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Government Funding in Title X Projects: Circumscribing the Constitutional Rights of the Indigent: Rust v. Sullivan

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GOVERNMENT FUNDING IN TITLE X PROJECTS: CIRCUMSCRIBING THE CONSTITUTIONAL RIGHTS OF THE INDIGENT: *RUST V. SULLIVAN*

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INTRODUCTION

Title X is the single largest source of public assistance to the indigent for family planning services.[1] The Public Health Services Act created Title X which provides public funds for family planning projects.[2] In 1988, the Department of Health and Human Services (HHS) promulgated new regulations that prohibited Title X project employees from engaging in advocacy, counseling, or referral for abortion. The regulations required the projects to maintain an objective integrity and independence from prohibited abortion activities by the use of separate facilities, personnel, and accounting records.[3] These new requirements were an extreme departure from the former HHS regulations, and placed heavy burdens on the fund grantees.[4] New York State and the grantees believed that the new regulations would result in a lower quality of health care for Title X's indigent clients, and that they violated the constitutional rights of these clients, the grantees and their

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* The author is an attorney who also publishes on domestic and international aspects of biotechnology. This article is dedicated to the memory of John Maher, Founder and President of Delancey Street Foundation, a brilliant social leader, a unique intellect and humanitarian, who was much loved by those who knew him.

1. New York v. Sullivan, 889 F.2d 401, 404 (2d Cir. 1989). *See* Massachusetts v. Secretary of Health and Human Services, 899 F.2d 53, 56 (1st Cir. 1990) (en banc) (holding that regulations altering interpretations of Title X by prohibiting non-directive abortion counseling or referral, and greater program separation were unconstitutional).

2. Public Health Services Act, §§ 1002, 1008, *as amended*, 42 U.S.C. §§ 300(a)-300(a-6) [hereinafter the Act].

3. 42 C.F.R. §§ 59.8, 59.9, and 59.10 (1992), *construed in*, Rust v. Sullivan, 11 S. Ct. 1759, 1765 (1991).

4. Section 1008 of the Act provides: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (1992). New York v. Sullivan, 889 F.2d at 404. The original interpretation of this section permitted Title X projects to provide information about, and referral for abortions, including names and addresses of abortion clinics. Such interpretations were considered neutral, as mere referral or collection of statistical data did not contradict section 1008, and were first permitted and then required by HHS. *Id.* at 405 (citing U.S. DEPARTMENT OF HEALTH EDUCATION & WELFARE, PROGRAM INCENTIVES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES (1976); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PROGRAM GUIDELINES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES § 8.6 (1981)).

staff.[5] They appealed adverse decisions in the lower courts, and in May of 1991, the Supreme Court affirmed these holdings in *Rust v. Sullivan*.[6] The Court understood that the new regulations were a departure from former practice, but they held that they did not violate the constitutional rights of the parties and so were valid discretionary interpretive acts of the Secretary of HHS.[7]

Dr. Rust and his co-petitioner's were recipient grantee-providers of family planning funds under Title X and doctors who supervised Title X projects. The State of New York was also a grantee through the New York State Department of Health (NYSDOH) and had distributed nearly $6 million in Title X funds to 37 agencies. New York City also participated through its Health and Hospitals Corporation. New York, and Dr. Rust brought two suits challenging the new regulations, and these were later consolidated.[8] Dr. Rust had previously obtained injunctive relief against implementation of the revised regulations, and after case consolidation moved for summary judgement.[9]

The United States District Court for the Southern District of New York upheld the regulations.[10] The court concluded that "the new regulations, despite their significant changes from the guidelines, are supported by sufficiently reasonable grounds that they should not be set aside as arbitrary or capricious."[11] Further, the Court held that the regulations did not impermissibly interfere with the indigent client's First and Fifth Amendment rights to receive information about abortion services, or the grantee-providers' First Amendment rights to discuss abortion.[12]

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5. New York v. Bowen, 690 F. Supp. 1261 (S.D.N.Y. 1988), *aff'd sub nom.*, New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989), *aff'd sub nom.*, in Rust v. Sullivan, 111 S. Ct. 1759 (1991); New York v. Sullivan, 889 F.2d at 406-07 (discussing the summary of challenges).

6. 111 S. Ct. 1759 (1991). The State of New York declined to continue the appeal, and HHS Secretary Bowen was succeeded by Secretary Sullivan. Dr. Rust, and the other plaintiffs then sued both New York and the Secretary of HHS.

7. 111 S. Ct. at 1767-69. *But see* Henry J. Reske & Mark Hansen, *House Reacts to* Rust *Decision*, A.B.A. J. 108 (Oct. 1991) (stating "the ABA House of Delegates in August approved without opposition a measure supporting the right of health-care clinics to counsel on abortion").

8. New York v. Sullivan 889 F.2d at 406. The actions consolidated were, New York v. Bowen, No. 88-0701 (S.D.N.Y. 1988) (order granting preliminary injunction) and Rust v. Bowen, No. 88-0702 (S.D.N.Y. 1988) (order granting preliminary injunction).

9. *Bowen*, 690 F. Supp. at 1263.

10. *Id.* at 1274. The court denied the plaintiff's Motion for Summary Judgment, and granted the defendant's. At the district court, Dr. Rust had argued that the new regulations frustrated the intent of Congress, violated the letter and intent of Title X, and worked a deprivation of First and Fifth Amendment rights. The plaintiffs raised four central issues: 1) whether the regulations were view-point discriminatory; 2) whether they censored speech; 3) whether the prohibitions on abortion counseling within Title X projects violated the First and Fifth Amendment rights of women who were pregnant; and 4) whether the regulations affecting counseling and advocacy infringed the First Amendment rights of the Title X grantees. *Id.* at 1265.

11. *Id.* at 1272.

12. *Id.* at 1273.

In his review before the Court of Appeals Dr. Rust was also unsuccessful.[13] He had again argued that the new regulations violated both the language and the intent of Title X and deprived both the grantees and the indigent recipients of their constitutional rights. The government, the appellants argued, "may not condition receipt of a benefit on the relinquishment of constitutional rights."[14] The court said, however, that participants in Title X projects remain free to say whatever they wish about abortion outside the project. The situation, they hinted, might be different if the state barred doctors who performed abortions in private facilities from the use of public facilities.[15]

The Court of Appeals affirmed the lower court's decision, and held that the regulations were a permissible construction of Sections 1006 (a), and 1008 of the Public Health Service Act.[16] The Secretary did not need to cite any abuses under the prior regulations in order to justify the statutory revisions.[17] Further, the Secretary's admission that the changes were in response to a shift in political climate did not affect the validity of the revised regulations.[18] The new regulations, the Court implied, were not an affirmative legal barrier to abortion nor a facial violation of the plaintiffs' right to free speech.[19] Therefore, a woman's and her doctor's rights to privacy and free speech about abortion were not violated by the new regulations.

The Supreme Court upheld the constitutionality of these regulations. According to the reasoning of the majority, the selective use of the public funding process to prohibit abortion counseling, referral and advocacy but allow the same for all other forms of family planning, is a legitimate use of state power.[20] The decision, the majority said, left the indigent client wanting an abortion, with the same choices as if Congress had never funded family planning services.[21] The effective preclusion of the Title X client's right to abortion was accomplished by her own indigence, the majority said,

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13. New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989).

14. *Id.* at 412 (distinguishing Perry v. Sindermann, 408 U.S. 593 (1972)) (holding that the non-renewal of a non-tenured State university professor, based on his exercise of free speech violates the 14th Amendment, due process, since no hearing was afforded, and there was an expectation of contract renewal).

15. *Id.* at 412-13 (referring to Perry v. Sindermann, 408 U.S. 593 (1972)).

16. *Id.* at 414.

17. *Id.* at 418 (Kearse, J., dissenting). Since no abuses were cited it follows that such enumeration was not required.

18. *Id.*

19. *Id.* at 411-13.

20. Rust v. Sullivan, 111 S. Ct. at 1764-66 (defining the regulations), and at 1769, 1775 (explaining the court's findings). The Secretary has the authority to make Title X grants "'in accordance with such regulations as [he] may promulgate.'" *Id.* at 1767 (quoting 42 U.S.C. § 300a-4). Title X empowers the Secretary "'to make grants and enter into contracts . . . to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services.'" *Id.* (quoting 42 U.S.C. § 300a). This power is subject to disallowance of expenditures for programs where abortion is used as a method of family planning. *Id.* at 1764-65.

21. 111 S. Ct. at 1778.

and not by the decision of the court.[22] Further, the majority said, the doctor patient relationship was not disturbed as the indigent clients would know that the limited advice given by the physician, avoiding any mention of abortion, would be the result of the regulations.[23] The High Court said, "[i]t would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from the Title X project, but the Constitution does not require that the Government distort the scope of its mandated program in order to provide that information."[24]

This article argues that the majority characterized Dr. Rust's allegations as devoid of constitutionally based issues. As evidenced by the split in the federal courts and the Supreme Court's own dissenting opinions, the Secretary's regulations raised serious questions involving fundamental freedoms. Because other constructions of the Act, not touching on First and Fifth Amendment constitutional rights remained available, the majority misapplied the rules of statutory construction. Further, the majority invaded the constitutional rights of the grantee-providers and the client-recipients of Title X programs, based on the presence of some federal co-funding and a government desire to restrict speech content. The intent of the Congress as illuminated through the Act, the legislative history, and prior experience and regulations all speak to a contrived political result in the majority's decision. The Supreme Court moves outside its realm when it legislates from the bench.[25]

Conditioning the benefits of public health care projects on the relinquishment of the indigent's and the providers' guaranteed rights is unconstitutional. Such limits on fundamental rights cannot be construed as a funding prerequisite, and the government cannot silence diversity in America by buying up fundamental rights.[26]

The decision leaves the impression that the majority believes that since the poor should be gratefully for whatever assistance they get, legislated comprehensive family planning is not necessary for them. The Court and not the Act has ordained this result. A single administrative agency's regulations, which disallows the physician from speaking to an indigent client on all medical options, under the auspices of a congressional Act proclaimed to

22. *Id.*

23. *Id.* at 1776.

24. *Id.* at 1777.

25. *See Rust*, 111 S. Ct. at 1789 (O'Connor, J., dissenting) (implying that when the Court tells a coordinate branch of the government what it can and cannot do, the Court acts at the limits of its power).

26. *See* 111 S. Ct. at 1778-79, 1782-83 (Blackmun, J., dissenting). *See generally* Carole I. Chervin, *The Title X Family Planning Gag Rule: Can The Government Buy Up Constitutional Rights*, 41 STANFORD L. REV. 401, 408 (1989) (concluding that the government cannot infringe on privacy rights by censored government subsidized speech); Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990) (discussing cases that have tried to condition government benefits, e.g., unemployment compensation, and abortion).

be part of a broad based comprehensive health care program, are arbitrary and capricious.[27]

This article concludes that single agency, interpretive regulations may not capture and gerrymander an Act of Congress to suit an administrative Secretary's view of how people should live. The Public Health Services Act was meant to deliver broad-based medical services independent of viewpoint, and government control of free speech, and the Secretary's regulations impermissibly interfere with the Title X client's First and Fifth Amendment rights to receive information, and their right of self determination in reproductive planning. The regulations also infringed the First and Fifth Amendment rights of the indigent client's doctors and their staff, by allowing minor government offices to use regulatory schemes to interject themselves into the federally protected professional relationships of doctors and their patients.[28]

The article examines the background of the case, the Second Circuit decision, and the Supreme Court decision. It offers an analysis of the cases, relevant statutes, regulations, and the legislative history as they reflect on First and Fifth Amendment rights, and constitutional avoidance through the use of statutory construction.

It also discusses the imminent changes now anticipated by the recent electoral mandate which swept Bill Clinton into office and formally ended the reign of conservative and religious factions in American politics. A way must be found to limit the opportunity for such extraordinary swings in philosophy as expounded by the instrumentality of state or city administrative offices.

Similar to the resistance some local governments displayed to meaningful adoption of the federal anti-discrimination statutes in the 1960s, permitting such extraordinary reinterpretations of Title X by local administrative agencies infringes the prerogative of Congress to legislate effectively. Gross divergence from established federal political goals by local regulatory re-interpretation impacts directly on people's lives, their means to assert their constitutional rights, and their basic health care services. It also burdens

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27. *Seeid.* at 1786 (citing Justice Marshall's dissent in Harris v. McRae, 448 U.S. 297 (1980)). *Harris* held that Title XIX does not require States to pay for medically necessary abortions). "While technically leaving intact the fundamental right protection in *Roe v. Wade*, the Court, 'through a relentlessly formalistic catechism,' once again has rendered the right's substance nugatory." *Rust*, 111 S. Ct. at 1786 (citation omitted). *See also id.* at 1787 (Stevens, J., dissenting, clarifying the scope of the Act); *id.* at 1789 (O'Connor, J., dissenting, calling the Secretary's interpretation unreasonable); New York v. Bowen, 690 F. Supp. at 1264 (discussing the comprehensive nature of the Act); New York v. Sullivan, 889 F.2d at 415 (Kearse, J., dissenting, referring to the decision as arbitrary and capricious).

