SMU | Dedman School of Law

SMU Law Review

Volume 46 | Issue 1 Article 14

January 1992

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III. PRIVACY AND SPEECH IN CONFLICT ESSAY

ABORTION AND SPEECH: A COMMENT

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LAST Term, in *Rust v. Sullivan*,[1] the United States Supreme Court upheld the Reagan administration's ban on abortion counseling and referrals by family-planning clinics that receive so-called "Title X" funds from the federal government.[2] The Department of Health and Human Services ("DHHS") included the ban in its 1988 regulations that imposed three new conditions upon recipients of federal funds for Title X family planning projects. First, the regulations state that Title X projects 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."[3] Thus, a pregnant patient could not be given a referral list that is weighted in favor of health care providers who offer abortions or that includes a health care provider whose principal business is the provision of abortions.[4] Second, the regulations prohibit Title X projects from "encourag[ing],

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

2. 42 C.F.R. pt. 59 (1991). In 1970, Congress enacted Title X of the Public Health Service Act (hereinafter "Title X" or "the Act"), Pub. L. No. 91-572, § 6, 84 Stat. 1506 (1970) (codified at 42 U.S.C. §§ 300 to 300a-8 (1988)), to provide federal funding for family planning services. Section 1008 of the Act, 42 U.S.C. § 300a-6 (1988), provides that "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." Regulations promulgated between 1970 and 1988 by the Department of Health, Education and Welfare, and later by the Department of Health and Human Services ("DHHS"), did not contain a ban on abortion referral and counseling by Title X programs. *See* Carole I. Chervin, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401, 406 (1989).

3. 42 C.F.R. § 59.8(a)(1) (1991). Effective March 20, 1992, DHHS modified its ban on abortion counseling and referral to permit physicians, but not nurses and nurse-practitioners, to discuss abortion with their patients. *See* Philip J. Hilts, *White House Allows Some Advice At Public Clinics About Abortion*, N.Y. TIMES, Mar. 21, 1992, at A1. The modification was invalidated by the U.S. District Court for the District of Columbia, *see* National Family Planning & Reproductive Health Ass'n v. Sullivan, No. 92-935 (CRR), 1992 U.S. Dist. LEXIS 7043 (D.D.C. May 28, 1992), which thereafter refused to stay its order invalidating the modification, *see id.*, 1992 U.S. Dist. LEXIS 9421 (July 1, 1992).

4. *Id.*

promot[ing] or advocat[ing] abortion as a method of family planning."[5] And, third, the regulations require that Title X projects maintain "program integrity," that is, that the projects be organized and operated to keep them financially and physically separate from abortion activities.[6]

In upholding the regulations, the *Rust* Court offered a majority opinion that simply missed the mark. The majority's tortured analysis in *Rust* might have been unexceptionable, at least for an opinion on abortion,[7] but its results were not. Without ever conceding that it was doing so, the opinion expanded the powers of administrative agencies and altered the legal environment surrounding the physician-patient relationship.

Rust simultaneously expands the scope of federal agencies' interpretive powers while it diminishes the judiciary's role as an arbiter of statutory meaning. Reviewing the ban on abortion counseling and referrals, the Court deferred to the DHHS's interpretation of Title X, which did not mention either subject. In support of this conclusion, the Court invoked *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[8] under which, if a statute is silent or ambiguous on an issue that is the subject of judicial review, a court should defer to the agency's regulation as long as it is based upon a permissible reading of the statute.

Another principle of judicial review, however, provides that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[9] Consistent with this principle, the Court has held since *Chevron* that an agency's otherwise permissible construction of a statute is not entitled to deference if it raises serious constitutional questions that may be avoided if "there is another interpretation, not raising these serious constitutional con-

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5. *Id.* § 59.10(a).

6. *Id.* § 59.9.

7. As the Court's abortion opinions mount in number, each new opinion must tip-toe even more delicately than the last through the doctrinal minefield created by the Court's prior opinions. One need be no fan of the opinions in Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), either by Chief Justice Rehnquist for the majority, *id.*, or by Justice Scalia, *id.* at 532 (concurring in part & concurring in the judgment), to agree with their characterizations of the Court's abortion doctrine as "a web of legal rules that have become increasingly intricate," *id.* at 518, and that have resulted in "chaos," *id.* at 535 (Scalia, J.). *But cf.* Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2809 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) ("Although *Roe* has engendered opposition, it has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which a state law is unenforceable"). The Court's opinion in *Rust* represents an alternative to the intricate and highly nuanced opinion that attempts to render prior holdings faithfully, to conform as nearly as possible to precedent, to be candid and honest about one's own holding, and to announce departures from precedent accurately and promptly, *see generally* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987) (delineating the content of a judicial "obligation of candor"). The often difficult task of writing candidly becomes a good deal simpler as soon as one or more of these obligations is abandoned.

