potential life of the fetus—was held never to exceed the mother's own interest in her life and health, however.[118] Under *Roe*, a state never could prohibit abortion "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[119] With that exception, the *Roe* Court announced a framework for acceptable state regulations of abortion, based on the three trimesters of a pregnancy.[120] The choice of this framework was based on two factors. First, abortion in the earlier stages of pregnancy is a safer procedure for the mother than is childbirth, and second, a fetus is not viable

113. *Roe*, 410 U.S. at 153. The Fourteenth Amendment states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

114. *Roe*, 410 U.S. at 152-53 (citations omitted) (citing Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (contraception); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (child rearing and education); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (same)). The Court noted in *Roe* that the privacy right, while not explicitly mentioned in the Constitution, previously had been recognized under the "penumbras" surrounding the Bill of Rights generally, *id.* at 152 (citing Griswold v. Connecticut, 381 U.S. 475, 484-85 (1965)); the First Amendment, *id.* (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)); the Fourth and Fifth Amendments, *id.* (citing Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Boyd v. United States, 116 U.S. 616, 624-35 (1886)); the Ninth Amendment, *id.* (citing *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring)); and the Fourteenth Amendment, *id.* (citing *Meyer*, 262 U.S. at 399).

115. *Id.* at 152-53; *see supra* note 114. The Fifth Amendment, which is applicable to federal government actions, states: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

116. *Roe*, 410 U.S. at 154.

117. *Id.* at 155.

118. *Id.* at 164-65.

119. *Id.*

120. A trimester is three months long: a pregnancy of nine months' duration therefore is divided into three trimesters. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2445 (4th ed. 1976).

outside the womb until a certain point during the pregnancy.[121] As a pregnancy proceeds to term, the risk of maternal death during abortion increases until it is equal to the risk of death during childbirth.[122] When *Roe* was decided, the risks became equivalent at the end of the first trimester.[123] Therefore, during the first trimester of the pregnancy, the Court held that a woman's privacy interest outweighed the state's interest in regulation such that she was free to choose an abortion, in consultation with her physician, without any interference from the state.[124] During the second and third trimesters, however, the state could regulate the abortion procedure so long as the regulation was "reasonably relate[d] to the preservation and protection of maternal health."[125] The *Roe* Court further established that during the portion of the pregnancy after fetal viability,[126] the state may go so far as to prohibit abortion altogether, except in cases in which continuation of the pregnancy endangers maternal life or health.[127]

Then-Justice Rehnquist dissented in *Roe*, criticizing both the majority's characterization of and analytical source for the woman's right to choose abortion.[128] While recognizing that persons have Fourteenth Amendment interests in freedom from unwanted state regulation, he dismissed the notion that those claims could be called privacy rights.[129] He noted that the "transaction resulting in an operation such as [abortion] is not 'private' in the ordinary usage of that word."[130] He also looked to the intent of the drafters of the Fourteenth Amendment, finding no evidence that they meant to allow a fundamental "right to abortion" because in 1868 a majority of states had statutes limiting abortion.[131]

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121. *Roe*, 410 U.S. at 149, 159, 162-63.

122. *See id.* at 150. The risk to the woman's health posed by abortion continually increases as the pregnancy advances. *Id.*

123. *Id.* at 163. The Court recognized that its understanding of the issue was based on the medical knowledge of the time and that advances in medical science and technology change understandings about medical risks. *Id.* at 149, 163.

124. *Id.* at 163.

125. *Id.*

126. Viability, defined as the point during the pregnancy at which the fetus can survive independently of the mother, according to the *Roe* Court is "usually placed at about . . . 28 weeks [after conception] but may occur earlier, even at 24 weeks." *Id.* at 160 (citing DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1689 (24th ed. 1965); LOUIS M. HELLMAN & JACK A. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971)).

127. *Id.* at 164-65.

128. *See id.* at 172-78 (Rehnquist, J., dissenting).

129. *Id.* at 172 (Rehnquist, J., dissenting).

130. *Id.* (Rehnquist, J., dissenting).

131. *Id.* at 174-77 (Rehnquist, J., dissenting). While noting that 36 states had enacted "abortion laws" in 1868, some of them still in effect in 1973, *id.* at 175-76 (Rehnquist, J., dissenting), then-Justice Rehnquist did not explain the scope of those laws. The Texas statute

In the portion of his dissent that presaged his opinions in *Webster v. Reproductive Health Services*[132] and *Rust*, Justice Rehnquist disagreed with the majority's "sweeping invalidation of any restrictions on abortion during the first trimester," and its requirement that the state show a compelling interest to justify the regulation of abortion thereafter.[133] He criticized the majority for balancing the state's interest in regulation against the woman's privacy interest, noting that such a test is appropriate more to legislative policy analysis than to a judicial determination.[134] Finally, because Justice Rehnquist believed the right in question was not fundamental, he stated his preference for a less stringent test to uphold abortion regulation: a showing that the law has a rational relationship to a valid state objective.[135]

The majority opinion in *Roe* evinced not only a concern for women's health and a strong sense of judicial respect for the doctor-patient relationship, but also recognized women's need to make informed medical decisions.[136] Several important cases decided in the years following *Roe* focused on these aspects of the abortion question, further interpreting the permissible limits of governmental involvement in a woman's right to choose. In *Planned Parenthood v. Danforth*,[137] decided in 1976, the Court upheld a Missouri statute requiring that pregnant women electing first trimester abortions sign consent statements indicating that their abortion choice was fully informed and freely made.[138] In addition, the Court invalidated a portion of the statute requiring physicians to attempt to preserve fetal life even when performing first trimester abortions, because the statute failed to respect *Roe*'s paramount interest in maternal health during the first portion of the pregnancy.[139] Similarly, the Court's

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in question criminalized the performance of abortion unless the mother's life was endangered by the pregnancy. *Id.* at 117-18. The majority opinion addressed the generally accepted reasons for the abortion statutes in effect in the mid-19th century: concern about the safety of the abortion procedure, an interest in reducing the high mortality rate then associated with abortion, and the state's interest in preserving fetal life. *Id.* at 147-152.

132. 492 U.S. 490 (1989).

133. *Roe*, 410 U.S. at 173-74 (Rehnquist, J., dissenting).

134. *Id.* at 173 (Rehnquist, J., dissenting).

135. *Id.* (Rehnquist, J., dissenting).

136. *See supra* notes 112-27 and accompanying text.

137. 428 U.S. 52 (1976).

138. *Id.* at 65-67. The Court noted that the abortion decision "is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Id.* at 67. The Court further noted that for its purposes the term "informed consent" meant "giving . . . information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." *Id.* at 67 n.8.

139. *Id.* at 81-84.

1979 decision in *Colautti v. Franklin*[140] reaffirmed the *Roe* majority's insistence that the Fourteenth Amendment requires protection of maternal health over the life of the fetus during the first trimester of pregnancy.[141]

During the post-*Danforth* period, however, the Court decided a pair of cases concerning public funding for abortion that defined the abortion choice for indigent women.[142] In *Maher v. Roe*[143] the Court held the federal government was not obligated to pay for nontherapeutic abortions[144] through its Medicaid programs and that a state's policy decision to use its federal funds to support childbirth expenses but not the abortion choice of indigent women did not violate the Equal Protection Clause of the Fourteenth Amendment.[145] In *Harris v. McRae*,[146] decided in 1980, the Court reaffirmed *Maher*'s analysis and extended it to hold that there was no governmental obligation to provide Medicaid funding even for certain medically necessary abortions.[147] *Maher* and *McRae* were decided over vigorous dissents.[148]

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140. 439 U.S. 379 (1979).

141. *Colautti* struck down a state statute requiring higher standards of physician care in performing abortions when the fetus might be viable because it did not state explicitly that when there is a conflict between maternal and fetal health, the mother's health always must prevail. *Id.* at 398-401.

142. *See* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977). *Maher* and *Harris* have provided the analytic framework for many of the Court's subsequent abortion and public funding decisions, including *Rust*. *See Rust*, 111 S. Ct. at 1772-73.

