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Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey

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ABORTION COUNSELING AS VICE ACTIVITY: THE FREE SPEECH IMPLICATIONS OF *RUST v. SULLIVAN* AND *PLANNED PARENTHOOD v. CASEY*

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In dissenting from the Supreme Court's 1994 decision upholding portions of an injunction against abortion protestors, Justice Scalia wrote:

> [T]his case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal.
>
> But the context here is abortion. . . . "[It is] painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." . . . Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment.[1]

Contrary to Scalia's suggestion, the First Amendment was sacrificed at the abortion altar much earlier. In its hurry to dismantle abortion rights in the area of abortion counseling,[2] the Court also pulled apart the fundamental tenets of the First Amendment. At least two decisions, *Rust v. Sullivan*[3] and *Planned Parenthood v. Casey*,[4] squarely presented First Amendment issues pertaining to abortion counseling, although in slightly different contexts. *Rust* involved a challenge to federal regulations requiring that health clinics receiving federal subsidies refrain from counseling about abortion as an alternative to childbirth. *Casey* involved, among other abortion-related issues, the constitutionality of a Pennsylvania law compelling doctors to provide certain (arguably biased) information to clients seeking abortions. In both cases, the Court rejected or ignored the petitioners' First Amendment challenges. The *Rust* majority apparently believed that the federal regulations requiring recipients of federal funds to convey only pro-childbirth information to their

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1. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2534–35 (1994) (Scalia, J., dissenting) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting)).

2. This article uses the term "abortion counseling" to encompass advice and information on abortion given to prospective patients by health care providers.

3. 500 U.S. 173 (1991).

4. 112 S. Ct. 2791 (1992).

clients did not unconstitutionally condition the receipt of those funds.[5] The *Casey* plurality chose to forego First Amendment analysis altogether and upheld the Pennsylvania statute as a reasonable regulation of the practice of medicine.[6]

Rust and *Casey* appear to be only superficially related. After all, *Rust* involved government subsidization of speech, an area the Court treats differently from the direct regulation of speech at issue in *Casey*.[7] Most scholars writing about abortion counseling have focused primarily on the First Amendment aspects of *Rust*,[8] centering much of their criticism on the Court's unconstitutional conditions analysis.[9] Few scholars have even discussed the First Amendment aspects of *Casey*, much less linked the case to *Rust*.[10] A closer examination of *Rust* and *Casey*, however, reveals a common thread running through the cases: the Court's treatment of abortion counseling as a form of activity rather than a form of speech. That treatment, in turn, has much to do with the Court's emerging view

5. See *Rust*, 500 U.S. at 196–98. The unconstitutional conditions doctrine holds that the government may not condition a grant or benefit on the relinquishment of a constitutional right, such as the right to speak freely. See Speiser v. Randall, 357 U.S. 513, 518–19 (1958) (noting that discriminatory denial of tax exemption for engaging in protected speech violated First Amendment); Laurence H. Tribe, American Constitutional Law § 11-5, at 781 (2d ed. 1988).

6. See *Casey*, 112 S. Ct. at 2824.

7. The Court consistently distinguishes between direct government regulation of speech and government refusal to fund speech. Generally, the Court carefully scrutinizes laws prohibiting advocacy of certain ideas, see Kingsley Int'l Pictures Corp. v. Regents of N.Y., 360 U.S. 684, 689 (1959), or laws prohibiting leafleting, see Schneider v. New Jersey, 308 U.S. 147, 162 (1939), although it uses different standards of review in each instance. In contrast, the Court recognizes a need for governmental discretion in doling out funds and thus accords greater deference to government funding decisions that affect speech. See Regan v. Taxation With Representation, 461 U.S. 540, 545–46 (1983).

8. See, e.g., David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. Rev. 675, 679-80 (1992); Phillip J. Cooper, Rusty Pipes: The *Rust* Decision and the Supreme Court's Free Flow Theory of the First Amendment, 6 Notre Dame J.L. Ethics & Pub. Pol'y 359, 379 (1992); Stanley Ingber, Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogne, 46 Rutgers L. Rev. 1473, 1579–1612 (1994); Thomas W. Mayo, Abortion and Speech: A Comment, 46 SMU L. Rev. 309, 311 (1992); Dorothy E. Roberts, *Rust v. Sullivan* and the Control of Knowledge, 61 Geo. Wash. L. Rev. 587, 605 (1993); Stephen F. Rohde, *Rust v. Sullivan*: Subverting the Constitution and Abusing Judicial Power?, 25 Beverly Hills B. Ass'n J. 155, 159 (1991); Ann B. Weeks, Note, The Pregnant Silence: *Rust v. Sullivan*, Abortion Rights, and Publicly Funded Speech, 70 N.C. L. Rev. 1623, 1657 (1992); see also Cass R. Sunstein, Democracy and the Problem of Free Speech 114–18 (1993) (considering the *Rust* decision in the broader context of unconstitutional conditions and government funding).

9. See Sunstein, supra note 8, at 116–18; Cole, supra note 8, at 685; Rohde, supra note 8, at 159–60; Weeks, supra note 8, at 1664.

10. For a sampling of the authors who have tackled the First Amendment issues in *Casey*, see Paula Berg, Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice, 74 B.U. L. Rev. 201, 213–31 (1994); Elizabeth A. Schneider, Comment, Workability of the Undue Burden Test, 66 Temp. L. Rev. 1003, 1024 (1993).

that abortion is no longer a fundamental right; instead, the Court's current jurisprudence implicitly equates abortion with less-protected economic activities such as gambling. With abortion no longer a fundamental right, the Court more easily manages to lump abortion and abortion counseling together, treating both as part of the same activity under a questionable and largely abandoned commercial speech doctrine. This approach allowed the Court to overlook the free speech implications of abortion counseling and to forego any meaningful First Amendment analysis in *Rust* and *Casey*. Thus, the Court's "ad hoc nullification machine" to which Justice Scalia refers has been devouring the First Amendment rights of women and their doctors for some time.

Part I of this article discusses the Court's opinions in *Rust* and *Casey*. It first demonstrates that the driving force in both decisions was the Court's characterization of abortion counseling as an activity rather than as speech. Part I further discusses the speech/conduct distinction in First Amendment jurisprudence and demonstrates that abortion counseling falls on the speech side of that distinction. Parts II and III suggest that the real cause of the conflation of speech and conduct in *Rust* and *Casey* was the confluence of (1) the reemergence of reasoning found in a curious commercial speech decision—*Posadas de Puerto Rico Associates v. Tourism Company*[11] and (2) the Court's rapidly changing view of a woman's constitutional right to terminate her pregnancy.

I. *RUST* AND *CASEY* REVISITED: THE CONFLATION OF SPEECH AND CONDUCT

A. Rust v. Sullivan

Rust involved regulations under Title X of the Public Health Services Act, which provides federal funding to family planning projects offering "acceptable and effective family planning methods and services."[12] Although Title X provides broad funding for family planning programs, it specifically prohibits the allocation of funds to programs in which abortion is used as a method of family planning.[13] Prior to 1988, however, Title X programs were not prohibited from engaging in nondirective counseling about abortion.[14]

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11. 478 U.S. 328 (1986).

12. 42 U.S.C. § 300(a) (1988).

