NOTE

Rust v. Sullivan: Redirecting the *Katzenbach v. Morgan* Power

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In *Rust v. Sullivan*,[1] the United States Supreme Court upheld a Department of Health and Human Services regulation,[2] which forbids employees of federally funded family planning clinics from discussing abortion with their clients.[3] *Rust's* holding, however, conflicts with previous First Amendment doctrine involving content-based conditions on government subsidy and employment.[4] The *Rust* Court could have reached this decision in one of two ways: the Court could have considered the constitutionality of the regulation, or the Court could have found that the decision on constitutionality was not its to make. The former approach is often labeled "theoretical," while the latter is labeled "metatheoretical."[5]

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

2. 42 C.F.R. § 59.10 (1992).

3. *Rust*, 111 S. Ct. at 1771.

4. The regulation conditioned receipt of a government subsidy on speech content without requiring the government to show a compelling state interest. *See* discussion *infra* part III.

5. In a purely theoretical decision, the Court does not question its own role in deciding the constitutional issue. An example of this is Cohen v. California, 403 U.S. 15 (1971) (holding imprisonment for potentially offensive word printed on jacket unconstitutional). In a purely metatheoretical decision, the Court does not reach the "merits," but decides not to hear the case. An example of this is Allen v. Wright, 468 U.S. 737 (1984) (holding that parents of black school children lack standing to contest federal tax deductions to schools that discriminate on the basis of race). Metatheoretical decisions are often couched in terms of "judicial restraint." Many constitutional decisions combine theoretical and metatheoretical aspects. An example of this is Roe v. Wade, 410 U.S. 113 (1973) (holding state law criminalizing abortion an unconstitutional interference with the right to privacy). Many commentators recognize this distinction, *e.g.*, Larry A. Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 40 OHIO ST. L.J. 3 (1981), although not always using these terms. *See, e.g.*, Lawrence Gene Sager, *Fair Measure: The Legal*

On the surface, the *Rust* Court appears to rule on the constitutionality of the regulation, applying theoretical First Amendment doctrine. This Note, however, proposes that the *Rust* Court decided that the constitutional decision was not its to make. This decision has critical metatheoretical implications because it does not merely involve speech protection in the federally funded workplace; rather, it allows the federal courts to defer to an administrative agency's constitutional interpretation.[6] Such deference, in turn, shifts power from the judiciary to the executive branch.

By deferring to the discretion of another branch of the federal government on a question of constitutional interpretation, the *Rust* Court implicitly resurrects and reshapes the long ignored doctrine of *Katzenbach v. Morgan*.[7] Despite their different substantive issues, these two cases have a similar effect on the federal judiciary's role in constitutional interpretation. Section I of this Note describes the facts and history surrounding *Rust* and *Morgan*. Section II examines the *Rust* doctrine of judicial deference in the context of *Morgan*. Section III examines the *Rust* Court's approach to the First Amendment issues raised by the regulation in question. Finally, Section IV explores *Rust's* possible implications.

I. A COMPARISON OF *MORGAN* AND *RUST*

The facts and history of *Morgan* and *Rust* must be examined before comparing the Court's metatheoretical approaches in those cases. In *Morgan*, the Court addressed the constitutionality of a state law requiring citizens to pass a literacy test before being allowed to vote.[8] Previously, *Lassiter v. Northampton County Board of Elections*[9] controlled this issue. In upholding literacy tests, the *Lassiter* Court found that "[t]he ability to read and write . . . has some relation to standards

Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212, 1213-15 (1978); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 3 (1962) (describing this distinction in the context of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). This Note uses these terms because no other terms that describe this distinction have been widely accepted.

6. This Note uses the phrase "constitutional interpretation" to refer to any act of a governmental body, intentional or otherwise, that potentially alters constitutional doctrine.

7. 384 U.S. 641 (1966).

8. *Id.* at 643.

9. 360 U.S. 45 (1959).

designed to promote intelligent use of the ballot."[10]

Consistent with *Lassiter*, the state of New York required its citizens to pass an English literacy test before voting.[11] After the *Lassiter* decision and the passage of the New York law, however, the United States Congress passed Section 4(e) of the Voting Rights Act of 1965,[12] prohibiting "the States from conditioning the right to vote of [U.S. citizens educated in Spanish in Puerto Rico] on ability to read, write, understand, or interpret any matter in the English language."[13]

The plaintiffs in *Morgan*, registered New York voters, challenged the constitutionality of Section 4(e) to the extent that it prohibited the enforcement of the election laws of New York.[14] The issue was whether Congress could invalidate the New York law under its Fourteenth Amendment, Section 5 power if, under *Lassiter*,[15] the New York law did not violate the Fourteenth Amendment Equal Protection Clause.[16] The *Morgan* Court distinguished *Lassiter*, neither criticizing it nor overruling it.[17]

Justice Brennan's majority opinion in *Morgan* set out two rationales for upholding Section 4(e).[18] First, Congress may select means to remedy discrimination under the *McCulloch v. Maryland*[19] Section 5 standard.[20] Second, Congress may apply its superior legislative fact-finding competence to invalidate a state law that invidiously discriminates, even if, apparently, that law has been held constitutional by the Court.[21] The second rationale allows Congress to define for itself the constitutional provisions that it may enforce under Section 5.[22] Thus,

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10. *Id.* at 51.

11. N.Y. CONST. art. 2, § 1; N.Y. ELEC. LAW § 150 (Consol. 1949).

12. 42 U.S.C. 1973b(e)(1) (1964).

13. *Id.*

14. *Morgan*, 384 U.S. at 643-44.

15. *See* Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 302 (1982).

16. U.S. CONST. amend. XIV, § 1.

17. "[O]ur decision in *Lassiter* . . . is inapposite." *Morgan*, 384 U.S. at 649.

18. *Id.* at 650-58.

19. 17 U.S. (4 Wheat.) 316 (1819).

20. *Morgan*, 384 U.S. at 650-51. The *McCulloch v. Maryland* standard provides as follows: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. (4 Wheat.) at 421.

21. *Morgan*, 384 U.S. at 656 n.17. For an explanation of the difference between the two rationales in *Morgan*, *see infra* notes 45-47 and accompanying text.

22. Choper, *supra* note 15, at 303.

Morgan placed in the hands of Congress the power to interpret the Constitution and the power to make legislation according to that interpretation.

Rust arose from a controversy very different from that in *Morgan*. In 1970, Congress enacted Title X of the Public Health Service Act.[23] The Act authorized the Secretary of the Department of Health and Human Services to make grants to healthcare organizations "to assist in the establishment and operation of voluntary family planning projects. . . ."[24] Section 1008 of the Act specifies that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."[25] Until 1988, the Department interpreted Section 1008 as allowing unrestricted counseling and referral for abortion to encourage coordination with existing local and state family planning services.[26]

In 1988, the Secretary promulgated 53 Fed. Reg. 2923-2924,[27] which required 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. . . ."[28] The regulations forbid a clinic employee from referring a client to an abortion provider, even upon request, but allow the employee to respond, "the project does not consider abortion an appropriate method of family planning. . . ."[29]

A group of Title X grantees and doctors sued the Secretary on behalf of themselves and their patients, challenging the facial validity of the regulation and seeking injunctive relief.[30] The district court granted summary judgment in favor of the Secretary,[31] and the Second Circuit affirmed.[32] Chief Justice Rehnquist, writing for a five-to-four majority, relied on the agency's rule-making competence[33] and affirmed the Second

23. 42 U.S.C. §§ 300-300a-41 (as amended 1988).