143. 432 U.S. 464 (1977). In Beal v. Doe, 432 U.S. 438 (1977), a companion case to *Maher*, the Court held that Title XIX of the Social Security Act, 42 U.S.C. § 1396 (1988), did not obligate the expenditure of Medicaid funding for abortions that are not medically necessary. *Beal*, 432 U.S. at 447.

144. Abortions that are not medically necessary to the health of the mother often are referred to as "nontherapeutic." *See, e.g.*, *Beal*, 432 U.S. at 440-45 (describing the abortions for which petitioners sought Medicaid funding as "nontherapeutic" and "*unnecessary*—though perhaps desirable—medical services").

145. *Maher*, 432 U.S. at 469-80. The Fourteenth Amendment states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The petitioners in *Maher* asserted that Connecticut's different treatment of abortion and childbirth violated the latter provision. *Maher*, 432 U.S. at 470. In analyzing the constitutionality of a government funding decision, the Court held it need be shown only that the restrictions are rationally related to a legitimate governmental purpose. *Id.* at 477-78. The rational-relationship test is the basic analysis applied in an equal protection or due process analysis; this test has been analogized to a presumption of constitutionality. TRIBE, *supra* note 70, § 16-2, at 1439-43. By contrast, so-called "strict scrutiny" analysis is applied when a statute is challenged as infringing a fundamental right or distinguishing between persons in its application based on some suspect classification, such as race. *Id.* § 16-3, at 1451-52. To survive strict scrutiny, a statute must be shown to be justified by a substantial governmental interest; few statutes that impair fundamental rights survive such a challenge. *Id.* § 16-3, at 1452-53 & n.4.

146. 448 U.S. 297 (1980).

147. *Id.* at 313-18.

148. Justices Brennan, Marshall and Blackmun dissented in *Maher*; in *McRae* they were

In *Maher* a six-Justice majority held that, to be valid, any statute which " 'operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution' " must survive strict judicial scrutiny.[149] Poverty alone did not define a suspect class,[150] declared the majority, and furthermore, the rights the Court had defined in *Roe* were not fundamental in nature.[151] The constitutional right declared in *Roe*, according to the *Maher* Court, was not per se a "right to abortion," but rather the right to be free from "unduly burdensome interference" with the choice between abortion and childbirth.[152] For these reasons, the majority observed, a strict-scrutiny analysis was not necessary in *Maher*. The Court instead employed a rational relationship test and upheld the statute.[153]

Justice Marshall voiced an impassioned dissent, condemning the Court's decision as a "vicious attack"[154] on *Roe v. Wade*[155] and as "legal legerdemain" producing what would be a de facto total ban on abortions

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joined by Justice Stevens. *See McRae*, 448 U.S. at 329-37 (Brennan, J., dissenting); *id.* at 337-48 (Marshall, J., dissenting); *id.* at 348-49 (Blackmun, J., dissenting); *Maher*, 432 U.S. at 482-90 (Brennan, J., dissenting); *Beal*, 432 U.S. at 454-63 (Marshall, J., dissenting); *id.* at 462-63 (Blackmun, J., dissenting).

149. *Maher*, 432 U.S. at 470 (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)). Strict judicial scrutiny requires a showing of a compelling state interest in the regulation, such as would outweigh the rights that are infringed. *See* TRIBE, *supra* note 70, § 16-7, at 1454.

150. *Maher*, 432 U.S. at 471 ("[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." (citing *Rodriguez*, 411 U.S. at 29)). For discussions and arguments on both sides of the question whether there are constitutional rights to public support to enable the indigent to exercise fundamental rights, *see, e.g.*, Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 697-98 (finding no support for such rights in constitutional text, history, or structure); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 23-48 (1987) (arguing for a constitutional right to minimum income); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 659-60 (arguing that such rights can be found in the Constitution).

151. *Maher*, 432 U.S. at 471-73. The *Maher* Court explained that it had used a strict scrutiny analysis in *Roe* because of the extreme nature of the statutory prohibition, not because of the fundamental nature of the right. *Id.*

152. *Id.* at 473-74. Any burden on the indigent woman's choice, according to the *Maher* majority, was not the result of the statute, but rather of the woman's indigency, a situation existing wholly apart from the statute and unaffected by it. *Id.* at 474.

153. *See id.* at 474-81. The Court also drew a distinction between statutory provisions that directly interfere with constitutionally protected activity and those that encourage one such activity, but not another. *Id.* at 475 & n.9 (citing Buckley v. Valeo, 424 U.S. 1, 93-97 (1976)). The Court declared: "Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." *Id.* at 476.

154. Beal v. Doe, 432 U.S. 438, 455 (1977) (Marshall, J., dissenting).

155. 410 U.S. 113 (1973).

for the poor.[156] The Court's use of an "outdated and intellectually disingenuous 'two-tier' equal protection analysis," said Justice Marshall, allowed it to perpetrate its sleight-of-hand, and to set up a two-tiered system of abortion rights: one for the wealthy and one for the poor.[157]

Similarly, the five-to-four decision in *Harris v. McRae*,[158] authored by Justice Stewart, stated that the *Roe* decision had emphasized strongly a woman's interest in protecting her health, but rejected the claim that because the federal statute denied funding for *medically necessary* abortions it infringed on indigent women's privacy rights under the Due Process Clause.[159] Again the Court distinguished between direct governmental action to impose its will, which it said was impermissible, and the government's choice to encourage one activity and not another, which was found acceptable.[160] The Court declared that "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[161]

Dissenting again in *McRae*, Justice Marshall pointedly analyzed the probable *effects* of the federal government's refusal to fund medically necessary abortions on indigent women, concluding that these may include considerable health damage and as many as one hundred additional deaths per year.[162] He stated, as he had in *Maher*, that the majority's opinion effectively denied poor women the rights to abortion that had been declared available to all women in *Roe*.[163] Justice Bren-

156. *Beal*, 432 U.S. at 457 (Marshall, J., dissenting).

157. *Id.* at 457-58 (Marshall, J., dissenting). Justice Marshall urged his own sliding-scale equal protection analysis in which the importance of the benefits denied, the character of the affected class, and the state's interests would be balanced carefully in every situation, with the resulting "level" of scrutiny varying from case to case. *Id.* at 458 (Marshall, J., dissenting). Under this analysis, he noted, the challenged funding restrictions would fail. *Id.* (Marshall, J., dissenting).

158. 448 U.S. 297 (1980).

159. *Id.* at 315-17.

160. *Id.* at 315.

161. *Id.* at 316. The opinion emphasized the majority's view that the statute in question did not cause or affect indigent women's range of choices, which the Court claimed remained the same as they would have been absent the existence of Medicaid benefits generally. *Id.* at 316-17.

162. *Id.* at 339-40 (Marshall, J., dissenting).

163. *Id.* at 338 (Marshall, J., dissenting). In *Maher*, Justices Marshall and Blackmun had joined Justice Brennan's dissent, which analyzed the effects of the Medicaid funding restrictions on indigent women's rights to choose abortion. Maher v. Roe, 432 U.S. 464, 482-85 (1977) (Brennan, J., dissenting). Justice Brennan found that poor women's fundamental rights were inhibited unduly by the statutorily imposed "financial pressures . . . to bear children they would not otherwise have." *Id.* at 484-85, 488 (Brennan, J., dissenting). He further noted that the funding restriction should have been balanced against a compelling state interest as it represented an undue burden on a fundamental right. *Id.* at 484-85, 488-89 (Brennan, J.,

nan, writing a joint dissent in *McRae*, chastised the Court for once again failing to recognize that it is the *combination* of the pregnant woman's poverty and the government's funding decision that effectively prohibits her freedom of choice.[164]

Justice Stevens, explaining his decision to join the dissenters in *McRae*,[165] criticized the *McRae* majority for not properly recognizing women's rights to prefer their health to fetal life, and reminded the majority that *Roe* had held state action interfering with that right unconstitutional.[166] He analyzed *McRae* as an example of an unconstitutional special exception from a governmental benefit.[167] If Congress creates a benefit for a particular class of people, he stated, it has no right to withhold the benefit from members of that class just because they choose to exercise a constitutional right.[168]

Ten years after *McRae*, the Court extended its abortion funding doctrine in *Webster v. Reproductive Health Services*,[169] allowing restrictions on the use of public facilities and personnel to provide abortions when the mother's health or life was not in danger.[170] Chief Justice Rehnquist, writing for the majority,[171] upheld a Missouri statute that prohibited the use of public funds, facilities, or personnel to perform or assist in the performance of nontherapeutic abortions.[172] Noting that the

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dissenting). Justice Marshall also filed a separate dissent accompanying Beal v. Doe, 432 U.S. 438 (1977), that applied to *Maher* as well. *Beal*, 432 U.S. at 454-62 (Marshall, J., dissenting); *Maher*, 432 U.S. at 481. In that opinion, Justice Marshall's similarly emphasized the effects of the Court's decision. *See Beal*, 432 U.S. at 456-58 (Marshall, J., dissenting) (pointing out the effects on poor women and children of upholding the Medicaid restrictions, and decrying "[t]he Court's insensitivity to the human dimension of [its] decisions [in *Beal* and *Maher*]").