28. If administrative agencies wish to influence public opinion they have options that do not raise constitutional questions. Constructive educational and privately financed non-abortion alternative support programs could be used to encourage view-point acceptance among the government subsidized indigent in family health planning projects. For instance, racial integration, education and awareness has been promoted by federal agencies in the past, as well as by equal employment opportunities.

cities and states across the nation, in terms of budgetary planning, contract formation, manpower efforts and implementation costs.

I. *RUST V. SULLIVAN*

A. Background

Title X of the Public Health Services Act authorizes the Secretary to "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services."[29] These grants and contracts must "be made in accordance with such regulations as the Secretary may promulgate."[30] However, "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."[31]

In 1988 the Secretary of the Health and Human Services issued new regulations that prohibited Title X projects from engaging in counseling, referral, or advocacy of abortion rights.[32] These regulations required separate facilities for abortion, and non-abortion service activities, including counseling.[33] Previously, these separate service programs were permitted to share facilities within the same building.[34] The Secretary cited no abuses as a reason for the change. He stated that the interpretive changes were made in response to the political climate.[35] He explained his determination in light of critical reports from the offices of General Accounting, and the Inspector General.[36] These executive branch reports claimed prior policy failed to implement the statute properly, and that it was necessary to provide "clear and operational guidance to grantees to preserve the distinction between Title X programs and abortion as a method of family planning."[37] The Secretary stated but did not explain that the change was justified by client experience, and supported by a shift in attitude against the "elimination of unborn children by abortion."[38]

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29. Public Health Service Act, 84 Stat. 1508, *as amended*, 42 U.S.C. § 300(a).
30. 42 U.S.C. § 300(a-4).
31. 42 U.S.C. § 300(a-6).
32. 42 C.F.R. § 59.8(a)(1) and § 59.10(a) (1989).
33. 42 C.F.R. § 59.7 (1989).
34. *Bowen*, 1690 F. Supp. at 1264, 1271-73 (discussing 42 C.F.R. § 59.9).
35. 53 Fed. Reg. 2923-2924 (1988).
36. *Id.*
37. *Id.*
38. *Id.* The Secretary did not define the term "unborn children" as to whether he was referring to first trimester abortions or later stage abortions.

A suit was brought to prevent application of the new regulations and to challenge their implementation through injunctive relief.[39] The plaintiffs included several Title X grantee-providers, the State of New York, which receives Title X funds through the New York State Department of Health; the City of New York; the New York City Health and Hospitals Corporation; Planned Parenthood of New York City, Inc.; Planned Parenthood of Westchester/Rockland; Medical and Health Research Association of New York City, Inc.; Health Services of Hudson County, New Jersey; and Dr. Irving Rust and Dr. Melvin Padawer, doctors who supervise Title X programs who sued on behalf of themselves and their patients. The defendant was the Secretary of the Department of Health and Human Services, Otis R. Bowen, and his successor Louis W. Sullivan.

The Secretary promulgated the new regulations on February 2, 1988. Although Title X projects never performed or subsidized abortions,[40] the previous administrative interpretation at first permitted and then required the projects to provide information about and referrals for abortion.[41] Title X projects, therefore, traditionally included neutral counseling about abortion. These earlier practices permitted the accumulation of information on abortion services, and the related collection of statistical health data. The former test used under previous regulations, was whether the immediate effect of a health service activity, such as counseling on abortion and its consequences, encouraged abortion.[42]

B. The Second Circuit Decision

The plaintiffs brought two suits challenging the new regulations of the Department of Health and Human Services (HHS), *New York v. Bowen*, No. 88-0701, and *Rust v. Bowen*, No. 88-0702.[43] Dr. Rust and his co-plaintiffs sought declaratory and injunctive relief against implementation of the new interpretative regulations. The cases were consolidated and the United States District Court for the Southern District upheld the regulations.

In affirming the district court's summary judgment for the Secretary, the Court of Appeals held that the regulations were a permissible construction of

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39. 690 F. Supp. at 1263. NYSDOH funding was about $6 million in 1987-1988, and Dr. Rust of Planned Parenthood in New York received about $325,000 from NYS for family planning services.

40. 42 C.F.R. § 59.5(a)(9) (1992) (stating "the project will not provide abortion as a method of family planning.")

41. New York v. Sullivan, 889 F.2d at 405 (citing U.S. DEPT. OF HEALTH, EDUC. & WELFARE, PROGRAM INCENTIVES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES (1976), and U.S. DEPT. OF HEALTH AND HUMAN SERVICES, PROGRAM GUIDELINES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES § 8.6 (1981)).

42. 889 F.2d at 405. Mere referral for abortion giving both names and addresses was considered "non-directive" counseling. However, counseling that urged abortion, or the provision of transportation to abortion facilities were considered violative of § 1008.

43. *See supra* note 8 and accompanying text.

the statute and consistent with the First and Fifth Amendments.[44] The court determined that the regulations were not affirmative legal barriers to abortion and did not amount to facial violations of the plaintiffs' rights to free speech.[45] Title X, the court said, was limited to preconception services, and so the program, the Court of Appeals reasoned, did not provide services related to childbirth except in the context of referral because of pregnancy.[46] In that circumstance the projects must refer the pregnant client to a provider that promotes the welfare of the mother and the child. Further, the referral provider list may not be used to directly or indirectly encourage abortion,[47] such as by including on the list of referral providers health care providers whose principal business is the provision of abortions.[48] The regulations

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44. 889 F.2d at 404. *See generally* Steve Alumbaugh & C.K. Rowland, *The Links Between Platform-Based Appointment Criteria and Trial Judges' Abortion Judgments*, 74 JUDICATURE 153 (1990)(discussing the relationship of view-point politics and judicial appointment. Executive policy to favor a particular point of view may be reflected in appointments and may impact on cases like *Rust v. Sullivan*, where view-point politics seem to be controlling).

45. *See* 889 F.2d at 411.

46. *See id.* at 405 (discussing 42 C.F.R. § 59.8(a)(1)).

47. The regulations permit the grantee to give a woman a list of prenatal care service providers which might include some who offer abortions. *See* 889 F.2d at 416 (Kearse, J., dissenting) comments on the list requirements found at 42 C.F.R. § 59.8(a)(3). The list must comply with several requirements: 1) it must include any available prenatal care providers that do not perform abortion; 2) it cannot include providers that offer abortion as their "principal business;" 3) it cannot weigh in favor of abortion providers. In accordance with 42 C.F.R. § 59.8(a)(3), the woman may not be informed as to which providers on the list also perform abortions. *Id.* § 59.8(a)(2) states that, "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 the unborn child." *Id.* (emphasis removed).

"Thus the expressed prescription and proscriptions in the regulations require the grantee to emphasize prenatal care and prohibit it from identifying any entity as a provider of abortions." *Id.*

48. 889 F.2d at 416 (discussing 42 C.F.R. § 59.8(b)(4)). 42 C.F.R. § 59.10(a) disallows the use of Title X funds for activities that encourage, promote or advocate abortion, and provides a number of examples of what the Secretary now considers inappropriate under Title X:

> (a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:
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> (1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;
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> (2) Providing speakers to promote the use of abortion as a method of family planning;
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> (3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;
>
> (4) Using legal action to make abortion available in any way as a method of family planning; and
>
> (5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

required that Title X referrals cannot be made to an abortion provider even if requested by the client. A question even arose as to whether the keeping of the yellow pages was appropriate for a Title X facility, least a client should request it to attempt to locate an abortion provider.[49]

Aside from the restriction on provision of information, lobbying for legislation to increase the availability of abortion as a method of family planning, even if it were medically proven that abortion was the safest form of birth control for women, is not permitted. Development or dissemination of materials advocating abortion, providing speakers to promote abortion as a method of family planning, or using any legal action to make abortion available in any way, are all prohibited.[50] Further, the court stated that a program that counsels on the use of a particular contraceptive device plainly treats that device as a "method of family planning."[51]

C. The United States Supreme Court Decision

1. The Majority

The Supreme Court granted certiori to resolve the split among the Courts of Appeal. The First and Tenth Circuits had invalidated the Secretary's new regulations, the Second Circuit upheld them.[52] The Supreme Court's majority decision included Justices Rehnquist, White, Kennedy, Scalia, and Souter, in favor of the constitutionality of the regulations, and engendered three dissents.[53] In the opinion, authored by Chief Justice Rehnquist, the majority rejected Dr. Rust's argument that the regulations were arbitrary and capricious. Justice Rehnquist held that the Secretary's new regulations were a permissible construction of Title X; that the regulations did not violate the First Amendment free speech rights of the Title X fund grantee-providers, or their staffs, nor impermissibly infringe on the doctor-patient relationship; and that the regulations did not violate a woman's First Amendment rights by the imposition of viewpoint-discriminatory conditions tied to government

49. 889 F.2d at 406.

50. 42 C.F.R. § 59.10(a). *See* 889 F.2d at 408 (citing Jewel Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, 325 U.S. 161, 168-69 (1945)) (discussing the Fair Labor Standards Act). The Court relied on this case for its holding that general remarks found in the legislative history are not probative of Congressional intent on narrow issues.

51. 889 F.2d at 407.

52. Rust v. Sullivan, 111 S. Ct. 1759, 1764 (1991). Massachusetts v. Secretary of HHS, 899 F.2d 53 (1st Cir. 1990) (denying the validity of the regulations in part on constitutional grounds). *See supra* note 1 on the court's holding; Planned Parenthood Federation v. Sullivan, 913 F.2d 1492 (10th Cir. 1990) (denying the validity of the regulations as unconstitutional); and New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989) (validating the regulations).

53. 111 S. Ct. at 1764. Justice Blackmun filed a dissenting opinion, joined by Justice Marshall, Justice Stevens and Justice O'Connor in various parts. *Id.* at 1778.

subsidies, or her Fifth Amendment right to choose whether to terminate pregnancy.[54]

The majority recognized that the statute which prohibited the use of funds under Title X in which abortion is a method of family planning was ambiguous with regard to abortion counseling, referral, advocacy, and program integrity.[55] According to the Chief Justice, the construction of the statute by the administrative agency responsible for its administration, must be accorded substantial weight.[56] Further, he found that the Secretary's construction may not be disturbed as an abuse of discretion if it is a permissible or plausible construction of the plain language of the statute, and does not conflict with the intent of Congress.[57]

The majority said the administrative agency's interpretation of the statute and their resulting regulations, were entitled to deference, notwithstanding the fact that they reversed a long-standing agency policy permitting non-directive counseling and referral for abortion.[58] The change of interpreta-

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54. *Id.* at 1767-78. *See also id.* at 1778 (where Justice Blackmun countered in the dissent that "[c]asting aside established principles of statutory construction and administrative jurisprudence, the majority in these cases today unnecessarily passes upon important questions of constitutional law. In doing so, the Court, for the first time, upholds viewpoint-based suppression of speech solely because it is imposed on those dependent upon the Government for economic support." He stated further that, "the majority upholds direct regulation of dialogue between a pregnant woman and her physician . . .").

55. *Id.* at 1768 (citing Massachusetts v. Sullivan, 899 F.2d 53, 62 (1st Cir. 1990)) (reasoning that Congress had not specifically addressed the scope of the abortion prohibition). *See supra* notes 1, 52, and *infra* 144 and the accompanying text. "[T]he contemporaneous legislative history does not address whether clinics receiving Title X funds can engage in non-directive counseling including the abortion option and referrals." *Id.* at 1768 (citing Planned Parenthood Federation v. Sullivan, 913 F.2d 1492, 1497 (10th Cir. 1990)). *See supra* notes 1, 52, 55, and *infra* 144 and accompanying texts.

56. *Rust,* 111 S. Ct. at 1767 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). The Court's holding in this area is quite confusing when looked at from the perspective of other recent rulings. Justice Scalia's recent discussion in Boureslan v. Arabian American Oil Co., 111 S. Ct. 1227 (1991), for instance. The case specifically addressed the degree of deference due to an administrative agency with oversight responsibilities. In *Boureslan*, the Court came to exactly the opposite conclusion. There, the Court held that the construction of a statute by the agency responsible for its administration was not permitted deference. Justice Scalia reproached the Court for throwing the entire question of administrative deference into abeyance. *Id.* at 1236-37 (Scalia, J., concurring).

57. *Rust,* 111 S. Ct. at 1767-69.