13. Id. § 300a-6.

14. See, e.g., 42 C.F.R. § 59.5(a)(2) (1987) (regulation prohibits only counseling designed to coerce a patient "to employ or not to employ any particular methods of family planning"); Brief for Petitioners at Exhibit C-2, Rust v. Sullivan, 500 U.S. 173 (1991) (No. 89-1391) ("[T]he provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion, and the collection of statistical data and information regarding abortion are not considered to be proscribed by [Section 300a-6].") (citing Memorandum from Office of the General Counsel, Dep't of Health Educ. & Welfare (April 14, 1978)); see also 53 Fed. Reg. 2922, 2923 (1988) (noting

In 1988, the Secretary of Health and Human Services promulgated regulations that substantially curtailed the ability of Title X recipients to counsel patients about, and refer them for, abortions.[15] Specifically, the regulations banned Title X projects from "counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning."[16] In addition, the regulations prohibited Title X recipients from indirectly "encouraging or promoting" abortion by, for example, providing patients with lists of health care providers weighed in favor of those who performed abortions or whose primary business was providing abortions.[17] These prohibitions applied even if the patient specifically requested information about abortion or abortion providers.[18] In contrast, the regulations *required* Title X doctors and counselors to refer pregnant clients to appropriate prenatal or social

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that regulations in effect prior to 1988 provided for nondirective counseling about abortion).

15. See 42 C.F.R. §§ 59.8, 59.10 (1988) (hereinafter the regulations). Soon after President Clinton took office in 1993, the Secretary of Health and Human Services suspended the 1988 regulations. See 58 Fed. Reg. 7462, 7462 (1993). While the regulations are not currently effective, the *Rust* Court's decision to uphold them means that they can reemerge without constitutional impediment. In fact, the shift of power between political parties after the 1994 elections has been accompanied by attempts to override President Clinton's suspension of the regulations. See Jerry Gray, Issue of Abortion Is Pushing Its Way to Center Stage, N.Y. Times, June 19, 1995, at A1.

16. 42 C.F.R. § 59.8(a)(1) (1994) (suspended by President Clinton Feb. 5, 1993).

17. Id. § 59.8(a)(3) (Title X project cannot "weigh[ ] [a] list of referrals in favor of health care providers which perform abortions, . . . include] on the list of referral providers health care providers whose principal business is the provision of abortions, . . . exclud[e] available providers who do not provide abortions, or . . . 'steer[ ]' clients to providers who offer abortion as a method of family planning.").

The regulations did not merely prohibit counseling about abortion; they further prohibited Title X projects from engaging in activities that "encourage, promote or advocate abortion as a method of family planning." Id. § 59.10(a). Thus, the regulations forbade Title X projects from lobbying for legislation that would increase the availability of abortion as a method of family planning, paying dues to any organization whose activities consisted mainly of advocating the use of abortion, using legal action to promote abortion as a method of family planning, and providing speakers or developing or disseminating literature advocating the use of abortion as a method of family planning. Id. § 59.10(a)(1)–(5). The regulations did not, however, prevent Title X projects from engaging in anti-abortion activities. As with the counseling provisions, the Supreme Court upheld the lobbying and advocacy restrictions. See Rust v. Sullivan, 500 U.S. 173, 196–98 (1991).

18. See 42 C.F.R. § 59.8(b)(3)–(5) (1994) (suspended by President Clinton Feb. 5, 1993). The regulations provide the following example:

> A pregnant woman asks the title X project to provide her with a list of the abortion providers in the area. The project tells her that it does not refer for abortion and provides her a list which consists of hospitals and clinics and other providers which provide prenatal care and also provide abortions. None of the entries on the list are providers that principally provide abortions. Although there are several appropriate providers of prenatal care in the area which do not provide or refer for abortions, none of these providers are included on the list. Provision of the list is inconsistent with [section 59.8(a)(3)].

Id. § 59.8(b)(4).

services that promoted the welfare of the "unborn child" and, in the meantime, to furnish information necessary to protect the welfare of the "unborn child."[19]

The *Rust* petitioners, assorted Title X grantees, argued that the regulations violated the unconstitutional conditions doctrine by conditioning the grant of a government benefit on the relinquishment of a constitutional right.[20] Specifically, they claimed that the regulations' requirement that they espouse a particular viewpoint (pro-childbirth/anti-abortion) in order to receive Title X funds violated the First Amendment.[21] Petitioners recognized that the government had broad discretion to allocate federal funds.[22] Nevertheless, they argued that the Supreme Court had consistently stated that the government may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.' "[23] By conditioning Title X funds on the recipients' willingness to provide only pro-childbirth information to clients, petitioners argued, the regulations clearly violated this anti-viewpoint discrimination principle.[24]

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19. Id. § 59.8(a)(2).

20. For an in-depth description of the unconstitutional conditions doctrine, see Tribe, supra note 5, § 11-5, at 781; Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989). The doctrine's history ranges back to the Court's *Lochner*-era decisions, but subsequently has been used to protect personal liberties such as speech, association, religion, and privacy. See Sullivan, supra, at 1416; see also Richard A. Epstein, The Supreme Court 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 28–102 (1988) (discussing the many contexts in which the unconstitutional conditions doctrine operates). The doctrine's history has been inconsistent, with the Court unable to formulate a coherent theory. Numerous scholars have criticized the Court's use and application of the doctrine. See Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293, 1301 (1984); Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593, 595 (1990); Patricia M. Wald, Government Benefits: A New Look at an Old Gifthorse, 65 N.Y.U. L. Rev. 247, 255 (1990).

21. See Brief for Petitioners at 14–24, Rust v. Sullivan, 500 U.S. 173 (1991) (No. 89-1391).

22. See id. at 17 (noting Congress's power "to earmark federal funds for a chosen purpose"). The Supreme Court has frequently reaffirmed the government's broad spending powers. See Regan v. Taxation With Representation, 461 U.S. 540, 548–50 (1983).

23. Brief for Petitioners at 17, *Rust*, 500 U.S. 173 (quoting *Regan*, 461 U.S. at 548 (citations omitted)). Several other decisions reaffirm the Court's antipathy toward viewpoint-based restrictions on funding allocations. See Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987); FCC v. League of Women Voters, 468 U.S. 364, 383–84 (1984); Speiser v. Randall, 357 U.S. 513, 519 (1958).

24. The Eighth Circuit faced an almost identical issue three years prior to *Rust*. In Reproductive Health Serv. v. Webster, 851 F.2d 1071 (8th Cir. 1988), rev'd, 492 U.S. 490 (1989), the court examined the constitutionality of a state statute that made it unlawful for public employees, including doctors, nurses, social workers, and counselors, to "encourage or counsel a woman to have an abortion not necessary to save her life." Id. at 1077 n.9 (citing Mo. Ann. Stat. § 188.210 (Vernon 1983 & 1988 Supp.)). The majority held that the statute was unconstitutionally vague and violated the right to privacy. See id. at 1077–80.

A majority of the Court rejected the petitioners' argument and upheld the regulations. Like the petitioners, Chief Justice Rehnquist, who authored the majority opinion, framed the issue as an unconstitutional conditions problem.[25] He also acknowledged the Court's previous decisions holding that government subsidies aimed at suppressing particular ideas violated the unconstitutional conditions doctrine.[26] In addition, the Chief Justice recognized that the regulations were designed to "encourage" women to forego abortions[27] and that they did so by imposing one-sided restrictions on counseling and referral for abortion.[28] Nevertheless, the *Rust* majority found that the regulations did not discriminate on the basis of viewpoint. In Rehnquist's words, the government could

> selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[29]

Thus, the Court reasoned that the *Rust* regulations presented "not a case of the Government 'suppressing a dangerous idea,' but a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope."[30] That is, because the federally funded Title X program was designed to support preventive family planning, the govern-

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Judge Arnold, concurring in the result, based his reasoning on impermissible viewpoint discrimination, the argument espoused by the *Rust* petitioners:

> These statutes sharply discriminate between kinds of speech on the basis of their viewpoint: a physician, for example, could discourage an abortion, or counsel against it, while in a public facility, but he or she could not encourage or counsel in favor of it. That kind of distinction is flatly inconsistent with the First Amendment . . . .