164. *McRae*, 448 U.S. at 333 (Brennan, J., dissenting). Justices Marshall, Blackmun, and Stevens joined in the dissent. *Id.* (Brennan, J., dissenting).

165. *Id.* at 349-50 (Stevens, J., dissenting). Justice Stevens was in the *Maher* majority. *Maher*, 432 U.S. at 465.

166. *McRae*, 448 U.S. at 351, 352 n.4 (Stevens, J., dissenting). He thus distinguished *McRae* from *Maher*, in which the federal government had chosen not to fund only nontherapeutic abortion. *See Maher*, 432 U.S. at 478-80.

167. *McRae*, 448 U.S. at 349 (Stevens, J. dissenting).

168. *Id.* at 349-50 (Stevens, J. dissenting).

169. 492 U.S. 490 (1989).

170. *Id.* at 511.

171. *Id.* at 496. On the issue of the constitutionality of prohibiting the use of public funds, facilities, and personnel for performing abortions, Chief Justice Rehnquist wrote for a majority of the Court, which included Justices White, O'Connor, Scalia, and Kennedy. *Id.* Notably, two sections of the Rehnquist opinion were supported by only Justices White and Kennedy. *Id.* Had these two sections of the opinion received support from a majority of the Court, the *Roe* trimester framework would have been abandoned. *Id.* at 517-21.

172. *See id.* at 501-04. Three other portions of the statute had been challenged in the lower court. These provisions prohibited: (1) the use of public funding for counseling on nontherapeutic abortion; (2) physicians who were public employees from engaging in abortion counsel-

Due Process Clause does not create an affirmative right to public subsidies, even to ensure fundamental rights, Chief Justice Rehnquist cited *Maher* and *McRae* for the proposition that equal protection analysis of public funding restrictions requires only the rational-relationship test.[173] Because *Maher* already had held that state restrictions on public funding met the rational-relationship test, the Chief Justice said "it [would] strain[ ] logic to reach a contrary result for the use of public facilities and employees."[174] The Court concluded that poor women were not denied completely the choice about whether to end a pregnancy, because they were free to seek an abortion at private hospitals and clinics.[175] *Webster* thus completed the trilogy of Court decisions about public funding for abortions, limiting indirect subsidization of indigent women's abortions by allowing state prohibition on the use of public facilities for abortion.

THE ABORTION COUNSELING DECISIONS

Although the Court had no occasion to rule in *Webster* on a statutory prohibition of abortion counseling by public employees at public facilities, the Court had visited the question of permissible governmental controls on such speech six years earlier in *City of Akron v. Akron Center for Reproductive Health, Inc.*[176] In that case, abortion providers in Akron, Ohio challenged a city ordinance which, in part, specified details of the physician-patient conversation that would be compelled as part of obtaining written informed consent for an abortion.[177] By a vote of six to

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ing; and (3) the provision of such counseling in public facilities. *Id.* at 502-03. The lower courts had enjoined implementation of all three of the provisions, and the state chose to appeal only the injunction of the first provision, on the use of funding. *Id.* Because no appeal was made on the other two statutory restrictions, the Court did not reach those issues in *Webster*. *Id.* at 504. Although the majority limited itself to consideration of the issues represented by the statute, Justice Scalia in a concurring opinion indicated his interest in overturning *Roe*. *Id.* at 532 (Scalia, J., concurring).

173. *Id.* at 507-11.

174. *Id.* at 509-10. The Court held that there is " '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.' " *Id.* at 507 (quoting DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 196 (1989)). The Court found that no strict scrutiny of limitations on funding was required; rather only a showing of a rational relationship to "the legitimate governmental goal of encouraging childbirth" was sufficient. *Id.* at 508-09 (citing Harris v. McRae, 448 U.S. 297, 321-23 (1980), and Maher v. Roe, 432 U.S. 464, 470-71, 473-74 & n.8 (1977)).

175. *Id.* at 509.

176. 462 U.S. 416 (1983).

177. *Id.* at 442; *see also id.* at 423-24 n.5 (setting out the language of the ordinance's informed consent provisions). In addition to this provision, which is most relevant to the issues raised in *Rust*, the ordinance challenged in *Akron* included: (1) requirements that all abortions after the first trimester of pregnancy be performed in a hospital; (2) a requirement that the consent of one parent or a judicial authorization be obtained for abortions performed on mi-

three, the Court held the provision unconstitutional.[178]

Writing for the majority, Justice Powell distinguished Akron's informed consent ordinance from the informed consent statute the Court had upheld in *Planned Parenthood v. Danforth*.[179] The *Danforth* statute required only that a woman give informed written consent to an abortion procedure; it did not attempt to define or stipulate the parameters of the health care provider-patient consultation required for "informed consent."[180] The *Akron* majority held that the state's interest in informed consent did not give a state "unreviewable authority to decide what information a woman must be given before she chooses to have an abortion."[181] Furthermore, Justice Powell observed, the state interest did not justify regulations designed to influence the woman's decision.[182] The Akron ordinance exceeded the city's authority, according to Justice Powell, both because it required health care providers to recite a specific "litany of information" to their abortion-seeking patients and because its underlying purpose was to sway those patients away from abortion.[183] A footnote to the opinion also stated that appropriate counseling must be individualized, varying considerably from patient to patient, in order to satisfy each patient's needs.[184]

In her dissent, Justice O'Connor, joined by Justices Rehnquist and White,[185] noted that the Court previously had upheld abortion-related informed consent regulations that were indistinguishable from the Akron regulations in terms of their counseling requirements.[186] In a footnote,

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nors under 15 years of age; (3) a prohibition on the performance of an abortion until 24 hours after the woman had signed a written consent; and (4) a requirement that fetal remains be disposed of in a humane and sanitary manner. *Id.* at 421-24. All the provisions were held unconstitutional. *Id.* at 426.

178. *Id.* at 443-46, 452.

179. 428 U.S. 52 (1976).

180. *Akron*, 462 U.S. at 442-43. Justice Powell carefully noted that the Court continued to believe that consultation between patients and their health care providers is critical to the abortion decision. *Id.* at 447-48.

181. *Id.* at 443. Implicit in this discussion is the use of the rational-relationship test to evaluate the statute. The Court noted that the state's interest in ensuring that patients make an informed choice "will not justify abortion regulations designed to influence the woman's . . . choice between abortion or childbirth." *Id.* at 443-44.

182. *Id.* at 444. In an accompanying footnote, the majority noted that the legislation upheld in Maher v. Roe, 432 U.S. 464 (1977), and Harris v. McRae, 448 U.S. 297 (1980), which asserted a state interest in pregnancy rather than abortion, was valid "only because it did not add any 'restriction on access to abortions that was not already there.'" *Akron*, 462 U.S. at 444 n.33 (quoting *Maher*, 432 U.S. at 474).

183. *Akron*, 462 U.S. at 444-45.

184. *Id.* at 448 n.38.

185. *Id.* at 452 (O'Connor, J., dissenting).