24. *Id.* § 300a.

25. *Id.* § 300a-6.

26. *Rust*, 111 S. Ct. at 1768-69.

27. 42 C.F.R. § 59.8(a)(1) (1989).

28. *Id.*

29. *Id.* § 59.8(b)(5).

30. *Rust*, 111 S. Ct. at 1766.

31. New York v. Bowen, 690 F. Supp. 1261, 1274 (S.D.N.Y. 1988), *aff'd without opinion*, 863 F.2d 46 (2d Cir. 1988), *cert. denied*, 492 U.S. 923 (1989).

32. New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989), *aff'd*, 111 S. Ct. 1759 (1991).

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

Circuit's decision.[34]

The Supreme Court's analysis employed two steps. First, the Court held that the regulation is a permissible interpretation of Section 1008.[35] Second, the Court determined that the regulation is consistent with the First and Fifth Amendments of the Constitution.[36] The first step required the application of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[37] which states that when a statute is ambiguous and does not speak to the issue at hand, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[38] The second step required an analysis of the First Amendment doctrines set out in several cases, including *Rankin v. McPherson*[39] and *Arkansas Writers' Project, Inc. v. Ragland.*[40]

Although *Morgan* and *Rust* dealt with different substantive constitutional doctrines, certain procedural similarities between the two cases are immediately apparent. Both cases focused on a fundamental right and started with an apparently settled constitutional doctrine: *Morgan* raised the voting rights doctrine from *Lassiter,* while *Rust* implicated the First Amendment doctrines set out in *Rankin* and *Arkansas Writers'*. In both, a rule or policy existed in harmony with the apparently settled doctrine: a New York voting statute allowing literacy tests was consistent with *Lassiter*; a Health and Human Services policy that interpreted Section 1008 and allowed for abortion referrals was consistent with *Rankin* and *Arkansas Writers'*. In both, a federal action reversed the rule and conflicted with the settled doctrine: Section 4(e) of the Voting Rights Act disallowed the literacy test, reversed the New York statute and conflicted with *Lassiter*; the regulation in *Rust* disallowed abortion referrals, reversed the agency's policy and

34. White, Scalia, Kennedy, and Souter, JJ., joined the Chief Justice's majority opinion. Blackmun, J., filed a dissent, in which Marshall, J., joined, and in which Stevens, and O'Connor, JJ., joined in part. Stevens and O'Connor, JJ., filed separate dissents.

35. *Rust*, 111 S. Ct. at 1769-71.

36. *Id.* at 1771-78. The issues in *Rust* that involve abortion, privacy, women's rights, and the Fifth and Fourteenth Amendments are beyond the scope of this Note.

37. 467 U.S. 837 (1984).

38. *Id.* at 843. The Court's interpretation of *Chevron* holds the key to an examination of *Rust* on the metatheoretical level. *See* discussion *infra* part II.A.

39. 483 U.S. 378 (1987).

40. 481 U.S. 221 (1986). The First Amendment doctrine from *Rankin* and *Arkansas Writers'* involves speech content-based restriction on the receipt of government subsidies and government employment. *See* discussion *infra* part III.

conflicted with *Arkansas Writers'* and *Rankin*. Finally, both cases relied on explanations of relative institutional competence to uphold the rule in question.

II. DOCTRINES OF JUDICIAL DEFERENCE

While perhaps not significant in themselves, the procedural similarities between *Rust* and *Morgan* point to the Court's underlying conception of its own function. Both decisions refined the federal judiciary's role in reviewing the constitutionality of rules made by another branch of the national government based on the institutional competence of that branch. These decisions, however, provided only a vague description of the limits of the legislative branch's power. Similarly, both cases appeared to invite a non-judicial institution to enforce the constitutional provision that the Court declined to enforce.

A. Chevron *and Institutional Competence*

In *Morgan*, the Court allowed Congress to use its "specially informed legislative competence"[41] to define for itself the Equal Protection Clause provisions that it is permitted to enforce under Section 5 of the Fourteenth Amendment.[42] This part of the opinion, which occupies a single paragraph with accompanying footnotes,[43] inspired considerable controversy among constitutional scholars.[44] The question at the heart of the controversy is whether Congress can enforce a constitutional right that did not exist before Congress created it.[45] While Congress can exercise some discretion in deciding how to use its Section 5 power to enforce the Fourteenth Amendment,[46] modern jurisprudence places with the courts the role of interpreting the provisions that Congress may enforce.[47]

41. *Morgan*, 384 U.S. at 656.

42. *See* Choper, *supra* note 15, at 302-03.

43. *Morgan*, 384 U.S. at 653-56.

44. In addition to the sources cited *supra* note 15 and *infra* notes 45, 46, and 48, *see* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 253-60 (2d ed. 1991) and authorities cited therein.

45. Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 827 (1984).

46. Sager, *supra* note 5, at 1230. Section 5 of the Fourteenth Amendment empowers Congress to "enforce," but not to "interpret." Some may argue that a distinction between these two functions is impossible to maintain. This argument is beyond the scope of this Note.

47. *Id.*

Morgan, however, marked the first time that the Court granted to Congress the dual role of interpreting and enforcing constitutional provisions through legislation.[48] Congress has seldom attempted to use this power after *Morgan*,[49] and a majority of the Court never again relied on *Morgan* in this context.[50]

The *Rust* Court similarly deferred to the institutional competence of a rulemaking body. To uphold the regulations restricting employee speech, the Court had to find that the regulations were within the broad scope of Title X's authorization of grants to family planning clinics. Both parties pointed to language in Title X and to the legislative history to support their interpretation of the statute.[51] The Court decided that Title X's language was ambiguous and did not speak directly to the issues of counseling or referral.[52]

Under *Chevron*, when a statute is ambiguous and does not speak to the issue at hand, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[53] This permissible construction test has subsequently been interpreted by the Court to require adherence to traditional rules of statutory construction.[54] This interpretation was hinted at in *Chevron*.[55] However, the *Chev-*

48. William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 605 (1975).

49. In 1981, a "Human Life Bill" that redefined the constitutional status of the fetus was introduced in Congress. S. 158, 97th Cong., 1st Sess., 127 CONG. REC. 496 (1981). The proponents of this bill urged Congress to use its *Morgan* power to define the "life" clause of the Fourteenth Amendment. The bill was rejected. *See* Carter, *supra* note 45, at 823 n.17.

50. Carter, *supra* note 45, at 821. The Court came closest to allowing Congress to use its *Morgan* power in Oregon v. Mitchell, 400 U.S. 112 (1970). The Court chose not to, however, by a five-to-four margin.

51. The Department relied on H.R. CONF. REP. NO. 1667, 91st Cong., 2d Sess. 8 (1970), which states that "funds [shall] be used only to support preventive family planning services." The doctors relied on S. REP. NO. 1004, 91st Cong., 2d Sess. 10 (1970), which states that Title X is "part of comprehensive health care, [which should include] instruction, and referral to other services as needed." *See Rust*, 111 S. Ct. at 1768 n.3.

52. *Rust*, 111 S. Ct. at 1767. Justice Stevens, dissenting, found that the statute unambiguously supported the position of the doctors against the regulations. *Id.* at 1786-88. Because the *Chevron* judicial deference rule only applies when a statute is ambiguous, Justice Stevens would have invalidated the regulations. *Id.*

53. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

54. INS v. Cardoza-Fonseca, 480 U.S. 421, 446-48 (1987); *see also* Cass R. Sunstein, *Law and Administration after Chevron*, 90 COL. L. REV. 2071, 2077-78 (1990).