Id. at 1085 (Arnold, J., concurring in part and dissenting in part). The State of Missouri did not appeal the Eighth Circuit's decision striking the ban on counseling and, as a result, the Supreme Court did not decide the counseling issue. See Webster v. Reproductive Health Servs., 492 U.S. 490, 512 (1989).

25. See *Rust*, 500 U.S. at 192–200.

26. See id. at 192 (citing *Regan*, 461 U.S. at 548; *Ragland*, 481 U.S. at 234; and Cammarano v. United States, 358 U.S. 498, 513 (1959)).

27. See id. at 193 ("Here the Government is exercising the authority it possesses . . . to subsidize family planning services which will lead to conception and childbirth, and declining to 'promote or encourage abortion.' ").

28. See id. at 193–94 (noting that "a doctor employed by the project may be prohibited in the course of his project duties from counseling abortion or referring for abortion").

29. Id. at 193; see also id. (" 'A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.' ") (quoting Harris v. McRae, 448 U.S. 297, 317 n.19 (1980)); id. (" 'There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.' ") (quoting Maher v. Roe, 432 U.S. 464, 475 (1977)).

30. Id. at 194.

ment could enact regulations barring speech not directed at such planning.[31]

At first glance, *Rust* appears to be a straightforward decision. The Supreme Court recognized that Congress has wide discretion to allocate funds; that its discretion is limited so that it may not condition the acceptance of funds on the recipients' willingness to espouse a particular viewpoint; and that the regulations in *Rust* did not do so and were, therefore, constitutional. In other words, the Court apparently engaged in a simple application of the unconstitutional conditions doctrine. The problem with the *Rust* decision, however, is that contrary to the Court's characterization, the regulations were very much aimed at suppressing an idea that the government viewed as "dangerous."

First, the regulations did not merely refuse to subsidize certain speech but specifically prohibited Title X projects from counseling about abortion even if a client asked for abortion information.[32] Thus, the regulations sought to silence only one side of the discussion concerning legitimate family planning alternatives. That alone should have brought the regulations within the Court's traditional hostility to one-sided speech restrictions.[33] Moreover, the regulations in *Rust* were not acceptable under traditional First Amendment jurisprudence because they operated only in the context of Title X projects, leaving private physicians and even project physicians free to counsel about abortion on their own time.[34]

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31. See id. at 195 n.4 ("The regulations are designed to ensure compliance with the probibition . . . that none of the funds appropriated under Title X be used in a program where abortion is a method of family planning.").

32. See 42 C.F.R. § 59.8 (1994) (suspended by President Clinton Feb. 5, 1993); see also supra notes 16–18 and accompanying text.

33. See, e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) ("The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed."); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (citations omitted); see also Alexander Meiklejohn, Free Speech And Its Relation to Self-Government 26 (1948) (restricting speech based upon viewpoint considered a "mutilation" against which the First Amendment is directed); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 198–200 (1983) (discussing unconstitutionality of viewpoint-based restrictions on speech).

34. Professor Stone has used the term "modest viewpoint" restrictions to refer to those regulations which restrict viewpoints only in certain instances as opposed to regulations which impose an across-the-board ban on certain viewpoints. For example, anti-pornography legislation aimed at suppressing graphic, sexually-explicit speech that portrays women in submissive or subordinate positions qualifies as a "modest viewpoint" restriction. Such legislation does not ban all advocacy of the idea that women should be subordinate or submissive; rather it restricts expression of this view only through graphic, sexually-explicit means. See Geoffrey R. Stone, Anti-Pornography Legislation as Viewpoint-Discrimination, 9 Harv. J.L. & Pub. Pol'y 461, 463–65 (1986). On the other hand, a law criminalizing advocacy of violence against the government is a complete ban on expression of a particular viewpoint because it leaves no avenue of expression open. See Stone, supra note 33, at 198–99.

The Supreme Court has consistently applied the strictest scrutiny even to viewpoint-based regulations of a limited nature.[35]

Second, the regulations did not merely silence one viewpoint; they also compelled Title X projects to give pregnant women information about childbirth and prenatal care.[36] The Court's usual antipathy to viewpoint-based regulations is grounded in a fear of illicit government motivation—that is, a fear that government is restricting speech because it disapproves of a specific message.[37] The regulations' attempt to control all aspects of what was said in Title X projects regarding abortion made obvious the government's illicit motive.[38] Indeed, the Bush administration made clear from the outset that the regulations "exhibit[ed] a

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35. See, e.g., Schacht v. United States, 398 U.S. 58, 63 (1970) (striking down a federal statute prohibiting the use of military uniforms in theatrical productions tending to discredit the armed forces); American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986) (striking down Indianapolis anti-pornography ordinance).

The Court's hostility towards modest viewpoint regulations extends beyond direct regulation of speech. The Court's decisions regarding speech on public property are a good example. The government has broad discretion to regulate speech in "non-public fora"—government property that is not traditionally open to speech—such as prisons, fairgrounds, and mailboxes. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983). In fact, depending upon the nature of the non-public forum, the government may even ban speech entirely or restrict discussion in the forum to certain subject matter and speakers. See id. at 48–49, 53. Even given the government's wide latitude in defining the forum and the fact that citizens remain free to speak elsewhere, the government is still prohibited from engaging in viewpoint discrimination in non-public fora. See *Perry*, 460 U.S. at 46; see also Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141, 2147 (1993) (school district's denial of church group's request to show religious-oriented film on school property struck down as viewpoint-based discrimination).

In fact, the Court's application of the unconstitutional conditions doctrine to speech cases reflects its hostility to modest viewpoint bias. See, e.g., Speiser v. Randall, 357 U.S. 513, 519 (1958) ("denial of a tax exemption for engaging in certain speech . . . is 'frankly aimed at the suppression of dangerous ideas' ") (citing American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950)).

36. See 42 C.F.R. § 59.8(b) (1994) (suspended by President Clinton Feb. 5, 1993); supra note 19 and accompanying text.

37. See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) ("[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove of the speaker's views.' "); see also Stone, supra note 33, at 227; supra note 121.

38. The Bush administration attempted to cast the regulations as the government's expression of a viewpoint, rather than an attempt to manipulate the viewpoint of others. See Ruth Marcus, Abortion-Advice Ban Upheld for Federally Funded Clinics, Wash. Post, May 24, 1991, at A1, A18. Had the regulations merely required the provision of certain information about prenatal care and not attempted to suppress abortion information, the government's argument that there was no attempt to manipulate viewpoint would have been stronger. That the regulations clearly mandated childbirth information while simultaneously suppressing information about abortion made the government's illicit motive particularly obvious. Cf. Mark G. Yudof, When Government Speaks 234–35 (1983) (noting that while the government arguably can add its voice to debate over public

bias in favor of childbirth and against abortion" and that they were designed to send the message that "the federal government does not sanction abortion."[39] As one scholar noted, "[I]t would be difficult to imagine a law more clearly aimed at suppressing a dangerous idea than the Title X regulations."[40]

In light of the regulations' obvious bias, *Rust* did not involve as straightforward an application of the unconstitutional conditions doctrine as the Court would have had us believe. Nor did the Court somehow alter the parameters of the doctrine to allow viewpoint discrimination, as some scholars contend.[41] The Court did not explicitly endorse viewpoint discrimination; rather, it took pains to make its decision appear consistent with the doctrine as traditionally understood—including the anti-viewpoint discrimination principle espoused in so many of its previous decisions.[42] Similarly, one cannot attribute the *Rust* decision solely to the Court's often confused unconstitutional conditions jurisprudence.[43]

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matters, it cannot aim to suppress viewpoints with the use of discriminatory funding mechanisms).