58. *Id.* at 1768-69. Although the new regulations may have reversed long standing policy that permitted non-directive, counseling and referral for abortion, and represented a sharp break from prior construction, the Court held that the prior constitutionally consistent interpretation was not entitled to substantial weight. *Id.* at 1769 (citing *Chevron*, 467 U.S. at 862, 863-64) (holding that a revised statute interpretation deserves deference. This is because "'[a]n initial agency interpretation is not instantly carved in stone,' and 'the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.'") *Id.* at 1769 (quoting *Chevron*, 467 U.S. at 863-64). An agency is not required to "establish rules of conduct to last forever." *But see* Justice Scalia's comments as well as the dissents in *Boureslan v. Aramco* (here the court refused to recognize any deference to the administering agency, in part because the revisions were not contemporaneous with the legislation).

tion, Justice Rehnquist said, was amply supported by "reasoned analysis"[59] indicating that the new regulations were more in keeping with the statute's original intent, and justified by client experience, and accorded with a shift in attitude against the "elimination of unborn by abortion."[60]

The majority said that the new regulations prohibiting grantees-providers of Title X funds from engaging in abortion counseling, referral, and advocacy represented a permissible construction of the statute.[61] The majority rejected the contention that the plain language of Section 1008 only forbade the performance of abortions in Title X projects.[62] Justice Rehnquist agreed with the reasoning of the lower court that "it would be wholly anomalous to read Section 1008 to mean that a program that merely counsels but does not perform abortions does not include abortion as a method of family planning."[63]

The majority commented that the prohibited activities of abortion counseling, referral, and provision of information regarding abortion as a method of family planning do not on their face bar abortion referral or counseling where a woman's life is placed in imminent peril by her pregnancy.[64] Such counseling, Justice Rehnquist said, could not be considered a "method of family planning."[65] Provision in the regulations, he added, contemplated that Title X recipients may engage in otherwise prohibited abortion-related activates in such circumstances.[66]

The new regulations, the majority said, which interpret that Title X recipients are prohibited from engaging in abortion as a method of family planning did not violate the grantee-providers', their staff's or their patient's First Amendment right of free speech.[67] Therefore, according to the

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59. *Rust,* 111 S. Ct. at 1769 (citing Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983)).

60. *Id.* at 1769. *See also* Geri J. Yonover, *Fighting Fire With Fire: Civil RICO and Anti-Abortion Activists,* 12 WOMEN'S RTS. L. REP. 153 (1990) (discussing the nature of the "shift in attitude" described by the court in *Rust v. Sullivan,* and the civil disruptions staged by anti-abortionist activists).

61. 111 S. Ct. at 1769. A permissible construction is not the only one the agency could have reached, or even the one the court would have reached on the question.

62. *Id.* at 1766 (citing the appeals court decision, and later, affirming it).

63. *Id.* (quoting New York v. Sullivan, 889 F.2d at 407).

64. *Id.* at 1773.

65. *Id.*

66. *Id.* The Court found that the regulations contemplated that a Title X project would be permitted to engage in abortion referral in emergencies under 42 C.F.R. § 59.8(a)(2) (1989). A specific exemption for emergency care requires recipients "to refer the client immediately to an appropriate provider of emergency medical services." Further, Section 59.5(b)(1) also requires projects to provide "necessary referral to other medical facilities when medically indicated."

67. *Id.* at 1771-75. The majority stated their only concerned was with whether on their face, the regulations were authorized by the Act, and could be construed without infringing constitutionally protected rights. *Id.* at 1767. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is

majority the new regulations do not discriminate on the basis of viewpoint, and further, that it is the legitimate providence of government, to choose to fund one activity to the exclusion of another.[68] The new regulations, therefore, merely insured that Title X funds would not be used outside the scope of the federal program. In considering whether the new regulations interfered with the grantee-providers' employee's rights to free speech, the majority said that the regulations did not in any way restrict the employee's freedom of expression.[69] The majority reasoned that the limitation on their speech was acceptable as a consequence of their decision to accept employment in Title X projects.[70] Similarly the fact that Title X requires government and grantee-providers to help finance Title X projects by matching funds did not affect the reasoning of the majority.[71]

The majority held that the regulations do not condition receipt of public funds in Title X programs on the relinquishment of a constitutional right, such as the First Amendment right to engage in abortion advocacy and counseling, because the regulations did not force the Title X grantees, or their employees to give up abortion-related activities.[72] The Court said, they "remain free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X project"[73]

The majority added that the regulations do not violate a woman's Fifth Amendment right to choose whether to terminate her pregnancy.[74] Nor do they impermissibly burden a woman's right to an abortion.[75] The majority reasoned that this is true, because the "the Due Process Clauses generally confer no affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government

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insufficient to render [them] wholly invalid." *Id.* (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). *See generally* Helen McGee Konrad, Comment, *Eliminating Distinctions Between Commercial and Political Speech: Replacing Regulation With Government Counterspeech*, 47 WASH. & LEE L. REV. 1129 (1990) (discussing free speech and commercial speech aspects of abortion service providers and the traditional First Amendment protections afforded each).

68. 111 S. Ct. at 1775.

69. *Id.*

70. *Id.*

71. *Id.* at 1775-76. In the past, the Court had recognized that a mere subsidy in the form of government owned property, did not justify restrictions of speech in areas that had "been traditionally open to the public for expressing activity." *Id.* at 1776 (quoting United States v. Kokinda, 110 S. Ct. 3115, 3119 (1990)).

Justice Rehnquist indicated that "It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from government regulation, even when subsidized by the government." The Chief Justice went on to add, however, that "[w]e need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship." *Id.* at 1776.

72. *Id.* at 1775.

73. *Id.*

74. *Id.* at 1776-77.

75. *Id.* at 1776.

itself may not deprive the individual."[76] The government, Justice Rehnquist concluded, has no constitutional duty to subsidize an activity merely because it is constitutionally protected.[77]

The regulations, Justice Rehnquist added, did not violate a woman's Fifth Amendment right to make an informed decision regarding health care."[78] This was true, he reasoned, because the "doctor's ability to provide, and a women's right to receive" abortion information, is protected outside the scope of Title X programs.[79] The fact that most woman will be dissuaded from abortion as a practical choice as a result of their own indigence did not speak to a government imposed restriction.[80] Nor, Justice Rehnquist felt, did the regulations impermissibly infringe upon the doctor-patient relationship and thereby deprive the Title X client of information concerning abortion.[81]

The majority said that the restrictions on abortion related activities were permissible because they did not condition the receipt of a benefit on the

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76. *Id.* (quoting Webster v. Reproductive Health Services, 492 U.S. 490 (1989)). *But see generally* Catharine A. MacKinnon, *Reflections On Sex Equality Under Law,* 100 YALE L.J. 1281 (1991). "Because the social organization of reproduction is a major bulwark of women's social inequality, any constitutional interpretation of a sex equality principle must prohibit laws, state policies, or official practices and acts that deprive women of reproductive control or punish women for their reproductive role or capacity." *Id.* at 1319.

77. In *Webster,* the Court upheld a Missouri statute providing that no public facilities or employees be used to perform abortions, and that physicians conduct viability tests prior to performing abortions. *Webster* emphasized that so long as no affirmative legal obstacle to abortion services was created by a denial of the use of governmental money, facilities, or personnel, the practical effect of such a denial on the availability of such services is constitutionally irrelevant. See the discussion of *Webster* in *Rust,* 111 S. Ct. at 1776-77 (citing DeShaney v. Winnebago County Dept., of Social Services, 489 U.S. 189, 196 (1989)) (holding that a State's failure to protect a child from parental violence, does not violate due process because the State had no duty). The Court reasoned that in this line of cases, the State's decision to use public facilities and staff to encourage childbirth over abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy. *See* 111 S. Ct. at 1776 (citing to Harris Sec. of H.H.S. v. McRae, 448 U.S. 297, 315 (1980)) (reasoning that unequal subsidization encourages alternative activity deemed in the public interest).

See also Christopher A. Crain, *Judicial Restraint and the Non-Decision in* Webster v. Reproductive Health Services, 13 HARV. J. L. & PUB. POL'Y 263 (1990) (discussing the odd balance and implications of the Justice's decisions and their refusal to implicate *Roe v. Wade*) and James Bopp Jr. & Richard E. Coleson, *Webster and the Future of Substantive Due Process,* 28 DUQ. L. REV. 271 (1990) (discussing the impact of *Webster* on privacy rights and *Roe v. Wade*, arguing that it works a de facto reversal). *Compare* Thomas A. Eaton & Michael L. Wells, *Governmental Inaction as a Constitutional Tort: DeShaney and its Aftermath,* 66 WASH. L. REV. 107 (1991) (examiningthe trend towards non scrutiny of the State's role in exposing individuals to harm, and arguing that due process may require State protection). *See generally* LAWRENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990) (supporting pro-choice and public funding of abortion, and proposing a compromise of greater support for programs which improve contraception, and social support for families with children).

78. 111 S. Ct. at 1777.

79. *Id.*

80. *Id.* at 1777-78.

81. *Id.* at 1776.

relinquishment of a constitutional right.[82] According to Justice Rehnquist, the program funds are merely separate from other funding to preserve the integrity of Title X programs.[83]

Justice Rehnquist said, "[i]t would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project . . ."[84] However, he asserted that the regulations leave the indigent women with the same choices as if government had not chosen to fund family planning at all.[85]

2. The Dissent

Justice Blackmun was joined in part, by Justice Marshall, Justice Stevens, and Justice O'Connor, in firmly pronouncing that the new Health and Human Services Regulations, raised serious First and Fifth Amendment concerns, and that the Court of Appeals should have invalidated the regulation.[86] Attacking the majority's concept of statutory construction and administrative legislation, Justice Blackmun found fault with the pretense that "the Government may attach an otherwise unconstitutional condition to the receipt of a public benefit . . ."[87] He cited a number of cases which illustrated the proper construction, and provided the direction with which to narrow the permissible interpretations. "[F]ederal statutes," he continued, "are to be so construed as to avoid serious doubt of their constitutionality."[88]

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82. 111 S. Ct. at 1773-74 (distinguishing Perry v. Sindermann, 408 U.S. 593, 597 (1972)). In *Perry* the Court held "[E]ven though the government may deny [a] . . . benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."). *Perry,* 408 U.S. at 597.

83. 111 S. Ct. at 1774.

84. 111 S. Ct. at 1777.

85. *Id.* at 1778.

86. *Id.*

87. *Id.* at 1778-79. Justice Blackmun believed the regulations impose view-point restrictions. Other commentators have addressed an ideological shift on the court, which would reflect in view-point jurisprudence. *See generally* Lynne Henderson, *Authoritarianism and the Rule of Law,* 66 IND. L.J. 379 (1991). "While many liberal-progressive constitutional scholars have noted the 'conservative' shift in the Court's decisions and are voicing concern and proposing alternative strategies, it is the thesis of this Article that the problem is authoritarianism, not conservatism per se." *Id.* at 379.

88. 111 S. Ct. at 1778 (citing International Ass'n Machinists v. Street, 367 U.S. 740, 749 (1961) (voiding forced membership in a union shop agreement) supporting the idea that statutory construction must avoid constitutional doubts, *accord,* Hooper v. California, 155 U.S. 648, 657 (1895) (holding that the 14th Amendment's right to contract does not permit the making of contracts forbidden by State Constitution); Crowell v. Benson, 285 U.S. 22, 62 (1932) (discussing the Longshoreman's and Harbor Workers Compensation Act); and United States v. Security Industrial Bank, 459 U.S. 70, 78 (1982) (holding that the Bankruptcy Reform Act of 1978 could not be applied retroactively). Justice Blackmun notes that the majority did not "deny that the principle is fully applicable" to *Rust,* where a "plausible but constitutionally suspect statutory interpretation is embodied in an administrative regulation." *Id.* at 1778. *Edward J. DeBartolo Corp.,* 485 U.S. at 575 (reasoning that an act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available).

The role of the Court, according to Justice Blackmun, is not to "sidestep[]" this canon of construction with "feeble excuse[s] that the challenged regulations 'do not raise the sort of grave and doubtful constitutional questions,'"[89] Justice Blackmun argued that "[w]hether or not one believe[d] the Regulations [were] valid, it avoids reality to contend that they do not give rise to serious constitutional questions."[90] To Justice Blackmun the question raised by the regulations, squarely addressed the issue of dual standards of constitutional rights with lower standards being allotted to the indigent of our country. To Justice Blackmun, the majority's statement: "[t]here is no question but that the statutory prohibition contained in section 1008 is constitutional," simply begs the question.[91]

Furthermore, Justice Blackmun rejected the majority's limited approach in justifying the regulations as a permissible administrative agency interpretation.[92] To Justice Blackmun and other of the dissenters, the Court's duty speaks to avoiding "passing unnecessarily upon important constitutional questions . . . where . . . the language of the statute is decidedly ambiguous."[93] Justice Blackmun said, "[i]t is both logical and eminently prudent to assume that when Congress intends to press the limits of constitutionality in its enactments, it will express that intent in explicit and unambiguous terms."[94] Justice Blackmun closes his first point in stating that because he concludes that a plainly constitutional construction of section 1008 "is not only 'fairly possible' but entirely reasonable."[95] He would reverse the judgment of the Court of Appeals on that ground alone without deciding the constitutionality of the Secretary's regulations.[96]

Justice Blackmun's dissent also pointed out that until this decision "viewpoint-based suppression of speech . . . conditioned upon the acceptance of public funds" had never been upheld by the High Court.[97] For Justice Blackmun, whatever the government's power to condition receipt of public funds, "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

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89. 111 S. Ct. at 1778 (quoting United States v. Delaware and Hudson Co., 213 U.S. 366, 408 (1909)) (discussing the Hepburn Act).