55. "If a court, *employing traditional tools of statutory construction*, ascertains

ron Court did not clearly indicate which, if any, rules of statutory construction are to be used in applying the permissible construction test. The *Chevron* Court further confused the test by stating that the administrative agency's interpretation need only be "reasonable."[56] In a concurring opinion three years later, Justice Scalia interpreted *Chevron* to require only a determination that the regulation is reasonable, instead of requiring the permissible construction test.[57]

In *Rust*, the Court considered at length the competence of the Department of Health and Human Services to formulate its own regulations.[58] The Court stated that under these circumstances, it must generally "defer to the expertise of the agency."[59] The Court then determined that the Department's interpretation of the statute was a permissible construction.[60] Only after it determined that the regulation was a permissible construction did the Court discuss the principle of statutory construction that a statute must be construed so as to avoid constitutional questions.[61] This discussion seems odd coming *after* the Court's holding that the agency's construction was permissible. Two explanations for the Court's seemingly inverted analysis of this rule of statutory construction are possible. First, the Court might have considered the constitutional questions presented to be so meritless that the rule requiring the avoidance of constitutional questions did not need to be addressed, except as an afterthought. Second, the Court might have intended to remove this rule of construction from the *Chevron* permissible construction test, instead treating the rule as a post hoc check on the agency's power.[62]

The Chief Justice's language discredits the first explanation.[63] Additionally, it must be noted that two of the three fed-

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that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9 (emphasis added).

56. *Id.* at 844.

57. Justice Scalia interprets the "permissible construction" language to require the application of rules of statutory construction. INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring).

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

59. *Id.* at 1768.

60. *Id.* at 1769.

61. *Id.* at 1771. *See infra* part II.B., which describes the Court's untimely treatment of this rule of statutory construction.

62. Another possibility is that the order in which the Chief Justice addressed the arguments is arbitrary and meaningless. This Note presumes otherwise.

63. "[W]e do not think that the constitutional arguments made by the petitioners in this case are without some force. . . ." *Rust*, 111 S. Ct. at 1771.

eral courts of appeals that addressed the regulation invalidated it on constitutional grounds.[64] To assert that the practice of avoiding constitutional questions did not apply to this case, in light of the results in the courts of appeals, would be "disingenuous at best."[65] Therefore, the possibility that the Court considered the constitutional questions raised in *Rust* to be meritless does not sufficiently explain the omission of the constitutional question rule from the majority's discussion of the permissibility of the Department's construction of the statute.

Rather, the *Rust* Court omitted the constitutional questions rule from the *Chevron* permissible construction test. Although *Chevron* did not explicitly address whether the existence of a constitutional question affects the permissible construction test, subsequent case law has held that it does. For example, the Court in *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*[66] addressed a National Labor Relations Board regulation that prevented members of a labor union from distributing handbills outside of the members' place of employment.[67] The Court noted that restricting the distribution of handbills raised First Amendment freedom of speech questions.[68] The Court then held that the *Chevron* permissible construction test did not mandate deference to an agency when the regulation violated the rule of statutory construction that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems. . . ."[69]

Thus, before *Rust*, under *Chevron* and *DeBartolo*, the federal courts were required to defer to an agency's interpretation

64. In addition to New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989), *cert. granted*, 495 U.S. 956 (1990), *and affirmed*, 111 S. Ct. 1759 (1991), *see* Massachusetts v. Secretary of Health and Human Services, 899 F.2d 53 (1st Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991); Planned Parenthood Federation of America v. Sullivan, 913 F.2d 1492 (10th Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991).

65. *Rust*, 111 S. Ct. at 1778 (Blackmun, J., dissenting). In this statement, Justice Blackmun assumed that the Chief Justice applied the rule of statutory construction. However, Justice Blackmun also accuses the majority of "sidestep[ping] this established standard of construction." *Id.* It is unclear whether he considered the possibility that the rule was not applied at all.

66. 485 U.S. 568 (1988).

67. *Id.* at 575.

68. *Id.*

69. *Id.*

of the framework statute,[70] but not to an agency's interpretation of the Constitution. In removing the constitutional question rule from the *Chevron* analysis, *Rust* collapses the *DeBartolo* rule into *Chevron's* permissible construction test. The result is that the courts will defer both to an agency's interpretation of the framework statute and to an agency's interpretation of the Constitution.

Justice Scalia's concurring opinion in *INS v. Cardoza-Fonseca*[71] supports this conclusion. In *Cardoza-Fonseca*, the majority applied "ordinary canons of statutory construction"[72] to a decision by the Board of Immigration Appeals.[73] Justice Scalia stated that *Chevron* required courts to "give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent," and that the application of canons of statutory construction amounted to "an evisceration of *Chevron*."[74]

One canon states that a statute should be construed to avoid constitutional questions. The majority opinion in *Rust* mentioned this canon in the context of the *Chevron* permissible construction test.[75] Had Justice Scalia felt that a rule of statutory construction was actually being applied to the *Chevron* permissible construction test, it is reasonable to believe that he would have concurred, as he did in *Cardoza-Fonseca*, and reiterated his preference against the application of rules of statutory construction to the permissible construction analysis. Justice Scalia, however, joined the majority in *Rust*. This indicates that the constitutional questions rule was not included as part of the permissible construction analysis.

If the *Rust* Court deferred to the Department of Health and Human Services interpretation of the statute without considering the constitutional question, then the Court deferred to the constitutional interpretation of the Department. One may then wonder why the Court did not explicitly announce this jurisprudential approach. Perhaps its proponents could not assemble a majority behind such an openly nontraditional approach. Nevertheless, this same deference to the constitu-

70. A framework statute grants, defines, and restricts an agency's power to promulgate regulations.

71. 480 U.S. 421 (1987).

72. *Id.* at 449.

73. *Id.* at 446-48.

74. *Id.* at 454.

75. *Rust*, 111 S. Ct. at 1771.

tional interpretation of an administrative agency was explicitly suggested by Justice Scalia in his dissent in *Webster v. Doe*.[76]

Webster v. Doe involved the availability of judicial review of an employee termination decision made by the Director of Central Intelligence.[77] Under Section 102(c) of the National Security Act, the Director "may, in his discretion, terminate [an] employee . . . whenever he shall deem such termination necessary or advisable in the interests of the United States. . . ."[78] The terminated employee brought suit, claiming that the Director's action was arbitrary and capricious under Section 706 of the Administrative Procedure Act (APA),[79] and was violative of various constitutionally protected rights.[80] The Court held that Section 102(c) precluded judicial review, under the APA, of the Director's termination decisions, but held that Section 102(c) did not preclude review of the employee's constitutional claims.[81]

In a spirited dissent,[82] Justice Scalia stated that the majority's approach to the issue of the reviewability of the constitutional claims fell "far short of explaining the full scope of the areas from which the courts are excluded."[83] Justice Scalia suggested that the Director's decision on the constitutional issues was "beyond the range of judicial review,"[84] and denounced the presumption that "constitutional violations must be remediable in the courts."[85] The *Rust* Court appears to have implicitly adopted a similar deference to the constitutional decisions of an administrative agency.[86]

Thus, as in *Morgan*, the Court in *Rust* deferred to the constitutional interpretation of another branch of the federal gov-

76. 486 U.S. 592 (1988) (Scalia, J., dissenting).

77. *Id.*

78. 50 U.S.C. § 403(c) (1988).

79. 5 U.S.C. § 706(2)(A) (1988).