186. *Id.* at 471 (O'Connor, J., dissenting) (citing H.L. v. Matheson, 450 U.S. 398, 400 n.1,

Justice O'Connor hypothesized that informed consent regulations might be found to "violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology."[187] Justice O'Connor further noted that the Court had not discussed this possible implication of the regulations because the respondent Akron Health Center had not raised a First Amendment claim in the lower courts.[188]

Three years later, in *Thornburgh v. American College of Obstetricians & Gynecologists*,[189] the Court revisited the issue of the state's ability to regulate the dialogue preceding a patient's informed consent. In *Thornburgh* a five-to-four majority invalidated a Pennsylvania statute stipulating the particulars of the physician-patient conversation and requiring the physician to provide specific printed material to each patient.[190] The Court declared the printed material "nothing less than an outright attempt to wedge [Pennsylvania's] message discouraging abortion into the privacy of the informed-consent dialogue."[191] It held that the Pennsylvania statute in question was invalid for the same two reasons as the Akron ordinance: it was designed to persuade patients not to have abortions, and it attempted to define too inflexibly the specifics of the physician-patient dialogue.[192]

Interestingly, the *Thornburgh* opinion pointed to a statutory provision mandating the use of a prescribed agency list in patient consultations as an example of an unacceptably persuasive state technique.[193] The Court held that because the list was required to include certain

412 (1980) (upholding a Utah statute requiring that the patient be informed about adoption, fetal development, and foreseeable risks of the abortion operation)).

187. *Id.* at 472 n.16 (O'Connor, J., dissenting) (citing Wooley v. Maynard, 430 U. S. 705, 717 (1977), described *infra* note 223).

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

189. 476 U.S. 747 (1986).

190. *Id.* at 760-61. The majority noted that "[a] requirement that the woman give what is truly a voluntary and informed consent, as a general proposition, is, of course, proper and is surely not unconstitutional. But the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.' " *Id.* at 760 (citations omitted) (quoting *Akron*, 462 U.S. at 443-44, and citing Planned Parenthood v. Danforth, 428 U.S. 52, 67 (1976)).

191. *Id.* at 762.

192. *Id.* at 762-63. *Thornburgh*, like *Akron* was decided not on First Amendment grounds, but under the theory that state interference in the physician-patient dialogue impermissibly interfered with the patients' Fifth and Fourteenth Amendment due process rights to abortion. *See id.* at 761-63, 771-72.

193. *Id.* at 762-63. The statute required that the printed material include a statement to the effect that many public and private agencies existed to help if the patient chose to carry the pregnancy to term, and that the Commonwealth of Pennsylvania strongly urged the patient to contact them before making her abortion decision. *Id.* at 761 (quoting Pennsylvania Abortion Control Act, PA. STAT. ANN. tit. 18, § 3208(a)(1) (1983), *amended by* PA. STAT. ANN. tit. 18, § 3208(a)(1) (Supp. 1991)).

health care providers that might be "out of step with the needs of the particular woman," it represented an impermissible interference with the physician's responsibility and with the physician-patient dialogue.[194]

RUST'S SIGNIFICANCE TO ABORTION LAW

On its face the Court's opinion in *Rust* breaks little new doctrinal ground, either in the abortion field generally, or in the specific context of public funding. In its previous decisions in *Maher v. Roe*,[195] *Harris v. McRae*,[196] and *Webster v. Reproductive Health Services*,[197] the Court set out and solidified its view that indigent pregnant women have no right to public funding to facilitate their exercise of reproductive rights as defined in *Roe v. Wade*.[198] In addition, the court consistently had held that legislative decisions withholding public funding of abortions are not subject to strict scrutiny.[199] Without doctrinal support for a strict-scrutiny analysis of the Title X regulations, the outcome of the *Rust* decision is not surprising.[200] In all of the previous funding cases, however, the Court had performed *some* level of balancing the state's interest in the challenged statutes against the rights they infringed.[201] In *Rust* there was no such balancing test employed. The Court relied only on its previous decisions, without further analysis, to hold that the government's choice to fund childbirth but not abortion presents no impermissible obstacle in the path of an indigent woman's rights.[202] By simply declaring that no rights are infringed, the Court in *Rust* claimed that there was no need to analyze the permissibility of an infringement.

While *Rust* thereby avoided a direct assault on the fundamental concept—embodied in *Roe* and all subsequent abortion cases—that maternal health always must be of paramount concern in state efforts to regulate abortion, it raises concerns about the erosion of the law in this area.

194. *Id.* at 763.

195. 432 U.S. 464 (1977).

196. 448 U.S. 297 (1980).

197. 492 U.S. 490 (1989).

198. 410 U.S. 113 (1973). See *supra* text accompanying notes 112-75 for a discussion of the rights set out in *Roe* and their qualification in subsequent Court decisions.

199. See *supra* text accompanying notes 142-68 for a discussion of the analysis employed in this line of cases.

200. The Court relied on *Webster*, *Maher*, and *McRae* for its holding that "Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the government had chosen not to fund family-planning services at all." *Rust*, 111 S. Ct. at 1777-78.

201. *See, e.g.*, *Webster*, 492 U.S. at 507-11 (analyzing the rational relationship between the state's interest and the rights it infringed); Harris v. McRae, 448 U.S. 297, 324-26 (1980) (same); Maher v. Roe, 432 U.S. 464, 473-77 (1977) (same).

202. *Rust*, 111 S. Ct. at 1776-77.

Over a contrary reading by the Solicitor General, the Court construed sections of the Title X regulations to allow referral for abortion when a woman's pregnancy "places her life in imminent peril."[203] The Court did not, however, express a view as to whether the regulations banned abortion referral in the event of a less imminent, but equally serious threat to maternal health.[204] This foreshadows a significant change from the Court's earlier abortion decisions, which consistently held that serious health risks to the mother are of primary concern in the abortion context.[205]

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203. *Id.* at 1773. *But see* 42 C.F.R. § 59.8 (1991). Read together, §§ 59.8(a)(2)-(4) and (b)(1) on their face suggest that a Title X health care provider would be prohibited from counseling or referring a client for an abortion, at any point in her pregnancy, even when the mother's health is jeopardized. *See id.* §§ 59.8(a)(2)-(4), (b)(1). This restriction directly contravenes the Court's holdings in Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 768-69 (1986); Colautti v. Franklin, 439 U.S. 379, 400 (1979); and Roe v. Wade, 410 U.S. 113, 164-65 (1973), each of which states the paramount importance of the woman's health during the first trimester of her pregnancy. *See supra* notes 112-27, 141, and accompanying texts. The majority construed these regulations to preclude this effect, but the Solicitor General's interpretation, in his brief and at oral argument, was not so generous. *See Rust*, 111 S. Ct. at 1773; *id.* at 1786 n.6 (Blackmun, J., dissenting). The official transcript reported a series of questions from Justices Stevens, Souter, and Scalia to Solicitor General Kenneth W. Starr on the issue of abortion counseling and referral when a patient's health is threatened, including this dialogue between Justice Scalia and the Solicitor General:

> QUESTION: . . . Assuming it is not an immediate emergency but a [health] concern about 30 days from now, could the doctor say I just happened to notice this, I think you ought to have your tonsils taken out? . . .
>
> MR. STARR: Yes. I think that the physician can in fact alert the individual to a potential medical problem.
>
> QUESTION: And suggest the proper solution, in his or her judgment?
>
> MR. STARR: I think at that point the physician may very well be going beyond what Title X is all about. . . .
>
> . . . .
>
> QUESTION: . . . Do you think the [regulations] would prohibit the doctor from giving medical advice that is not specifically authorized by the statute or contemplated within the notion of family planning? . . . .
>
> MR. STARR: I disagree with that. . . .
>
> . . . .
>
> . . . I think it will violate the terms of the grant, because the grant is . . . funding this physician to provide Title X services.

Official Transcript of Oral Argument at 44-47, *Rust* (Nos. 89-1391 & 89-1392); *see also* Brief for Respondent at 7 n.5, *Rust* (Nos. 89-1391 & 89-1392) (noting that the regulations would allow abortion referral in emergency situations, but not stipulating that abortion referral is required during the first trimester of pregnancy if the mother's health is jeopardized).

204. *Rust*, 111 S. Ct. at 1773.

205. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 511 (1989) (allowing the prohibition of the use of public facilities for performing abortions unless necessary to save maternal life); Harris v. McRae, 448 U.S. 297, 326-27 (1980) (allowing restriction on the use of direct federal subsidies for abortion, except when the mother's life would be endangered if the fetus were carried to term).

