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RUSTY PIPES: THE *RUST* DECISION AND THE SUPREME COURT'S FREE FLOW THEORY OF THE FIRST AMENDMENT

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I. INTRODUCTION

The Supreme Court long ago abandoned the early approach to First Amendment questions that focused solely upon the asserted rights of the speaker. Over the years, the Court has defined a variety of other critical interests at stake in disputes over freedom of expression. Taken together, these interests, so the argument runs, obligate the government to safeguard what is termed the "free flow of information." While there have been occasional obstructions in the free flow pipeline permitted by the Court's rulings since the late 1970s, nothing compares to the serious threat to the flow of information like the ruling in *Rust v. Sullivan* rendered during the Court's October 1990 Term.[1]

Although most observers understandably see the *Rust* ruling as an abortion decision, Chief Justice Rehnquist's opinion for a 5-4 majority in that case has profound implications for the concept of free flow and the principles of freedom of speech from which it was constructed. This article considers those elements of free flow, the significance of the free flow doctrine as a whole, the argument of the *Rust* opinion, and the implications that case presents for the idea that the First Amendment protects more than words, that it safeguards communication as an enterprise.

II. THE ELEMENTS OF FREE FLOW THEORY

There is no doubt that many of the early free speech debates focused on protection for speakers, often those who sought to communicate unpopular, even hated ideas. Thus, those studying the history of free speech encounter the debate over whether Mr. Schenck went too far in sending his anti-war message to draftees, whether Eugene Deb's speech on World

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1. 111 S. Ct. 1759 (1991).

War I exceeded permissible limits, or whether Abrams and his colleagues moved beyond the protections of free speech in tossing leaflets off the roof of a New York building protesting U.S. involvement in Russian efforts to put down the revolution.[2] However, a variety of factors moved the Supreme Court away from the speakers' rights theory and toward an emphasis on free flow of information. These pivotal issues include the problem of the receivers' (or listeners') interests, the importance of protection for the message sent regardless of its source, the stock of information issue, and the importance of maintaining the integrity of communications processes quite apart from any particular message.

A. *The Development of Free Flow Theory*

There is nothing new in the idea that freedom of speech does more than simply protect a speaker. Indeed, Milton's classic defense of freedom of expression in 1644 declared that

> though all the windes of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to miscount her strength. Let her and Falsehood grapple; who ever knew Truth put to the wors in a free and open encounter.[3]

This is the origin of the marketplace of ideas concept, popularized by Holmes and Brandeis, which holds that the true test of an idea is its ability to get itself accepted in the marketplace of ideas.[4]

Alexander Meiklejohn wrote in criticizing early First Amendment opinions, however, that there was too much emphasis on speech as the right of an individual and not enough about the constitutional importance of communication; too much concern for an individualist definition and too little awareness of the social purpose of the First Amendment. For him, free speech was a means to the end of self-government rather than an end in itself.[5] The message and the importance of the availability of information to those who might want to

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2. *See* Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).

3. 2 COMPLETE PROSE WORKS OF JOHN MILTON 560 (D. Bush et al. eds., 1959).

4. *See* Whitney v. California, 274 U.S. 357, 371 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

5. "The principle of freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public

hear it were far more important than the claimed rights of the speaker. He insisted, "Now, in the method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers . . . [w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."[6]

If the point of freedom of speech is to protect the discussion and not simply the speaker, and that process is essential to self-government, then government may have an obligation to go beyond merely protecting speech from interference or censorship. It may have an affirmative obligation to facilitate communication in all its aspects. That is the argument made by Thomas I. Emerson, who maintained that government must "undertake positively to promote and encourage freedom of expression, as by furnishing facilities, eliminating distortions in the media of communication, or making information available."[7]

By the late 1960s, the communications revolution of the late twentieth century was well underway. The Court was repeatedly confronted by the fact that free speech meant far more than taking to the soapbox. First Amendment opinions increasingly referred to other aspects of the communication process and to the idea that there is a protection for the free flow of information. The Court upheld the right of adults to possess obscene matter for their own use in the privacy of their homes on grounds that the "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society."[8] The Court warned elsewhere against efforts "to control the flow of ideas to the public."[9] The Court also admonished the government to promote "the paramount interest in a free flow of information to the people."[10]

B. *The Effort to Craft a Standard*

Three sets of cases moved the free flow discussion along to the point where the Court was willing to use the term as a central concept in its rulings. First, there was the growing body of broadcasting cases from the late 1960s through the 1970s and

issues shall be decided by universal suffrage." ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1960).

6. *Id.* at 26.

7. THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 4 (1970); *see also* JOSEPH TUSSMAN, GOVERNMENT AND THE MIND (1977).

8. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

9. Lamont v. Postmaster Gen., 381 U.S. 301, 306 (1965).

10. Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

into the 1980s. At the core of many of the television cases, starting with the challenge to the fairness doctrine in *Red Lion Broadcasting v. FCC*,[11] was the discussion about whether the broadcasters' rights were the sole focus of concern in such cases, or whether the focus was actually a debate about the relationship among the asserted rights of the license holder, the needs of the public for information, and the concerns of the government as regulator attempting to safeguard the public interest. The Court concluded:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of the market, whether it be by the Government itself or a private licensee.[12]

The primary value, according to the Court, was the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas. . . ."[13] While there have been differences of opinion within the Court as to just how important the rights of broadcast licensees are relative to those of the viewers or listeners,[14] and how different broadcast journalism is from print,[15] the Court has clearly recognized that there are many facets to modern free speech that play simultaneous roles in what we call the communication process.

While the discussion over the role of broadcasting in freedom of speech was developing, there emerged an expanded freedom of speech and press debate concerning not only claimed censorship of publication, but also efforts to obtain protection for the right to acquire and edit information as well. In striking down across-the-board controls on prisoner mail, the Court rejected the claim that the central issue was the right of the inmates to express themselves. Instead, the Court focused upon the right of the addressee to receive the letters and the need to protect the process of communication. "Communication by letter is not accomplished by the act of writing words on paper. Rather, it is affected only when the letter is

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11. 395 U.S. 367 (1969).

12. *Id.* at 390.

13. *Id.*; *see also* William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303, 303.

14. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364 (1984); CBS v. FCC, 453 U.S. 367 (1981); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

15. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

read by the addressee."[16] By the mid-1970s, the Court had made clear that it was concerned with the right to send, the right to receive, and the process of communication. The Court also recognized a need to be free to acquire information, though it rejected the idea that the First Amendment is a freedom of information act. In a host of cases, the Court debated the questions of where and under what circumstances a reporter or an ordinary citizen could claim access to places like prisons, records, or channels of communication.[17] In these cases, the Court has upheld rights of access in a number of settings, including judicial proceedings.[18]

Finally, there was the body of case law that blended the developing commercial free speech debate with the effort to address regulation of campaign expenditures. The Court's determination in *Buckley v. Valeo*,[19] that the expenditure of money for the advancement of political candidates or ideas is, under many conditions, protected by the First Amendment, brought a revolution in campaign financing. The *Buckley* line of cases, coupled with the so-called commercial free speech cases, expanded both the concept of free flow of information and the range of issues to be debated when considering the limits of the free flow idea.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council*,[20] the Supreme Court ruled that the fact that a message was communicated by a profit-making organization with the intention of making money did not remove the speech from First Amendment protection. In coming to this conclusion, the Court observed that for the consumer, particularly some of the elderly consumers in the case, interest in commercial information such as pharmaceutical prices "may be keen, if not keener by far, than his interest in the day's most urgent political debate."[21] Neither the source of the information nor the fact that it was commercial rather than political undermined its value under the First Amendment. Justice Blackmun, writing for the Court in *Virginia State Board*, stressed the breadth of free speech protections. "Freedom of speech presupposes a

16. Procunier v. Martinez, 416 U.S. 396, 408 (1974).

17. Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1.