8. 467 U.S. 837 (1984).

9. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); *see also* United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); United States v. Delaware & Hudson Co., 213 U.S. 366, 407-08 (1909).

cerns, that may fairly be ascribed to" the statute.[10] The Court responded to this rule by concluding that no serious constitutional questions were even raised by the Title X regulations and therefore *Chevron* required judicial deference to DHHS's interpretation.[11]

The record does not support the Court's conclusion that there was no serious question whether DHHS's interpretation of Title X constituted discrimination on the basis of viewpoint (in violation of the First Amendment) or an excessive restriction on the privacy rights of women (in violation of the Fifth Amendment): "[d]isposition of the constitutional issues comprised half of the majority's opinion,"[12] four dissenting justices vigorously pressed the constitutional arguments against the regulation,[13] and the circuit courts were split over the constitutional issue.[14] Rather, it seems that the Court is now willing to sacrifice constitutionally inspired interpretative norms in favor of a broad principle requiring deference to agency interpretations.[15]

Rust's impact upon the physician-patient relationship is, if anything, even more pronounced. The Court's earlier informed-consent rulings had effectively insulated physicians and their patients from state efforts to prescribe various disclosures intended to discourage women from terminating their pregnancies.[16] In one of these cases, the Court explained that the state's

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10. *Edward J. DeBartolo Corp.*, 485 U.S. at 577.

11. Rust v. Sullivan, 111 S. Ct. 1759, 1771 (1991).

12. *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 395 (1991).

13. *See Rust*, 111 S. Ct. at 1178-80 (Blackmun, J., dissenting).

14. *Compare* Planned Parenthood Fed'n of Am. v. Sullivan, 913 F.2d 1492 (10th Cir. 1990) (holding that regulation violates the first and fifth amendments) *and* Massachusetts v. Sullivan, 899 F.2d 53 (1st Cir. 1990) (holding the regulation violates the first amendment) *with* New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989) (upholding the constitutionality of the Title X regulation), *rev'd sub nom.* Rust v. Sullivan, 111 S. Ct. 1759 (1991).

In addition to the indicia of substantiality discussed in the text, law review writers recognized the significance of the issue. *See, e.g.*, Chervin, *supra* note 2; *compare, e.g.*, Janet Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916 (1988) *with* Theodore C. Hirt, *Why the Government is not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895 (1988).

15. *Cf., e.g.*, Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2111-13 & n.196 (1990); *The Supreme Court—Leading Cases*, *supra* note 12, at 389-90, 395-99.

It has also been suggested that *Rust* further expands *Chevron* by requiring judicial deference to an agency's interpretation on a pure question of law, which the Court appeared to say was inappropriate in Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987). *See* Comment, *Administrative Agencies Get Their Way Over Constitutional Rights in* Rust v. Sullivan, 28 WILLAMETTE L. REV. 173, 177 (1991). At least four members of the Court, however, reject what they characterize as the "dicta" in *Cardoza-Fonseca*, *see* NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 133-35 (1987) (Scalia, J., concurring), and the rule has come under heavy academic attack as well. *See, e.g.*, Sunstein, *supra* at 2094-96.

16. *See* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (holding unconstitutional statutory requirement that a woman who seeks an abortion be told (1) the name of the physician who will perform the abortion, (2) the "particular medical risks" of the abortion procedure and of carrying the child to term, (3) the possibility of "detrimental physical and psychological effects" of abortion, (4) that medical assistance benefits may be available for prenatal care, childbirth, and neonatal care, (5) that the father is liable for child support, and (6) that printed materials are available from the state that describe the fetus and list agencies that offer alternatives to abortion); City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983) (holding unconstitutional city ordinance that

required disclosure "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 is obviously intended to do — the dialogue between the woman and her physician"[17] and that "[t]his type of compelled information is the antithesis of informed consent."[18] Indeed, in *Roe* itself, the Court wrote that the right to choose includes the right to seek the advice and guidance of a physician without undue governmental interference.[19]