In upholding the regulations challenged in *Rust*, the Court also modified the law relating to the physician-patient dialogue in the abortion context. Invoking *Thornburgh v. American College of Obstetricians & Gynecologists*[206] and *City of Akron v. Akron Center for Reproductive Health*,[207] the *Rust* majority effectively held for the first time that women are not entitled to receive the full range of information about their choices when faced with a pregnancy.[208] The majority distinguished the counseling requirements struck down in *Akron* and *Thornburgh* from the Title X regulations, noting that the former were overbroad, reaching *all* women and *all* physicians engaging in the abortion dialogue, rather than only that category of women whose poverty compels them to patronize federally funded clinics.[209] Because Title X patients have not *theoretically* lost their right to abortion-related information from other sources, reasoned the majority, the Title X regulations were saved from the fate that befell the *Thornburgh* and *Akron* statutes.[210] The Court made no attempt to assess the actual effect of the counseling requirements, which arguably could leave the pregnant members of Title X's target population with the mistaken impression that there is no other choice available to them but to carry their pregnancies to term.[211]

The potential effects of the new rules demonstrate the flaw in the Court's assumption that Title X patients are left with the same range of choices as they would have had in the absence of the federal program. First, the low probability that the low-income areas in which Title X clinics are located can support both a publicly funded (Title X) clinic and a private clinic means that if there is a Title X clinic in existence, it likely will dominate the market. Under this analysis, once a Title X clinic is established it probably will be the only available health care "choice" for the women in the area.[212] Establishing a Title X clinic therefore affects the available health care choices of low-income women. It follows that

206. 476 U.S. 747 (1986).

207. 462 U.S. 416 (1983).

208. *Akron* and *Thornburgh* held that only minimal state interference in the abortion counseling context was permissible. *See supra* notes 176-94 and accompanying text.

209. *Rust*, 111 S. Ct. at 1777-78.

210. *Id.* The majority ignored the fact that, unlike the *Rust* challenge, the statutes in *Akron* and *Thornburgh* were not challenged on First Amendment grounds. The Court also ignored Justice O'Connor's dissent in *Akron* distinguishing the Akron statute from statutory requirements on a physician to communicate the state's views on abortion, which she said might be unacceptable on First Amendment grounds. *See Akron*, 462 U.S. at 472 n.16 (O'Connor, J., dissenting).

211. *See, e.g.*, *Rust*, 111 S. Ct. at 1786-87 (Blackmun, J., dissenting) (noting that the Title X client will construe the limited counseling as advice to forgo her right to abortion); Chervin, *supra* note 12, at 403 (describing the need to analyze the effects of the regulations).

212. Indeed, one study of family planning clinics throughout the United States found that

prohibiting abortion counseling at the clinic directly affects the availability of that information; women will be forced to wait longer and travel further to learn about their options.[213] This effect is likely to be heightened in areas that are both low-income and primarily rural. Second, the Court's analysis ignores the fact that some Title X patients are required to pay part of the clinic fee, receiving only a partial subsidy from Title X. Absent other information, such patients will base their choice to pay the fee on the assumption that they will not need to go elsewhere for additional information. If a Title X patient can afford a private clinic fee in the first instance, she will be unlikely to choose a subsidized clinic; this is even more true for patients who can afford a private clinic fee *plus* the additional cost of the Title X fee.

THE FIRST AMENDMENT AND *RUST*

Unlike previous Court decisions concerning abortion counseling, in which challenges to the statutory or regulatory requirements were brought exclusively under the Fifth or Fourteenth Amendments, *Rust* present a clear First Amendment challenge.[214] The plaintiffs raised two kinds of First Amendment issues.[215] They claimed first that the abortion counseling ban constituted a content-based restriction on the speech between health care providers and their patients.[216] In addition they claimed that such restrictions could not be justified merely because the counseling speech was federally funded.[217] In order to understand the Court's response to these questions, one must understand the First Amendment's general proscription of government controls on speech based on its content. In addition, it is also important to understand the extent to which government funding of a program has been held to increase governmental authority to regulate speech.

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often these facilities are the only source of health care in an area. Donovan, *supra* note 12, at 198.

213. Elimination of Medicaid funding for abortion affected low-income women's abortions in that way: Medicaid-eligible women had abortions later in their pregnancies when public funding was no longer available than they had when it was available; they also travelled further to have the procedure. Stanley K. Henshaw & Lynn S. Wallisch, *The Medicaid Cutoff and Abortion Services for the Poor*, 16 FAM. PLAN. PERSP. 170, 179 (1984).

214. *Rust*, 111 S. Ct. at 1768-78; *see* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 758-72 (1986) (discussing the constitutionality of the statutes exclusively in the context of their effects on abortion rights); *Akron*, 462 U.S. at 472 n.16 (O'Connor, J., dissenting) (noting that "it does not appear that [the petitioner] raised any First Amendment argument in the court below").

215. See *supra* notes 20, 29-30 and accompanying text for a discussion of plaintiff's First Amendment challenges.

216. Brief for Petitioners at 13-39, *Rust* (No. 89-1391).

217. *See Rust*, 111 S. Ct. at 1772.

The First Amendment's guarantee that "Congress shall make no law . . . abridging the freedom of speech, or of the press"[218] has long been held a fundamental right for purposes of due process or equal protection review, as it is included explicitly in the text of the Bill of Rights.[219] It comprises not only the right to express ideas, but to receive ideas expressed by others.[220] One accepted tenet of modern First Amendment jurisprudence is that, with certain very limited exceptions, the "government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[221] The Court has recognized that content-based regulation may be permissible in limited circumstances in order to give effect to an important state objective.[222] When assessing the constitutionality of a speech regulation that is content-based, the Court has traditionally applied strict scrutiny analysis, asking first whether

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218. U.S. CONST. amend. I.

219. *See* TRIBE, *supra* note 70, §§ 11-1, 11-2 & 16-9, at 770-73, 1458-60.

220. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (citing Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972)); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Lamont v. Postmaster General, 381 U.S. 301, 306-07 (1965); Marsh v. Alabama, 326 U.S. 501, 505 (1946); Thomas v. Collins, 323 U.S. 516, 534 (1945); Martin v. Struthers, 319 U.S. 141, 143 (1943); *see also* Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854, 1863 (1983) (noting that the First Amendment's aim is to allow a person to realize his individual identity through the process of giving and receiving ideas and images) (citing Board of Educ. v. Pico, 457 U.S. 853, 867 (1982); Stanley v. Georgia, 394 U.S. 557, 564 (1969); *Griswold*, 381 U.S. at 482)).

221. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (citing Cohen v. California, 403 U.S. 15, 24 (1971); Street v. New York, 394 U.S. 576, 593-94 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); NAACP v. Button, 371 U.S. 415, 445 (1963); Wood v. Georgia, 370 U.S. 375, 388-89 (1962); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937)). *Mosley* concerned picketing activity on a public sidewalk adjacent to a public high school. *Id.* at 93. The Court struck down a local ordinance, enacted to prohibit all picketing except peaceful labor picketing within 150 feet of the school, finding it a violation of the Equal Protection Clause because it unfairly discriminated between types of picketing speech. *Id.* at 95-102.