18. *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

19. 424 U.S. 1 (1976).

20. 425 U.S. 748 (1976).

21. *Id.* at 763.

willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both."[22] Quite apart from the particular interests of the speaker and listener, said the Court, the society has "a strong interest in the free flow of commercial information."[23]

There was an argument that advertising was different from other forms of speech and that the information that the speakers sought to convey and the listeners to receive was available elsewhere. Therefore it was unnecessary to protect the advertisement. But the Court answered:

> We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated.[24]

The right to spend money to advance political views and the inclusion of profit-making institutions in that protection came together in *First National Bank v. Bellotti*,[25] where the Court struck down a Massachusetts restriction on corporate expenditures in referendum campaigns. Justice Powell insisted that it was unnecessary for the Court to concern itself with whether the Bank had a First Amendment right to freedom of speech.[26] "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[27] The Court concluded:

> [T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information."[28]

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22. *Id.* at 756.
23. *Id.* at 764.
24. *Id.* at 757 n.15.
25. 435 U.S. 765 (1978).
26. *Id.* at 775-76.
27. *Id.* at 777.
28. *Id.* at 783. The commercial speech and campaign expenditure cases have been controversial from a variety of perspectives, including the threats

In two opinions striking public utilities regulations, the Court warned that content-based prohibitions are unacceptable[29] and stressed the distinction between the prohibition of communication and acceptable time, place, and manner regulation.[30] Citing two earlier rulings, the Court observed: " '[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them.' . . . [T]he First Amendment presumes that some accurate information is better than no information at all."[31]

These rulings, taken together, present a free flow theory of the First Amendment which goes well beyond the speaker's rights and beyond merely adding listeners' interests to the claims of the speaker. The free flow theory provides that: listeners' rights to receive information are protected like the rights of the speaker; the protection of the message is as significant as the claims of the speaker; government may not inhibit the process of communication, including the ability to send as well as the ability to obtain information; and government may not attempt to limit the stock of information available in the marketplace of ideas.

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posed to the democratic process. *See id.* at 802 (White, Brennan and Marshall, JJ., dissenting).

29. In Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530 (1980), the Court warned

> 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. As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department of Chicago v. Mosley, [408 U.S. 92, 95 (1972)]. . . . In *Mosley*, we held that a municipality could not exempt labor picketing from a general prohibition on picketing at a school even though the ban would have reached both pro- and anti-union demonstrations. If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating." . . . To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

Id. at 537-38.

30. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

31. *Id.* at 562; *see also* Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Linmark Assocs. v. Willingboro, 431 U.S. 85 (1977).

III. THE *RUST* CASE AND ITS INTERNATIONAL COUNTERPART

There is no doubt that there have been departures in particular cases from the Court's announced free flow theory.[32] However, the *Rust* opinion seems to deliver a serious blow to the fundamental concept of First Amendment protection for the free flow of information. In order to comprehend the free speech implications of *Rust*, it is important to consider the development of the case in the circuits and its treatment in the Supreme Court.

A. *Title X Regulations in the Circuit Courts*

The Supreme Court granted certiorari in *Rust v. Sullivan* to resolve a conflict among the First, Second, and Tenth Circuits over their assessment of regulations issued in 1988 by the Secretary of Health and Human Services governing federally funded family planning operations, the so-called Title X programs.[33] The 1988 regulations represented a major change from the federal rules that had been in place for years prior.

In 1970, Congress passed Title X of the Public Health Services Act, entitled the Family Planning and Services Population Research Act of 1970.[34] The Court's announcement of a right to terminate pregnancies in 1973 fueled the debate over the availability of abortions for poor women.[35]

Two sets of cases testing the boundaries of abortion funding restrictions came to the Court during the 1970s. The first produced opinions upholding restrictions for so-called "nontherapeutic abortions."[36] The second set upheld restrictions imposed by the Hyde Amendment even where the abortions sought were therapeutic rather than elective, meaning that the woman's life or health was in question if she carried the pregnancy to term.[37]

Title X family planning funding also carried a restriction on abortion funding which read: "none of the funds appropriated under [Title X] shall be used in programs where abortion

32. I have discussed a number of these cases elsewhere. *See* Phillip J. Cooper, *The Supreme Court, the First Amendment, and Freedom of Information*, 46 PUB. ADMIN. REV. 622 (1986).

33. Rust v. Sullivan, 111 S. Ct. 1759 (1991), *cert. granted*, 110 S. Ct. 2559 (1990).

34. Pub. L. No. 91-572, 84 Stat. 1504 (codified at 42 U.S.C. § 300a (1989)).

35. Roe v. Wade, 410 U.S. 113 (1973).

36. *See* Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

37. Harris v. McRae, 448 U.S. 297 (1980).

is a method of family planning."[38] From its 1981 guidelines to 1988, the Department of Health and Human Services interpreted the statutory restriction to mean that the funds could not be used to finance abortions but permitted nondirective counselling under which family planning programs could provide information regarding abortion along with other material distributed to their clients.

In early 1988, HHS issued new regulations with a much more restrictive interpretation of the statute. Family planning services were restricted to "preconception" services only, a somewhat ironic action in light of the fact that the most common point of intake for such programs is pregnancy testing. The revision also included a restriction that precluded the grant recipients from using their funds to provide nondirective counselling regarding abortion, although programs were required to provide "a list of available providers that promote the welfare of mother and unborn child."[39]

Information regarding abortion or abortion providers could not be provided even if the patient specifically asked for it. In such a case, the counsellor was to inform the patient that the program did not regard abortion as an appropriate aspect of family planning. Moreover, the revised regulations prohibit not only the use of federal funds, but of virtually any other funds by the program to provide abortion related services. Those regulations required that a funded program and any affiliated organization that was involved in pro-abortion activities, including lobbying or the provision of speakers on abortion topics, be "physically and financially" separate.

Challenges were immediately launched to the facial validity of the regulations in a number of courts, seeking injunctions against their implementation. The District Court for Massachusetts promptly barred the HHS action.[40] The First Circuit affirmed the district court conclusion that the regulations were unconstitutional and found one of the regulations in violation of the statute.[41] The Tenth Circuit reached a similar conclusion a few months later, expressing explicit agreement with the

38. 42 U.S.C. § 300a-6 (1988).

39. 42 C.F.R. § 59.8(a)(2) (1990).

40. Massachusetts v. Bowen, 679 F. Supp. 137 (D. Mass. 1988).

41. Massachusetts v. Secretary of HHS, 899 F.2d 53 (1st Cir. 1990). The First Circuit sat en banc because there was some question whether the Supreme Court's ruling in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), required reconsideration of an earlier panel decision in the case.

First Circuit in the process.[42] However, the Second Circuit upheld the regulations.[43]

Three arguments were made in the lower courts. First, the 1988 regulations were challenged as violative of the intent of the Family Planning Act on grounds that the agency had given far too narrow a reading to the statute. Although the statutory language and the legislative history were ambiguous, the challengers rejected the claim that the courts should defer to HHS under the *Chevron* doctrine,[44] and cited instead the Supreme Court's ruling in the *Airbags* case.[45] Since the Secretary had operated under the much more permissive rules since 1981, the change, they urged, represented the kind of substantial departure from a settled agency interpretation that required, under the *Airbags* ruling, a reasoned explanation, certainly far more of a reasoned explanation than had been offered by HHS in 1988. In the absence of such a justification, the change should be regarded as arbitrary and capricious.