80. *Webster*, 486 U.S. at 596.

81. *Id.* at 603-04.

82. "[O]bsolete may be the assumption that we are capable of preserving a sensible common law of judicial review." *Id.* at 621 (Scalia, J., dissenting).

83. *Id.* at 608.

84. *Id.*

85. *Id.* at 612.

86. *Rust* can even be seen as an expansion of the deference that Justice Scalia demonstrated in *Webster*, in that the statute in *Rust* that empowered the Director of DSHS to promulgate regulations contained no clause limiting the availability of judicial review, 42 U.S.C. §§ 300-300a-41 (1988), whereas the statute that empowered the Director of the CIA to terminate employees contained the "whenever he shall deem necessary" language, 50 U.S.C. § 403(c) (1988).

ernment. *Morgan* allowed Congress to interpret the equal protection provisions that it is empowered to enforce. Similarly, *Rust* allowed the Department of Health and Human Services to interpret the statutes that it is empowered to enforce.

This aspect of *Morgan* has been criticized as being contrary to the spirit of *Marbury v. Madison*,[87] because it contradicts Chief Justice Marshall's proclamation that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[88] Even before *Rust*, *Chevron* itself had been described by Professor Sunstein as "counter-*Marbury*."[89] In extending *Chevron* to give deference to administrative regulations that raise constitutional questions, the Court in *Rust* brings to life Professor Sunstein's seemingly extreme characterization.[90] Thus, like *Morgan*, *Rust* alters the distribution of national powers by transferring what was a judicial duty to one of the political branches.

B. Limitations on the Judicial Deference Theories

Before *Rust*, the rules of statutory construction provided a limit to the deference that was granted to agencies under the *Chevron* permissible construction test.[91] *Rust* does not indicate what limits to this deference remain if such rules of construction are not applied. A similar question regarding the limitation of judicial deference was presented in *Morgan*.

In his dissent in *Morgan*, Justice Harlan expressed his fear about removing the constraints on deference that the rules of construction provided.[92] He noted that the interpretive role that the majority had granted to Congress could be used not

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87. 5 U.S. (1 Cranch) 137 (1803).

88. *Id.* at 177. *See* Katzenbach v. Morgan, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting); Cohen, *supra* note 48, at 606.

89. *See* Sunstein, *supra* note 54, at 2075.

90. *Rust* goes beyond even Sunstein's broad reading of *Chevron*. *Rust* was before the Court when Sunstein wrote his article. Regarding the pending litigation, Sunstein stated that:

> Serious constitutional questions would be raised by a congressional effort to prevent clinics from speaking to patients about the abortion alternative where the text of the statute is ambiguous. In the absence of a clear legislative statement, it should probably be interpreted so as to avoid the constitutional question.

Id. at 2113 n.196.

91. *See supra* notes 53-55 and accompanying text.

92. *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting).

only to expand individual rights, but also to contract them.[93] Justice Brennan responded to this assertion by stating that "Section 5 does not grant Congress power to exercise discretion in the other direction. . . ."[94] This one-way limit, the only limit that the *Morgan* Court placed on Congress's interpretive power, has been dubbed the "ratchet theory."[95]

The ratchet theory has been widely criticized because there is no logically compelling reason why Congress's Section 5 power should work in only one direction, and the *Morgan* Court does not explain why the expansion of rights should be preferred to contraction.[96] Furthermore, when multiple constitutional rights compete, expansion of one right can cause contraction of another; therefore, it is not obvious in which direction the ratchet is turning.[97] Thus, lacking logical support and coherent standards, the limit that the *Morgan* Court placed on its deference to Congress's rule-interpreting power amounts to no limit at all, leaving Congress broad discretion in the use of its new power to interpret the Constitution.

Similarly, the *Rust* Court does not provide a useful limit on the deference it grants to the rulemaking power of administrative agencies. If an administrative regulation implicates constitutional questions, then the permissible construction test provides no constitutional limitation on the regulation because the constitutional question rule is not part of the test.[98] If the constitutional questions rule is applied after the permissible construction test, as it was in *Rust*,[99] then this rule might serve as a limit on the agency's discretion, and a meaningful and workable limit to the agency's discretion might exist. Accordingly, the *Rust* Court's treatment of the constitutional questions rule must be examined.

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93. *Id.*

94. *Id.* at 651 n.10.

95. *See* Cohen, *supra* note 48, at 606; Carter, *supra* note 45, at 830-34 (describing the ratchet theory as limiting the *Morgan* power). A ratchet is a mechanical device that is designed so that the handle can be turned in one direction, but not in the other. Most ratchets, however, have a switch that changes the direction in which the handle can be turned.

96. Carter, *supra* note 45, at 830.

97. Sager, *supra* note 5, at 1231. Professor Sager provides the example of an ordinance, designed to prevent block-busting, that forbids for-sale signs in a racially integrated neighborhood. The right of members of the racial minority to live in integrated neighborhoods would expand, while the right of home owners to advertise the sale of their houses would contract.

98. *See supra* notes 75-76 and accompanying text.

99. *Rust*, 111 S. Ct. at 1767-71.

In *Rust*, the majority applied the standard from *United States v. Delaware and Hudson Co.*[100] and *United States v. Jin Fuey Moy*.[101] Those cases stated that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also *grave doubts* upon that score."[102] Interestingly, the majority omitted the dates from its citations for these two cases—1909 and 1915.[103] The Court did not mention that since those dates, the grave doubts standard has been modified by cases such as *International Association of Machinists v. Street*.[104]

In *Street*, the Court stated that "federal statutes are to be so construed as to avoid *serious doubt* of their constitutionality."[105] Similarly, in *United States v. Security Industrial Bank*,[106] the Court asked only "whether a construction of the statute is *fairly possible* by which the constitutional question may be avoided."[107] Although the Court has not explained the differences in these standards, the common meaning of these words would indicate that "grave doubts" is the most stringent, that "serious doubts" is less stringent, and that "fairly possible" is the least stringent.[108]

In *Rust*, the Court returned to the more stringent standard.[109] The Court stated that the regulations "do not raise the sort of grave and doubtful constitutional questions" that would require their invalidation.[110] Because of the context of the regulation in question, its disharmony with existing First Amend-

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100. 213 U.S. 366, 408 (1909).

101. 241 U.S. 394, 401 (1915).

102. *Rust*, 111 S. Ct. at 1771 (quoting *Jin Fuey Moy*, 241 U.S. at 401) (using *Delaware and Hudson Co.*, 213 U.S. at 408, for support) (emphasis added).

103. *Id.*

104. 367 U.S. 740 (1960).

105. *Id.* at 749 (emphasis added).

106. 459 U.S. 70 (1982) (Rehnquist, J., 6-3 decision).

107. *Id.* at 78 (emphasis added).

108. In his dissent, Justice Blackmun seems to have missed this distinction: "The majority does not dispute that 'federal statutes are to be so construed as to avoid *serious doubt* of their constitutionality.'" *Rust*, 111 S. Ct. at 1778 (emphasis added). Later, he uses the "grave doubts" standard and the "fairly possible" standard, apparently interchangeably. *Id.* at 1778, 1780.

109. Or, perhaps, the Court combined all three standards. Such a combination, as applied in *Rust*, appears to have the same effect as the "grave doubts" standard.