Admittedly, the Court's recent decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[20] represents a change of heart concerning detailed informed consent requirements.[21] Yet *Casey* broadly reaffirms the Court's support for the more general principle in its earlier informed-consent cases that access to the guidance and assistance of a physician is an essential part of the right to choose. More specifically, after *Casey* states may require the giving of "*truthful, nonmisleading information* about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus."[22]

By contrast, the Court in *Rust* upheld a wholesale federal assault upon the notion of "choice" and "informed consent" by upholding DHHS's ban on informative and informed discussions of the abortion option. The result is a physician-patient relationship in Title X clinics that the government requires to be half-truthful (and to that extent untruthful[23]) and inherently misleading.

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required a woman who seeks an abortion be told (1) the fetus's gestational age, (2) "that the unborn child is a human life from the moment of conception, (3) a detailed account of "the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed," (4) that the fetus may be viable if its gestational age exceeds 22 weeks, (5) that the "attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the operation," (6) a detailed descriptions of the risks attendant to surgical abortion procedures, and (7) the availability of public and private family-planning, pregnancy, and postnatal services).

In Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992), the Court overruled *Akron* and *Thornburgh* "[t]o the extent [those cases] find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus". *Id.* at 2824.

17. *Thornburgh*, 476 U.S. at 763.

18. *Id.* at 764.

19. Roe v. Wade, 410 U.S. 113, 163 (1973).

20. 112 S. Ct. 2791 (1992).

21. *See supra* note 16.

22. *Casey*, 112 S. Ct. at 2824 (emphasis added).

23. *See* George J. Annas, *Restricting Doctor-Patient Conversations in Federally Funded Clinics*, 325 NEW ENG. J. MED. 362 (1991):

> [P]hysicians can mislead patients as much by silence as by direct advice. *In the doctor-patient context, a half-truth is the same as a lie*, and it violates both medical ethics and the doctrine of informed consent. By legally approving inherently unethical behavior, the Court's opinion in *Rust* is a direct attack on medical ethics in the doctor-patient relationship.

Id. at 364 (emphasis added); *see also* Jeremy Sugarman & Madison Powers, *How the Doctor Got Gagged: The Disintegrating Right of Privacy in the Physician-Patient Relationship*, 266 J.A.M.A. 3323, 3327 (1991) ("Legislation that introduces a political agenda into practice . . . is both medically and morally unsound").

The *Rust* opinion's two consequences — the expansion of federal agency authority in the sphere of legislative interpretation and the distortion of the physician-patient relationship — are linked by a common failing. The majority vastly underestimated the constitutional significance of the speech elements of the case. The Court's decision has been criticized,[24] even by commentators who agree with the Court's ultimate resolution of the constitutional issues,[25] for its failure to take seriously the first amendment issues raised by petitioners. Perhaps the Court was being manipulative and disingenuous,[26] but it is also possible that the Court simply could not or would not recognize the gravity of the constitutional issues before it.

The key to understanding *Rust*'s failure is the Court's reliance upon the reasoning of its earlier "abortion funding" cases. In *Maher v. Roe*[27] and *Harris v. McRae*,[28] the Court held that the states and Congress were not obligated to fund abortions as part of the state-federal Medicaid health care program.[29] The essential holding of those cases was that the government may express a preference for child-birth over abortion through its funding decisions, and its decision to fund and thereby encourage one type of activity does not penalize or burden the unfunded activity. The government may not affirmatively burden or interfere with the exercise of a fundamental right, but neither is it required to alleviate burdens or ameliorate interferences (such as the indigency of Medicaid beneficiaries) that otherwise exist.

The reasoning in *Maher*, *Harris*, and for that matter in *Rust* itself, partakes of the semi-mystical aphorism, "the greater power includes the lesser power." Congress was under no constitutional obligation to create and fund the Medicaid[30] and the Title X family planning programs. The "greater" power to fund none of these activities, the argument seems to go, includes the "lesser" power to fund only those health care or family planning activities that please the sovereign, or to impose such restrictions on the conduct and speech of employees as may please the sovereign.[31] As beguiling as this

24. *See* Note, *Administrative Agencies Get Their Way Over Constitutional Rights in* Rust v. Sullivan, 28 WILLAMETTE L. REV. 173 (1991).

25. *See The Supreme Court—Leading Cases*, *supra* note 12, at 395 ("Although the majority correctly decided the constitutional issues, it ought never to have reached them.").