Second, opponents argued that the regulations were in violation of the First Amendment freedom of speech because they interfered with the communication between a doctor and patient or between a counsellor and client.

Finally, the challengers argued that the regulations were in violation of a woman's constitutional right to choose to terminate her pregnancy under *Roe v. Wade* because the restrictions on information and services to the patients placed an unacceptable burden on the woman's ability to make an informed decision. Citing the Supreme Court's opinions in *City of Akron v. Akron Center for Reproductive Health*[46] and *Thornburgh v. American College of Obstetricians and Gynecologists*,[47] Planned Parenthood and the other plaintiffs argued that, ever since *Doe v. Bolton*,[48] which was issued along with *Roe v. Wade* in 1973, the Court had consistently rejected government actions that interfered with the consultation between the woman and her physician in discussions concerning whether to terminate a pregnancy.

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42. Planned Parenthood v. Sullivan, 913 F.2d 1492, 1495 (10th Cir. 1990), *aff'g* 687 F. Supp. 540 (D. Colo. 1988).

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

44. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); *see also* NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990).

45. Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29 (1983). This case deals with the mandate for passive restraint devices, or airbags, in federal regulations, and is commonly referred to as the *Airbags* case.

46. 462 U.S. 416 (1983).

47. 476 U.S. 747 (1986).

48. 410 U.S. 179 (1973).

The lower courts agreed that neither the language of the act nor the legislative history was sufficiently clear to resolve the statutory claims. Despite the fact that both the First and Tenth Circuits thought the Secretary's "reasoned analysis" in support of the changed regulations was "weak," neither could, consistent with their view of the requirements for judicial deference under *Chevron* and *NLRB v. Curtin Matheson Scientific*,[49] reject the administrative construction of the statute.[50] Even so, both circuits found that Section 59.9 concerning the "physical and financial separation" requirement simply went too far and violated legislative intent.

Neither the First nor the Tenth Circuit found any ambiguity with respect to the constitutional issues. Both began by rejecting the government's contention that these regulations were nothing more than an extension of the line of cases, beginning with *Maher v. Roe*[51] and including the *Webster* ruling, which held that government was free in its policies to prefer childbirth over abortion. Although they accepted the general authority of the government to prefer childbirth and to refuse to fund abortion, the two circuits did not grant the proposition that therefore any policy favoring childbirth over abortion was acceptable.

The First Circuit began from the proposition that the decision to terminate a pregnancy is protected by *Roe v. Wade*. The dialogue between physician and patient is also protected according to *Akron*[52] and *Thornburgh*.[53]

The Supreme Court in *Akron*, inter alia, struck a requirement that a physician provide a specific message to the patient. The First Circuit cited the Supreme Court conclusion in that

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

50. The First Circuit concluded:

> Our examination of the traditional elements of statutory construction yields the following results. The plain words of the statute are susceptible to differing interpretations. The contemporaneous legislative history is inconclusive, except on the issue of program coordination. The subsequent legislative history indicates congressional acquiescence to the previous agency policy promoting nondirective counselling, but this acquiescence does not preclude a change in agency policy. And, finally, because of the deference due an agency's interpretation of an enabling statute, the Secretary's new policy is not impermissible under the statute.

Massachusetts v. Secretary of HHS, 899 F.2d 53, 64 (1st Cir. 1990).

51. *See supra* note 36.

52. City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 442-47 (1983).

53. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 763-65 (1986).

case that: "It is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether."[54] Additionally, the *Akron* Court had concluded, the law unduly restricted a physician from providing the best medical advice. The Court said in *Akron* that "it remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances."[55] The First Circuit relied upon the *Akron* opinion's conclusion that: "By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed 'obstacles in the path of the doctor upon whom [the woman] is entitled to rely for advice in connection with her decision.' "[56]

The two circuits noted that *Thornburgh* had been based upon *Akron* and went beyond it in warning that government could not use forced information delivered by doctors to coerce a patient not to have an abortion. The First Circuit cited *Thornburgh's* warning that "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.' "[57] Judge Bownes quoted at length the Supreme Court's admonition from *Thornburgh* that the Constitution recognized the place of the physician in this decision process and the need for independence.

> Even the listing of agencies . . . presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and this places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agency of the State in treating the woman and places his or her imprimatur upon both the materials and the list. . . . All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician.[58]

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54. *Akron*, 462 U.S. at 444.
55. *Id.* at 443.
56. *Id.* at 445.
57. *Thornburgh*, 476 U.S. at 760.
58. *Id.* at 762-63. The First Circuit recalled its own decision in Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006 (1st Cir. 1981). In that case, the court struck down a waiting period requirement because it

Given the direct interference in the physician's ability to answer specific questions posed by patients and the admonitions of *Akron* and *Thornburgh*, the First Circuit concluded: "The effect of the new regulations is to infringe upon women's freedom of reproductive choice by denying them access to important information and by interfering with the physician-patient relationship."[59]

There was no doubt that there was an interference in free communications. Therefore, according to the First Circuit, the questions were whether there was something about these communications that kept them outside the protection of the First Amendment, or, if they were covered, was there some adequate justification for the abridgement of free expression.

As to the former, the court rejected the argument that government could carve out a class of communications and simply treat it as non-First Amendment speech because it involved grant recipients in the family planning program. Such an argument could not be made unless one were prepared to overturn a long line of decisions providing that one cannot be made to accept unconstitutional conditions as the price of a government grant or job.[60] The Circuit Court cited the frequently quoted passage from *Perry v. Sindermann*:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government 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 interest—especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech, . . . his exercise of those freedoms would in effect be penalized and inhibited.[61]

The First Circuit relied upon *FCC v. League of Women Voters*[62] to apply the basic law of substantive restriction upon

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added an unjustified burden on the woman's decision. That statute might also have fallen for reasons similar to the present case except that it allowed the physician and patient considerably more freedom to go beyond the required information.

59. Massachusetts v. Secretary of HHS, 899 F.2d 53, 67 (1st Cir. 1990).

60. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 405 (1963).

61. *Secretary of HHS*, 899 F.2d at 72-73 (quoting Perry v. Sinderman, 408 U.S. 593, 597 (1972)).

62. 468 U.S. 364 (1984).

expression and concluded that the reasons for protecting the speech in the present case are even greater than in *League of Women Voters* and that the claimed governmental interest was even less substantial, certainly not rising to the level of anything approaching a compelling justification.

The Tenth Circuit, like the First, refused to accept the government's contention that these regulations were but an extension of the line of cases decided in the 1970s and 1980s holding that government may use its funding decisions to favor childbirth over abortion.

> Had the regulations directed that once pregnancy is established the clinic must say, "Go away, we only give advice on prepregnancy planning," then it might be said the government has done no more than subsidize a permissible activity. The regulations, however, require the clinic to go one step further in its treatment of the patient. When a patient is diagnosed as pregnant she must be provided with both referrals to prenatal service providers and with interim information on prenatal care. 42 C.F.R. Section 59.8(a)(2). Even if the patient specifically requests information on abortion, the clinic is not permitted to advise her about it.[63]

Citing *Harris v. McRae*, the Tenth Circuit concluded that the regulations placed "a state created obstacle in the path of a woman's exercise of her freedom of choice."[64] Like the First Circuit, the Tenth Circuit panel found that case plainly fit *Thornburgh* and *Akron*.