222. Note, *supra* note 220, at 1854; *see also* Paul B. Stephan II, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 205, 214-31 (1982) (noting that the Court has limited its absolute rule that government action must be content neutral by upholding regulations and statutes forbidding political advertising on public buses, land use controls on adult theaters, and radio broadcast of sexually explicit speech). Some members of the Court have characterized sexually explicit speech and commercial speech as appropriately regulated on the basis of their subject matter. *See* Texas v. Johnson, 491 U.S. 397, 430 (1989) (Rehnquist, C.J., dissenting); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983); Smith v. United States, 431 U.S. 291, 317-18 (1977) (Stevens, J., dissenting). The Court also has recognized that regulations based not on the speech's content, but only on the time, place, and manner in which it is expressed are permissible, if they are " 'narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.' " Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)); *see Mosley*, 408 U.S. at 98.

there is a "compelling state interest" in the regulation, and, second, whether the statute is "narrowly drawn" to achieve that purpose, or whether there is a less restrictive alternative formulation that could achieve the state's goal.[223]

Some Supreme Court decisions have drawn a distinction between "content-based" regulation, including controls based on the subject matter of speech, and "viewpoint-based regulation," which includes controls based on the opinions expressed by the speaker, rather than on the kind of speech in which she is engaging.[224] Other cases do not make this distinction, however, and the Court cannot be said to have either embraced or rejected it.[225] Both content- and viewpoint-based regulations have triggered the familiar two-part analysis.[226]

The Court also has decided a line of cases concerning governmental authority to regulate speech through its funding decisions.[227] It held

223. Boos v. Barry, 485 U.S. 312, 321 (1988) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). In *Boos* the Court invalidated a portion of a District of Columbia ordinance that banned the display of signs expressing opinions against a foreign country's policies within 500 feet of that country's embassy. The restriction was held unconstitutional because it was based only on the signs' content, and because there was a content-neutral approach available to reach the government's objective of keeping the peace and not offending the foreign government; namely, the government could have prohibited *all* picketing of any kind. *Id.* at 327. Another portion of the ordinance, banning *any* congregation within 500 feet of an embassy, was upheld because it was not content-based. *Id.* at 329; *see also* Wooley v. Maynard, 430 U.S. 705, 715-17 (1977) (striking down a statute requiring all drivers of noncommercial vehicles in New Hampshire to carry on their license plates the state's motto "Live Free Or Die," which was counter to petitioners' religious viewpoint). The *Wooley* Court noted that " 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.' " *Id.* at 716-17 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted)). Interestingly, New Hampshire's case was briefed in part by then-state Attorney General, and later Supreme Court Justice, David Souter. *Id.* at 706. *See also* Geoffrey R. Stone, *Restrictions of Free Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 82 & n.6 (1978) (noting that the Court has not articulated a precise method for testing the constitutionality of content-based speech restrictions, but that it has used variations of the compelling-interest strict-scrutiny analysis).

224. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 811-12 (1985); Young v. American Mini Theatres, Inc., 427 U.S. 50, 67-68 (1976) (plurality opinion).

225. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 384 (1984) (using the terms content-based and viewpoint-based interchangeably to refer to impermissible regulations prohibiting editorializing by radio stations receiving federal grant support).

226. *Id.* at 380-81. The Court noted that " '[t]he First Amendment's hostility to content-based regulation extends not only to restriction on particular viewpoints, but also to prohibition of public discussion of an entire topic.' " *Id.* at 384 (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980)).

227. *See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231-32 (1987) (finding unconstitutional a state tax scheme imposing sales tax on certain magazines but not others); *League of Women Voters*, 468 U.S. at 399-401 (rejecting federal regulations prohibit-

unanimously in *Regan v. Taxation with Representation*[228] that the government has authority to fund one *type* of speech over another[229]—for example, to subsidize counseling or other private speech, but not legislative lobbying. In addition, the *Regan* majority noted that it was not necessary to engage in strict judicial scrutiny of statutes which make such funding distinctions. This, the Court declared, was because such statutes do not discriminate on the basis of the content of speech or the viewpoint expressed.[230]

In *Regan*, as in the Court's previous decisions, content- and viewpoint-based discrimination in federal subsidies was prohibited.[231] The Court made it clear that Congress may not, in making its funding decisions, "discriminate invidiously in its subsidies in such a way as to ' "aim[ ] at the suppression of dangerous ideas." ' "[232] In *Arkansas Writers' Project, Inc. v. Ragland*[233] the Court noted that this prohibition extends to attempts to suppress " 'public discussion of an entire topic.' "[234]

In the context of one of the abortion funding cases, the Court invalidated, on substantive due process grounds, a state statute that included specific statements required of health care providers in counseling their patients.[235] While the Court's analysis was based on the patients' Fifth and Fourteenth Amendment rights to abortion rather than First Amendment grounds, the Court emphasized the constitutional importance of the dialogue between health care providers and their patients that leads

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ing editorializing by publicly funded radio and television stations); Perry v. Sindermann, 408 U.S. 593, 597 (1972) (holding that denial of tenure to a professor at a public college on the basis of his outspoken criticism of the college's administration would be unconstitutional).

228. 461 U.S. 540 (1983).

229. *Id.* at 545-46 (citing Cammarano v. United States, 358 U.S. 498, 513 (1959)). *Regan* upheld a section of the Internal Revenue Code, 26 U.S.C. § 170(c)(2) (1988), allowing an income tax deduction for private contributions to nonprofit organizations that do not engage in lobbying, but not extending the deduction to private contributions to nonprofit entities that do lobby. *Id.* at 546-48.

230. *Id.* at 548-50.

231. *Id.* This is true for direct subsidies, such as grants to radio stations, *League of Women Voters*, 468 U.S. at 399-401, and for indirect governmental subsidies such as tax exemptions for certain kinds of speech but not others, *Arkansas Writers' Project, Inc.*, 481 U.S. at 231-32.

232. *Regan*, 461 U.S. at 548 (quoting *Cammarano*, 358 U.S. at 513 (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958))) (alteration by *Regan* Court).

233. 481 U.S. 221 (1987).

234. *Id.* at 230 (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980), and citing *League of Women Voters*, 468 U.S. at 383-84; Metromedia, Inc. v. San Diego, 453 U.S. 490, 518-19 (1981) (plurality opinion); Carey v. Brown, 447 U.S. 455, 462 n.6 (1980)).

235. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 760-64 (1986); see *supra* notes 189-94 and accompanying text for a discussion of the *Thornburgh* decision.

to the patients' informed consent to medical treatment.[236] Justice Blackmun, writing for the majority, said "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.' "[237]

The *Rust* Court's analysis represents a significant departure from prior First Amendment cases involving publicly funded speech. The *Rust* Court's reliance on *Regan*[238] to support its view that the regulations were not impermissibly content-based was misplaced. *Regan* involved a governmental decision not to fund one category of speech—lobbying by nonprofit organizations—not a decision to distinguish between particular statements within a speech category on the basis of their content.[239] In *Rust*, however, the majority declared that funding speech about childbirth but not about abortion was analogous to the congressional decision not to fund all nonprofit lobbying upheld in *Regan*.

Furthermore, the *Rust* majority declared that the challenged regulations were not viewpoint- or content-based, but merely a governmental choice to fund one activity over another.[240] The language of the abortion counseling regulations themselves do not support this holding, however, as they *require* that specific information be given to a pregnant Title X patient concerning prenatal care to protect her health and the health of the fetus, but *prohibit* any counseling on or referral for abortions.[241] In addition, they contain direct references to the government's goal of reducing the incidence of abortion.[242] Moreover, the fact that the regulations are content-based was admitted by the Secretary of Health and Human Services in his brief to the Court.[243]

Because the regulations are in actuality content-based, the *Rust*

236. *Thornburgh*, 476 U.S. at 761-63.

237. *Id.* at 760 (quoting Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 443-44 (1983)). In an earlier case, Justice O'Connor suggested that regulations having such an effect would violate the First Amendment. *Akron*, 462 U.S. at 472 n.16 (O'Connor, J., dissenting); *see supra* notes 185-88 and accompanying text.

238. Regan v. Taxation with Representation, 461 U.S. 540 (1983).

239. *Id.* at 548.

240. *See Rust*, 111 S. Ct. at 1771-76. This analysis assumes that the "activity" that the government has chosen to fund is not in itself viewpoint discriminatory, an assumption which is flawed in this context, *id.*, as even the Secretary admitted in his brief; *see infra* note 243 and accompanying text.

241. *See* 42 C.F.R. § 59.8 (1991).