26. *Id.*

27. 432 U.S. 464 (1977).

28. 448 U.S. 297 (1980).

29. *Maher* addressed only the right of states to exclude funding for nontherapeutic abortions, *i.e.*, those that are not "medically necessary." *See Maher*, 432 U.S. at 466. *Harris*, on the other hand, permitted the federal government to refuse funding for both therapeutic and nontherapeutic abortions, except to save the life of the mother or when the pregnancy was the result of rape or incest. *See Harris*, 448 U.S. at 302.

30. The point has been debated extensively, *see, e.g.*, 2 & 3 PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE & BIOMEDICAL & BEHAVIORAL RESEARCH, SECURING ACCESS TO HEALTH CARE: THE ETHICAL IMPLICATIONS OF DIFFERENCES IN THE AVAILABILITY OF HEALTH SERVICES (1983), but the Supreme Court has decided the issue, *see* Harris v. McRae, 448 U.S. 297, 317-18 (1980) (rejecting as "extraordinary" the argument that the due process clause would have required Congress to subsidize medically necessary abortions "even if Congress had not enacted a Medicaid program to subsidize other medically necessary services").

31. Any suggestion that the doctrine of "unconstitutional conditions" is in danger of extinction should be taken seriously. *See, e.g.*, Cass R. Sunstein, *Why the Unconstitutional Con-*

logic appears to be (at least to some members of the Court[32]), it is deeply flawed in the context of the regulations at issue in *Rust*. When the "lesser power" to attach conditions on the appropriation of Title X funds leads to a gag rule on physicians and nurses employed by the Title X project, the Court cannot claim on DHHS's behalf that the agency is writing on a blank slate. Congress has created an environment that permits, even encourages, the creation of a physician-patient (as well as counselor-patient and nurse-patient) relationship. By creating a set of affirmatively slanted and misleading rules for speech about abortion, DHHS has imposed restrictions on those professionals that undermine the relationship and harm both the patient and the physician.

The Court in *Rust* failed to see that the Title X regulations were not part of a simple, binary, on/off, funded/unfunded governmental program paradigm. The relevant context in which to assess the gravity of the constitutional issues in *Rust* was not "the greater power includes the lesser power," because the choice at the time the Title X regulations were promulgated and at the time the Court decided *Rust* was not between "no family planning program" and "a family planning program with restrictions on speech." The relevant context for a constitutional analysis of the regulations in *Rust* was the situation that existed *at the time the regulations were promulgated.* There existed a government-backed family planning program, in which women — many of them young, minority women, lacking the financial means to obtain private family planning assistance, and some (perhaps more) lacking the social and psychological support to deal without assistance with their reproductive choices — were dependent upon the professional judgment, assistance, and advice of others. The federal government itself was responsible for the creation of that trusting, dependent relationship, and the Title X regulations pervert that relationship at the expense of the woman who is effectively invited by the government to walk into the Title X clinic.

I do not mean to suggest by these comments that the element of timing is significant. The Title X regulations would be just as offensive if they had been promulgated when the Title X funds were first appropriated eighteen years earlier. The burden of the argument comes down to this: Once the federal government decides to fund a program within which the physician-patient relationship is created, it alters the social conditions, the choices, and the world view of the patient. It encourages her to enter into a relationship

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ditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U.L. REV. 593 (1990) (arguing that the doctrine has outlived its usefulness); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416, 1417 (1989) (the doctrine is "riven with inconsistencies" and in "disarray"). *See also* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 217 (1992) ("the government may pretty well attach whatever conditions it wants to the receipt of its funds, even when those conditions quite brazenly prefer one set of ideas over another").

32. *See, e.g.*, Walton v. Arizona, 110 S. Ct. 3047, 3072 (1990) (Blackmun, J., dissenting); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763 n.8 (1987); Posadas de Puerto Rico Assocs., dba Condado Holiday Inn v. Tourism Co. of Puerto Rico, 478 U.S. 328, 359 (1986) (Stevens, J., dissenting); Lockett v. Ohio, 438 U.S. 586, 633 (1978) (Rehnquist, J., concurring in part & dissenting in part); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127-29 (1982) (Rehnquist, J., dissenting).

with clinic personnel in which she has a right to expect that professional rules of disclosure, candor, and honesty apply. The government simply may not act as though it had nothing to do with the creation of that relationship or those expectations. Given its role in their creation, it is passing strange that the government (speaking through the *Rust* Court) refused to acknowledge their importance or even their existence.[33]