In its treatment of the First Amendment issue, the Tenth Circuit focused upon the rights and responsibilities of the doctor as well as those of the patient. "Although the matter has received little separate attention in court opinions to this point, the limitations placed on Title X physicians in communicating with their patients, and referral obligations imposed upon them, violate the constitutional rights of the physicians themselves. The dearth of attention may be because the physicians' rights are considered derivative from the rights of the patient."[65]

The court argued that the decision on what to tell a patient is governed by professional norms which place the physician in an impossible position in light of the prohibitions presented in

63. Planned Parenthood v. Sullivan, 913 F.2d 1492, 1499-500 (10th Cir. 1990).

64. *Id.* at 1501.

65. *Id.* at 1503.

the Title X regulations. "The canons of ethics of the medical profession require a physician to give patients advice that includes abortion as an alternative to carrying a pregnancy to term when the patient's health condition warrants."[66] In a footnote, the court cited several professional codes outlining the obligation of a physician to provide the patient with complete information, including the abortion option.[67] Presumably, the Court said, failure to honor those professional conduct codes because of the HHS regulations could result in professional sanctions against the clinicians.[68] From all of that the court determined that: "To condition receipt of Title X funds upon physicians' promise not to give advice that the standards of their profession require them to give implicates the physicians' First and Fifth Amendment rights."[69]

Turning to the patient's First Amendment interests, the Tenth Circuit took on the government's argument that the information was available from alternative sources in a lengthy footnote in which it suggested that because there has been so much legal activity concerning the availability of abortion in many states, women were particularly in need of additional information and there was little evidence that it was otherwise available.

> One reason women might seek information about their medical options at a family planning clinic is the confusion that arises from the barrage of bills introduced, passed, vetoed, or stayed by judicial action. . . . The two decisions issued at the end of the most recent Supreme Court term, *Hodgson v. Minnesota* . . . and *Ohio v. Akron Center for Reproductive Health* . . . (upholding parental noti-

66. *Id.*

67. The court cited:

Current Opin. of Council on Ethical & Judicial Affairs of the American Medical Association—1986, [at] ¶ 807 ("physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice"); American College of Obstetricians & Gynecologists (ACOG), *Standards for Obstetric-Gynecologic Services* 57 (1985) (in event of unwanted pregnancy the physician should counsel patient of abortion option); ACOG, *Statement of Policy: Further Ethical Considerations in Induced Abortion* (Dec. 1977) ("Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or the range of options to which the patient is entitled.").

Id. at 1503 n.5.

68. *Id.* at 1504.

69. *Id.*

> fication statutes), are unlikely to reduce the legislative activity or women's confusion about their medical options.[70]

Judge Baldock dissented, in part, accepting the argument that the rules were an extension of the *Maher* line of cases. Still, he recognized that: "The regulations, however, undoubtedly infringe upon the doctor-patient relationship by limiting the *free flow* of information from the doctor to the patient regarding abortion services."[71] Even so, he concluded, "[T]he Constitution provides little protection for the 'dialogue' a physician undertakes in the course of treating a patient. . . . Regulation of the professions is a matter within the competence of lawmakers, not federal courts."[72]

The Second Circuit issued its opinion upholding the regulations before either of the other circuits acted. The court accepted the contention that the HHS regulations were an extension of the cases permitting government preference in favor of childbirth over abortion. It rejected the unconstitutional conditions argument on grounds that counsellors and others "remain free to say whatever they wish about abortion outside the Title X project."[73] Finally, to the degree that the regulations limited expression regarding abortion, they constrained it on both the pro- and anti-abortion sides of the issue.

Judge Kearse, who issued a strong dissent quoted at length in both the First and Tenth Circuit opinions, found:

> It is naive to assert that not talking about abortion to a pregnant woman when discussing her options is value-neutral. In addition, the regulations are not even facially neutral because they allow postconceptional counseling in the best interests of the unborn child but not regarding abortion. By discussing only what is best for the unborn child, the counselor has already made the

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70. *Id.* at 1501 n.3 (footnotes omitted). Even so, the Circuit opinion observes in the next note that "The Supreme Court's recent Ohio opinion, while approving a state requirement that a physician inform one parent when a minor patient is considering abortion, continues to recognize the importance of the advice of a detached physician with full information." *Id.* at 1502 n.4.

71. *Id.* at 1505 (Baldock, J., dissenting) (emphasis added). He goes on to note that "A physician certainly has a common law duty to discuss matters openly and frankly with the patient. See Smith v. Cote, 128 N.H. 231, 513 A.2d 341, 355 (1986) (Souter, J., concurring)." *Id.*

72. *Id.*

73. New York v. Sullivan, 889 F.2d 401, 412 (2d Cir. 1989).

> woman's choice. The Government, in restricting the counselor's options to that choice, enforces its choice.[74]

Indeed, Kearse found the regulations pervasively biased against abortion. A woman, Kearse observed, "cannot make an informed choice between two options when she cannot obtain information as to one of them."[75]

A Second Circuit panel, citing arguments and authorities similar to the Title X case, rejected a challenge to an Agency for International Development (AID) regulation that precluded grant recipients from engaging in abortion related activities.[76] The "Standard Provision to be Used in Grants and Cooperative Agreements with U.S. Nongovernmental Organizations" holds that foreign nongovernmental organizations receiving AID funds must

> certif[y] in writing that it does not perform or actively promote abortion as a method of family planning in AID-recipient countries and does not provide financial support to any other foreign nongovernmental organization that conducts such activities.[77]
>
> As the court indicated, the phrase "actively promote" is defined in the Standard Clause to include "providing advice and information regarding the benefits and availability of abortion," "encouraging women to consider abortion," and "[l]obbying a foreign government to legalize or make available abortion." . . . These restrictions on abortion-related activities apply to the entire organization, not just to the project or division of the foreign NGO receiving AID funds.[78]

The Supreme Court denied certiorari in the AID case two weeks after rendering its ruling on the Title X regulations.[79]

IV. *RUST* IN THE SUPREME COURT

Like a number of his other opinions, it is perhaps more fitting to read Chief Justice Rehnquist's argument for the bare majority more like a brief than as a majority opinion. But as an opinion for the Court, it contains a variety of comments that

74. Massachusetts v. Secretary of HHS, 899 F.2d 53, 72 (1st Cir. 1990).
75. New York v. Sullivan, 889 F.2d at 416-17.
76. Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 915 F.2d 59 (2d Cir. 1990).
77. *Id.* at 61.
78. *Id.*
79. Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 915 F.2d 59 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2257 (1991).

will be cited for propositions quite apart from debates over the right to an abortion. Rehnquist, like Chief Justice Stone long before him, buries propositions in his opinions "like squirrels store nuts to be unearthed at a later time when necessary."[80] In *Rust*, Rehnquist both pulled nuggets from opinions of the past and stored others away for the future.