90. *Id.*

91. *Id.* at 1779 n.1. Since the language of § 1008 does not address counseling, referral, advocacy, or program integrity, the regulations easily sustains a constitutionally trouble-free interpretation. *Id.* Yet, Justice Blackmun's dissent points out, the majority rejected a constitutionally sound construction for one that "is by no means clearly constitutional."

92. *Id.* at 1778.

93. *Id.* at 1779.

94. *Id.* at 1779-80 (citing Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2113 (1990)). "It is thus implausible that, after Chevron, agency interpretations of ambiguous statutes will prevail even if the consequences of those interpretations is to produce invalidity or to raise serious constitutional doubts."

95. 111 S. Ct. at 1780 (quoting Machinists v. Street, 367 U.S at 750). *See supra* note 88 and accompanying text.

96. 111 S. Ct. at 1780.

97. *Id.*

speech."[98] According to Justice Blackmun, it cannot seriously be disputed that the regulation prohibitions on abortion counseling and referral are content-regulation of speech.[99] "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."[100] Yet, Justice Blackmun found the majority compelled anti-abortion speech on one hand while suppressing speech favorable to abortion on the other.[101] For instance, HHS's own description of its regulations shows that,

> Title X projects are required to facilitate access to prenatal care and social services, including adoption services, that might be needed by the pregnant client to promote her well-being and that of her child, while making it abundantly clear that the project is not permitted to promote abortion by facilitating access to abortion through the referral process.[102]

Justice Blackmun found it remarkable that the majority concluded that "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another."[103] The claim that Title X is merely limited to preventative services was also misleading since "[i]n addition to requiring referral for prenatal care and adoption services, the regulations permit general health services such as physical examinations, screening for breast cancer, treatment of gynecological problems, and treatment for sexually transmitted diseases. [Similarly to

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98. *Id.* (citing Speiser v. Randall, 357 U.S. 513 (1958)) "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech . . . The denial is 'frankly aimed at the suppression of dangerous ideas.'" 357 U.S. at 518-19 (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950).

"A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of 'a law . . . abridging the freedom of speech, or of the press.'" *Rust,* 111 S. Ct. at 1780 (quoting Federal Communications Comm'n v. League of Women Voters of Cal., 468 U.S. 364, 383-84 (1984)).

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." 111 S. Ct. at 1780 (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (ordinance forbidding all picketing within 150 feet of a school except peaceable labor disputes, is void for overbreadth)).

99. 111 S. Ct. at 1781.

100. *Id.* (quoting Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530, 546 (1980)).

101. *Id.* discussing 42 C.F.R. § 59.8(a)(2) (1990) which provides that after a client is diagnosed as pregnant, "the project refers the women for prenatal pregnancy care rather than providing 'options counseling,' which could violate Section 1008 by influencing her choice towards abortion."

42 C.F.R. § 59.8(a)(4) does not prohibit providing information "medically necessary to assess the risks and benefits of different methods of contraception," so long as no abortion counseling is made.

102. 111 S. Ct. at 1781 (quoting 53 Fed. Reg. 2927 (1988) (emphasis in opinion)).

103. *Id.*

abortion information] [n]one of these medical services are strictly preventative preconceptional services."[104]

Furthermore, Justice Blackmun rejected the majority's holding on "advocacy."[105] The case the majority relied on was *Regan v. Taxation With Representation of Washington*,[106] which held that the government has no obligation to subsidize a private party's efforts to petition the legislature on its views.[107] However, in Rust, the advocacy issues are extended to "all speech having the effect of encouraging, promoting, or advocating abortion . . ."[108] These provisions, Justice Blackmun says, "intrude upon a wide range of communicative conduct including the very words spoken to a woman by her physician."[109] The result of such regulation is that it impermissibly forces each petitioner "to be an instrument for fostering public adherence to an ideological point of view [he or she] finds unacceptable."[110] This intrusive, ideologically based regulation, Justice Blackmun said, "goes far beyond the narrow lobbying limitations approved in *Regan*, and cannot be justified simply because it is a condition upon the receipt of a governmental benefit."[111]

The dissent states that a woman seeking the services of Title X has every reason to expect that "her physician will not withhold relevant information regarding the very purpose of her visit."[112] To hold that the doctor-patient relationship is less worthy or substantial when the patient lacks resources to seek a non-government provider, ignores the situation of a vast number of Americans. Justice Blackmun quoted Justice Marshall in saying, "[i]t is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live."[113]

The challenged regulations did violate the First Amendment rights of Title X staff members, according to the dissent. They explained that the

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104. *Id.* n.2.

105. *Id.* at 1782 (the requirement to not encourage, promote or advocate abortion, prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes, far beyond lobbying efforts. The regulations do not, however, proscribe or even regulate anti-abortion advocacy).

106. *Id.* (citing Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983) (discussing a content neutral provision in a tax code involving not-for-profits)).

107. *Regan*, 461 U.S. at 546 (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)) (discussing F.I.T. laws) (Douglas, J., concurring) (consistent with First Amendment constraints, the government may not manipulate subsidy programs in a way aimed at the suppression of ideas it considers undesirable)).

108. *Rust*, 111 S. Ct. at 1782.

109. *Id.*

110. *Id.* (quoting Wooley v. Maynard, 430 U.S. 705, 715 (1972)) (holding that a State cannot require an individual to disseminate an ideological message on his car license plate).

111. 111 S. Ct. at 1782.

112. *Id.* at 1782 n.3.

113. *Id.* (quoting United States v. Kras, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting) (discussing a refusal of an indigent's request to have fees waived for a bankruptcy filing)).

deprivation was a result of the limitation on the staff's freedom of expression as a consequence of their decision to accept employment at a federally funded project.[114] "[I]t has never been sufficient to justify an otherwise unconstitutional condition upon public employment that an employee may escape the condition by relinquishing his or her job."[115] According to Justice Blackmun, "[i]t is beyond question 'that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.'"[116]

In his last point, Justice Blackmun asserted his doubts: "[O]ne can imagine no legitimate governmental interest that might be served by suppressing such information."[117] "[F]reedom to differ," he added, "is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[118] In the view of Justice Blackmun, in the past, "the Court has allowed to stand only those restrictions upon reproductive freedom that, while limiting the availability of abortion, have left intact a woman's ability to decide without coercion whether she will continue her pregnancy to term."[119] The majority's decision in *Rust*, "places formidable obstacles in the path of Title X clients' freedom of choice and thereby violates their Fifth Amendment rights."[120] Both the purpose and the result of the new regulations is to deny women the ability to choose their

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114. 111 S. Ct. at 1783.

115. *Id.* at 1782.

116. *Id.* (quoting Abood v. Detroit Board of Education, 431 U.S. 209, 234 (1977) which cited Elrod v. Burns, 427 U.S. 347, 357-60 (1976)); Perry v. Sindermann, 408 U.S. 593 (1972); and Keyishian v. Board of Regents, 385 U.S. 589 (1967). Justice Blackmun also noted that:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'

Rust, 111 S. Ct. at 1782-83 (quoting *Perry*, 408 U.S. at 597).

117. 111 S. Ct. at 1784. Justice Blackmun can give no legitimate reason for the suppression, some commentors agree and have offered speculation applicable to the subject. *See* Dean Pappas, *The Independent Sector and the Tax Law: Defining Charity in an Ideal Democracy*, 64 S. CAL. L. REV. 461, (1991). By controlling funding for charitable deduction, the government can lead some organizations into financial ruin. Conditional government funding to non-profits could include attempts to regulate abortion clinics and free speech.

118. 111 S. Ct. at 1784 (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that a compulsory pledge of allegiance in public schools was unconstitutional)).

119. *Id.* (citing Maher v. Roe, 432 U.S. 464 (1977) (defeating an indigent's right to a non-medically necessary abortion, even though the State chose to pay child birth expenses) Webster v. Reproductive Health Services, 492 U.S. 490 (1989), and Harris v. McRae, 448 U.S. 297 (1980)). *See supra* notes 27, 76, 77, and *infra* note 214 and accompanying text.

120. 111 S. Ct. at 1785.

reproductive destiny. That result is not the consequence of poverty, but of the government's deliberate, "ill-intentioned distortion of information it has chosen to provide."[121] For Justice Blackmun, "the majority disregards established principles of law and contorts this Court's decided cases to arrive at its preordained result."[122]

II. ANALYSIS

A. Constitutional Issues

1. Liberty

One importance of *Rust* lies in the battle between the justices over the process of characterizing the issues, and the resulting "viewpoint decision" which has been imposed, to some degree, on all Americans.[123] The majority used the "tool" of characterization to examine and resolve the issues of this case. Once defined or characterized the conflicting interests were then balanced by the majority by applying selective case and statutory law.[124] For instance, "Liberty" is a majestic term, a concept which gathers meaning from the whole of our social, legal and political environment. Concepts such as liberty, change with the changes in our society.[125] It is elementary that liberty, as protected under the Constitution, extends far beyond the mere basic freedom from physical restraints. Liberty is protected under the Due Process Clause which has been held to extend to such intangibles as the freedom to marry,[126] to use contraceptives,[127] or even

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121. *Id.*

122. *Id.* at 1786.

123. The new regulations arguably violate the First Amendment by impermissibly discriminating on the basis of view-point. This is true because the regulations require no counseling, referral, or even discussion on the lawful option of abortion, while at the same time compelling the provider to give unweighted information promoting the continuation of pregnancy. *See* 111 S. Ct. at 1781, 1782, explaining the dissents view that the regulations violate the free speech rights of private health care organizations that receive and co-fund Title X programs, as well as their staff, and their patients, because they impose view-point-discriminatory conditions on government subsidies.

See also Justice Blackmun's dissent, 111 S. Ct. at 1780 (citing Regan v. Taxation With Representation of Washington, 461 U.S. 540, 548 (1983)) where the dissent argues that government may not place certain conditions on the receipt of federal subsidies, and it may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'"

124. Because the majority chose a very specific non-constitutional way to characterize the plaintiff's interests the majority avoided any deeper vision into the constitutional basis of the important matters before the Court. *See e.g., Rust,* 111 S. Ct. at 1786, illustrating Justice's Blackmun's comment that the majority merely manipulated the law to arrive at a preordained result.

125. Board of Regents v. Roth, 408 U.S. 564, 571 (1972).

126. Loving v. Virginia, 388 U.S. 1, 7 (1967). The Court invalidated a statute addressing anti-miscegenation as institutionalizing "White Supremacy."

the decision to bear children.[128] In challenges of a controversial nature, such as those involving reproductive freedom, one of the first determinations of the Court, must be to establish what interests are involved.[129]

Beginning in 1965 with *Griswold v. Connecticut*,[130] where the court identified an interest in reproductive privacy, and later in *Eisenstadt v. Baird*,[131] clarifying an interest in individual, as opposed to marital sexual privacy, and later still in *Roe v. Wade*,[132] protecting an interest in self-determination, the Court first defined and then protected a specific interest in the area of constitutional rights called privacy. If the characterizations of the Court had been too narrow, the Court may have denied Constitutional protection, because it would have determined that the issues laid outside the scope of a constitutional guarantees.[133] After characterizing issues as liberty issues, the Court was able to demonstrate support, and a right to protection of privacy in terms of fundamental, constitutional rights and freedoms. Once an interest is characterized as a particular liberty or freedom issue, the Court may then balance the private interest, the risk of erroneous

127. Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to use contraception to unmarried persons) and Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (in which the Court characterized the married couples right to use contraceptives, as a general right of privacy).

128. Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974). In *La Fleur*, the Court held that mandatory maternity leave infringed upon the freedom of personal choice in the private decision to have children. The Court found this was a violation of due process under the Fourteenth Amendment. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (referring as well, to liberty in their concurring opinions); *Rust*, 111 S. Ct. at 1786 (discussing the deprivation of liberty affecting the Title X segment population); and Roe v. Wade, 410 U.S. 113, 153 (1973) (where the Court based the right to privacy for a women's choice of abortion in exercising her reproductive rights, on the Fourteenth Amendment's concept of personal liberty).

129. *See Rust*, 111 S. Ct. at 1767 (illuminating the process of the Court in structuring its starting points for departure).

130. 381 U.S. 479 (1965). In *Griswold*, the Court determined that an interest could be characterized as an interest in privacy from governmental intrusion into the marital choice of breeding. The Court found that the use of contraceptives was a protected right within that freedom of choice.

131. 405 U.S. 438 (1972).

132. 410 U.S. 113. *See supra* notes 27, 77 and accompanying texts. *Roe* held that women have the fundamental liberty to choose whether to give birth, and so before viability the state has no compelling interest which could override an individual's decision.

See also Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 429-30 (1983) (construing Roe, which holds that "a pregnant woman must be permitted, in consultation with her physician, to decide to have an abortion and to effectuate that decision free of interference by the State.") *See Rust*, 111 S. Ct. at 1784, discussing liberty and its meaning, as well as discussing *Akron* and *Roe*, both of which support the idea that by damming the flow of information from the physician to the patient, the Secretary's regulations impermissibly impede a women's exercise of her constitutional right od privacy.