It is in this respect that the *Rust* Court's reliance upon *DeShaney v. Winnebago County Department of Social Services*[34] is instructive. In that case, Joshua DeShaney was beaten mercilessly by his father until he became permanently comatose. The father's violence toward his infant son had been faithfully documented by the social services authorities of Winnebago County, Wisconsin, who did nothing to help Joshua escape. Joshua's guardian sued the local officials who had not intervened,[35] and the Supreme Court held that there was no state action and, thus, no violation of the fourteenth amendment supporting damages under the civil rights statutes.[36] The Court stated that "nothing in the language of the Due Process Clause . . . requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."[37] The *Rust* Court uses this comment to support its conclusions that "[t]he Government has no constitutional duty to subsidize an activity merely because the duty is constitutionally protected"[38] and that the Title X regulations are constitutional because they do not impermissibly burden or penalize a woman's choice to obtain an abortion.[39]

Dissenting in *DeShaney*, Justice Brennan argued that there was, indeed, state action in that case, in the form of a child welfare system that led citizens to rely upon the public agencies to "do something" about cases of domestic violence.[40] The existence and operation of a county department of human services changed the factual backdrop against which the saga of domestic violence was played out, and that change influenced neighbors and other officials to rely on county officials to intercede. To borrow a phrase

33. My analysis here borrows from the insights in Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1 (1989). A related point—that the pervasiveness of the government in everyday life requires stricter scrutiny of restrictions that are attached to government programs—is made by RODNEY A. SMOLLA, *supra* note 31, at 218-19.

34. 489 U.S. 189 (1989).

35. The first time Joshua was hospitalized with multiple bruises and abrasions, the county obtained a court order that placed the boy in the temporary custody of the hospital. Three days later, however, a team of experts concluded that there was insufficient evidence of abuse to continue the custody order. *Id.* at 192. Joshua was returned to his father. Over the next seven months, case workers recorded the evidence of continued abuse, but nothing more was done to protect Joshua from his father. *Id.* at 192-93.

36. *DeShaney*, 489 U.S. at 201-202. The civil rights statutes at issue were 42 U.S.C. §§ 1983, 1985, 1988 (1988).

37. *DeShaney*, 489 U.S. at 195.

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

39. *Id.*

40. *DeShaney*, 489 U.S. at 204-05 (Brennan, J., dissenting).

from Professor Sunstein,[41] the government itself changed the baseline, and in so doing, the otherwise private conduct of a father was transformed into a failure of public institutions, as well.

In a similar vein, the *Rust* Court's failure to attach significance to the first amendment and privacy rights of clinic patients and personnel is a *DeShaney*-like failure. When the Court concluded that patients are no worse off by virtue of the new regulations than they would have been if no Title X project had been made available and funded,[42] it ignored the government's involvement in creating and supporting the intimate relationship that exists between physician and patient. The federal government invited Title X patients into family-planning clinics whose counseling programs were supported by the government itself. It provided patients with physicians and nurses and the opportunity to consult with them. The patients had government-created and government-backed expectations of a traditional, trust-based relationship with health care professionals. In addition, the patient's reliance upon the government was made more acute by Title X's financial requirements. If the patient could contribute to the cost of her counseling and care, a fee was collected from her, which reduced the patient's financial ability to obtain unbiased counseling from a private clinic.[43]

If the Court had been more sensitive to the federal government's role in shaping this relationship, it might well have found enough merit in the constitutional claims of the clinics to reject the *Chevron* rule of deference to DHHS's statutory interpretation. A truly independent judicial review of the Title X regulations might have led the Court, in turn, to reject DHHS's interpretation of Title X and to protect the integrity of the professional relationship that the federal government had brought into existence.

A similar lack of perspective may well plague *Bray v. Alexandria Women's Clinic*,[44] the next major abortion controversy to be decided by the Court. The proliferation of protests at abortion clinics across the country over the past two years[45] made *Bray* one of the most closely watched cases of the Supreme Court's 1991 Term. Now that the Supreme Court has ordered the case to be held over for reargument,[46] *Bray* will be one of the most closely

41. *See* Sunstein, *supra* note 31, at 601-03.

42. *Rust*, 111 S. Ct. at 1776-78.