39. 53 Fed. Reg. 2922, 2943–44 (1988). Then-Solicitor General Kenneth Starr's comments after the *Rust* decision illustrate the regulation's anti-abortion agenda. Starr said that

> the administration was "pleased" that the court had ruled that "the government as financier, as creator of government programs, should be able to make policy determinations and specifically here it should be able to say, 'We do not want abortion to play a role in family planning programs that are federally subsidized.' . . . The government is able to take sides; it is able to have viewpoints when it is funding."

Marcus, supra note 38, at A18.

40. Cole, supra note 8, at 688 n.47.

41. See, e.g., Berg, supra note 10, at 210 (*Rust* Court "endorsed the proposition that government may, to promote its viewpoint, censor speech of publicly funded speakers"); Weeks, supra note 8, at 1668 (*Rust* implies that government has "almost unreviewable authority to control the content of protected speech through federal funding").

42. See Rust v. Sullivan, 500 U.S. 173, 192–95 (1991). Moreover, the Court recently reaffirmed its antipathy to viewpoint-based distinctions in funding decisions. See Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510, 2517–19 (1995). In a 5-4 decision the *Rosenberger* Court ruled that the university's attempt to exclude religious groups from certain funding allocations was unconstitutional viewpoint discrimination. See id. The *Rosenberger* majority attempted to distinguish *Rust* by claiming that, in contrast to *Rosenberger* which involved government efforts to "create a program to encourage private speech," *Rust* involved government attempts to "enlist[ ] private entities to convey its own message." Id. at 2518–19. Although viewpoint discrimination was impermissible in the former, it was permissible in the latter. At best, such a distinction seems naive given its assumption "that private and state speech always may be separated by clean lines and that [*Rosenberger*] involve[d] only the former" while *Rust* involved the latter. Id. at 2548 n.11 (Souter, J., dissenting). This is especially true when one considers that many of the Title X recipients in *Rust* clearly did not view themselves as government employees enlisted to convey a particular message. At worst, such a distinction encourages the government to manipulate its characterization of certain programs in order to control what is said.

43. See, e.g., Michael J. Elston, Artists and Unconstitutional Conditions: The Big Bad Wolf Won't Subsidize Little Red Riding Hood's Indecent Art, Law & Contemp. Probs., Autumn 1993, at 327, 340–43 (noting the Court's often confused application of the

With respect to selective government funding aimed at suppressing particular viewpoints, the Court *has* been consistent. It has never wavered from the proposition that the government cannot use funding decisions to suppress viewpoints with which it disagrees[44] and, in cases involving actual viewpoint discrimination, it has explicitly acknowledged the regulations' unconstitutionality.[45] Rather, the key to the *Rust* Court's treatment of the regulations lies in its inability to see abortion counseling as speech.

The *Rust* majority's conflation of speech and conduct is obvious at several points in its opinion, beginning with the Court's discussion of the parameters of Title X itself. According to the Court, Title X was designed to subsidize preconception family planning services.[46] As such, the ban on abortion counseling (a post-conception activity) was no different from a ban on the provision of prenatal care by a doctor (another post-conception activity). Both were "prohibition[s] on a project grantee or its employees from engaging in *activities* outside of the project's scope."[47] In rejecting the *Rust* petitioners' argument that the regulations were viewpoint-discriminatory, the Court stated that the government can "selectively fund a program to encourage certain *activities* it believes to be in the public interest, without at the same time funding an alternative program."[48] Such an action is not viewpoint discrimination; it is merely a government decision "to fund one *activity* to the exclusion of the other."[49] Finally, in distinguishing one of the numerous precedents cited by petitioners, the majority commented that the regulations were not a "case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund *activities,*

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unconstitutional conditions doctrine and its potential effect on *Rust*); Nancy Pineles, Note, *Rust* on the Constitution: Politics and Gag Rules, 37 How. L.J. 83, 98–101 (1993) (noting that the Court's inability to distinguish between its "coercion" and "free choice" approaches in subsidy cases may have resulted in *Rust*).

44. See supra note 23 and cases cited therein.

45. See, e.g., Speiser v. Randall, 357 U.S. 513, 528–29 (1958) (requiring veterans to sign loyalty oaths to qualify for tax benefits violates First and Fourteenth Amendments); see also Perry v. Sindermann, 408 U.S. 593, 597 (1972) (finding unconstitutional public school teacher's dismissal for publicly criticizing school administration). In fact, at least twice the Court has intimated that mere subject matter based discrimination in funding/taxing decisions is impermissible. See Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229–31 (1987); FCC v. League of Women Voters, 468 U.S. 364, 383–84 (1984). One could argue that these cases are anomalous in their strict scrutiny of subsidies based on subject matter distinctions; however, the Court's expanded protection of speech in those cases certainly supports the proposition that, even in the subsidies context, the Court looks askance at attempts to suppress particular points of view.

46. See Rust v. Sullivan, 500 U.S. 173, 193 (1991).

47. Id. at 194 (empbasis added).

48. Id. at 193 (emphasis added).

49. Id. (emphasis added); see also id. (" 'A refusal to fund protected *activity*, without more, cannot be equated with the imposition of a 'penalty' on that *activity*.' ") (citations omitted) (emphasis added); id. (" 'There is a basic difference between direct state interference with a protected *activity* and state encouragement of an alternative *activity* consonant with legislative policy.' ") (citations omitted) (emphasis added).

including speech, which are specifically excluded from the scope of the project funded."[50] Indeed, with the exception of the last statement, the Court never referred to abortion counseling as speech, and even then it was subsumed into the "activity" of "family planning/abortion."

Once the *Rust* Court transformed speech into action, its decision became easy to justify. With the *Rust* regulations framed as restrictions on "activity," the case before the Court became indistinguishable from previous cases in which the Court refused to require subsidization of abortions or other activities, leaving the decision to subsidize within the legislature's discretion.[51] More importantly, by defining abortion counseling as an activity, the Court was not compelled to apply traditional speech jurisprudence to the regulations at issue, including its usual strict review of viewpoint-based regulations.

Significantly, *Rust* is not the only instance in which the Supreme Court treated abortion counseling as an activity rather than as speech. Only a year later in *Planned Parenthood v. Casey*,[52] the Supreme Court again overlooked the significant speech implications of Pennsylvania's abortion statute and upheld it as a reasonable regulation of the medical profession.

B. Planned Parenthood v. Casey

The *Casey* petitioners challenged several provisions of Pennsylvania's abortion statute,[53] primarily claiming that they violated a woman's Fourteenth Amendment right to privacy.[54] However, petitioners also challenged one provision, the informed consent requirement,[55] as a violation of the First Amendment's protection of speech.[56] As in *Rust*, the Court

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50. Id. at 194–95 (distinguishing Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987)) (emphasis added).

51. See Maher v. Roe, 432 U.S. 464, 475–77 (1977); Harris v. McRae, 448 U.S. 297, 311–27 (1980). A few commentators have noted the *Rust* Court's reliance on *Maher* and *Harris* in its elision of the distinction between speech and conduct. See, e.g., Cooper, supra note 8, at 380–81 (*Rust* Court's treatment of abortion counseling as activity rather than speech violates fundamental precepts regarding the First Amendment and the free flow of information); Mayo, supra note 8, at 313–14 (criticizing *Rust* Court's reliance on abortion funding cases to reach a similar decision when speech issues are involved); Rohde, supra note 8, at 159 (arguing that *Rust* Court manipulated past unconstitutional conditions precedent and facts in its effort to uphold regulations).

52. 112 S. Ct. 2791 (1992).