110. *Rust*, 111 S. Ct. at 1771 (internal quotations omitted). The Court may have felt that it had to resurrect this standard for statutory interpretation, because the regulation may have been invalidated had either of the other two standards been applied.

ment doctrine,[111] and the interpretations of the courts of appeals,[112] the Court interpreted "grave doubts" to mean "not beyond possible modification of existing doctrine."[113] *Rust* appears to allow the Court to uphold a regulation that raises constitutional questions whenever the Court can construe existing doctrine to accommodate the regulation. Under this approach, the Court's deference to constitutionally questionable regulations is limited only by the Court's ability to imagine possible modification of existing doctrine. Such an infinitely flexible standard amounts to no restriction at all. Thus, as in *Morgan*, the Court in *Rust* placed no predictable limits on its deference to the rule-interpreting discretion of another branch of the federal government.

C. The Court's Role and the "Underenforcement" Thesis

When the Court defers to the constitutional interpretation of another branch of government, it also relinquishes its power to enforce the constitutional provision that it is no longer interpreting. Professor Sager recognized this connection and provided an explanation for the *Morgan* Court's deference to the rule-interpreting discretion of Congress.[114] He noted that the federal courts have two roles in constitutional adjudication. First, the federal courts establish doctrine. Second, they enforce constitutional protections.[115] Professor Sager maintains that although these two functions often overlap, certain judicial decisions describe the limit of the court's role in enforcing constitutional protections without delineating the boundary of those protections.[116] In other words, such decisions operate on a metatheoretical level, rather than on a theoretical level. Professor Sager notes that these metatheoretical decisions have three characteristics. First, they appear to be disharmonious with an existing constitutional doctrine. Second, they base their holding on institutional competence. And third, they contain other anomalies that result from the disparity between the limits of the protections and the limits of the court's role in enforcement.[117]

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111. *See infra* part III.
112. *See supra* note 64 and accompanying text.
113. *See Rust*, 111 S. Ct. at 1771.
114. *See* Sager, *supra* note 5.
115. *Id.* at 1213.
116. *Id.* at 1218-19.
117. *Id.*

The *Rust* decision exhibits all three of the characteristics identified by Professor Sager. *Rust* represents a significant departure from certain First Amendment doctrines.[118] The Court relies on arguments of institutional competence to support this departure.[119] And an anomaly results from the Court's denial that a constitutional question existed in *Rust*. This anomaly is evidenced by the Court's strained interpretation of the "grave doubts" standard.[120] Therefore, under Professor Sager's analysis, the *Rust* Court did not make a decision based on substantive constitutional interpretation, but decided its role in enforcement. This distinction explains some of the more startling aspects of *Rust*, but leaves unresolved the question of who should enforce the underenforced constitutional protections.

Whether the *Rust* Court based its decision on its interpretive role or on its enforcement role, the regulation would have been upheld. If the decision is seen as a statement on the Court's enforcement role, however, Congress, the states, the Department of Health and Human Services, and the voting public[121] are alerted to the existence of an underenforced constitutional protection. In other words, these institutions are told that the theoretical limit of First Amendment protection lies beyond the reach of the Supreme Court's enforcement power, and they are put in a position to pass legislation or regulations that reinforce the First Amendment beyond the limit of the Court's power.

This is, in fact, exactly what has happened. Not long after *Rust* was decided, Congress began deliberation on a bill[122] that would invalidate the Department of Health and Human Services speech regulations.[123] A majority of both chambers passed this bill, but the House fell twelve votes short of overriding a subsequent presidential veto.[124] Congress's delay indicates that it did not object to the Department's interpretation of the framework statute, or to the Department's interpretation of

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118. *See infra* part III.

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

120. *See supra* notes 100-113 and accompanying text.

121. Following the writing of this Note, President Bush failed in his bid to be reelected to a second term, perhaps in part because the voting public sought to enforce constitutional provisions left underenforced by the Court.

122. H.R. 2707, 102d Cong., 1st Sess. (1991).

123. Adam Clyner, *Bill to Let Clinics Discuss Abortion is Vetoed by Bush*, N. Y. TIMES, Nov. 20, 1991, at A1.

124. *Id.* at A12.

the substantive constitutional doctrines at issue in *Rust;* Congress could have objected to these interpretations in 1988 when the regulation was passed. Instead, Congress attempted to fill the enforcement void in the First Amendment, and perhaps the Fifth Amendment, which was left by the *Rust* decision, according to what it perceived to be the full dimensions of those amendments.[125] Statements made by members of Congress during deliberation on this bill support this theory; months after the Court decided *Rust*, proponents of the bill argued that the regulations infringe on First Amendment protections.[126]

A conflict occurred because those outside of Congress interpreted *Rust* as a ruling on substantive First Amendment law. For example, in a statement defending his veto, then President Bush assumed that the Court found that the regulation did not violate the First Amendment.[127] Thus, while a majority of Congress attempted to compensate for the underenforcement of the First Amendment, the President believed that the First Amendment was already fully enforced by the Court to its substantive limit. Had the Court clarified its enforcement role,[128] Congress and the President could have focused the debate on whether First Amendment protection should be enforced by the legislative branch, instead of arguing over whether the regulations violated the First Amendment.

Professor Sager's analysis illuminates an important difference between *Morgan* and *Rust*: In *Morgan*, the Court allowed Congress to fill an enforcement void that existed prior to the *Morgan* decision; whereas in *Rust*, the Court created the First Amendment enforcement void that Congress later tried to fill.[129] In this regard, the effect of the regulations in question in *Rust* is more subtle than the effect of the statute at issue in *Morgan*, because the effect is less obvious to the individuals affected.[130]

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125. *See* Sager, *supra* note 5, at 1227.

126. "Abortion rights advocates, arguing that the counseling ban would infringe on the First Amendment's freedom-of-speech protection for medical personnel, had hoped to bring along enough traditionally anti-abortion votes in both houses to produce the first successful veto override of the Bush presidency." 49 CONG. Q. 3456 (Nov. 23, 1991).

127. *See* Clyner, *supra* note 123.

128. Conversely, the Court could have clarified that it did not alter its enforcement role, but, rather, that it altered First Amendment doctrine.

129. *See supra* notes 122-126 and accompanying text.

130. Only the Congressional action following *Rust* made the front pages.

Another important difference exists between *Rust* and *Morgan*. In *Morgan*, the Court deferred to the constitutional interpretation of Congress, which remained constrained in its interpretive capacity by the Presidential veto; whereas in *Rust*, the Court deferred to the constitutional interpretation of an administrative agency, which remains unaffected by the Presidential veto.[131] For example, if Congress chose to use the *Morgan* constitutional interpretation power, but the President objected, Congress would need a two-thirds supermajority to exercise this power. On the other hand, if an administrative agency promulgated a regulation of questionable constitutionality, the agency would have interpreted the Constitution and found the regulation to be constitutional. The Court would then defer to the agency's interpretation. Thus, an agency's interpretation under *Rust* would lack the supermajoritarian constraint that Congress's interpretation would have under *Morgan*.

The 1991 anti-*Rust* bill illustrates another result of *Rust* that sets it apart from *Morgan*. Administrative agencies exist because Congress cannot manage every aspect of national policy.[132] Because of Congress's inability to micromanage, administrative framework statutes are often drafted broadly and vaguely so that the agency has the flexibility necessary for effective management. Such management includes the adoption and implementation of specific regulations to effectuate the statute.[133] Broad or vague statutes, however, create the opportunity for the President to direct the agency head, whom the President probably appointed, to promulgate a regulation that is contrary to Congress's unstated or unclear intent. Under *Rust*, the courts will defer to that regulation,[134] even if it raises constitutional questions. Congress must then clarify the original statute by passing a new statute with enough votes to override the inevitable Presidential veto. This cooperative effort between the President and an administrative agency allows the President to effectively veto an unclear provision in

131. The administrative agency also remains immune to a legislative veto under INS v. Chadha, 462 U.S. 919 (1983).

132. *E.g.*, Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1981).