242. Section 59.2 states that "[f]amily planning . . . should reduce the incidence of abortion." *Id.* § 59.2.

243. Brief for Respondent at 23 n.21, *Rust* (Nos. 89-1391 & 89-1392). In this footnote, the Secretary asserted that the regulations "prohibit all discussion of abortion 'pro or con,' " to support his statement that the regulations are not viewpoint-based, but rather only content-based. *Id.* The brief further stated that "[e]ven if the regulations did impose a viewpoint restriction, the analysis would be much the same. The government is entitled to have a view-

Court should have subjected them to a traditional two-part analysis requiring a compelling state interest and regulations narrowly drawn to further that interest. Under such an analysis, however, the regulations seemingly would fail. The government's stated interest in this case is in implementing its "value judgment favoring childbirth over abortion."[244] The Court has previously said that interest was not compelling enough to support direct restrictions on the content of private speech between a patient and her physician.[245] Even if that interest was sufficiently compelling, content-based regulations would have to be narrowly tailored to serve it under the traditional strict-scrutiny analysis. A set of regulations defining the contours of family planning counseling could narrowly serve a governmental purpose to favor childbirth over abortion only by being flagrantly coercive, offering the Title X patient no opportunity to hear about her choices beyond the government's preferred option. This, the *Rust* majority claimed, the regulations did not do. Why then did the *Rust* Court uphold regulations that had these effects? Was it simply because federal funding was involved?[246]

Indeed, the Court did rely on the fact that it was a government funded program that defined the speech rights involved here.[247] The majority framed the issue as a demand for a government subsidy, then dismissed it on the basis that there is no governmental duty to subsidize all fundamental rights.[248] According to the Court: "we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund . . . speech."[249] It then categorized the counseling speech involved as

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point when it participates in public discourse." *Id.* The Secretary provided no supporting citation for this statement. *Id.*

244. *Id.*

245. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 760-63 (1986). In *Thornburgh* the Court noted that "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" *Id.* at 760 (quoting City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 443-44 (1983)).

246. Professor Sunstein has suggested that the Court's willingness to make this kind of distinction stems from its reliance on the outmoded doctrine of unconstitutional conditions. Sunstein, *supra* note 8, at 602-04. This anachronistic model, according to Sunstein, is based on the idea that the normal state of affairs is no governmental intervention; such analysis ignores the presence and effects of the modern administrative state. *Id.* at 595, 603 (presenting the Court's decision in Harris v. McRae, 448 U.S. 297 (1980), as an illustration of the problem). Professor Sunstein recommended that the Court should recognize the doctrine's flaws and replace it with a straightforward analysis weighing governmental purposes against rights infringed, even when the government action is a funding decision. *Id.* at 620-21.

247. *See Rust*, 111 S. Ct. at 1172-73.

248. *Id.* at 1773.

249. *Id.*

"outside the scope of the project."[250] From the Court's perspective then, the fact that the Title X program involved a financial subsidy of private counseling speech gave the government power to control the content of that speech without any constitutional limitations.[251] Although the Court noted that public funding would not "invariably" justify government control over the content of expression, it limited the examples of situations in which government control would not be sufficient.[252] These included public speech on public property or other areas " 'expressly dedicated to speech activity,' "[253] and in a university setting.[254] The Court declined to resolve the question whether the health care provider-patient relationship was so "fundamental to the functioning of our society" that it too should be specially protected, as are conversations in a university context.[255]

This conception of the speech rights in question was fundamentally flawed, because it failed to consider fully the Title X patients' rights to receive full information in the context of the government subsidy which *they* receive through Title X. This resulted in an inadequate analysis by the Court of whether the regulations represent an unconstitutional condition on the receipt of a public benefit.[256] The *Rust* majority analyzed the counseling regulations as though they affected only the Title X project and its staff, but not the indigent clients.[257] This reasoning was supported by the Court's notion that the "doctor-patient relationship established by the Title X program [is not] sufficiently all-encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice."[258] Title X patients' First Amendment right to receive com-

250. *Id.*

251. *Id.* at 1772-73. The Court noted: "Within far broader limits than petitioners are willing to concede, when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 1173.

252. *Id.* at 1776.

253. *Id.* (quoting U.S. v. Kokinda, 110 S. Ct. 3115, 3119 (1990)).

254. *Id.*

255. *Id.*

256. In this sense, the Court's unconstitutional conditions analysis is doubly flawed: first, because the Court utilized the doctrine at all, *supra* note 246 (reporting one commentator's view that the doctrine is anachronistic and therefore not useful), and second, because the Court failed to analyze the subsidy received by Title X patients.

257. *See Rust*, 111 S. Ct. at 1771-76. The Court characterized the benefits of Title X funding as accruing to the Title X project and to its employees.

258. *Id.* at 1776. This assertion runs directly counter to the legislative history of the program: it was created to provide to its target population a system of comprehensive, quality health care to which they would otherwise not have access. Brief for Petitioners at 2-3, *Rust* (No. 89-1391). The *Rust* Court's analysis suggests that if the Title X program could be said to create an expectation or entitlement to a comprehensive doctor-patient relationship, the Court might have found that the abortion counseling ban deprived Title X patients of some due

plete information therefore was not merely ignored by the Court, they implicitly were held not to exist.[259] Similarly, the Court failed to recognize the fact that the Title X program is a subsidy to the patient and that the benefit she receives is conditioned on her unknowing surrender of her right to full information. Viewed this way, the counseling regulations fail as an unconstitutional condition on a government benefit, whether or not the information is available elsewhere.[260]

In addition, the *Rust* majority's analysis of health care providers' speech rights is questionable. Because the regulations in question require speech about one alternative while prohibiting speech about another, they obviously intrude on physicians' and health care workers' ethical and legal obligations to give pregnant Title X patients information about all of their medical choices.[261] *Rust* thus represents a result which the Court previously said it would never reach:[262] the government grants benefits only to Title X clinics and patients that effectively give up their fundamental rights to free speech, and in the case of Title X physicians, expose themselves to liability for malpractice.[263]

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process property right. *See* Sunstein, *supra* note 8, at 597-99 (suggesting that under one view of an unconstitutional conditions analysis, traceable to Justice Holmes, the government's ability to impose conditions on its funding decisions is constrained only when there is some pre-existing entitlement in the program).

259. Because the patient has no expectation of receiving full advice, by the Court's logic she is held not to have lost anything if she is not provided with information. *Rust*, 111 S. Ct. at 1776-77.

260. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 597 (1972) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958), for the proposition that even when there is no right to a benefit, the government may not require the tender of a fundamental right as consideration for receiving it).

261. *Rust*, 111 S. Ct. at 1780 (Blackmun J., dissenting). The duty of physicians and other health care workers to disclose full information to their patients in order to provide patients the opportunity to make an informed choice about their treatment is found in the common-law doctrine of informed consent. Brief of Twenty-two Biomedical Ethicists as Amici Curiae Supporting Petitioners at 13-16, *Rust* (Nos. 89-1391 & 89-1392); *see also* Brief for Petitioners at B-1 to B-3, *Rust* (No. 89-1391) (listing the 31 jurisdictions in which physicians have been held liable for failure to disclose all information relevant to the patient's exercise of an informed choice about medical treatment).

262. Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983) ("The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas'. . . . [Here] [w]e find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)).

263. In 30 states and the District of Columbia, physicians have been held liable for failing to disclose full information relevant to a patient's informed choice about medical care. Brief for Petitioners at B-1 to B-3, *Rust* (No. 89-1391). All health care providers at Title X clinics must be under the supervision of a physician. 42 C.F.R. § 59.5(b)(6) (1991).

CONCLUSIONS

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make [the abortion] choice freely is fundamental. Any other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.[264]

Justice Powell wrote these words in 1986 in *Thornburgh v. American College of Obstetricians & Gynecologists.*[265] The *Rust* Court, however, reached out[266] to define indigent women's right to choose abortion in different terms than those used by Justice Powell. The Court recognized that the abortion counseling ban will complicate Title X patients' decisions to seek abortions, and upheld it, without close analysis, on the basis that these women will be no worse off than if Title X did not exist.[267]

This fundamental assumption—that Title X clients have not really lost anything under the regulations, because they had nothing to lose to begin with—is the heart of *Rust*'s problems. The Court ignored the fact that by creating the Title X program, the government immediately affects all of its potential users, who now have access to services they otherwise

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264. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986).