53. The provisions at issue in *Casey* included a 24-hour waiting period requirement, an informed consent provision, a parental consent provision, a spousal notification provision, and various reporting and recordkeeping requirements. See 18 Pa. Cons. Stat. Ann. §§ 3205, 3206, 3207(b), 3209, 3214(a), 3214(f) (1983 & Supp. 1995).

54. See *Casey*, 112 S. Ct. at 2803, 2820–33; see also infra Part III.A.2. for a more detailed discussion of the Court's decision regarding petitioners' Fourteenth Amendment claims.

55. See 18 Pa. Cons. Stat. Ann. § 3205 (Supp. 1995).

56. See Brief for Petitioners and Cross-Respondents at 53–55, *Casey*, 112 S. Ct. 2791 (Nos. 91-744 and 91-902).

ignored the speech aspects of the informed consent provision and found it constitutional.

Section 3205, the informed consent provision of Pennsylvania's amended abortion statute, requires doctors to provide women seeking abortions with certain information, including the risks of and alternatives to the procedure, the medical risks of carrying the child to term, and the probable gestational age of the "unborn child" at the time of the abortion.[57] The statute further requires physicians to inform their patients of the availability of (1) printed materials published by the state describing the fetus and providing information about alternatives to abortion,[58] (2) medical assistance benefits for prenatal care, childbirth, and neonatal care,[59] and (3) information pertaining to the father's legal responsibility to assist with child support.[60] All information must be provided at least 24 hours prior to an abortion[61] and the woman must certify in writing that she has received it.[62] Any physician failing to comply with this statute is subject to suspension or revocation of her license for "unprofessional conduct" in addition to criminal penalties.[63]

The health care providers who were the petitioners in *Casey* challenged Section 3205 as violating the First Amendment by compelling them to act as mouthpieces for the state in discouraging abortion.[64] Specifically, petitioners relied on *Wooley v. Maynard*[65] and a series of cases which held that the state may not "constitutionally require an individual

57. See 18 Pa. Cons. Stat. Ann. § 3205(a)(1) (Supp. 1995).

58. See id. § 3205(a)(2). Section 3208 contains an extensive description of the content of the printed materials to be made available. For example, the materials must include a geographical index and description of all available programs designed to assist a woman through pregnancy and adoption as well as information on the availability of medical assistance benefits for pregnancy and neonatal care. See id. § 3208(a)(1). Furthermore, the materials must contain a statement that the father is liable for child support payments even if he has offered to pay for the abortion and a statement that adoptive parents can legally pay the costs of pregnancy, childbirth, and neonatal care. See id. They additionally must contain "accurate scientific" descriptions of the probable anatomical and physiological characteristics of the fetus at two-week gestational increments from fertilization to full term (including pictures), as well as relevant information on the possibility of the fetus's survival. See id. § 3208(a)(2).

59. See id. § 3205(a)(2).

60. See id.

61. See id. §§ 3205(a)(1), (a)(2).

62. See id. § 3205(a)(4).

63. See id. § 3205(c). Section 3205(c) provides that any physician who performs an abortion without obtaining certification is guilty of a "summary offense" for the first failure and a "misdemeanor of the third degree" for each subsequent failure. The district court in *Casey* found "no other instance [in which] an informed consent regulation provide[s] for criminal penalties." Planned Parenthood v. Casey, 744 F. Supp. 1323, 1355 (E.D. Pa. 1990), aff'd in part, rev'd in part, 947 F.2d 682 (3d Cir. 1991), aff'd in part, rev'd in part, 112 S. Ct. 2791 (1992).

64. See Brief for Petitioners and Cross-Respondents at 53–55, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744 and 91-902).

65. 430 U.S. 705 (1977).

to participate in the dissemination of an ideological message."[66] Petitioners contended that the state's anti-abortion message was obvious throughout Section 3205, although that provision purported to require only the provision of neutral information.[67] They relied heavily on the fact that Section 3205 required provision of specific, detailed information about abortion alternatives to every patient, regardless of individual circumstances and under duress of criminal penalties.[68] Such requirements forced physicians " 'to act in a manner inconsistent with their professional judgment' " and forced them to "convey the state's message at the cost of violating their own conscientious beliefs and professional commitments."[69]

Respondents, also recognizing the speech implications of Section 3205, grounded their defense of the statute in First Amendment principles as well, arguing that the statute was a permissible regulation of commercial speech.[70] Relying on the Third Circuit's ruling below,[71] respondents argued that commercial speech enjoys less protection than other

66. Id. at 713. *Wooley*, which held that the state cannot punish citizens for obscuring a "Live Free or Die" motto on license plates, is but one of many cases recognizing that the government cannot compel one to foster an ideology. Thus, the government cannot require students to say the pledge of allegiance in school, see West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943), newspapers to run editorial replies of political candidates whom they have criticized, see Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974), privately owned utilities to enclose in its billing envelopes inserts from advocacy groups who disagree with the utilities' views, see Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 12–17 (1986), or parties to agency shop agreements to pay dues used to advance political objectives, see Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232–37 (1977).

Significantly, the Court's antipathy toward government-compelled speech extends to compelled disclosure of fact as well as statements of ideology. Thus, the Court in Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988), struck down a North Carolina statute that required professional fundraisers to disclose to potential donors the average percentage of the amount raised that was actually turned over to the charitable organizations for which they were working. That the statute involved merely "compelled statements of 'fact' " as opposed to compelled statements of opinion made no difference to the Court since "either form of compulsion burden[ed] protected speech." Id. at 797–98.

67. See Brief for Petitioners and Cross-Respondents at 54–55, *Casey*, 112 S. Ct. 2791. The district court in *Casey* similarly noted that "[t]he mandated information required by sections 3205 and 3208 will create the impression in women that the Commonwealth disapproves of the woman's decision" and that it was "an attempt by the Commonwealth to alter a woman's decision after she has determined that an abortion is in her best interest." *Casey*, 744 F. Supp. at 1354.

68. See Brief for Petitioners and Cross-Respondents at 54–55, *Casey*, 112 S. Ct. 2791.

69. Id. (quoting *Casey*, 744 F. Supp. at 1354).

70. See Brief for Respondents at 70–71, *Casey*, 112 S. Ct. 2791. The Supreme Court has defined commercial speech as "speech which does 'no more than propose a commercial transaction.' " Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

71. The Third Circuit, in contrast to the district court, upheld Section 3205 as a permissible regulation of commercial speech. See Planned Parenthood v. Casey, 947 F.2d 682, 705 (3d Cir. 1991), aff'd in part, rev'd in part, 112 S. Ct. 2791 (1992).

forms of speech, especially when, as here, the government regulation compels disclosure of factual information rather than suppresses information.[72]

Despite briefing of the free speech issues by both sides, the *Casey* joint opinion[73] dismissed petitioners' First Amendment argument in a few short sentences:

> To be sure, the physician's First Amendment rights not to speak are implicated, [*see Wooley v. Maynard,*] but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[74]

Other than a brief citation to *Wooley*, the joint opinion did not discuss the parameters of the petitioners' compelled speech argument.[75] Nor did it pick up on respondents' commercial speech argument—an especially surprising omission in light of the Third Circuit's discussion of the issue.

The joint opinion's failure to discuss the First Amendment implications of Section 3205 is telling, although not because the Justices were necessarily wrong in refusing to find a violation of the First Amendment. Indeed, resolution of this particular speech issue would have been difficult and, arguably, an issue of first impression for the Court.[76] The issue before the Court—whether the state could compel physicians to give certain factual, abortion-related information to clients—did not fall squarely

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72. See Brief for Respondents at 70–71, *Casey*, 112 S. Ct. 2791. Respondents and the Third Circuit relied primarily on the Supreme Court's decision in Zauderer v. Office of Disciplinary Counsel, which held that states may require attorneys to disclose certain information regarding contingent fee arrangements in advertisements as long as the "disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." 471 U.S. 626, 651 (1985).