133. *Rust*, 111 S. Ct. at 1778-79 (where Justice Blackmun's dissent addressed how the majority dealt with this issue).

deprivation, and the government's interest against the great weight of our historical constitutional guarantees.[134]

The Constitution was made to protect a new country formed from diverse and mostly immigrant populations possessing fundamentally differing views. The accident of view-point on abortion as natural, novel, or even shocking, when reflected in regulations does not pre-determine their constitutionality. Since non-enumerated Constitutional rights are retained by the people under the Ninth Amendment, the customary privileges and immunities are sheltered by the right to privacy and liberty concepts. The potentiality of viability in embryotic life is not an historically protected state interest under European or American law, and therefore, the decisional authority over choice must remain with the woman and not the state.

In *Rust*, the majority used several specific characterizations of the issues, and placed all the contest outside the scope of constitutional freedoms. The majority literally announced that the challenged regulations, "do not raise . . .'grave and doubtful constitutional questions.'"[135] This deliberate mischaracterization allowed the majority to reach the implicit conclusion that the constitutional rights of the poor, are somehow different from those shared by the rest of society. Assuming administrative agencies are not wastefully spending taxpayer funds, the decision also implicitly suggests that the Secretary's old regulations were somehow at fault. This implied fault is indicated by the very need to have spent taxpayer's money to reinterpret the regulations, even though no actual abuse had occurred or was cited.[136]

Dr. Rust and his co-petitioners, however, regardless of the deliberate mis-characterization of their position, did raise basic issues asserting

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134. Mathews v. Eldridge, 424 U.S. 319, 333, 335 (1976) (addressing a denial of Soc. Sec. benefits) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)) (where a failure to notify a natural father of the pending adoption of his allegedly unsupported son was held to be a violation of due process). *Mathews*, 424 U.S. at 335:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

See J. MOHR, ABORTION IN AMERICA 167 (1978) (hypothesizing that Protestant fears about keeping up with the reproductive rates of Catholic immigrants played a greater role in enacting anti-abortion laws in nineteenth-century America than did Catholic opposition to abortion.) *See* Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 601 (1986) ("The fetus was not given any rights independent of its mother; rather, it was only after the fetus became a person at birth that it acquired legal rights as a separate entity.").

135. 111 S. Ct. at 1771 (quoting United States v. Delaware and Hudson Co., 213 U.S. 366, 408 (1909)).

136. 111 S. Ct. at 1769, 1788 (where Justice Stevens remarks on this by noting that the Secretary's new regulations represent an assumption of policy making duties reserved to Congress). *See supra* notes 17, 35 and accompanying texts on the lack of instances of abuse under the old regulations. The fact that two courts of appeals and a divided majority of the Supreme Court could differ clearly indicates that constitutional issues are implicated.

fundamental rights. Their issue was the denial of First and Fifth Amendment rights for themselves and women, by affirmative government interference in reproductive planning projects.[137] In *Roe v. Wade,* and its progeny,[138] the Court laid out the value of reproductive freedom quite clearly. "'[L]iberty,' if it means anything, must entail freedom from governmental domination in making the most intimate and personal decisions."[139] In *Akron v. Akron Center for Reproductive Health, Inc.*,[140] the Court held that the government's interest in ensuring that a pregnant woman receives the relevant medical information "will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth."[141]

Rust is but a part of a line of cases which illustrate the struggle between Americans who want to preserve America's social diversity and freedom options based on liberty principles, and those who wish to limit those freedoms.[142] Some Americans perceived that "dangerous ideas" come from too much social diversity and freedom.[143] Similar to our genetic and biological needs, however, diversity in and freedom of expression offer essential challenges to and benefits for the ongoing evolution of our society.

Since Dr. Rust's complaint alleged violation of constitutionally based freedoms, in part based on the regulation's imposition of viewpoint based restrictions, core constitutional values are central to the case.[144] The mischaracterization the majority employed, conveniently allowed them to deal

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137. *Id.* at 1781. *See* Roe v.Wade, 410 U.S. 113 (1973) and its progeny for an in depth treatment of a woman's fundamental, constitutionally protected right to self-determination.

138. Roe v. Wade, 410 U.S. 113 (1973). *See, e.g.*, Planned Parenthood of Cen. Mo. v. Danforth, 428 U.S. 52 (1976) defining the viability of a fetus, a duty to preserve life, and a denial of spousal consent requirements. *See* Lawrence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights and the Dilemma of Dependance,* 99 HARV. L. REV. 330 (1985) (debating the obstacle/benefit distinction in abortion funding cases).

139. 111 S. Ct. at 1784 (explaining that the Fifth Amendment protects a pregnant women's right to be free of affirmative government interference in her decision).

140. 462 U.S. 416 (1983). *See supra* note 132 and *infra* note 160 and accompanying texts.

141. 111 S. Ct. at 1784 (construing *Akron*, 462 U.S. at 429-30). In *Akron*, the State of Ohio passed an ordinance requiring all abortions performed after the first trimester of pregnancy to be performed in a hospital. The Supreme Court found the section unconstitutional. *Id.* at 1784 also citing Maher v. Roe, 432 U.S. at 464, 473 (quoting Whalen v. Roe, 429 U.S. 589, 599, 600 & nn. 24, 26 (1977)) (noting that abortion cases "recognize a constitutionally protected interest 'in making certain kinds of important decisions' free from governmental compulsion.").

In *Maher*, 432 U.S. at 464, the Court upheld a statute allowing medicaid recipients payments for medical services related to childbirth, but denying such payments for non-therapeutic abortions. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Id.* at 475. *Maher* dealt with the funding of abortions in a federal program, and did not address information or referral.

142. *Rust,* 111 S. Ct. at 1784 (discussing a test of freedom rights as the right to differ.)

143. Id. at 1772, 1780.

144. *Id.* at 1779. This perspective is verified by the fact that two of the three Court of Appeals which reviewed the challenges to the regulations invalidated them on constitutional grounds, Massachusetts v. Secretary of Health and Human Services, 899 F.2d 53 (1990), and Planned Parenthood Federation v. Sullivan, 913 F.2d 1492 (10th Cir. 1990).

with the petitioner's interests outside the context of constitutionally protected rights. This permitted the majority to base their decision on the relatively simplistic question of whether the Secretary of HHS had the authority to revise its own regulations, and not the weightier question of whether the form of those revisions were functionally needed or constitutionally appropriate.[145]

The majority used the characterization "tool" in several other situations as well. For instance, the majority permitted characterization of the Act's term "abortion as a method of family planning" as including the mere counseling of abortion, its procedures, risks and provider list.[146] Information is not a form of birth control. This is a new and unique view in definitional terms.[147] As an initial premise, "family planning" refers to the process by which individuals ordinarily regulate their reproductive fertility and sexual potency to make it more or less likely they will reproduce. Abortion preserves individual bodily integrity when "family planning" has failed to limit fertility or sexual potency for whatever reason. Abortion is clearly not a method of "family planning" because its function does not make it more or less likely that an individual would undergo reproduction. The mere counseling on a common and potentially dangerous medical procedure called abortion, its processes, risks and provider list cannot, itself, be considered to encourage abortion as a method of "family planning."[148]

The majority also mistakenly essentially characterized the government's: (1) intrusion into the grantee-providers' and their staff's freedom of expression, as a permissible cost of employment within a Title X project;[149]

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145. 111 S. Ct. at 1788 (in Justice O'Connor's dissent she touches upon the constitutional and policy making aspects of the Secretary's regulations and their unreasonable interpretations of the statute, as one contrary to the intent of Congress).

146. *Id.* at 1768, 1769. *See also Rust,* 889 F.2d at 407. The Court of Appeals stated that a program that counsels use of a particular contraceptive device plainly treats that device as a "method of family planning." Affirmed by the majority, this decision still lacks a logical base. A doctor who counsels a patient on the procedures and potential hazards of the medical procedure called abortion is not necessarily promoting the idea that the patient have one. Similarly, a stock broker who counsels a client on government or junk bonds is not necessarily promoting them. The words advising, informing, educating all have completely separate meanings from the word promoting. Information on mutual funds or stocks, or on the Constitutional right of abortion is not analogues to promoting any of them. Information and the freedom to communicate ideas, even unpleasant ones is a right under the Constitution.

147. 111 S. Ct. at 1786-88. Justice Steven notes the majority's lack of attention to the fact that the statute has been consistently interpreted for over 18 years and four presidents. His dissent qualifies the regulations as prohibiting conduct, not speech, and gives several examples of other regulations that underscore this distinction.

148. Abortion is more appropriately categorized as a related medical service, much as are treatments for sexually transmitted diseases, adoption services, and breast cancer screenings, all of which are a part of the Title X health services program. *Id.* at 1781 n.2. *See also id.* at 1783 discussing the physician's ethical duty to the patient to advise on all medical options.

149. *Id.* at 1775. *See id.* at 1779 (noting that the Tenth Circuit found the regulations to "fal[l] squarely within the prohibition in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) . . . against intrusion into the advice a woman requested from or is given by her doctor.")

(2) intrusion into the doctor/patient relationship as permissible, as long as it remained within the context of Title X projects;[150] (3) intrusion into the client's right to medical self-determination without coercion as the price of government assistance;[151] (4) intrusion into the duty doctors' owe to their patients and professional oath as permissibly intermittent and conditional;[152] and (5) intrusion into the grantee-providers' freedom of expression by virtue of matching funds in Title X projects, as non-existent.[153]

2. First and Fifth Amendment Rights

The majority has held that individuals employed in Title X projects must relinquish their free speech and adhere to the regulation's imposed restrictions as a job requirement.[154] This was not unconstitutional, they explained, as it was a condition of employment in a Title X program, employment in which is not mandatory. Such a gross denial of basic freedoms does not, according to the majority, raise "grave and doubtful constitutional questions."[155] The decision implies that such restrictions on basic First and Fifth Amendment freedoms of speech and self-determination, are merely time and place restrictions and, therefore, are not pertinent to the basic exercise of constitutional rights of free expression and the exchange of ideas and information. However, the time and place restrictions on the free speech of Title X providers is their entire working lives.

No constitutional right, for ourselves or our forefathers, has ever previously been found to rely on the manner of a person's employment or their choice of health care provider. America's constitutional freedoms are not for sale, especially not in a government buy-back program which it packages in the guise of a desperately needed health care program for poor Americans. It is despicable for the government to bribe the poor and helpless into relinquishing their fundamental American rights with a health entitlement program in the guise of a public charity.

It is the clear duty of government to care for the poor of our society. A duty which is performed for its own sake, not as a political business

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The First Circuit, en banc found the regulations to violate both the privacy rights of the Title X patients and the First Amendment rights of Title X grantee-providers. A bare majority of the Justices in *Rust* reached the opposite result. That alone demonstrates that important questions of constitutionality were suspect and strongly suggests that the outcome was impermissibly view-point directed.

150. 111 S. Ct. at 1777-78.

151. *Id.* at 1776-77.

152. *Id.*

153. *Id.* at 1775.

154. *Id. See generally* Alan E. Brownstein & Stephen M. Hankins, *Pruning* Pruneyard: *Limiting Free Speech Rights Under State Constitutions On the Property Of Private Medical Clinics Providing Abortion Services,* 24 U.C. DAVIS L. REV. 1073 (1991) (discussing the conflict of government controlled speech and commercial free speech).

155. 111 S. Ct. at 1771.

venture in buying up constitutional rights.[156] Even if an American can ever bargain away his or her constitutional rights, it should never happen as between the government and their charge; the poor. The uneven bargaining power of the government alone in such a contract would invalidate it. Freedoms in America can never be exclusively for the privileged who can afford them.

The Public Health Services Act did not preordain the unfair result which the majority imposed. "Not a word in the statute, however, authorizes the Secretary to impose any restrictions on the dissemination of truthful information or professional advice by grant recipients."[157] It is the majority's decision that differentiates the distribution of basic freedom of information and expression between the social classes.[158]

The Secretary's regulations impermissibly interfered with the Title X client's First and Fifth Amendment rights to receive information about reproduction, and the grantee-providers' First and Fifth Amendment rights to provide pertinent and necessary medical information.[159] Under the holding in *Rust*, the majority invites government violation of the petitioner's constitutional rights, and control of free speech in professional relationships. The majority superficially evaded responsibility for this offensive result by attempting to distinguish *Akron v. Akron*,[160] and *Thornburgh v. American College of Obstetricians & Gynecologists*,[161] on a "post-hoc" basis.[162] They claimed that the government's intrusion into the doctor/patient dialogue (invalidated in those cases) applied to all physicians, while the restrictive regulations in Rust, pertain only to a class of health care providers employed at Title X projects.[163]

This characterization is both misleading and incorrect. The rights protected in *Akron*, and *Thornburgh*, are constitutionally protected personal

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156. *See generally* Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6 (1988) (describing unconstitutional government conditioning of public benefits).