43. *See* Massachusetts v. Secretary of Health and Human Servs., 899 F.2d 53 (1st Cir. 1990).

44. National Org. for Women, 726 F. Supp 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.*, Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

45. *See generally* Catherine S. Manegold, *194 Arrested in Protests at Buffalo Abortion Clinics*, N.Y. TIMES, Apr. 23, 1992, at B9; Gina Kolata, *Nomadic Group of Anti-Abortionists Uses New Tactics to Make Its Mark*, N.Y. TIMES, Mar. 24, 1992, at A12; *Planned Parenthood Clinic In Montana Damaged by Fire*, N.Y. TIMES, Jan. 20, 1992, at A15; *95 Arrested at Abortion Protest in Wichita*, N.Y. TIMES, Aug. 20, 1991, at A20; *Operation Rescue Condemns Death Threats, Oppressed by Zealots*, N.Y. TIMES, Sept. 4, 1991, at A22; Felicity Barringer, *Abortion Foes Clog Vermont Courts*, N.Y. TIMES, May 7, 1990, at A12; *41 Protesters Arrested at an Abortion Clinic*, N.Y. TIMES, Feb. 25, 1990, pt. 1, at 39.

46. *See* Bray v. Alexandria Women's Clinic, 60 U.S.L.W. 3827 (U.S. June 8, 1992) (order that "[t]his case is restored to the calendar for reargument").

watched cases of the 1992 Term, as well. The Court's order provides some evidence that the eight justices who heard oral argument in the case before Justice Clarence Thomas was confirmed are deadlocked and that Justice Thomas's vote is needed to break a tie.[47] Thus, it seems certain that *Bray* will be not only a close decision, but also another early test of the judicial philosophy of the Court's newest justice.[48]

The underlying facts of *Bray* are all too familiar:

> To achieve [the goals of stopping the practice of abortion and reversing its legalization,] the individual defendants have agreed and combined with one another and with defendant Operation Rescue to organize, coordinate and participate in "rescue" demonstrations at abortion clinics in various parts of the country . . . . The purpose of these "rescue" demonstrations is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely. . . . By disrupting and blockading family planning clinics, defendants and their followers hope (i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services and (iii) to impress upon members of society the moral righteousness and intensity of their antiabortion views.[49]

Acting under the authority of 42 U.S.C. § 1985(3),[50] the district court enjoined the defendants "from, in any manner or by any means, trespassing on, blockading, impeding or obstructing access to or egress from any facility at which abortions, family planning or gynecological services are provided in" seven communities in northern Virginia.[51] Out of concern over the limits of

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47. *See* Linda Greenhouse, *High Court Delays Ruling on Protest*, N.Y. TIMES, June 9, 1992, at A1.

48. *See* Linda Greenhouse, *Consequential Cases Are Likely to Test the Supreme Court's New Majority*, N.Y. TIMES, Oct. 7, 1991, at A14. In his first abortion case, Justice Thomas voted with Chief Justice Rehnquist and Justices White and Scalia to overrule *Roe v. Wade*. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 60 U.S.L.W. 4795, 4826 (U.S. June 29, 1992) (Rehnquist, C.J., dissenting); *id.* at 4835 (Scalia, J., dissenting).

49. National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1488 (E.D. Va. 1989), *aff'd*, 914 F.2d 582, 586 (4th Cir. 1990).

50. 42 U.S.C. § 1985(3) (1988) provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against one or more of the conspirators.

51. National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1497 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990).

the first amendment, however, the district court refused plaintiffs' request for an injunction against "those 'rescue' operations that tend to intimidate, harass or disturb patients or potential patients of the clinics."[52] The Court of Appeals for the Fourth Circuit affirmed the district court in all respects.[53]

Although the *Bray* case is about abortion protests, it is not being treated as a case about the law of abortion or the law of protests. The case will not be won or lost on the basis of the constitutional doctrines of privacy under the fourteenth amendment or freedom of speech under the first amendment.[54] Instead, the primary issues[55] in *Bray* are (1) whether the abortion protests that target women generally, or women seeking abortions more specifically, meet section 1985(3)'s element of "discriminatory class-based animus,"[56] and (2) whether defendants have conspired to deprive the statutorily-protected class of its constitutional right — not to obtain an abortion — *but to engage in interstate travel.*[57]

It is not hard to imagine the reasons why the right to abortion is not at the center of the *Bray* case. For one, the rule announced in *Roe v. Wade* is a fourteenth-amendment limitation upon state action, and it may plausibly be argued that the protesters who blockade entrances to abortion clinics are

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52. *Id.*

53. *See* National Org. for Women v. Operation Rescue, 914 F.2d 582, 586 (4th Cir. 1990).