133. *Id.*

134. That is, the court will defer to the regulation if it passes the increasingly lenient permissible construction test. *See* discussion *supra* notes 41-75 and accompanying text.

an existing framework statute. The President need merely direct the agency to create a regulation contrary to that provision, substitute his version, and frustrate the intent of the Congress that passed the original statute.

In apparent recognition of the *Rust* majority's deference to the constitutional interpretation of an administrative agency, Justice Blackmun began his dissent as follows: "Casting aside established theories of statutory construction and administrative jurisprudence, the majority in these cases today unnecessarily *passes upon important questions of constitutional law*."[135] One could argue, however, that the *Rust* Court did not pass on any constitutional questions, but found the regulations to be consistent with existing First Amendment jurisprudence. If this argument succeeds, then the judicial deference to the constitutional interpretation of an administrative agency that is suggested by this Note is merely academic. Accordingly, the Court's discussion on the First Amendment issues must be addressed.

III. AVOIDANCE OF FIRST AMENDMENT PRECEDENT IN *RUST*

The *Rust* Court could have addressed the First Amendment issues first. Had the Court done so and found the regulations to be unconstitutional, it would have had no need to address the *Chevron* statutory construction issue. The Court, however, chose to address the metatheoretical *Chevron* issue first.[136] Only after deciding to defer to the constitutional interpretation of the agency did the Court consider the petitioners' First Amendment objections.[137] Thus, by addressing the metatheoretical issue first, the Court predetermined the theoretical issues, rendering discussion of the First Amendment issues unnecessary.

The Court did not, however, simply ignore the theoretical First Amendment questions in *Rust*. Instead, the Court discussed the petitioners' objections and struggled to fit the regulations into existing First Amendment doctrine. It did not succeed.

The petitioners made two First Amendment objections. First, they argued that although the government may place conditions on receipt of subsidies, the regulations before the

135. *Rust*, 111 S. Ct. at 1778 (Blackmun, J., dissenting) (emphasis added).
136. *Id.* at 1767.
137. *Id.* at 1771.

Court impermissibly use subsidies as a means to regulate speech content.[138] Second, they argued that although the government may place conditions on potential employees, the regulations impermissibly condition government employment on relinquishment of First Amendment freedoms.[139] Each of these arguments are discussed in turn.

A. Spending Discretion or Speech Content Restriction?

The Supreme Court has repeatedly allowed governments to place conditions on the receipt of government subsidies.[140] Yet, absent a compelling state interest, the Court has not allowed these conditions to be based on speech content.[141] The Court applied this rule in the following three cases: *Arkansas Writers' Project, Inc. v. Ragland*,[142] *Regan v. Taxation With Representation of Washington*,[143] and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*.[144] In *Rust*, the Court departed from this precedent.

In *Arkansas Writers'*, the Court addressed an issue involving a state regulation that taxed magazines, but exempted religious, professional, trade, or sports periodicals.[145] The Court found this regulation to be "particularly repugnant to First Amendment principles" because "a magazine's tax status depends entirely on its content."[146] The Court held that when the government seeks to regulate speech content, it "must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[147]

In *Regan*, the Court examined the constitutionality of a prohibition against the use of tax-deductible contributions to support lobbying activities.[148] This restriction was not content-based. Writing for a unanimous Court, Justice Rehnquist

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138. *Id.*

139. *Id.* at 1774.

140. *E.g.*, Maher v. Roe, 432 U.S. 464, 474 (1977).

141. *See infra* notes 142-155 and accompanying text.

142. 481 U.S. 221 (1987).

143. 461 U.S. 540 (1983).

144. 475 U.S. 1 (1986).

145. *Arkansas Writers'*, 481 U.S. at 223.

146. *Id.* at 229; *see also* FCC v. League of Women Voters of California, 468 U.S. 364 (1984) (holding unconstitutional a section of the Public Broadcasting Act that prohibited nonprofit educational stations that received grant money from engaging in editorializing).

147. *Arkansas Writers'*, 481 U.S. at 231.

148. *Regan*, 461 U.S. at 544.

upheld the regulation, reasoning that it was not intended to suppress any ideas, and did not have that effect.[149] He did, however, note that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas."[150]

In *Pacific Gas & Electric Co.*, the Court examined an order from the California Public Utilities Commission that required a privately owned utility company to include in its billing envelopes printed matter with which the utility company disagreed.[151] The restriction was content-based.[152] The Court noted the possibility that the utility company would "be required to alter its own message as a consequence of the government's coercive action [and that this] is a proper object of First Amendment solicitude."[153] Ultimately, the Court held that because "the danger is one that arises from a content-based grant[,] . . . it is a danger that the government may not impose absent a compelling interest."[154] The Court confirmed the notion that the First Amendment protects both "the public's interest in receiving information" and "the speaker's interest in self-expression."[155]

The type of unconstitutional regulation that the Court warned of in *Regan*, and remedied in *Arkansas Writers'* and *Pacific Gas & Electric Co.*, involves two concurrent conditions: first, that the government uses its discretion to allocate resources; and second, that the government discriminates on the basis of content. The *Rust* Court, however, modeled these two conditions as mutually exclusive, as if in doing one, the government could not possibly do the other: "[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the

149. *Id.* at 548.

150. *Id.* (internal quotations omitted). Chief Justice Rehnquist's comment was dicta. It reminds us that a regulation that grants or denies a tax exemption, as in *Arkansas Writers'*, or one that grants or denies a monopoly, as in *Pacific Gas & Elec. Co.*, has the same effect as a regulation that grants or denies a direct subsidy, as in *Regan* or *Rust*. In both cases, the government grants a monetary benefit to members of one group at the exclusion of members of another.

151. *Pacific Gas & Elec. Co.*, 475 U.S. at 4. As a corporation, the utility company retains First Amendment speech rights. *See* First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

152. *Pacific Gas & Elec. Co.*, 475 U.S. at 13.

153. *Id.* at 16.

154. *Id.* at 16-17.

155. *Id.* at 8.

other."[156] The Court thus created a dichotomy which suggests that any time the government uses its spending discretion, it must not be violating a First Amendment guarantee.[157] This dichotomy, however, does not alter the fact that the regulation unquestionably turns on speech content and that content-based regulations are scrutinized more highly.[158]

Although faced with a content-based regulation, the *Rust* Court did not address the issue of whether there existed a compelling state interest. In this regard, *Rust* directly conflicts with the *Arkansas Writers'* holding that the government may not base decisions on how to apportion funds on compliance with restrictions on speech content without showing a compelling state interest.[159] Furthermore, the factual setting in *Rust* is strikingly similar to that in *Pacific Gas & Electric Co.*[160] Again, *Pacific Gas & Electric Co.* involved an administrative ruling that restricted the speech content of communication from a private utility company to its client.[161] Similarly, *Rust* involved an administrative regulation that restricted the speech content of communication from private clinics to their clients.[162] The utility company in *Pacific Gas & Electric Co.* had been granted a monopoly position by the government.[163] Similarly, the clinics in *Rust* had been granted subsidies by the government.[164] Both cases involved the public's interest in receiving information as well as the speaker's interest in self-expression. The *Pacific Gas & Electric Co.* Court required the government to demonstrate a compelling state interest.[165] The *Rust* Court, however, declined to follow this precedent and required no showing of a compelling state interest.