157. 111 S. Ct. 1787 (Stevens, J., dissenting).

158. *Id.* at 1779, 1783 (this is implicit in the conditioning of a public benefit).

159. *Id.* at 1782.

160. *Id.* at 1777 (citing to Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (invalidating an ordinance requiring all physicians to make specific statements to patients)). *See supra* notes 132, 140, 141, and *infra* notes 162, 171, 178 and accompanying text.

161. *Id.* at 1777 (citing Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (invalidating a state statue mandating a list of agencies offering alternatives to abortion)). *See supra* note 149, and *infra* notes 162, 165, 178, and accompanying text.

162. *Id.* at 1777 (noting that the majority felt it critical in the *Akron* and *Thornburgh* decisions that all doctors within the jurisdictions would be required to provide specified information on abortion. In contrast, the majority said, in *Rust* a doctor's right to give and a women's right to receive information on abortion are unfettered outside the Title X project). *See also id.* at 1775, and 1785 (noting the majority's comment that the new regulations leave a client in the same position as if the government had never enacted Title VII).

163. *Id.* at 1777.

rights, not rights bestowed or denied by virtue of government or non-government supplemented employment or health plan participation.[164] The very essence of a constitutional right is that it is shared by all Americans. The manipulation of the doctor/patent dialogue is clearly an effort "to deter a woman from making a decision that, with her physician, is hers to make."[165]

The Secretary's regulations required doctors in Title X projects to refer a pregnant woman to pre-natal care regardless of her personal medical situation or preference. Should the indigent client be informed and verbal enough to inquire about her abortion option, the regulations then require the doctor to respond that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."[166] The doctor's words are controlled by government, and not by medical opinion, the oath of the profession, or the needs of the patient.

The poor, and mostly uneducated Title X client is likely to construe the carefully phased dictated response from her doctor as balanced medical advice. If she then foregoes her option to seek an abortion, it may be due in great part to the impact of this essentially "pre-recorded" government message presented through a trusted figure, her doctor.

Upon hearing this "advice" women will either carry the pregnancy to term, or seek a non-Title X program to assist them with coping with the failure of family planning practices to regulate the growth of their family. However, because the regulations hinder the flow of information to the pregnant, possibly frightened and confused client, the receipt of further information on all available services could be substantially delayed. The decision in *Rust* could re-open wide the door to illegal and unconstitutional later-stage abortions.[167] The medical soundness of the abortion procedure is presently lessened as the pregnancy advances, thereby substantially increasing the risk to the woman. The result of the Secretary's dictatorial regulations is to lessen the incident of abortion by interrupting the flow of

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164. In *Thornburgh*, 476 U.S. at 762, the Court disapproved a requirement that a physician provide a woman with a list of agencies offering alternatives to abortion, finding it to be "nothing less than an outright attempt to wedge the [State]'s message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Accord,* Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (supporting the proposition); *see* Loving v. Virginia, 388 U.S. 1, 12 (1967).

165. 111 S. Ct. at 1786 (quoting *Thornburgh*, 467 U.S. at 474, 759).

166. 42 C.F.R. § 59.8(b)(5). Yet, according to Justice Stevens in his dissent, "[n]ot a word in the statute, however, authorizes the Secretary to impose any restrictions on the dissemination of truthful information or professional advice by grant recipients." 111 S. Ct. at 1787.

See also 111 S. Ct. at 1788. Justice Stevens stated in his dissent that "In a society that abhors censorship and in which policymakers have traditionally placed the highest value on the freedom to communicate, it is unrealistic to conclude that statutory authority to regulate conduct implicitly authorized the Executive to regulate speech." *Id.*

167. *Id.* at 1785.

information at the risk of the general well-being of women in the program and their families.[168]

By suppressing medically pertinent information and interjecting a non-medically related, physician delivered ideological message, the government imposes "formidable obstacles" on the client's freedom of choice.[169] Such impositions by government violate the indigent-client's Fifth Amendment rights.[170]

> 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 lives, in the hands of medical professionals. One seeks a physician's aid not only for medication or diagnosis, but also for guidance, professional judgment, and vital emotional support. Accordingly, each of us attaches profound importance and authority to the words of advice spoken by the physician.[171]

In approving the regulations, the majority ignored that entire line of cases which warns, that regulations tending to "confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession," are absurd.[172]

The majority offhandedly announced that it did not need to consider the intrusion caused by the new regulations on the professionals or their clients as the Title X regulations do not significantly impinge upon them or the doctor-patient relationship.[173] The majority justified the federal government's interjection by stating that the regulations did not require the professional to say anything that they did not hold true.[174] The Court ignored the fact that the withholding of information is also a communication, that such non-information is deliberate misinformation, and that the "profes-

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168. *Id.* at 1782 n.3, and 1785 (discussing a women's expectations in dealing with her doctor, and the impact of misinformation, or no information).

169. *Id.* at 1785.

170. *Id.* (noting that "It is crystal-clear that the aim of the challenged provisions . . . is not simply to ensure that federal funds are not used to perform abortions, but to 'reduce the incidence of abortion.'")

171. *Id. See also id.* at 1785-86 (citing *Akron*, 462 U.S. at 447) which quoted Colautti v. Franklin, 439 U.S. 379, 387 (1979) ("[I]n *Roe* and subsequent [doctor/patient] 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.'"); *supra* note 132 and accompanying text.

172. 111 S. Ct. at 1786 (citing Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 67, n.8 (1976)).

173. *Id.* at 1776. *See* New York v. Sullivan, 889 F.2d at 415 (citing Carole I. Chevin, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 STANFORD, L. REV. 401, 408 (1989)) (stating that of the 4.3 million people that Title X serves, out of its target population of 14.5 million women, all have incomes 150% below the poverty line). In light of these figures it seems quite possible that Title X programs are the only care these women might obtain. It also seems possible that many do not understand English, or know how to go about questioning a doctor, or inquiring about their rights.

174. 111 S. Ct. at 1776.

sional" is ethically bound to inform the client on all relevant matters. This is true because within the professional-client relationship, it is the client who makes the decision once given the options by the informed professional.

Without a single poll, or statistical guide of any kind the majority came to the startling conclusion that the expectations of the patient-recipients, as to whether they would be receiving comprehensive medical advice, was non-existent.[175] According to the majority, the program does not provide post-conception medical care and so, therefore, a doctor's silence regarding abortion options could not "reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her."[176] But this reliance, based in part on the claim that Title X is merely limited to preventative services is misleading, since in addition to requiring referral for prenatal care and adoption services, the regulations permit general health services such as physical examinations, screening for breast cancer, treatment of gynecological problems, and treatment for sexually transmitted diseases.[177] In light of these non family planning, gynecological services, and the congressional mandate of a broad based health program, the client would more likely get the impression that the physicians silence on abortion meant abortion was not medically appropriate for her, or possibly that it was illegal.

The patient is denied complete professional information before making a medical decision. The regulations, thus violated the woman's Fifth Amendment right to medical self-determination, and sabotaged her informed decision powers.[178] Dr. Rust showed, that since recipients of Title X funding projects are indigent, these women will be forced to relinquish their constitutionally protected right of abortion because they will no longer have meaningful access to abortion. The majority has construed a self-serving legislative policy which, burdens and practically eliminates the Title X client's access to abortion. The new regulations gut the intent of Congress in enacting Title X as part of a comprehensive health program,[179] and leaves the

175. *Id.* at 1776.

176. *Id.* at 1776.

177. *See supra* note 104 and accompanying text. *See* 111 S. Ct. at 1764 (discussing Title X's funding uses as, preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities).

178. Under Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983) (invalidating a city ordinance requiring all doctors to make specific statements to the patient prior to performing an abortion). The ordinance was designed to ensure the woman's consent was informed, and under, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (striking down a state statute mandating that a list of agencies offering alternatives to abortion and a description of fetal development be provided), the government cannot interfere with a woman's right to make an informed and voluntary choice by placing restrictions on the patient/doctor dialogue. Yet, in *Rust,* the High Court comes to the opposite conclusion, even while they admit, "It would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project . . ." The Court concludes, however, that the Constitution does not require that the government conform its mandated program provide that information. 111 S. Ct. at 1777-78.

179. 111 S. Ct. at 1768.

impoverished client wanting abortion information, in a position of no benefit from the public's tax dollars or Congressional legislation.[180] It may also leave her without adequate time in which to safely seek an abortion, if she is confused by the restrictions or the limited medical advice.

The majority with no medical experience to determine what type of medical resolution would best serve any particular client, dictated to the physicians what they may and may not do. Further, permitting regulations that unfairly benefit one healthcare provider—non-abortion providers, as opposed to abortion providers—are arbitrary and capricious.[181]

The Secretary's regulations also provide nonexclusive factors for the Secretary to consider in conducting a case-by-case finding on objective integrity and program independence. It seems, therefore, that the survival of health care providers will depend on how well they please the political appointee, the Secretary.[182]

Further, consider the test being used by the High Court.[183] The Court implemented a reasonable basis test. According to the majority, the Secretary's regulations are a plausible construction of the Act, and therefore, entitled to deference.[184] But even assuming arguendo, that no constitutional issues are raised in *Rust*, gender discrimination is still an issue in this case because the new regulations clearly do not impact on men who seek government health program assistance. Under this middle tier test reserved for quasi-suspect classifications the burden is on the state to show a substantial relationship to an important government objective. Outcomes such as the one

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180. 111 S. Ct. at 1777. The majority wrongfully asserts that the difficulties a woman encounters when a Title X project does not provide abortion counseling or referral leave her in "no different position than she would have been if the government had not enacted Title X." This is self-serving, because any delay caused by a misunderstanding as to the scope of the regulations or the limited advice of her doctor may cause a woman to forfeit the time during which an abortion may be safely performed. It also deprives her of the benefit of her tax dollars which, in part, fund the Title X program.

See also 111 S. Ct. at 1785 n.5 In tort liability, commentators have pointed out that, "[i]f there is no duty to go to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which make his situation worse . . . The same is true, of course, of a physician who accepts a charity patient. Such a defendant will then be liable for a failure to use reasonable care for the protection of the plaintiff's interests." *Id.* (quoting PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 378 (5th ed. 1984) (discussing the duty owed to charity patients with the view of providers as good Samaritans)).

181. 111 S. Ct. at 1765 (describing the regulations requirements in constructing the provider list). In New York v. Sullivan, 889 F.2d at 415, before the Court of Appeals, in Circuit Judge Kearse's dissent, she commented on her belief that the Secretary's new interpretation of the regulations were capricious and violative of rights guaranteed by the Constitution. Judge Kearse referred to 42 C.F.R.§§ 59.7, 59.10 (1988) entitled PROHIBITION ON COUNSELING AND REFERRAL FOR ABORTION SERVICES. These sections state that Title X projects may not provide counseling concerning abortion or provide referral for abortion. Judge Kearse added, "There can be no doubt that the Secretary intends this regulation to forbid a grantee from informing a pregnant woman of the availability of abortion and even from telling her where she can get abortion-related information." *Id.* at 415-16.

182. New York v. Sullivan, 889 F.2d 401, 406. *See supra* note 146 and *infra* notes 189, 217 and accompanying texts.

183. *Rust,* 111 S. Ct. at 1767.

184. *Id.*

in *Rust*, rally support for the argument that the better test for laws which "work a gender classification" governed is strict scrutiny.[185]

3. Co-funding

The majority was incorrect in refusing to recognize that the government cannot invade the constitutional rights of grantee-providers or client-recipients of federally funded health-care programs, based on the existence of federal co-funding.[186] The label the majority gives the constitutional intrusion, e.g., a regulatory restriction on free speech in the context of a federally funded health maintenance project, does not accurately frame the true nature of economics within Title X projects. That is because the Title X program requires matching grantee-provider funds.[187] The Secretary's restrictions on reproductive planning, therefore, affected a project where 50% of the financing is being supplied by independent non-government sources. As discussed in *FCC v. League of Women Voters of California*,[188] the mere fact that government funds are involved should not trigger, governmental viewpoint domination of domestic health projects.[189]

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185. *See* PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, *Classification Based on Sex* 576-621 (2d ed. 1983). *See generally* James M. McGoldrick, Jr., *The Separation of Powers Doctrine: Straining Out Gnats, Swallowing Camels*, 18 PEPP. L. REV. 95 (1990) (discussing aspects of recent Supreme Court decisions that indicate an intrusion by the Court into the powers of Congress, and the proper test for gender discrimination cases).

186. It is the duty of government to support the constitution, not to promote view-point implementation of publicly funded medical programs. The Secretary's prompting for new regulations came from an executive office. The administration may be using public funds to deliver its political message, and appease its political supporters. View-point judicial decisions are allowing the politicalization of the judiciary, and an erosion of the Separation of Powers doctrine.

187. 111 S. Ct. at 1775. The providers argued that the required matching funds aspect of Title X invalidated the regulations because they penalized privately funded speech.

188. *Id.* (citing Federal Communications Comm'n v. League of Women Voters of Cal., 468 U.S. 364 (1984) (refusing to ban editorials from stations receiving federal financial aid)). *See infra* note 212 and accompanying text.