73. Although a majority of the Court voted to uphold Section 3205, the Justices were badly split as to their reasoning. Only the joint opinion discussed the First Amendment aspects of the informed consent provision. The remaining four Justices voting to uphold it simply relied on a due process argument—that abortion procedures, including the informed consent provision, were subject to reasonable regulation by the legislature. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2867 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); see also infra Part III.A.2. for a discussion of the various opinions in *Casey*.

74. *Casey*, 112 S. Ct. at 2824 (citing Wooley v. Maynard, 430 U.S. 705 (1977)) (other citations omitted).

75. Petitioners also briefly raised a second First Amendment argument regarding Section 3205. They argued that the statute

> violat[ed] the First Amendment rights of the woman who must listen to the state's litany in order to obtain an abortion. 'While [the government] clearly has a right to express [its] views to those who wish to listen, [it] has no right to force [its] message upon an audience incapable of declining to receive it.'

Brief for Petitioners at 54 n.86, *Casey*, 112 S. Ct. 2791 (quoting Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring)). Neither respondents nor the Court responded to this argument.

76. For a suggested First Amendment analysis of medical counseling, including abortion counseling, see generally Berg, supra note 10, at 243–65.

within the precedents cited by either petitioners or respondents. On the one hand, the factual information compelled by Section 3205 is not necessarily "ideological" in the same sense as the political message compelled in *Wooley*.[77] On the other hand, counseling about abortion does not fall within the Supreme Court's definition of commercial speech—that which proposes a commercial transaction.[78] Moreover, although the Court has allowed the government more leeway to compel disclosure of factual information in the commercial speech context, such compulsion still may be prohibited if it attempts to prescribe an ideology.[79]

The joint opinion's real flaw came in its cavalier dismissal of petitioners' free speech argument because it did not consider abortion counseling to be a form of speech. In fact, the opinion gives one the impression that abortion counseling is so obviously a form of activity rather than speech that it is not even worth discussing at length. According to the joint opinion, abortion counseling is merely "part of the practice of medicine," and thus an *activity* easily regulated by the state.[80] The Court's justification for its decision to uphold Section 3205 in the face of petitioners' First Amendment challenge included specific references to previous decisions giving legislatures broad discretion to regulate business and professional activity, rather than citations to free speech prece-

77. It is not unusual for states to have statutes, as did Pennsylvania, requiring that persons undergoing medical treatment receive certain information about the risks of surgery, potential side effects of certain drugs, etc. See, e.g., 40 Pa. Cons. Stat. Ann. § 1301.103 (1992) (requiring that physician inform a patient of the "nature of the proposed procedure or treatment and of those risks and alternatives to treatment or diagnosis that a reasonable patient would consider material to the decision whether or not to undergo treatment or diagnosis" prior to provision of health care services). Such informed consent provisions are largely uncontroversial. Much of the material in Sections 3205 and 3208, however, went well beyond giving patients an assessment of medical risks and, in addition, focused on social, cultural, and economic issues related to abortion. See 18 Pa. Cons. Stat. Ann. § 3205(a)(2) (Supp. 1995) (requiring physician to inform patient of abortion alternatives, right to medical assistance benefits for childbirth-related activities, and right to child support from the father of the unborn child); id. § 3208 (requiring Department of Health to make available pamphlets describing development of the unborn child at two week intervals). Thus, Sections 3205 and 3208 were at least a hybrid of ideological and factual information. See Brief for Amicus Curiae American Psychological Association In Support of Petitioners at 19, *Casey*, 112 S. Ct. 2791 (arguing that "[i]n the gnise of obtaining 'informed consent,' the Pennsylvania Act thrusts health care professionals into the woman's broader decisionmaking process").

78. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760 (1976). For a more in-depth discussion of the relationship between abortion counseling and commercial speech, see infra notes 135–138 and accompanying text.

79. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985); see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 115 S. Ct. 2338, 2347 (1995) (state may only " 'prescribe what shall be orthodox in commercial advertising' by requiring the dissemination of 'purely factual and uncontroversial information' ") (quoting *Zauderer*).

80. *Casey*, 112 S. Ct. at 2824.

dents.[81] That the joint opinion lumped together all of the challenged statutory provisions, referring to them as "health regulations" involving "medical procedure[s],"[82] further evidences its confusion of speech and conduct. There was no recognition that one of those medical procedures primarily involved speech.[83]

Casey, decided a year after *Rust* and in a different jurisprudential context, makes obvious the conflation of speech and conduct and thus reveals it to be the thread unifying the decisions. The *Rust* Court's discussion was littered with unconstitutional conditions analysis, making that conflation difficult to identify. The *Casey* Court never really bothered to consider the First Amendment implications of the statute, and instead flatly stated that abortion counseling could be regulated as a medical activity. An examination of the speech/conduct distinction in Supreme Court jurisprudence, however, does not support the Court's characterization of abortion counseling as conduct.

C. Rust, Casey, *and the Speech/Conduct Distinction in First Amendment Jurisprudence*

The Court's treatment of abortion counseling as conduct in *Rust* and *Casey* presents a twofold problem. First, abortion counseling *is* a form of speech under the Court's longstanding jurisprudence. Second, although the Court has held that speech can occasionally amount to conduct for

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81. See id. (citing Whalen v. Roe, 429 U.S. 589, 598 (1977) (holding that statute requiring filing of certain information regarding potentially harmful drugs with the New York State Health Department was a reasonable exercise of state police powers) and Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 486–91 (1955) (holding various regulations pertaining to optometry profession to be consistent with the Due Process and Equal Protection clauses of the Fourteenth Amendment)).

82. *Casey*, 112 S. Ct. at 2821.

83. Medical activity that consists primarily of speech does not automatically deserve First Amendment protection. There are instances when speech essentially amounts to the practice of medicine and could be considered a regulated activity. For example, physician advice regarding the necessity or wisdom of a particular surgical procedure could give rise to malpractice liability, which many would agree has few First Amendment implications even though the advice is itself speech. See, e.g., Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1254 (1995) (noting that the bare fact of communication does not necessarily implicate the First Amendment). This proposition may be true when the regulation at issue is general in application, such as common law and statutory malpractice laws which aim at a generally defined activity. However, when the government targets speech for regulation, as Pennsylvania did with Section 3205, one simply cannot ignore the potential First Amendment considerations—primarily because once the government seeks out speech for regulation, one must be concerned with attempts to manipulate information. See generally Geoffrey R. Stone, Autonomy and Distrust, 64 U. Colo. L. Rev. 1171, 1173 (1993) (arguing that much of the Court's First Amendment jurisprudence is propelled by a distrust of government efforts to alter the distribution of information). This is not to say that speech always deserves First Amendment protection; indeed, there are many instances when it does not. See infra Part I.C. However, regulations targeting speech ought to at least raise a First Amendment issue for the Court.

First Amendment purposes, it has done so only in narrowly defined circumstances inapplicable to abortion counseling.

The speech/conduct distinction, a recurring one in First Amendment jurisprudence, is grounded in the idea that, while the First Amendment protects freedom of expression, it does not protect mere action.[84] The distinction is most important in those situations where the Court must determine whether certain nonverbal conduct, such as flag burning[85] or boycotts,[86] is "expressive." Under Supreme Court jurisprudence, expressive conduct enjoys First Amendment protection,[87] although not always to the same extent as "pure speech."[88] Nonexpressive conduct enjoys no First Amendment protection.[89]

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84. See, e.g., Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993) (First Amendment does not protect violence); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (distinguishing between conduct intended to express an idea and that which produces harm distinct from communicative impact). Professor Emerson framed the issue as follows:

> The first task is to formulate in detail the distinction between "expression" and "action." . . . [T]he whole theory and practice of freedom of expression—the realization of any of the values it attempts to secure—rests upon this distinction. Hence the starting point for any legal doctrine must be to fix this line of demarcation.