To illustrate its new approach to content-based speech restriction, the *Rust* Court provided a hypothetical example: "A doctor who wished to offer prenatal care to a project

156. *Rust*, 111 S. Ct. at 1772.

157. Or, perhaps, it must not be violating any other constitutional guarantee.

158. "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." Consolidated Edison Co. of New York v. Public Service Comm'n of New York, 447 U.S. 530, 537 (1980).

159. Arkansas Writers', 481 U.S. at 231.

160. Curiously, the dissenting opinions in *Rust* did not mention this case.

161. *Pacific Gas & Elec. Co.*, 475 U.S. at 4.

162. *Rust*, 111 S. Ct. at 1764.

163. *Pacific Gas & Elec. Co.*, 475 U.S. at 22 n.1 (Marshall, J., concurring).

164. *Rust*, 111 S. Ct. at 1764.

165. *Pacific Gas & Elec. Co.*, 475 U.S. at 16-17.

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."[166] In other words, rules that condition government subsidies on speech content are no longer subject to greater scrutiny than rules that create nonspeech conditions. Thus, the *Rust* Court, "for the first time, [upheld] viewpoint-based suppression of speech solely because it is imposed on those dependant upon the Government for economic support."[167]

Again, two characterizations of the *Rust* Court's novel treatment of content-based restrictions may be offered. First, the Court handed down a theoretical decision and altered First Amendment doctrine. Second, the Court handed down a metatheoretical decision and decided that the First Amendment decision was not for the Court to make. This second explanation is supported by the Court's subsequent decision in *Simon & Schuster v. New York State Crime Victims Board*[168] *Simon & Schuster* demonstrated that the theoretical First Amendment doctrine applied in *Arkansas Writers'* and *Pacific Gas & Elec. Co.* remained unchanged by the *Rust* decision.[169]

In *Simon & Schuster*, the Court addressed the New York "Son of Sam law." This law required that an entity that contracts with a person who was accused or convicted of a crime for the production of a book describing the crime must make funds from that contract available to the victims of the crime who obtain civil judgments against the criminal.[170] The Court struck down the statute.[171] Relying on *Leathers v. Medlock*[172] and *Arkansas Writers' Project, Inc. v. Ragland*,[173] the Court reasserted that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech,"[174] and that when the government attempts to restrict speech content, it "must show that its regulation is necessary to serve a compel-

166. *Rust*, 111 S. Ct. at 1772. Prohibiting the performance of prenatal care would, of course, be a non-speech condition.

167. *Id.* at 1778, 1780 (Blackmun, J., dissenting).

168. 112 S. Ct. 501, 508 (1991).

169. *Id.* at 509-10.

170. *Id.* at 504.

171. *Id.* at 508.

172. 111 S. Ct. 1438 (1991).

173. 481 U.S. 221 (1987).

174. *Simon & Schuster*, 112 S. Ct. at 508.

ling state interest and is narrowly drawn to achieve that end."[175] The Court recognized the difference between the taxation regulation in *Arkansas Writers'* and the donation requirement in *Simon & Schuster*, but stated that "this difference can hardly serve as the basis for disparate treatment under the First Amendment."[176]

Similarly, the difference between the taxation regulation in *Arkansas Writers'* and the subsidy regulation in *Rust* cannot serve as the basis for disparate First Amendment treatment. Thus, *Simon & Schuster* indicates that *Rust* did not alter the presumption of unconstitutionality that accompanies a restriction on speech content. *Rust* simply avoided the compelling state interest test altogether.

B. Unconstitutional Conditions on Employment

After declining to apply the compelling state interest test to a content-based restriction, the *Rust* majority addressed the petitioners' argument that the regulations impermissibly condition government employment on the relinquishment of First Amendment freedoms. The majority noted that the regulation limited the freedom of expression of the clinic employees, explaining that "this limitation is a consequence of their decision to accept employment" in the Title X project.[177] The reasoning employed in *Rust* presents a stark departure from established doctrine that was applied in several previous cases, including *Rankin v. McPherson*,[178] *Elrod v. Burns*,[179] and *Perry v. Sindermann*.[180] In all of these cases, a government entity attempted to condition employment on compliance with a restriction on First Amendment freedoms.

In *Rankin*, a deputy was fired after her boss, an elected official, overheard her making a critical comment about President Reagan while at work.[181] The Court held that "a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of

175. *Id.* at 509.

176. *Id.* at 508.

177. *Rust*, 111 S. Ct. at 1775.

178. 483 U.S. 378 (1987).

179. 427 U.S. 347 (1976).

180. 408 U.S. 593 (1971). For another example of the Court's refusal to allow subsidies to be conditioned on performance in the workplace, *see* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

181. *Rankin*, 483 U.S. at 380-81.

speech."[182]

In *Elrod*, an elected sheriff required employees who wished to keep their jobs to pledge political allegiance to the Democratic Party.[183] The Court held that "[r]egardless of the nature of the inducement, [including] denial of public employment, . . . no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[184]

In *Perry*, a college refused to renew the contract of a professor who publicly disagreed with the college's Board of Regents.[185] The Court held that "even though a person has no 'right' to a valuable government benefit, [the government] may not deny a benefit to a person on a basis that infringes on his constitutionally protected interests—especially, his interest in freedom of speech."[186]

The *Rust* Court distinguishes the above cases using two lines of reasoning. First, the *Rust* regulation merely prevents employees from performing activities that they are not being paid for;[187] and second, the regulation restricts a program, not a person.[188] The majority's first line of reasoning, however, does not effectively distinguish *Rust* from *Rankin*. The deputy in *Rankin* was paid for performing police work, not for making political comments. Similarly, a clinic employee in *Rust* is paid to counsel clients regarding family planning, not to counsel regarding abortion. While it is true that the two cases differ in that there was no official regulation against the speech in *Rankin*, the result in that case would not have been different if the deputy had been told, ex ante, that she could be fired for saying certain things. The regulation at issue in *Rust* tells employees in advance that they probably will be fired for saying the "A" word, because if the clinic loses its funding, it probably will not be able to pay the employee. The majority admitted as much, stating that "this limitation is a consequence

182. *Id.* at 383 (citation omitted). For an explanation of why unconstitutional conditions may not be placed on an employee under an at-will contract, *see* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 1, 6-14 (1988).

183. *Elrod*, 427 U.S. at 355.

184. *Id.* at 356.

185. *Perry*, 408 U.S. at 595.

186. *Id.* at 597.

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

188. *Id.*

of their decision to accept employment in the project. . . ."[189]

The majority's second line of reasoning makes a formal distinction between "program" and "person" that fails to consider real world effects. The regulation restricts the "program," which restricts the clinics, which then must choose either to pass the restriction on to clinic employees or to give up the funding. Thus, the result is exactly the same as if the regulation directly restricted the employees, as did the government in *Elrod*.[190] *Elrod* probably would not have been decided differently if the county had passed a regulation aimed only at the law enforcement "program," mandating that it could not hire non-Democrats. Moreover, the *Rust* majority blurs its own distinction by labeling the regulation "a prohibition on a project grantee or its employees."[191]

Although the regulation prohibiting the mention of abortion conflicts with previous First Amendment doctrine, Chief Justice Rehnquist fails to criticize the previous rules and writes as if the majority's decision is consistent with precedent.[192] One is compelled to consider the explanation that the Court did not disagree with the holdings in *Arkansas Writers'* and *Rankin*. It appears, instead, that the Court did not apply precedent, deciding that it is not the role of the federal courts to question the constitutional interpretation of an administrative agency. The effects of this metatheoretical ruling could be far-reaching.