A. *Setting the Stage for the Constitutional Debate*

The Court's discussion of the fact pattern suggests early on the character and approach of the argument. The discussion begins by flatly stating that the Section 300a-6 restriction on "abortion as a method of family planning" was "intended to ensure that Title X funds would 'be used only to support preventive family planning services, population research, infertility services, and other related medical, information, and educational activities.' "[81] Even though all the courts that considered the matter found the statutory language too ambiguous to be useful, the Court presents this proposition as a clear premise. Next, Rehnquist jumps immediately to the 1988 amendments without discussion of the longstanding prior regulations.[82]

His discussion of the specific mandates of these regulations at the outset of the case is troublesome in part because he makes no reference to their significant alteration from the prior version. Only later does he recognize that point, though it was at all stages central to the case. He noted that 59.8(a)(1) provides that a "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." He went on to editorialize that "Because Title X is limited to preconceptional services, the program does not furnish services related to childbirth. Only in the context of a referral out of the Title X program is a pregnant woman given transitional information."[83] The problem is that he assumes as a premise that the statute intended to provide only preconception services and ignores the long standing practice of providing post-conception counseling. Rehnquist also referred to the 59.10(a) restriction that bars any actions that "encourage, promote or advocate abortion as a method of family planning." Again, he presented the interpretation that included such a wide ranging

80. *See* ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956).

81. *Rust*, 111 S. Ct. at 1764-65.

82. *See id.* at 1765.

83. *Id.*

set of activities that burden pro-choice groups as though that had been the statutory purpose or longstanding administrative practice. Finally, he referred to the 59.9 requirement that "Title X projects be organized so that they are 'physically and financially separate' from prohibited abortion activities." Again, this is presented as though the agency were writing on a clean slate. In some sense, his approach is understandable in light his lack of regard for the ongoing administrative practice doctrine set forth in his partial dissent in the *Airbags* case.

Although the Court announced at the outset its intention to decide the case in order to resolve a conflict among the circuits, it ignored the other two opinions and addressed only the Second Circuit contentions without reference to Judge Kearse's dissent.

Having previously implied that the purpose of the statute was clear, Rehnquist altered course considerably in his discussion of the statutory challenges to the HHS regulations. He agreed that the statute was ambiguous in language and in legislative history.[84] He provided three answers to the statutory arguments. First, he contended that *Chevron* required deference to the agency. Second, he rejected the longstanding administrative practice argument. Third, even if one applied the *Airbags* requirement that the Secretary supply a "reasoned analysis" in support of a policy change, the regulations passed muster, according to the Court.

Rehnquist's reading of the *Chevron* deference doctrine is extremely broad, an interpretation rejected by Justice Stevens in his *Rust* dissent. Stevens was the original author of the *Chevron* opinion (in which Rehnquist did not participate).[85] Citing the deference language from *Chevron*,[86] Rehnquist observed

84. *Id.* at 1767-68.

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

86. If a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

The Secretary's construction of Title X may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent. *See id.* In determining whether a construction is permissible, "[t]he court need not conclude that the agency construction was the only one it could permissibly have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. Rather, substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it. *Id.* at 844. *See also Rust*, 111 S. Ct. at 1767.

that the language of the Act was so broad that the Court was "unable to say that the Secretary's construction of the prohibition in [Section] 1008 to require a ban on counseling, referral, and advocacy within the Title X project, is impermissible."[87]

A number of problems are apparent. At the outset, it somehow passed Rehnquist's notice that a statute as broad and ambiguous as he assumes this one to be presents obvious difficulties where it implicates First Amendment issues since it is hornbook law that even permissible statutes which affect freedom of speech must be narrowly tailored to achieve constitutionally acceptable ends.

Second, there is, in the majority opinion, a willing abandonment of the task of statutory interpretation to an agency where the agency's interpretation may be plainly abusive unless, as is rarely true, the legislature includes specific prohibitory language in a statute. There is a significant difference between beginning with a presumption of validity and barring inquiry unless there is a plainly expressed prohibition in the legislation. That is especially true where fundamental rights protected by the First Amendment are at issue. Rehnquist observed that: "When we find, as we do here, that the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal, we customarily defer to the expertise of the agency."[88] The short answer should be, "but not where the First Amendment is involved."

Further, it is one thing to employ a broad doctrine of deference where the administrative action in question rests upon technical expertise and administrative experience, and quite another where, as Justice Stevens pointed out in the *Rust* dissent, the regulations "represented an assumption of policymaking responsibility that Congress had not delegated to the Secretary."[89] This distinction is all the more true when the new interpretation was not contemporaneous with enactment of the statute and flew in the face of longstanding administrative practice.[90] Reference to the truism in the *Airbags* ruling that agencies are "not required to 'establish rules of conduct to last forever,' "[91] is hardly adequate to justify abandonment of the traditional responsibility of courts to interpret statutes.

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

88. *Id.*

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

90. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29 (1983).

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

The dissenters, led by Justice Blackmun with strong separate support from Justice O'Connor, contended that the Court erred in providing an interpretation of the statute which, contrary to numerous precedents, failed to "avoid serious doubt of [its] constitutionality."[92] Blackmun insisted:

> [T]he majority sidesteps this established canon of construction with the feeble excuse that the challenged Regulations "do not raise the sort of 'grave and doubtful constitutional questions,' . . . that would lead us to assume Congress did not intend to authorize their issuance." . . .
>
> This facile response to the intractable problem the Court addresses today is disingenuous at best. Whether or not one believes that these Regulations are valid, it avoids reality to contend that they do not give rise to serious constitutional questions. The canon is applicable to this case not because "it was likely that [the Regulation] . . . would be challenged on constitutional grounds," ante, at 15, but because the question squarely presented by the Regulations—the extent to which the Government may attach an otherwise unconstitutional condition to the receipt of a public benefit—implicates a troubled area of our jurisprudence in which a court ought not entangle itself unnecessarily.[93]

B. *The Free Speech Argument*

There were two types of constitutional issues in question in *Rust*, the First Amendment freedom of speech problem and the Fifth Amendment claim that the regulations violated the right to choose to terminate the pregnancy. The concern here is with the *Rust* case as a First Amendment discussion and not primarily with the right to abortion issue.

The argument, according to the Court, was in two parts. First, Rehnquist responded to the claim that the

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

93. *Id.* at 1778-79. Justice O'Connor noted:

> In this case, we need only tell the Secretary that his regulations are not a reasonable interpretation of the statute; we need not tell Congress that it cannot pass such legislation. If we rule solely on statutory grounds, Congress retains the power to force the constitutional question by legislating more explicitly. It may instead choose to do nothing. That decision should be left to Congress; we should not tell Congress what it cannot do before it has chosen to do it.

Id. at 1789 (O'Connor, J., dissenting).

> regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit "all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy-while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term."[94]

Second, he reacted to the contention that the rights of both the patients and the staff of recipient programs were violated because the funding for their services was contingent upon an unconstitutional condition, to wit, the waiver of their right to freedom of speech.

Rehnquist began from the contention that the statute is clearly constitutional under the *Maher v. Roe* line of cases in that government plainly can prefer childbirth over abortion in its policies. Therefore,

> Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[95]

Under this approach, counselling is clearly regarded as action, an "activity," rather than speech, and activities not consonant with legislative policy may be prohibited. Hence, Rehnquist wrote, "This is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside its scope."[96]

Rehnquist cited as an example of permissible policy the following situation. "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism."[97] This analogy is problematic. A more accurate comparison would arise if, in implementing such a statute, the government adopted rules prohibiting grant recipients from discussing Communism or Fascism at all—even if someone

94. *Id.* at 1771-72.
95. *Id.* at 1772.
96. *Id.* at 1772-73.
97. *Id.* at 1773.

asked a direct question about those ideologies. In that setting, it is absurd to suggest that such regulations would not be blatant violations of free speech "in their most pristine and classic form."[98] If allowed to survive, such rules would presumably prohibit a study of the failures of those ideologies and the governments shaped by them. Had such a program existed at the time of the framing of the Constitution, the Founders and early partisans would have been in serious trouble, given their tendency to evaluate governmental institutions of the past so as to learn from those institutions' successes and failures.