Thomas I. Emerson, Toward a General Theory of the First Amendment 60 (1966) (hereinafter General Theory). Numerous scholars have questioned the wisdom of distinguishing between speech and conduct, especially given Professor Emerson's admission that the line between speech and action "at many points . . . becomes obscure. Expression often takes place in a context of action, or is closely linked with it, or is equivalent in its impact." Id. For a sampling of the numerous articles debating the speech/conduct distinction in First Amendment jurisprudence, see John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1494 (1975); Thomas I. Emerson, First Amendment Doctrine and the Burger Court, 68 Cal. L. Rev. 422, 430 (1980); Kent Greenawalt, O'er the Land of the Free: Flag Burning as Speech, 37 UCLA L. Rev. 925, 928 (1990).

Despite the rigorous debate among scholars, the Supreme Court's recent decision in *Mitchell* reaffirmed the vitality of the speech/conduct distinction in First Amendment jurisprudence. See *Mitchell*, 113 S. Ct. at 2201 (upholding Wisconsin's use of penalty enhancements in bias and hate crimes because penalties were "aimed at conduct unprotected by the First Amendment").

85. See Texas v. Johnson, 491 U.S. 397, 403 (1989).

86. See *Claiborne Hardware*, 458 U.S. at 907; International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 214 (1982).

87. See, e.g., *Johnson*, 491 U.S. at 405–06 (holding that flag burning is expressive conduct under the First Amendment); United States v. O'Brien, 391 U.S. 367, 376 (1968) (acknowledging that draft card burning might have sufficient expressive elements to bring it within the purview of the First Amendment).

88. See *O'Brien*, 391 U.S. at 377 (holding that regulation of expressive conduct does not violate the First Amendment if it is within the constitutional power of the government, it furthers an important or substantial government interest, the government interest is unrelated to the suppression of free expression, and the incidental restriction of First Amendment freedoms is no greater than essential to further the government interest).

89. See supra note 84 and cases cited therein. At least one commentator has noted that "[a]lthough the Supreme Court has recoguized that some conduct may not be

Insofar as abortion counseling is concerned, however, the issue is not whether it is expressive or nonexpressive conduct, but whether it is conduct at all. In the *Rust* Court's own words, the regulations prohibited "counseling, referral, and . . . provision of information regarding abortion as a method of family planning."[90] Similarly, the Pennsylvania informed consent statute in *Casey* directed doctors to "orally inform" women of certain information pertaining to abortion procedures and alternatives.[91] It seems apparent that the counseling provisions in *Rust* and *Casey* involve speech or expression in its most literal sense—that is, they involve oral or written communication of information.[92] More importantly, they involve speech in the sense used by the Supreme Court in its First Amendment decisions: the direct communication of ideas.[93] To

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protected as symbolic speech by the First Amendment, it has rarely, except in dicta, encountered such conduct." The Supreme Court, 1992 Term—Leading Cases, 107 Harv. L. Rev. 144, 239–40 (1993) (citations omitted). The Court's decision in *Mitchell*, however, may signal an increased willingness to find certain conduct nonexpressive and, therefore, unprotected.

90. Rust v. Sullivan, 500 U.S. 173, 193 (1991). The wording of the regulations is almost identical to the Supreme Court's description. See, e.g., 42 C.F.R. § 59.8(a)(1) (1994) (suspended by President Clinton Feb. 3, 1993) ("A title X project may not provide counseling concerning the use of abortion . . . or provide referral for abortion . . . ."); id. § 59.8(a)(2) (Title X patient must be "provided with information necessary to protect the health of mother and unborn child").

91. See 18 Pa. Cons. Stat. Ann. § 3205(a)(1)–(2) (1983 & Supp. 1995) (noting that the physician shall "inform[ ]" or "orally inform[ ]" patients of certain information).

92. Webster's dictionary defines the term "speech" as "the communication or expression of thoughts in spoken words." Merriam-Webster's Collegiate Dictionary 1129 (10th ed. 1994). It further defines the term "express" as "to make known . . . opinions or feelings." Id. at 410. "Act," on the other hand is defined as "the doing of a thing." Id. at 11. While speech and expression also involve "the doing of a thing," they are specifically limited in that they contemplate an *act of communication.* This narrowing focus distinguishes between speech/expression and action. See Yniguez v. Arizonans for Official English, 42 F.3d 1217, 1231 (9th Cir. 1994), reh'g granted, 53 F.3d 1084 (9th Cir. 1995) (noting that speech "consists of the 'expressive conduct' of vibrating one's vocal chords, moving one's mouth . . . or of putting pen to paper, or hand to keyboard"). With these distinctions in mind, the definitions of the "activities" such as advocacy, counseling, and referral prohibited by the *Rust* regulations clearly fall within the narrow purview of speech or expression and, therefore, should be treated as such. See Merriam-Webster's Collegiate Dictionary, supra, at 18 (defining the verb "advocate" as "to plead in favor of"); id. at 264 (defining the verb "counsel" as to "advise"); id. at 982 (defining the verb "refer" as "to direct attention usu[ally] by clear and specific mention").

93. The Court has sought to protect the communication of ideas in order to protect other fundamental values. See, e.g., New York Times v. Sullivan, 376 U.S. 254, 269–73 (1964) ("central meaning of the First Amendment" is to protect speech that enables citizens to make decisions regarding self-governance); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (listing various values protected by the First Amendment). Professor Emerson has grouped these values into four broad categories:

> Maintenance of a system of free expression is necessary (1) as a method of assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decisionmaking, and (4) as a means of maintaining the balance between stability and change in the society.

treat the *Rust* and *Casey* counseling provisions as something other than regulations of speech is simply absurd. Unlike the burning of a flag or draft card, which only becomes expressive in certain contexts, there is no reason to counsel other than to provide or communicate information. With expression as its very essence, how can abortion counseling not be considered speech? At the very least, abortion counseling includes an expressive component that should have triggered First Amendment scrutiny in *Rust* and *Casey*.[94]

There is a flip side to the jurisprudential distinction between speech and conduct. Just as one can say that some conduct amounts to speech or expression, one can say that some speech or expression occasionally amounts to conduct. For example, the Court has previously deemed "fighting words" and "obscenity" to be so far removed from the "essential part of any exposition of ideas"[95] that they enjoy no First Amendment protection.[96] The Court has reasoned that fighting words such as epithets and other forms of personal abuse are more akin to physical assaults

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Emerson, General Theory, supra note 84, at 3. Abortion counseling fulfills at least one, if not all, of these values. For example, the ability to terminate a pregnancy often has a significant effect on a woman's ability to take control of her life. See Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N.C. L. Rev. 375, 382–86 (1985); Catherine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1309–28 (1991). Thus, abortion counseling fosters a woman's personal autonomy and individual self-fulfillment. See also Berg, supra note 10, at 236–39 (arguing that "[d]octor-patient speech is essential to maintaining patients' autonomy, self-determination, and dignity in the face of illness"). Professor Berg posits an additional way in which doctor-patient speech serves the values underlying the First Amendment. Doctor-patient discourse facilitates the patient's discovery of her "medical truth"—"the particular course of treatment that is best for [her]." Id. at 235–36. Additionally, such discourse also facilitates "the discovery of scientific and medical truth" because "conversations with numerous patients over time enhance doctors' scientific and medical knowledge about . . . the practice of medicine." Id. at 236.