265. *Id.*

266. The previous, long-standing Title X regulatory framework did not raise constitutional issues, and allowed all nondirective pregnancy and abortion counseling. The majority's decision to ignore the traditional doctrine of statutory construction and their subsequent decision to reach out to decide the constitutional questions in *Rust* evince the Court's new brand of judicial activism. This aspect of *Rust* may produce positive results, insofar as the decision may cause Congress to be clearer in its future statutory drafting. *Rust* has already inspired two bills clarifying the language of Title X to permit nondirective abortion counseling by Title X health care providers. S. 323, 102d Cong., 1st Sess. (1991) (passing the full Senate on July 17, 1991); H.R. 392, 102d Cong., 1st Sess. (1991) (not considered by the full House as of time of this Note's publication); Telephone Interview with Paul Feldman, Legislative Director in the office of Rep. David Price, (D-N.C.) (Oct. 22, 1991). The language of the bills was appended to the 1992 Appropriations Act for Health and Human Services, and approved by both houses, but did not withstand a Presidential veto and an override attempt. H.R. 2707, the House Appropriations Bill for Labor and Health and Human Services contained a provision prohibiting the appropriation of any federal money to the enforcement of the Title X regulations. The bill passed both houses of Congress, and was reported out of conference committee in late October, 1991. Telephone Interview with Kimberly Reynolds, Legislative Assistant to Sen. Terry Sanford (D-N.C.) for Labor and Human Resources (Oct. 22, 1991). President Bush vetoed the bill in November, 1991, and an override attempt in the House of Representatives fell short by fourteen votes. 137 CONG. REC. H10,491, H10,507-08 (daily ed. Nov. 19, 1991). On March 20, 1992, the Health and Human Services Department issued guidelines for implementing the gag rules which lift the abortion-counseling ban from clinic doctors, but not for other health care providers at Title X clinics. *See* Hilts, *supra* note 7, at 1.

267. *Rust*, 111 S. Ct. at 1777-78.

could not afford. For that reason, the assumption that they are no worse off under the regulations assumes that they will choose not to use the program, not that they will use it and unwittingly give up their First Amendment rights in the process. In so holding, the Court looked at the law and the Title X patient's experience from the perspective of a financially privileged person. Such a person will never have to be burdened with the need to make an uninformed choice between the two finite and discrete options represented by abortion and childbirth, and can afford to make the decision to opt out of the Title X program in any event. Title X family planning counseling was developed to serve indigent or financially strapped women. Title X projects often require such women to pay a nominal fee for the services they receive through the program; often the fee is as much as they can afford.[268] Having expended their resources to gain access to the project's staff, these women effectively *have no choice* but to take the information proffered by the project as their only source of medical information. Framing the question in terms of their opportunities to seek information elsewhere thus misses the point.

Pregnant women who are Title X patients have no real choice to seek information elsewhere for two reasons. First, the biological fact of their pregnancy and the trimester framework established in *Roe v. Wade*[269] means that they will have only a limited amount of time in which to seek a low-risk, affordable, and legal abortion. Second, many Title X clients have no financial resources to seek the information elsewhere.[270] Furthermore, given the requirement that the Title X provider keep silent about abortion but speak about prenatal care, nothing in the Title X framework alerts these women that other information exists for them to seek. At that point, which is imminently reachable in the Title X context, the government's action through its Title X program takes the form of a state-coerced promotion of one alternative over another.

Rust also foreshadows a more broadly applicable change in the Court's abortion jurisprudence, by signalling that the law no longer holds a pregnant woman's health of paramount concern in the abortion decision. The *Rust* Court is not straightforward in this holding, however. Instead, the Court disingenuously interprets the language of the regula-

268. *See* Donovan, *supra* note 12, at 198, 201-02; Brief of Twenty-two Biomedical Ethicists as Amici Curiae Supporting Petitioners at 21-22, *Rust* (Nos. 89-1391 & 89-1392); *see also* Brief for Petitioners at 3, *Rust* (No. 89-1391) (noting that in addition to Title X and other public monies, clinics receive private funding from grants and patient fees).

269. 410 U.S. 113, 164-65 (1973); *see supra* notes 120-27 and accompanying text.

270. In fact, a recent study suggested that many low-income women no longer can afford even Title X clinics, which are having to increase their fees to make up for reduced federal program funding, higher medical costs, and greater patient health care needs. Donovan, *supra* note 12, at 201-02.

tion to hold that Title X health care providers may counsel and refer for abortion when the mother's life is in danger, while not providing such an interpretation to support counseling and referral when maternal health is at stake. While seeming to stretch to preserve *Roe* rights, then, the *Rust* majority actively narrows them.

The potential implications of *Rust* in the First Amendment area are also far-reaching. *Rust* deals not with content-based regulation of marginal speech (such as commercial speech or pornography),[271] but with private, confidential speech between a health care provider and her patient when any portion of that speech is subsidized publicly. In addition, the *Rust* Court held that government regulations restricting the content of funded speech are not subject to *any* degree of judicial scrutiny. *Rust*, therefore, affects kinds of speech that traditionally have enjoyed paramount protection, including discussions of "important social issues," and speech that implicates both First Amendment rights to the free exchange of ideas and Fifth and Fourteenth Amendment rights to privacy.[272] Federal grants for the arts and for libraries are but two of the public subsidies that could be affected by the *Rust* decision's loosened standards for analysis of governmental restrictions on subsidized speech. In addition, *Rust* allows governmental intrusion into any professional-client dialogue that is funded publicly, even those that traditionally have been considered privileged. Examples beyond *Rust*'s doctor-patient context might include discussions between a social worker or a public defender and his clients.[273]

When will *Rust* be used in the future? A challenge to regulations including content- or viewpoint-based restrictions on expression that is even partially publicly funded, after *Rust*, will require no analysis of the

271. *See* Smith v. United States, 431 U.S. 291, 318-21 (1977) (Stevens, J., dissenting) (characterizing sexually explicit speech and commercial advertising as distinguishable from other more meritorious speech but not as worthy of censorship).

272. Even in the cases dealing with the limited First Amendment protection afforded commercial speech, the Court has noted that "where . . . a speaker desires to convey truthful information relevant to important social issues such as family planning . . . the First Amendment interest served by such speech [is] paramount." Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 69 (1983) (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 700-01 (1977); Bigelow v. Virginia, 421 U.S. 809, 822 (1975)). In *Bolger* the Court noted that the activity in question—the advertisement of contraceptives—was especially protected, because it included elements both of the right to free exchange of information and ideas, and the right to privacy and autonomy in personal decision making. *Id.* (citing *Carey*, 431 U.S. at 700-01).

273. One could imagine regulations limiting the advice that a social worker might provide to her clients about sources of additional public funds, or limiting a federal public defender's ability to seek for his guilty drug dealer client sentencing options that are against the government's preference for strict sentencing for such offenders. Following the Court's analysis, however, this result of *Rust* might be limited when an entitlement to the publicly provided consultation could be shown.

government's interest at all. This result will be due to the majority's reasoning that such regulations do not deny completely the opportunity to express particular views, but only relegate them to a completely unsubsidized arena.[274] The *Rust* Court explicitly recognized only two exceptions to its view that public funding is sufficient to justify governmental controls over the content of speech: publicly funded speech that occurs in traditionally public places and in universities.[275] In all but these exceptional publicly funded contexts, the net result of *Rust* might be that free expression and the exchange of ideas are reduced from a right to a private privilege—those who have the financial wherewithal will enjoy full First Amendment "rights," and those without will enjoy free access only to the government's views.[276]

If the Court's decision in *Rust* could be characterized as limited to the context of abortion counseling or lobbying, or federally funded abortion-related activity, it would be merely another chapter in the story of the Court's present attempts to limit pregnant women's rights to choose among medical alternatives. *Rust*'s importance is far broader, however. It suggests that the government has almost unreviewable authority to control the content of protected speech through federal funding. In addition, *Rust* is a strong statement about the limited nature of the personal rights held by those without power and wealth who are dependent on the administrative state in late twentieth-century America.

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

275. *Id.* at 1776.

276. Professor Catharine MacKinnon has made this argument in the context of federal funding for abortion. She noted that Roe v. Wade, 410 U.S. 113, 154 (1973), and its successor cases, particularly Harris v. McRae, 448 U.S. 297, 314 (1980), granted women "abortion as a private privilege, not as a public right," and that "women with [financial] privileges get rights." CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 100-01 (1987). These ideas about abortion are further developed in CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 184-95 (1989).