54. Despite the district court's finding that two of the purposes of the blockade were "to dissuade women from seeking a clinic's abortion services and . . . to impress upon members of society the moral righteousness and intensity of their antiabortion views," National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1488 (E.D. Va. 1989), *aff'd*, 914 F.2d 582, 586 (4th Cir. 1990), neither lower court held that the protest blockades were speech or symbolic expressive conduct entitled to protection under the first amendment. Indeed, the lower courts took care to distinguish Operation Rescue's purely physical blockades, which the courts held could be enjoined, from conduct that tended to "intimidate, harass or disturb patients or potential patients," which both lower courts agreed could not be enjoined without violating the first amendment. *See id.* at 1497. Respondents did not file a cross-petition to challenge the courts' denial of their injunction against the offensive speech elements of defendants' protests, so the Court will not have an opportunity to consider the first amendment issue.

55. In addition to the two issues discussed in the text accompanying *infra* notes 56-57, the parties have also briefed issues that relate to pendent claim jurisdiction and attorney fees. *See* Teree E. Foster, *Do Organized Blockades of Abortion Clinics Violate Federal Law?*, PREVIEW 31, 33 (Issue 2, 1991).

56. Although the statute does not contain the phrase, "discriminatory class-based animus," *see supra* note 50, but instead addresses conspiracies directed against "*any person* or class of persons" (emphasis added), the Supreme Court's earlier opinions have created such a requirement. *See* United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825, 834-35 (1983); Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

The Court has stated that it is an open question "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under . . . § 1985(3)," *Griffin*, 403 U.S. at 102; *see also Scott*, 463 U.S. at 836 (describing the question as a "close" one). Many of the comments made by members of Congress during the floor debates in 1871 support the inference that Congress did not intend to limit the statute to discrimination against blacks. *See, e.g.*, Neil H. Cogan, *Section 1985(3)'s Restructuring of Equality: An Essay on Texts, History, Progress, and Cynicism*, 39 RUTGERS L. REV. 515, 559-68 (1987); Comment, *A Construction of Section 1985(3) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 407-11 (1979).

57. Although it appears that the parties briefed the abortion/privacy issue, the court of appeals concluded, "The district court did not, and we do not, reach the question of whether § 1985(3) can encompass violations of a right to privacy". National Organization for Women v. Operation Rescue, 914 F.2d 584, 586 (4th Cir. 1991).

engaged in private conduct, not state action. Lower federal courts have consistently held that state action, not purely private conduct, is a required element of a section 1985(3) claim based upon an interference with the rights of abortion or privacy.[58] More importantly, at the time *Bray* was being litigated in the lower courts, it was widely feared that the Court lacked a solid majority that still supported the principal conclusion in *Roe* that there is a fundamental constitution right to choose whether to have an abortion.[59] Under these circumstances, there were sound strategic reasons for the plaintiffs and the lower courts in *Bray* to rely principally, if not exclusively, upon the right to travel. The result of all this, however, is an inability to identify abortion as the logical, rhetorical, and emotional center of the *Bray* case, and an argument for the plaintiffs may have been lost in the process.

The argument that state action is a required element in a section 1985(3) action where the challenged activity is intended to deprive plaintiffs of a right guaranteed against government interference reflects two central concerns: federalism and judicial workloads. Without this requirement, the argument goes, any private conspiracy aimed at the deprivation of any federal right would become a federal case. Because state laws cover trespass, breaches of the peace, and the like, there is no need for a federal remedy. Thus, the creation of a federal remedy would be an expression of disrespect of state law enforcement and judicial officers,[60] and it would seriously overburden the federal judicial system with claims in which the federal government's interest was slight.[61]

And yet, surely there are times when local laws, or local law enforcement institutions, are or will be inadequate to defend the constitutional interests of

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58. *See, e.g.*, New York State NOW v. Terry, 704 F. Supp. 1247, 1260 (S.D.N.Y. 1990); Roe v. Operation Rescue, 710 F. Supp. 577, 582-83 (E.D. Pa. 1989); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 681 F. Supp 688, 691 (D. Ore. 1988); Chico Feminist Women's Health Ctr. v. Butte Glen Medical Soc'y, 557 F. Supp. 1190, 1197 (E.D. Cal. 1983).