Rehnquist rejected the petitioners' use of *Arkansas Writers' Project, Inc. v. Ragland*,[99] asserting that the statute in that case fell because it "discriminated between magazines on the basis of their content" and "target[ed] a small group within the press" to be taxed.[100] He found neither of those problems in the Title X regulations: "But we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded."[101]

Suggesting that what was really at issue was a question of discrimination rather than a claim to an independent right, Rehnquist observed: "Petitioners' assertions ultimately boil down to the position that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights."[102] Citing *Regan v. Taxation With Representation of Washington*,[103] *Maher v. Roe*,[104] and *Harris v. McRae*,[105] he announced, "the Court has soundly rejected that proposition."[106] Of the three cases, only *Regan* was a First Amendment case. Justice Blackmun pointed out that three justices in *Regan* "joined the Court's opinion precisely '[b]ecause 26 U.S.C. § 501's discrimination between veterans' organizations and charitable organizations is not based on the content of their speech.' "[107] The question with respect to the Title X regula-

98. Edwards v. South Carolina, 372 U.S. 229, 235 (1963).
99. 481 U.S. 221 (1987).
100. *Rust*, 111 S. Ct. at 1773.
101. *Id.*
102. *Id.*
103. 461 U.S. 540 (1983).
104. 432 U.S. 464 (1977).
105. 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980).
106. *Rust*, 111 S. Ct. at 1773.
107. *Id.* at 1780-81 (Blackmun, J., dissenting) (citing *Regan*, 461 U.S. at 551).

tions was not denial of status but prohibition of otherwise existing rights.

The Court's opinion necessarily turned to the argument about the doctrine of unconstitutional conditions. Rehnquist provided two responses. The first was that what was really involved here was a form of time, place, and manner regulation in that only one portion of the recipient organization's activities was affected—that part funded by government. Therefore, there were other avenues of expression available. The second argument was that "the regulations do not significantly impinge upon the doctor-patient relationship"[108] because the doctor is not required to say anything which he or she does not believe and because the program does not "justify an expectation on the part of the patient of comprehensive medical advice."[109]

The former argument is based upon the idea that so long as the organization maintains a physical and financial separation between its grant-funded program and the rest of its operations, it is free to provide abortion information in the nonfunded area. That does not change the fact that patients coming into a clinic operated by a funded organization cannot be provided with information regarding abortion, even if the patient specifically asks for it. The clinic, under the rules, may not tell a patient that she might wish to consult with the other, nonfunded, portion of the organization for information. The Court's response is circular. The Court held that because the program receives government funds, it may not provide requested information in its possession.

The Court's comment that the patient has no right to expect comprehensive medical information would be amusing were its consequences not so tragic. The issue was never whether a patient was entitled to comprehensive information. The question was whether the patient could be denied, and the providers prohibited from presenting, answers to specific medical questions directly relevant to pregnancy and family planning in a situation in which information was provided about only one dimension of a possible medical choice. Even the dissenting Tenth Circuit Judge who held in favor of the rules recognized that there was plainly an interference in the doctor/patient relationship in which the physician had some obligations. The majority in the Tenth Circuit clearly pointed out that the obligations were not merely common law based but

108. *Id.* at 1776.
109. *Id.*

also grounded in sets of professional codes which specifically required disclosure of the information sought by patients. Moreover, the lessons of both *Thornburgh* and *Akron* are plainly contrary to *Rust*. If the Court wanted to make the claims advanced in *Rust*, it should have explicitly limited or overturned those two rulings.

In the end, the Court found itself facing the inevitable. It was either constrained to support a right/privilege dichotomy or uphold the doctrine of unconstitutional conditions. In the end, it chose, without admitting the point, the former. Rehnquist wrote: "The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority."[110] There is absolutely no distinction between that conclusion and the repeatedly rejected assertion that students, teachers, or other government employees can be made to surrender their First Amendment freedoms as a condition of employment.

Nor is it adequate to argue that the focus is on the organization rather than the individual.[111] The effort by the Court to differentiate *FCC v. League of Women Voters*[112] on that point was singularly unpersuasive.

The defects in Rehnquist's opinion are manifold. The Court began by confusing speech and conduct. Rehnquist maintained that:

> A doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such service is outside the scope of the federally funded program. The regulations prohibiting abortion counseling and referral are of the same ilk. . . . This is not a case of the Government "suppressing a dangerous idea," but of prohibition on a project grantee or its employees from engaging in activities outside of its scope.[113]

Actually, his statement is in error on both counts. First, control over speech is not the control over the delivery of patient care. The former is speech and the latter is action. At a minimum, there is speech plus, the regulation of which requires a different approach from that employed by the Court. Second, the

110. *Id.* at 1775.
111. *Cf.* NAACP v. Alabama, 357 U.S. 449 (1958).
112. 468 U.S. 364 (1984).
113. *Rust*, 111 S. Ct. at 1773.

government could suppress the inappropriate conduct, the "nonspeech element," without suppressing the speech.[114] The only reason for controlling the speech is to control the idea.

If Rehnquist is correct, then it should be equally acceptable to discriminate among Title X recipients on the basis of their ideology or religion, since that would be another way of protecting against 'inappropriate' behavior by recipients. Their speech does not present adequate grounds to predict inappropriate behavior any more than the fact that the clinician is a Protestant as opposed to a Catholic.

The contention that there is no discrimination with respect to abortion related speech is patently untrue in two respects. First, as Judge Kearse pointed out in her Second Circuit opinion, there is a clear bias against information about abortion. The Tenth Circuit agreed and argued that it would have been an entirely different matter had the regulations called upon the clinic to say nothing more after the point at which it was determined that the woman was pregnant. The regulations did far more in prohibiting even a response to a direct request for information about abortion while simultaneously mandating distribution of information concerning childbirth and prenatal care. Second, the Court was simply in error in suggesting that physicians were not required to advance a position in which they did not believe. By compelling the physician to withhold valid medical information regarding abortion and to affirmatively state that abortion is not an appropriate method of family planning, there is a clear effort to coerce speech with a point of view in the face of contrary personal beliefs and professional responsibilities. The Court has held that freedom of thought without freedom of speech is meaningless, and to compel the public advocacy of positions not held by the clinician is plainly unacceptable.[115]

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114. *See* United States v. O'Brien, 391 U.S. 367 (1968). The district court addressed this question with respect to the AID "standard clause" but the second circuit panel did not rely on the argument in its opinion. In the district court the argument for interference with the speech element rested upon the presence of the discretion accorded the government in matters of foreign policy. This uncritical deference is characteristic of some of the Court's opinions. *See, e.g.*, Haig v. Agee, 453 U.S. 280 (1981). However, it flies in the face of a number of declarations that a talismanic invocation of foreign policy or national security is insufficient to effectively waive the protections of the first amendment. *See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297 (1972); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

115. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Wooley v. Maynard, 430 U.S. 705 (1977).

When Rehnquist argued that failure to support abortion did not mean content-based discrimination, he ignored the difference between no action by government and coercion not to speak. As the lower courts recognized, this would be an entirely different case if the communication was not barred.