IV. POSSIBLE IMPLICATIONS OF *RUST*

If *Rust* grants considerable discretion to administrative agencies that promulgate regulations that conflict with constitutional provisions, its holding may have far-reaching results. Because the results would occur whether or not the majority intended them, the majority's intent to further restrict the right to abortion is not critical. Nevertheless, these intentions are worth examining because of their possible political and jurisprudential relevance.

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189. *Id.* at 1775.

190. *Elrod*, 427 U.S. 347.

191. *Rust*, 111 S. Ct. at 1772.

192. For example, Chief Justice Rehnquist states that: "There is no question but that the statutory prohibition contained in § 1008 is constitutional." *Id.*

A. Does Rust *Merely Erode* Roe v. Wade?

The members of the *Rust* majority are among the Justices who have not concealed their contempt for *Roe v. Wade*.[193] The decisions in *Harris v. McRae*[194] and *Webster v. Reproductive Health Services*[195] stand as examples of the decline of the substantive Fifth Amendment right to privacy upon which *Roe* stands. The decision in *Rust* can be seen as no more than an attempt by the majority to manipulate existing doctrine to achieve a result that it finds politically or morally desirable. This explanation is suggested by Justice Blackmun, who accused the majority of "disregard[ing] established principles of law and contort[ing] this Court's decided cases to arrive at its preordained result."[196]

One could argue that, given the Court's general dissatisfaction with *Roe*, any modification of the enforcement role of the federal courts that appears to have occurred in *Rust* would have only precedential value in other cases that implicate *Roe*. According to this interpretation, the Court would not grant broad discretion to administrative regulations that implicate constitutional issues unless those regulations involve family planning.[197] Even if the Court intended such a limited reading of *Rust*, however, Justices applying this case in the future might not share this limited intent. Furthermore, if the Court is result-oriented, this decision will allow too much discretion, because it is unlikely that family planning is the only issue for which the Justices have political or moral agendae.

B. Possible Applications of Rust *Are Planted in Its Own Dicta*

To predict possible future interpretations of the *Rust* rule of judicial deference, we need not look beyond *Rust's* dicta. The Court appears to assure us that its holding would not

193. 410 U.S. 113 (1973) (invalidating laws that criminalize abortion).

194. 448 U.S. 297 (1980) (upholding a statute that denied Medicaid funding for abortion).

195. 492 U.S. 490 (1989) (upholding a state law restricting abortions).

196. *Rust*, 111 S. Ct. at 1786, (Blackmun, J., dissenting).

197. For recent examples of cases in which the Court has declined to apply *Chevron* broadly in non-family planning cases, *see* Presley v. Etowah County Comm'n, 60 U.S.L.W. 4135 (1992) (striking down an interpretation of the Voting Rights Act by the U.S. Attorney General, meant to remedy racial discrimination); Lechmere, Inc. v. NLRB, 60 U.S.L.W. 4145 (1992) (striking down a NLRB ruling aimed at preventing employers from interfering with union picketing).

apply to content-based restrictions of speech in a university setting because "the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."[198] Such an assurance would not have been necessary before *Rust* because the government could not condition subsidies on the content of speech,[199] and because universities have been within a traditionally protected sphere of free expression.[200] The *Rust* Court, however, declined to enforce both of those guarantees. The Court allowed the Department of Health and Human Services to base a subsidy on the content of clinic employees' speech, and the Court allowed the Department to invade the traditionally protected sphere of the doctor-patient relationship.[201]

In place of these two guarantees, the Court offers the vagueness and overbreadth doctrines. This dictum implies, however, that the Court would not strike down a regulation that places a content-based restriction on university employment or attendance if that regulation is neither vague nor overbroad. These doctrines provide shrinking degrees of protection.[202] Thus, the *Rust* Court may have paved the way for the Department of Health, Education and Welfare to condition federal subsidies on adherence to regulations which prohibit speech that the Department considers offensive, such as science or literature courses that subscribe to or deny modern evolutionary theory. *Rust* appears to allow both regulations so long as they are neither vague nor overbroad. Thus, *Rust's* dictum provides a possible application of its rule.

C. Other Possible Applications of Rust

A broad reading of *Rust* inspires one to imagine the outer limit of constitutionally questionable administrative regulations to which the Court would defer. Consider a Nuclear Regulatory Commission (NRC) regulation that conditions an employee's receipt of salary or pension on refraining from speaking to anyone about a hazardous situation at a power

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

199. *See supra* notes 142-155 and accompanying text.

200. *See* Papish v. Board of Curators of the Univ. of Missouri, 410 U.S. 667 (1963).

201. A product of this sphere of protection is the physician/patient privilege.

202. *See* Osborne v. Ohio, 110 S. Ct. 1691 (1990) (holding that statute forbidding the possession of certain kinds of nude photographs was not overbroad).

plant. That the regulation restricts speech content should bother no one after *Rust*. An employee's challenge to such a regulation is likely to fail after *Rust*, because a reviewing court would likely defer to both the NRC's First Amendment interpretation as well as to the NRC's institutional rule-making competence. Even the possible adverse effects on public health of the regulation would probably not place it beyond the undefined realm of a "permissible" construction. This hypothetical regulation illuminates the potential problem inherent in *Chevron/Rust* deference; namely, that an agency could promulgate constitutionally questionable regulations designed to cover its mistakes. Other self-serving agency regulations could be created to prevent reduction of the agency's own budget or to prolong its own existence.

Similarly, the Internal Revenue Service (IRS) could place speech content-based restrictions on tax benefits. Suppose the IRS promulgated a regulation that made a tax exemption for dependent children[203] conditioned on the use of parental powers to teach that abortions are not appropriate.[204] This regulation could result from the sort of intragovernmental collusion that arguably motivated the regulation in *Rust*: The President appoints the department head, who promulgates regulations designed to further the President's political goals. The federal courts would not consider such motivation in determining whether the regulation is a "permissible" interpretation of the framework statute. The *Rust* Court deferred to the agency's constitutional interpretation, a matter arguably beyond the agency's competence. Similarly, the courts could defer to the hypothetical IRS regulation, even though the purpose of the regulation is clearly beyond the Department's comparatively superior competence.

V. CONCLUSION

On first reading *Rust v. Sullivan*, a student of constitutional law senses that something is out of place. A closer reading reveals that the *Rust* Court ignored First Amendment precedent. An examination of the *Chevron* Court's permissible construction analysis reveals that the Court performed this

203. 26 U.S.C. § 151(c)(1) (1991).

204. This hypothetical regulation was proposed by Professor John Mitchell, *in Don't Ever Discuss Rust v. Sullivan with a Lady in a Grocery Line*, 9 CONST. COMMENTARY 25, 37 (1992).

test without applying the standard rule that requires statutes to be construed so as to avoid constitutional questions. One is compelled to consider the explanation that the Court did not interpret the First Amendment at all, but rather, deferred to the Department of Social and Health Services' interpretation. In other words, *Rust* does not deal with theoretical First Amendment issues, but rather deals with the metatheoretical question of who is to decide those issues.

The Court similarly deferred to Congress's constitutional interpretation in *Katzenbach v. Morgan*. Analysis of that case illuminates the balance of power implications underlying *Rust*. Although the controversial part of the *Morgan* decision fell into disuse, *Rust* appears to have a bright future; the outlook of the current Court should ensure continuing judicial deference to the discretion of administrative agencies regarding constitutional issues.