189. *Federal Communications Comm'n*, 468 U.S. at 400. The Court invalidated a federal law providing that noncommercial television and radio stations that obtained federal funds were "barred absolutely from all editorializing" because it "is not able to segregate its activities according to the source of its funding," and thus, "has no way of limiting the use of its federal funds to all non-editorializing activities." The law in *FCC* would have had the effect that a noncommercial education station that received only 1% of its overall income from [federal] grants is barred absolutely from all editorializing, "and barred from using even wholly private funds to finance its editorial activity." The Court recognized that were Congress to permit the recipient stations to establish 'affiliate' organizations which could then use the station's faculties to editorialize with non-federal funds, the statute "would plainly be valid." In *FCC*, however, the Court did not require separate facilities for the non-federally funded activities.

Because Title X requires that grant recipient providers contribute to the financing of Title X projects through matching funds and grants, the regulation's restrictions on abortion counseling and advocacy penalize privately funded speech. Under *FCC*, the larger the health care facility of the grantee the more intrusive on free speech the regulations would become. This is true because the ratio of Title X federal funds to the grantee's total income from other sources would be small.

Title X offers subsidies. The denial of subsidies based on any viewpoint, nonetheless a neutral viewpoint (as existed under the old HHS regulations), is unconstitutional under precedent.[190] The denial of subsidies is meant to regulate what some Americans believe are "dangerous ideas."[191] This philosophy ignores the fact that diversity, and tolerance of diversity are necessary ingredients in our "New World." Justice Stevens dissenting, said, "[l]ike the statute itself, the regulations prohibited conduct, not speech."[192]

Beyond the contradictions raised by the majority's decision and the precedent cases such as FCC, on co-funding issues, is the Court's decision in *United States v. Kokinda*.[193] There, the Court recognized that the existence of a government subsidy, in the form of property, did not justify restriction of free speech in areas that had "been traditionally open to the public for expressive activity."[194] This holding should clearly apply to the area of publicly funded health services like Title X which often take place in educational institutions. Similarly, the Court has recognized that universities, and other educational institutions that could receive Title X funds, are traditional spheres of free expression, "so fundamental to the functioning of our society . . . ,"[195] that conditions attached to the expenditure of government funds are restricted by the vagueness and overbreadth doctrines of the First Amendment.[196] Adding to that recognition of the importance of and fundamental need for diversified expression, by analogy the traditional professional relationship of doctor and patient must enjoy protection under the First and Fifth Amendments from governmental interference by way of regulation.

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190. *See supra* notes 77 and 128 and accompanying text (discussing due process); *Rust*, 111 S. Ct. at 1781 (discussing the view-point based restrictions).

191. 111 S. Ct. at 1780 (Blackmun, J., dissenting) (discussing Speiser v. Randall, 357 U.S. 513, 518-19 (1958)) (the term "dangerous ideas" is meant to indicate diverse ideas. Accepting the preservation of America's right to differ is central to reducing view-point government impositions.)

192. *Id.* at 1787-88.

193. *Id.* at 1776 (citing United States v. Kokinda, 110 S. Ct. 3115, 3119 (1990); Hague v. CIO, 307 U.S. 496, 515 (1939); and Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (all discussing speech activity)).

194. *Rust*, 111 S. Ct. at 1776.

195. *Id.* The Court presents a view of universities as an oasis of free expression in isolation from the daily existence of most Americans. This portrayal although poetic perhaps, is a wholly unauthorized corralling of First Amendment rights.

Briefly, Title X provides about a third of all public funds for family planning clinics, or $475,000,000 in fiscal year 1988. Four hundred clinics served 4,300,000 clients. *See* New York v. Bowen, 690 F. Supp. 1261, 1263 (S.D.N.Y. 1988). It therefore, may not be practical to condition subsidies on the forbearance of abortion counseling and maintain: that Title X's medical services are comprehensive, cost efficient, maintain medically complete healthrecords, or offer referrals to competent third party care providers.

196. *Rust*, 111 S. Ct. at 1776 (citing Keyishian v. Board of Regents, 385 U.S. 589, 603, 605-06 (1967) (upholding a State university professor's right not to discuss possible communist affiliations)).

B. *Constitutional Avoidance*

Justice O'Connor in her dissent, put forth a powerful argument that on the basis of improper statutory construction alone, the Secretary's interpretative regulations were invalid.[197] When a particular interpretation of a statute raises serious constitutional problems, the Court is obliged to avoid it. This flows from the "time-honored practice" of the Court "of not reaching constitutional questions unnecessarily."[198] Justice O'Connor stated, "In this case, we need only tell the Secretary that his regulations are not a reasonable interpretation of the statute."[199] Since other acceptable constructions of the Act which did not disturb protected constitutional rights remained available, the Court should have construed the statute to avoid the agency's interpretative regulations from intruding on fundamental rights.

Clearly, the Secretary's former regulations did not raise constitutional questions based on former implementation, since the reasons given by the Secretary were admittedly based on political perceptions.[200] Therefore, interpretations of the Title X legislation which did not raise inequities of liberty and constitutional rights were possible.

C. Legislative History

The intent of the Congress is illuminated through the Act, the legislative history, and the prior regulations. They all speak to the contrived political result in the majority's decision.[201] The Court implies as an initial proposition, that general remarks found in the legislative history are not probative of Congressional intent on narrow issues.[202] This position serves no function as an investigatory tool, but it does serve to curtail investigation. Yet, the narrow legislative inquiry being investigated in *Rust*, was whether the legislative history shed any light on the scope of the terms of the Act. The nature of the question assured that the answer could only be determined by reviewing the remarks of Congress, which occurred during the legislative process, and which addressed the scope of the legislation. The legislative history provides ample examples that Congress intended the Act to be construed broadly, such as the emphasis it puts on the proper function of the Act as a broad-based health care program, providing comprehensive services to all persons.[203]

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197. 111 S. Ct. at 1788-89 (O'Connor, J., dissenting).

198. *Id.* at 1788.

199. *Id.* at 1789.

200. *See supra* notes 18 and 35 and accompanying text.

201. 111 S. Ct. at 1786.

202. *Id.* at 1770.

203. *Id.* Further, the lack of amendment or implementation of changes for over 18 years, and refunding processes, are all evidence that congressional intent was satisfied.

Section 59.9 on program integrity mandates the use of separate facilities, personnel and records. This regulation arguably frustrates the intent of Congress in that Title X programs are an integral part of a broader health care system. The House Conference Report stated that the legislation does not and is "not intended to interfere with or limit programs conducted in accordance with State or local laws" and regulations which are supported by funds other than those authorized under this legislation.[204] This would, therefore, include state financed programs permitting abortion counseling, and private funding regulations shared by those similarly situated to the petitioners. Further, from a conservation of resources perspective, non-integration of health options should be impermissible as they burden the health and tax systems with inefficient use of public funds by necessitating duplication of some services, equipment, and staffing.[205]

The Secretary promulgated the program integrity regulations in direct response to the executive branch's observations from the General Accounting Office (GAO) and the Office of the Inspector General (OIG).[206] GAO and OIG reported that "[b]ecause the distinction between the recipients Title X and other activities may not be easily recognized, the public can get the impression that Federal funds are being improperly used for abortion activities."[207] Yet, the supporting documentation of the program shows no abortions had taken place under the Title X program.[208] Use of the word "activities" by the Inspector General was deliberate to attempt to include tangential issues like abortion information. The statute does not disallow abortion information and such is pertinent to the "comprehensive" nature of the health care act.[209] The justification given by the GAO and the OIG is completely illusory and unjustifiable. The House and the Senate are housed in the same building, might not this same public, in the GAO's example, just as easily get the impression they are one and the same?

According to the Secretary, "[h]aving a program that is separate from such activities [as abortion] is a necessary predicate to any determination that

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204. *Id.* (citing H.R. CONF. REP. No. 1667, 91st Cong., 2d Sess. 6, at 8-9 (1970), *reprinted in,* 1970 U.S.C.C.A.N. 5080, 5082). *See generally* Clinton Broden, *Emergency Room Surgery On Abortion Rights*, 6 J. L. & POL'Y 827 (1990) (discussing State challenges and funding in great detail).

See, e.g., The New York Law Journal, Vol. 205, Number 73, Court Decisions: Hope v. Perales, First Judicial Dept., NY County-Supreme Court, 4/17/91 N.Y.L.J. 21 (col. 6) (citing East Meadow Community Concerts Ass'n v. Board of Education, 18 N.Y.2d 129, 133 (1966)); Madole v. Barnes, 20 N.Y. 2d 169, 173 (1967); *accord*, Moe v. Secretary of Administration & Finance, 417 N.E. 2d 113. "Although the poverty of eligible women is not of the State's creation (*Maher v. Roe*) and there is no constitutional obligation to pay for the medical care of the poor (*Id.*), the New York State equal protection clause guarantees equal participation in state benefits once such benefits are extended."

205. Centralization of services is crucial to keeping medical costs down, and maintaining complete medical records.

206. *Rust*, 111 S. Ct. at 1769.

207. *Id.* at 1769-70.

208. New York v. Sullivan, 889 F.2d 401, 418 (1989).

209. 111 S. Ct. at 1787, 1788 (Stevens, J., dissenting).

abortion is not being included as a method of family planning in the Title X program."[210] However, separateness of health programs is usually established by separate funding and bookkeeping, and not by separate housing. The confirmation of accountants and inspectors is a reasonable standard more likely then the Secretary's to avoid waste of public funds in public health programs. This is especially true in light of the fact that no abuses under the prior regulatory system were alleged.

In *Rust*, the Court insisted that regulations requiring separate facilities were valid regardless of whether or not the recipient grantee formed a separate affiliate to refer and counsel clients wanting abortions.[211] That restraint flies in the face of *FCC*, where the Court recognized that sharing physical faculties with a non benefit recipient provider was not an intrusion on the use of public funds.[212] In fact it is a cautious and financially resourceful method of delivering broad based health services to those in need of public support.

The requirement of separate building facilities will provoke a massive duplication of staff, medical equipment, and supplies for state, city, and private providers disseminating information on abortion counseling. The result of the new regulations will be less services for the needy and/or a significant increase in the cost of medical services borne by the taxpayer. Since the national budget is under the constraints of massive debt, no corresponding increase in public funds to enable the outfitting of alternative facilities is likely. Services to the poor will be reduced.

In 1987, the Hyde Amendment[213] limited the appropriations under the Act stating that: "[n]one of the Federal funds provided in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term . . ."[214] The Hyde Amendment does not attempt to limit free speech pertaining to counseling or referral of abortion procedures, or the inherent hazards associated with it. The Amendment speaks only to the "performance" of abortion, therefore, the amendment itself is recent testimony to the continued desire in a later Congress to interpret the Act broadly. For instance, a Senate Report states that:

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210. *Id.* at 1770 (quoting 53 Fed. Reg. 2940 (1988).

211. *Id.* at 1774.

212. Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364, 400 (1989). *See supra* notes 188-89 and accompanying text.

213. New York v. Sullivan, 889 F.2d at 407 (citing the Hyde Amendment, Pub. L. No. 100-202, 101 Stat. 1329-99 (1987)).

214. *Id.* *See* Harris v. McRae, 448 U.S. 297, 315 (1980) (upholding the constitutionality of the Hyde Amendment, which denied public funds for some medically necessary abortions. The provision "places no governmental obstacle in the path of a women who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.")

> This legislation is designed to make comprehensive, voluntary family planning services, and information relating thereto, readily available to all persons in the United States desiring such services; to provide greatly increased support for biomedical, behavioral, and operational research relevant to family planning and population; to develop and disseminate information on population growth; and to coordinate and centralize the administration of family planning and population research programs conducted by the Department of Health, Education and Welfare.[215]

In that same report, it states that "[t]he committee does not view family planning as merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispension of contraception devices."[216] According to a statement of Rep. Kyros, "[This legislation] will make an important contribution to the health of American mothers and children. This bill will make family planning services available to low-income women who presently want and need but cannot afford them and will increase the federal role in population research."[217]

Senator Hart said that "[This] legislation 'moves toward providing much needed medical family planning services to millions of women who cannot afford them, and it provides for the research that will help us better to understand the phenomena of population growth and enable all couples to regulate fertility according to their individual consciences.'"[218]

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215. New York v. Sullivan, 889 F.2d at 408 (quoting S. REP. NO. 1004, 91st Cong., 2d Sess. 3 (1970), *excerpted in,* 116 CONG. REC. 24,094 (1970)).

216. *Rust,* 111 S. Ct. at 1768 n.3 (also citing the report at p. 10).

217. New York v. Sullivan, 889 F.2d at 408 (citing 116 Cong. Rec. 37,380).

Because the new regulations require separate facilities, and staff, as well as the usual separate records, the costs to implement the new guidelines would necessarily be substantial. The separateness requirement would also hamper total family health planning efforts because it puts great emphasis on pre-natal care and causes duplicity in equipment and supplies. Sonar machines, for instance, are quite expensive and are used in a variety of ways by health care providers. Since shared facilities are no longer possible, the greater cost in referral for basic testing, and the additional effort required by the indigent client wanting abortion information, would hamper efforts to secure accessible and competent family health services.