There is a dangerous tendency in this opinion to set up a false dichotomy between treatment of speech in the context of funded action and speech otherwise protected by the First Amendment. If Rehnquist's position were valid, it would be permissible for government units which support abortion providers with state or local funds to prohibit anti-abortion discussion or counseling by physicians in that jurisdiction. While the earlier cases hold there is no obligation to advance a policy with which the government disagrees, that is not a recognition of the power to ban the discussion of the idea.

Rehnquist's response to the *Perry v. Sindermann* and *FCC v. League of Women Voters* arguments is circular on the one hand and disingenuous on the other. The attempt to distinguish between the individual and organization in this case will not withstand scrutiny. The speaker does not lose his or her First Amendment protection because he or she is associated with an organization.

First, the organization itself can assert First Amendment claims in its own right and on behalf of its members.[116] Second, the doctrine of unconstitutional conditions and the rejection of the right/privilege dichotomy specifically stand for the proposition that a public employee who works for an organization, even if it is created by statute, does not lose the protection of the First Amendment.[117] Third, the core of the First Amendment argument is precisely that professional, complete, conscientious performance of the duties of the grantee organization requires full disclosure by the employee of the grantee. The Court plainly recognized that fact in the earlier *Akron* and *Thornburgh* opinions.

The Court's contention that doctors can talk elsewhere is not a satisfactory answer to the doctrine of unconstitutional conditions. It begs the question. The cases involving schools and civil service employment would all fall, if that were true, since students, teachers, and civil servants could exercise their

116. *See* FCC v. League of Women Voters, 468 U.S. 364 (1984); NAACP v. Alabama, 357 U.S. 449 (1958).

117. *See* Rankin v. McPherson, 483 U.S. 378 (1987); Perry v. Sindermann, 408 U.S. 593 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

freedom of expression outside the school and during off duty hours.

The approach taken by the Court eviscerates the doctrine of unconstitutional conditions and reimposes the right/privilege dichotomy. The point is that government necessarily operates under special limitations presented by the Constitution and not merely by the legislature. Congress may choose not to fund clinics at all, but if it elects to fund the clinics, it may not do so in a manner that violates the Constitution. The logic which makes it possible to place words in the mouths of physicians contrary to sound medical judgment and prohibit presentation of valid information would just as easily justify discrimination in government programs on the basis of race or gender.

The Court contends that: "The grantee, which normally is a health care organization, may receive funds from a variety of sources for a variety of purposes."[118] The argument that it can therefore speak of abortion with other funds in other places is no answer. It merely says that when government pays it may require waiver of otherwise protected liberty. The Court should at least be forthright enough to admit this fact and not pretend to maintain its longstanding position on the right/privilege dichotomy.

V. WHOSE INTERESTS COUNT? PROTECTION FOR THE RECEIVER

The *Rust* opinion presents a speaker-versus-government discussion that leaves serious damage in its wake for the concept of the free flow of information under the First Amendment. Consider the *Rust* opinion from the perspective of the elements of the free flow framework.

A. *The Independent Interests of the Receiver*

The linchpin of the free flow theory is the idea that it is meaningless to speak of freedom of expression if willing listeners are prohibited by government from receiving the message.[119] Viewed from the perspective of interests of the listener, the *Rust* opinion is devastating. It presents at least three serious implications.

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

119. Procunier v. Martinez, 416 U.S. 396, 408-09 (1974); *see also supra* text accompanying note 16.

The obvious issue is that a willing listener who takes the affirmative step of going to a funded family planning program is specifically barred from hearing information that has been available there for years and would be readily obtainable now but for the government's prohibition. She may obtain information about whether she is pregnant and how to bring that pregnancy to a full term delivery. She may not receive clinically valid information about how to safely terminate the pregnancy which is a decision she is, in most instances, legally entitled to make.

Surely her interest in information about the abortion option is at least as significant as that of the addressee of a prisoner's letter in the *Procunier* case or the senior citizens who sought information on prescription drug prices in *Virginia Board of Pharmacy*. That it might be possible to obtain the information from some other source, as seen by a visit in the *Procunier* case of the prisoner letter or by physically shopping from store to store in the *Virginia Board of Pharmacy* situation, was not a factor in the other decisions and should not be one here.

The second dangerous implication from this case is that so long as one is poor enough, government may do through funding control what it could not do otherwise—prohibit access to abortions. The fact that government is not obligated to fund abortions does not authorize it to interfere in the process of communication about the option. Government is not obligated to print newspapers, but it is most assuredly precluded by the First Amendment from abridging the freedom of the press.[120] It is not obligated to provide funding for a system of public broadcasting but, having done so, it may not attempt to condition funding on a willingness to censor editorial decisions in programming.[121] In addition, until the *Rust* ruling, although government was not obligated to fund an abortion for a poor woman, it was not permitted to coerce her into not having one by manipulating the messages she could receive from the clinicians to whom she went for medical advice.[122]

The other problem with the alternative source thesis is the obvious defect noted by the First Circuit, the Tenth Circuit, the dissent by Judge Kearse in the Second Circuit, and in Justice Blackmun's dissent. Women attend these funded clinics

120. Arkansas Writers Project v. Ragland, 481 U.S. 221 (1987).

121. FCC v. League of Women Voters, 468 U.S. 364 (1984).

122. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983).

because they do not have ready access to alternative information for the simple reason that they do not have the money. The *Rust* decision does have a plainly discriminatory element to it, but not just discrimination as to the content of communications. It discriminates in the exercise of First Amendment rights on the basis of wealth. But for the poverty of the woman, government would not be able to control the information she receives. And given the fact that the Court does not suggest that the permissible government preference for childbirth over abortion rises to the level of a compelling interest, along with its patent admission that the statute is not narrowly tailored to the achievement of any other compelling interest, the provision as applied by these regulations should fall.[123] This contention is not dependent upon the right to choose abortion as the basis for the claim of discrimination. The discrimination is an abridgement of speech.

Beyond the question of discrimination, the *Rust* decision poses an additional free flow problem on purely practical grounds. As the Tenth Circuit observed, in an era when states are significantly modifying their abortion statutes and hospitals are changing their policies, it is difficult, if not impossible, for a person who lacks financial resources and perhaps education as well to obtain the requisite information.[124] And in that process, time is of the essence, since the stage of pregnancy is both a critical legal and medical element in the availability of abortion.

The Court's opinion also ignores the fact that there is more than one potential recipient of the information. The spouse or significant other plainly has an interest in the information and will be unable to assist the woman with her decision, to the degree that she wants that cooperation, if it is withheld. Then there are family members who may wish to provide support and assistance in the decision, again assuming that the woman wants it. By prohibiting the communication of abortion information, the government interferes not only with the right of the patient as "addressee," but also with the rights of her loved ones.

B. *Protecting the Message*

The Court attempts to use a device to avoid some of the many infirmities of the regulations. This device is the dichot-

123. Boddie v. Connecticut, 401 U.S. 371 (1971).

124. *See* Planned Parenthood v. Sullivan, 913 F.2d 1492, 1501 n.3 (10th Cir. 1990).

omy drawn in the opinion between control over the grantee organization and the freedom of the clinicians. In so doing, however, the Court inadvertently highlights another free flow flaw in its ruling. In *First National Bank v. Bellotti*,[125] the Court ruled that in the free flow theory of free expression, the message is protected without regard to its source.[126] Thus, the *Bellotti* Court specifically rejected the argument that the fact that the regulated entity was a bank made a difference and, at the same time, refused to let the case turn on whether profit-making corporate entities have a First Amendment right of free speech. Instead, the Court determined that what was important was the "stock of information" in the marketplace of ideas, not the source from which that stock is derived.[127] The fact that the information might be available from some other source in some other form had no bearing at all upon the First Amendment protection available to the message. Similarly, the Court's *League of Women Voters* opinion protected the editorial discretion of the station despite the fact that it held a license issued by the FCC and was funded by the federal government.