59. Of the five justices who refused to join Chief Justice Rehnquist's plurality opinion or Justice Scalia's concurring opinion in Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), both of which invited the Court to overrule *Roe v. Wade*, only three justices remain on the Court (Justices Blackmun, Stevens, and O'Connor). Those three justices were joined by Justice Souter and Justice Kennedy (who voted with Chief Justice Rehnquist in *Webster*) to form a bare majority in favor of retaining the essential features of *Roe* in Planned Parenthood of Southeastern Pennsylvania v. Casey, 60 U.S.L.W. 4795 (U.S. June 29, 1992).

60. *Cf.* Wm. Bradford Reynolds, *Judicial Excess in Wichita*, N.Y. TIMES, Sept. 1, 1991, at E11 (nat'l ed.) ("Kansas has perfectly adequate trespass, nuisance and battery laws to use against Operation Rescue demonstrations. . . . In declining jurisdiction in [an abortion protest] case like Judge Kelly's [in Wichita, Alabama district judge] Propst said 'it would be a sign of judicial arrogance' to suggest that the state courts could not deal with the issues").

61. *Cf.* Scott v. Moore, 680 F.2d 979 (5th Cir. 1982) (*en banc*), *rev'd sub nom.*, Scott v. Moore, 463 U.S. 825 (1983):

> The extension of § 1985(3) to protect against private infringement of every right protected against governmental action by the Constitution would create a *Bivens*-type tort action against every private conspiracy that affects a federal constitutional right. A citizen has a right to be secure in his property and home, but we do not think that § 1985(3) confers a cause of action for a conspiracy by a person's neighbors to block his driveway in order to keep him from driving his automobile to his place of business.

Id. at 1014 (Rubin & Williams, JJ., dissenting) (footnote omitted).

plaintiffs under siege. Section 1985(3) itself provides a remedy for such cases in its "preventing and hindering clause,"[62] by which, "[i]f private persons take conspiratorial action that prevents or hinders the constituted authorities of any state from giving or securing equal treatment, the private persons would cause those authorities to violate the 14th Amendment."[63] Under the right set of facts, then, even private action could "trigger" state action sufficient to overcome the concerns expressed in the preceding paragraph. It is difficult to avoid the impression that when state and federal officials ignore the lawless interference with a woman's exercise of that right, they are not simply tolerating the interference but are participating in it, as well. The plaintiffs in *Bray* did not make this argument,[64] however, and the Supreme Court will presumably not consider it.

This point is brought into even sharper focus by the *Rust/DeShaney* paradigm. When the Court in *Roe* recognized a woman's fundamental right to choose whether to terminate a pregnancy, it arguably altered the "baseline"[65] so as to require a federal remedy for private assaults on that right. The Court told women that they had a federal constitutional right to choose to have an abortion through the first trimester of their pregnancy, and about 1.5 million women a year exercised that right by going to clinics and hospitals to obtain abortions. The Court subsequently upheld state requirements that first-trimester abortions be performed in hospitals or licensed clinics,[66] which centralized abortion services and made it easy for abortion protesters to locate abortion providers and seekers.[67] Just this past Term, the Court upheld Pennsylvania's requirement of a twenty-four-hour waiting period between the informed consent disclosures and the abortion procedure.[68] As a result, women seeking abortions may be subjected to two gauntlets of jeering protesters.

This is a stage that has been created and set by the federal government. The Court itself has placed these actors and forces in motion. It would be a denial of reality for the Court to hold that criminal conduct aimed at preventing the exercise of abortion rights is not imbued with sufficient federal interest to warrant the invocation of section 1985(3). Without this view of the world it has helped to create, it seems unlikely that a majority of the Court will perceive that the case has profound implications for the right to abortion.

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62. *See supra* note 50.

63. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 384 (1979).

64. *See* National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1494, n.11 (E.D. Va. 1989).

65. *See supra* note 41 & accompanying text.

66. *See* Simopoulos v. Virginia, 462 U.S. 506 (1983) (upholding requirement that abortions be performed in either a hospital or an appropriately licensed clinic).

67. Finding abortion providers will be even easier now that the Court has upheld the constitutionality of state requirements of detailed recordkeeping and reporting by abortion facilities. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2832-33 (1992).

68. *See id.* at 2825-26.