218. New York v. Sullivan, 889 F.2d at 408 (citing 116 Cong. Rec. 24,093).

Not all regulatory agencies share the Secretary's view of the necessity to change regulations because of a so called change in political climate. *See generally* Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, The Progenitors, and the State: Toward A Dynamic Theory Of Status, Rights, and Research Policy,* 5 HIGH TECH. L. J. 257 (1990). This article discusses the recent ban on federal funding on projects involving the transplantation of fetal tissue derived from an elective abortion. The federal government's ban on research on fetal tissue, for instance, was a surprise to the National Institute of Health. However, the fact that it was a surprise to NIH is telling. Clearly, NIH did not perceive a "view-point problem" in the research it funded. The end of research in fetal tissue may signal a greater thrust of research in non-related biotech areas, an industry which the administration has nurtured. In biotechnology, human DNA is often co-mingled with that of other species of plants and animals, resulting in bio-engineered life forms. Such transgenic inventions are frequently used to produce commercial quantities of rare disease fighting drugs. *See generally* Linda Maher, *Environmental Concerns: In Domestic and International Regulatory Frameworks for Biotechnology,* 24 LAW/TECHNOLOGY 1, No. 1 (discussing the biotech field, but not commenting on the impact of the loss of fetal tissue research to this field). *See also* Chryss B. *The Fetal Tissue Transplant Debate in the United States: Where is King Solomon When You Need Him?,* 7 J.L. & POL. 379

There is no section of the statute that specifically excludes abortion counseling or referral. In validating the Court of Appeals decision, the majority accept that congressional refunding is not demonstrative of support for any previous administrative interpretation of the statute. The effect of the majority's decision is a coup d'etat by the judiciary in which they permit themselves to restrictively revise broadly intended legislation of Congress, by a distortedly narrow reinterpretation of agency regulations. Using their surgical procedures, the majority bypassed the function of the legislature, which had consistently demonstrated its support for the broad based health care program it previously implemented, revised and funded.[219] The legislature has reauthorized the Act numerous times, and it has specifically rejected amending Title X to prohibit funds for counseling and referral for abortion. What greater indication of congressional intent is needed?[220]

The majority declares, that general statements by members of Congress at the time of re-funding are not conclusive.[221] Yet all legal scholars know that a search for conclusive evidence in statutory history is a misnomer. The rules of statutory construction require weighing all relevant information to permit reconstruction of the implicit intent of Congress.[222] Further, the majority pronounced that the legislative history showing Congress' rejection of a proposed amendment to Title X specifically prohibiting funds for counseling and referral for abortion was not indicative of congressional intent.[223] Congress, they said may have believed that the statute already provided such restrictions.[224] Yet they point to no hearing where the Secretary or other party testified to such a conclusion, and ignore the fact that Congress authored the legislation. The majority discard central investigatory tools and then claim they can find no evidence of the intent of Congress. Their investigation was, therefore, over before it began.

A single agency's interpretive regulations should never be permitted to capture and gerrymander an Act of Congress to suit an administrative Secretary's view of how people should live. Special interest groups do not dictate law in this country, elected congressional representatives make law.

(1991). Recent efforts in legislation impose servere constraints on fetal tissue research. Fetal tissue research has becoming dominated by abortion politics, when the potential benefits to mankind are potentially unlimited. Further, with the advance of biotechnology, fetal tissue research offers superior opportunities to engineer cures for diseases, and advanced genetic therapies.

219. *See* New York v. Sullivan, 889 F.2d at 407, 408.

220. *Id.* at n.2, and at 409.

221. *Rust,* 111 S. Ct. at 1768.

222. *Id.* at 1778, 1788 (Blackmun, J., and O'Connor, J., dissenting).

223. *Id.* at 1768, likewise they acknowledge that the legislation does not address whether clinics receiving Title X funds can offer non-directive counseling on abortion. Merely because the issue was not addressed does not mean the legislative history is ambiguous on the intent of Congress. The activity is clearly not forbidden as it is not even raised.

224. New York v. Sullivan, 889 F.2d at 409 (citing 124 CONG. REC. 37,046 (1978)) (statement of Rep. Rogers) ("the point of what we are doing in title X . . . is to let people know how to avoid pregnancy. . . . The amendment is not needed.")

Such important congressional legislative functions should not be subject to captured by a mere regulatory reinterpretation on the part of a single Secretary in one administrative department of government. The majority's decision to support this obstruction of justice is an invasion by judicial legislation, and an assault upon the Office of the Congress and the doctrine of Separation of Powers.[225]

No amendment has ever been made to in any way alter or redirect the Secretary's initial interpretation of the regulations to provide a broad based medical services including abortion counseling to the nation's poor. Indeed, the Secretary has said that he has reinterpreted the regulations not because of a continuing erroneous policy which misinterpreted Congress' original intent, but because of social pressure "against the killing of unborn children."[226] However, the Secretary's interpretation oversteps his authority. Congress and the High Court are the only entities that can clarify at what point our society will recognize a fertilized glob of living cells as a "child." The definition of "child" implicit in the Secretary's phraseology cannot be found in any dictionary, and it clearly represents a non-medical, non-neutral, politically based, ideological preference against the existence of certain constitutional freedoms.

D. The Winds of Change and the Clinton Administration's Political Agenda

The recent presidential elections have brought a formal end to the conservative and religious agenda set forth by the Reagan and Bush administrations some twelve years ago. However, it is important to remember that the Clinton election was not won by a popular landslide. Many Americans continue to feel justified in restricting the freedoms of other Americans for a variety of reasons, as discussed throughout this article.

In order to bring the country together, with understanding and compassion for all sides, the Clinton administration will have to weigh their constitutional options to structure a withdrawal from the previous administration's positions in regards to Title X regulations and, in particular, the "Gag Rule." The President has rescinded the gag rule,[227] and stated his support for effective change in this area. However, since his announcement, in the final days of the Bush administration, the country has been irreversibly

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225. New York v. Sullivan, 889 F.2d at 407 (citing Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984)) (noting that a regulation must reflect the intent of Congress). *See generally* James M. McGoldrick, *The Separation of Powers Doctrine: Straining Out Gnats, Swallowing Camels?* 18 PEPP. L. REV. 95 (1990) (discussing the Court's use of certain tests for cases potentially raising constitutional question. For instance, the Court may invoke a reasonable basis test or the rational basis test, and each test used can invoke different responses and resolutions in a particular case. Some tests trigger compelling state interests, and suspect classifications while others do not).

226. *Rust*, 111 S. Ct. at 1769.

227. Executive Order of January 22, 1993.

involved in three major military actions, and made aware of an existing further Bush budgetary deficit of twenty billion dollars.[228] The impact of these cumulative post-election, preinaugural events, seems designed to distract attention from President Clinton's winning domestic platform, and to untimely complicate his already drafted budget.

However, given President Clinton's actions, no doubt domestic emphasis will prevail, and HHS regulations and Title X will be revised. How the President will decide to go about this revision will raise interesting issues in constitutional law, such as the Separation of Powers. Clearly, an Executive Order cannot function as a clarification of Congressional intent as found in present Title X legislation, nor can it overrule the holdings of the present conservative Supreme Court. Nor can the Bush administration's preelection announcement of its withdrawal of support for the "Gag Rule" satisfactorily resolve the legal issues, if in fact it has had any legal effect.

the Executive Order can, however, serve as an initial statement of policy and demonstrate support for the many necessary changes that will have to be undertaken at all levels of government to effectively produce change. Under the present Supreme Court holdings, restrictive interpretations by local administrative offices are constitutional Therefore, to effect change in the standards now in place, new legislation, either amending aspects of Title X, or clarifying the intent of Congress in regards to Title X, will be needed.

The scope of the effort ahead cannot be underestimated, nor may the present election victory cloak the lengthy battle which lies ahead. The former regime has had twelve years in which to place party members in positions of influence over policy and funding throughout every level of government, and in every state of the union. Because of important characteristics of government employment, e.g., seniority, building a nationally accommodating responsive political structure for Title X is a daunting task. The manner of efforts put forth will impact the permanency of any solution, and ultimately serve either to quicken or slow the pendulum of political perspective.

Any new Title X legislation realistically may be tested in state and federal courts throughout the land. That could hold up meaningful implementation of corrective legislation for several years. In *Rust*, the abusive regulations were implemented in 1988, and ruled on by the High Court three years later, only after incompatible circuit decisions had been handed down. During that time, a co-plaintiff, New York City's own Corporation Counsel, experienced a change of guard, rethought its position, and then declined to participate as the matter proceeded to be presented before the High Court. Furthermore, states and cities which have already implemented new HHS regulations along *Rust's* lines, like New York, may protest any re-installation of the former regulatory interpretation or any new corrective interpretation which will inevitably impact their budgets. These impacts would be caused by the

228. Kurt Chandler, *Both Sides Regroup for New Agenda on Abortion*, STAR TRIBUNE, Jan. 2, 1993, at A1.

reexpansion of comprehensive heath services under Title X, to include unified facilities which include abortion services, as opposed to the costs of lifting the veil of the "Gag Rule" per se.

Further, under the abusive Title X regulations requiring separate facilities for abortion services, thousands of private contracts, leases and equipment purchases have been stimulated. The duties under these contracts may make it quite difficult to reintegrate abortion services into the now-existing facilities. These factors will affect the speed and effectiveness of implementation of the corrective changes once they are federally implemented and accepted by state and city governments.

A particular difficulty the Clinton administration will face in reintegrating abortion services into the mandated comprehensive medical services program Title X was designed to be, is a permanent scare inflicted by the abuse of the instrumentality of local administrative offices. This particular abuse was clearly urged by the federal government under the previous administration, but the question remains now for President Clinton: How can this instrumentality of political agenda be disarmed, to curtail its continued interjections into the day-to-day functions of government?

CONCLUSION

The majority improperly characterized Dr. Rust's allegations as devoid of constitutionally based issues. Since other acceptable constructions of the Act, not touching the protected area of constitutional rights were available, the Court was required to construe the statute to avoid regulations intruding on fundamental rights. Further, the government cannot invade the constitutional rights of grantee-providers or client-recipients of federally funded health care programs based on the existence of some federal co-funding. Such limits on fundamental rights cannot be construed as job prerequisites, and the government cannot silence diversity in America by buying up fundamental rights from the poor.

The court is outside its realm when it legislates from the bench as it has in *Rust*. The new regulations should have been set aside under statutory construction principles, constitutional principles, or as arbitrary or capricious in the favoring of non-abortion referral providers. The regulations impermissibly interfere with the indigent client's First and Fifth Amendment rights to receive information and exercise rights involving health services, and the grantee-providers' First Amendment rights to discuss all health service options. The new regulations violate both the language and the intent of Title X. The government has unconstitutionally conditioned receipt of a benefit on the relinquishment of constitutional rights. Participants in Title X projects are not free to exercise their right of free speech, and their doctors are torn from the oaths of their profession by an intruding government. The new regulations are an affirmative legal barrier to women's health care choice, and amount to facial violations of the plaintiffs' rights to free speech, and sexual discrimination.

The decision leaves the indigent client wanting alternative services to prenatal care in a worse position then if Congress had never funded family planning services, because she has lost time in locating relevant medical information. Therefore, greater health risks are imposed on the indigent client which further limit her exercise of her right to choose a legal abortion option. Since the risk to the life of a women ending her pregnancy increases after the first trimester, the new regulations undisputedly injure some of their dependant clients. Effective preclusion of the grantee's right to disengage her pregnancy has been accomplished by the majority, and not by Title X legislation, or even by the indigence of the client.

Further, the protected professional doctor/patient relationship was seriously disturbed by the majority's decision. The Constitution requires that the Government create undistorted program mandates in order to assure her the privacy all Americans expect in professional relationships.[229] A single administrative agency's, interpretive regulations should not be permitted to circumvent congressional legislative privilege, and permit an administrative Secretary to dictate to people how they should live. Minor government officers must not be permitted to use regulatory schemes to interject themselves or their personal "viewpoints" into the protected professional relationships of doctors and their patients, or unconstitutionally impose them on their indigent charges.

The issues of reorganization of the comprehensive health care program aspect of Title X, in particular, its abortions services facilities placement, are quite complex and will be difficult to implement. Corrective HHS regulations stimulated by the Clinton administration, and congressional cooperation, will likely be delayed by judicial challenges, federal and local budgetary constraints, and by existing contractual obligations. However, the tone for change has been clearly heard in America, and the tactful persuasion of both sides toward constructive avenues of expression will undoubtedly be carefully explored.

229. *See generally* David R. Dow, *The Establishment Clause Argument For Choice*, 20 GOLDEN GATE U. L. REV. 479 (1990) (discussing the fact that most commentors treat abortion rights exclusively as a privacy issue, while it in fact may also raise Establishment Clause implications).