The criticism of *Bellotti* and *Virginia Board* turned largely on whether the fact that the information was produced in an attempt to make a profit affected the First Amendment status of the expression. The Court rejected not only that conclusion but the question itself. In *Rust*, not even that argument is present since these are nonprofit organizations whose only interest is in the presentation of information on the basis of which the patient may make clinically sound decisions.

Indeed, in a very direct way, the government is permitted by the *Rust* opinion to systematically seek to reduce the "stock of information" by precluding dissemination of a set of ideas by persons and organizations which seek to provide them. The point is not merely that the regulations discriminate on the basis of content, which they do, but that they seek to block messages which are in themselves otherwise plainly protected. The implications are profound indeed, for they suggest a return to the days when free speech was made to turn on the identity and character of the speaker as well as the intent with which the ideas were communicated.[128]

125. 435 U.S. 765 (1978).

126. *Id.* at 783.

127. *See supra* text accompanying notes 25-28.

128. *See generally* ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES (1941).

C. *Maintaining System Integrity: The Process of Communications*

The "stock of information" discussion in the Court's free flow rulings concerns the process of communication as well as the protection of the content of the messages sought to be communicated. The idea of free flow is itself associated with the effort to "open the channels of communication."[129] The *Rust* ruling damages that system of information flow in several important ways.

Rust begins by removing a channel of communications that had previously been accorded particular importance, that between the physician and patient. In the *Roe* opinion itself, the Court did not speak of the right to terminate a pregnancy as some sort of abstract decision made by a patient apart from other medical information and options. The Court spoke of the decision to terminate, at least in the first trimester, as a matter of "medical judgment" and personal choice. The companion *Doe v. Bolton*[130] case focused on the doctor/patient relationship as central to the abortion decision and struck efforts by the state to interfere in that decision process. That process of consultation has been repeatedly protected by the Court up to and including the *Akron* and *Thornburgh* cases.

The doctor/patient relationship is, however, not the only communication process issue in the case. The interference in the communication between an organization set up for the purpose of conveying information to others is itself a plain interference with free flow. The only way that an organization can comply with the regulations is by a decision not merely to remain passively silent, but by a willingness to deliberately withhold information in its position that the officers of the organization believe responsible health care providers ought to make available. The coercion acts to spark a kind of active self-censorship. The message of the Court's rulings on vagueness and overbreadth is precisely that government action which breeds self-censorship is the most dangerous kind of abridgement of freedom of expression.

VI. THE RISKS OF *RUST*

The *Rust* opinion is far more than an abortion decision. It has wide ranging consequences. The opinion promises to have profound implications for the doctrine of unconstitutional con-

129. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980).

130. 410 U.S. 179 (1973).

ditions, the reimposition of the right/privilege dichotomy with respect to government employees (either full time or through grants or contracts), the speech/action distinction in First Amendment issues, the distinction between regulation of pure expression and speech plus action, and notions of access to information as an aspect of First Amendment protected freedom of speech. All of these are quite apart from the obvious issues associated with the right to privacy in general and the decision to terminate a pregnancy in particular.[131]

But beyond its particular impacts, the *Rust* opinion seriously undermines the entire idea that the First Amendment

131. Numerous articles discuss the abortion focused aspect of the right to privacy. *See* Susan F. Appleton, *Doctors, Patients and the Constitution: A Theoretical Analysis of the Physician's Role in 'Private' Reproductive Decisions*, 63 WASH. U. L.Q. 183, 236 (1985); Andrea Asaro, *Judicial Portrayal of the Physician in Abortion and Sterilization Decisions: The Use and Abuse of Medical Discretion*, 6 HARV. WOMEN'S L.J. 51 (1983); Louise M. Benjamin, *NBC, the Advisory Council, and the American Birth Control League: A Study in the Definition of a Controversial Issue of Public Importance*, 28 FREE SPEECH Y.B. 70 (1990); Janet Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916 (1988); Paul H. Brietzke, *Public Policy: Contract, Abortion, and the CIA*, 18 VAL. U. L. REV. 741 (1984); Ruth Colker, *Abortion & Dialogue*, 63 TUL. L. REV. 1363 (1989); Charles R. DiSalvo, *Abortion and Consensus: The Futility of Speech, the Power of Disobedience*, 48 WASH. & LEE L. REV. 219 (1991); Theodore C. Hirt, *Why the Government is Not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895 (1988); C. Andrew McCarthy, *The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics*, 77 CALIF. L. REV. 1181 (1989); Thomas P. Monaghan, *Sidewalk Counseling: A First Amendment Right*, 31 CATH. LAW. 50 (1987); Edward G. Reitler, *The Title X Family Planning Subsidies: The Government's Role in Moral Issues*, 27 HARV. J. ON LEGIS. 453 (1990); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991); G. Yanover, *Fighting Fire With Fire: Rico and Anti-Abortion Activities*, 12 WOMEN'S RTS. L. REP. 153 (1990); Thomas J. Antonini, Note, *First Amendment Challenges to the Use of Mandatory Student Fees to Help Fund Student Abortions*, 15 J.C. & U.L. 61 (1988); Margaret T. Brenner, Note, *International Family Planning*, 8 HOUS. J. INT'L L. 155 (1985); Carole I. Chervin, Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401 (1989); Catherine Hebert, Note, *Prohibition of Public Funding for Abortion Counseling: Government Violation of Women's Constitutional Right of Privacy*, 17 HASTINGS CONST. L.Q. 421 (1990); Mary Joan Loeffler, Note, *Silencing the Abortion Option: Planned Parenthood Federation of America v. Bowen, 680 F. Supp. 1465*, 5 COOLEY L. REV. 837 (1988); Michael Marcus, Note, *United States Foreign Population Assistance Programs: Antiabortion Propaganda?*, 15 BROOK. J. INT'L L. 843 (1989); Alexandra A.E. Shapiro, Note, *Title X, The Abortion Debate, and the First Amendment*, 90 COLUM. L. REV. 1737 (1990); Terry Nicole Steinberg, Note, *Abortion Counseling to Benefit Maternal Health*, 15 AM. J.L. & MED. 483 (1989); Nancy Lynn Walter, Note, *Committee to Defend Reproductive Rights v. Myers]: The Constitutionality of Conditions on Public Benefits in California*, 33 HASTINGS L.J. 1475 (1982).

protects more than narrowly defined rights of political speakers—that it embraces a broader notion of the free flow of information. More than that, by its rhetoric and tone it devalues First Amendment currency. The Court should either take the first opportunity to clarify the apparent discrepancies between *Rust* and the free flow opinions or it should forthrightly reject the free flow conception and explain the new framework for First Amendment analysis. The Court has been rightly criticized in the past two decades for weak attempts to differentiate what are clearly contradictory precedents leaving a confused body of law in its wake.[132] The *Rust* opinion, not only leaves a host of competing case law,[133] but also leaves a framework that seems completely out of step with the ruling. In so doing, the *Rust* opinion is corrosive of a system of First Amendment law that is essential to the nation and to the international perception of the United States as a bastion of liberty.

132. *See, e.g.*, Haig v. Agee, 453 U.S. 280, 310 (1981) (Blackmun, J., concurring).

133. *See, e.g.*, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983).