94. Several Supreme Court decisions suggest that even regulation of conduct is impermissible under the First Amendment if it is aimed at suppressing expression. See Texas v. Johnson, 491 U.S. 397, 406 (1989) (government "may not . . . proscribe particular conduct *because* it has expressive elements"); United States v. O'Brien, 391 U.S. 367, 377 (1968) (implying that state regulation of conduct aimed at suppressing free expression is impermissible). As discussed in Part I, supra, the apparent purpose and effect of the counseling provisions in *Rust* and *Casey* was to skew the information provided about abortion; the provisions were, therefore, aimed at expression rather than conduct.

95. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

96. Originally, the Supreme Court also found libel and commercial speech to be completely unprotected by the First Amendment. See Beauharnais v. Illinois, 343 U.S. 250, 256–57 (1952) ("libelous . . . utterances are no essential part of any exposition of ideas"); Valentine v. Chrestenson, 316 U.S. 52, 54 (1942) (noting that the First Amendment poses "no . . . restraint on government as respects purely commercial advertising"). Currently, however, the Court accords both categories of speech some protection, although less than it accords purely "political" speech. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761–62 (1976) (advertising); *New York Times*, 376 U.S. at 269 (libel).

than to speech.[97] The Court has similarly held that obscenity is so far removed from the exposition of ideas that it "is not within the area of constitutionally protected speech or press."[98] Abortion counseling simply does not fall within the fighting words doctrine;[99] nor can one say that abortion counseling amounts to "lewd and obscene" speech.[100] More importantly, one cannot say that such counseling is not an "essential part of the exposition of ideas" given that the whole point of abortion counseling is to advise and communicate information to women so that they may make life-affecting decisions.

Additionally, even if abortion counseling were conduct-like, and thus outside the purview of the First Amendment, the Supreme Court recently indicated that viewpoint-based discrimination is still impermissible. That is, although the government can proscribe entire categories of speech, such as fighting words, it must nevertheless neutrally regulate such speech and cannot ban one viewpoint while leaving others unregulated.[101] Thus, even if counseling were akin to conduct, the Court should have scrutinized the provisions for viewpoint discrimination.[102]

It appears, then, that the Court's traditional conduct-as-speech and speech-as-conduct analyses do not support an argument that abortion counseling amounts to conduct. And, in fact, those analyses appear nowhere in the *Rust* and *Casey* decisions. Rather, the Court simply asserted that the speech at issue was a regulated activity by subsuming the speech aspects of abortion counseling into a separate activity: the act of abortion.[103] Because the Court viewed abortion counseling as integral to the act of abortion, it could not (nor did not) distinguish between the two.

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97. See *Chaplinsky*, 315 U.S. at 572 (citing Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)); see also David S. Bogen, The Supreme Court's Interpretation of the Guarantee of Freedom of Speech, 35 Md. L. Rev. 555, 558 (1976) (noting that fighting words are "similar in nature to a physical attack").

98. Roth v. United States, 354 U.S. 476, 485 (1957).

99. Fighting words are those "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky*, 315 U.S. at 574.

100. The Supreme Court has most recently defined "obscenity" as a work which (1) " 'the average person, applying contemporary community standards' would find . . . , taken as a whole, appeals to the prurient interest," (2) depicts "in a patently offensive way, sexual conduct," and (3) "taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973) (citation omitted).

101. See R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2545–47 (1992) (holding that statute banning only racially hateful fighting words was impermissible viewpoint-based discrimination even though fighting words as a whole were proscribable).

102. For an interesting comparison of the Court's treatment of viewpoint discrimination in *Rust* and *R.A.V.*, see Elena Kagan, The Changing Faces of First Amendment Neutrality: *R.A.V. v. St. Paul*, *Rust v. Sullivan*, and the Problem of Content-Based Underinclusion, 1992 Sup. Ct. Rev. 29, 38.

103. One could argue that the Court subsumed abortion counseling into a broader activity, the practice of medicine, rather than the narrower activity of abortion. However, as discussed in Part III, infra, the special nature of abortion was a driving force for the *Rust* and *Casey* Courts' treatment of abortion counseling; thus, abortion appears to be the more appropriate activity on which to focus.

Such an approach does not comport with the First Amendment doctrine currently applied by the Court. While the Court has considered some speech to be conduct and vice versa, no established doctrine denies First Amendment protection merely because speech is associated with another regulated activity.[104]

II. Abortion Counseling As Economic Activity

There is one notable exception to the Court's refusal to subsume speech into related economic activity. In *Posadas de Puerto Rico Associates v. Tourism Company*,[105] the Court briefly deviated from its usual commercial speech jurisprudence and ruled that such speech could be regulated as part of the state regulation of economic activity. That reasoning appears to have resurfaced in the Court's *Rust* and *Casey* opinions.

A. *Commercial Speech,* Posadas, *and the "Greater Includes Lesser" Rationale*

Since the Court's 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, commercial speech—defined as that which does "no more than propose a commercial transaction"[106]—has enjoyed at least a measure of First Amendment protection.[107]

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104. Some scholars have argued forcefully that commercial speech is indistinguishable from other commercial activities. See, e.g., Thomas H. Jackson & John C. Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 18 (1979) ("The decisive point [in determining whether the First Amendment should apply] is the absence of any principled distinction between commercial soliciting and other aspects of economic activity."). Nevertheless, the Court has held that such speech is entitled to some First Amendment protection. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (although "advertiser's interest is a purely economic one . . . [t]hat hardly disqualifies him from protection under the First Amendment").

105. 478 U.S. 328 (1986).

106. *Virginia State Bd.*, 425 U.S. at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

107. See id. at 763–64. Some commentators argue that recent decisions have gutted the holding in *Virginia State Board* and a related case, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). See, e.g., Albert P. Mauro, Jr., Comment, Commercial Speech After *Posadas* and *Fox*: A Rational Basis Wolf in Intermediate Sheep's Clothing, 66 Tul. L. Rev. 1931, 1931 (1992) (arguing that the Court's recent interpretations of *Central Hudson* have "rendered [commercial speech] an endangered species"); David F. McGowan, Comment, A Critical Analysis of Commercial Speech, 78 Cal. L. Rev. 359, 369–81 (1990) (noting evolution of commercial speech cases and weakened protection for such speech). In many cases since *Virginia State Board* and *Central Hudson* the Court has indeed upheld regulations of commercial speech. Nevertheless, it is a mistake to say that such speech enjoys almost no protection, especially since the Court recently used *Central Hudson* to strike down regulations of commercial speech in at least two cases. See, e.g., Edenfield v. Fane, 113 S. Ct. 1792, 1804 (1993) (affirming lower court decision to strike down Florida rule prohibiting in-person solicitation by accountants); City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1517 (1993) (affirming lower court decision to strike down city ordinance prohibiting distribution of commercial handbills on public property).

Although the Court recognized that advertisers' interests were primarily economic, it nevertheless extended First Amendment protection to commercial speech because of society's strong interest in the "free flow of commercial information"—even information as seemingly mundane as drug prices.[108] Recognizing, however, that "the Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression,"[109] the Court has applied less rigorous scrutiny to regulations of commercial speech—upholding regulations of commercial speech about lawful activities as long as they serve a substantial government interest, directly advance that interest, and are no broader than necessary to protect that interest.[110] In 1986, however, the Court handed down an aberrant 5-4 decision in *Posadas.*

Posadas addressed a Puerto Rico statute legalizing casino gambling but outlawing advertisement of that gambling to Puerto Rico residents.[111] Then-Justice Rehnquist, writing for the majority, admitted that the advertising at issue involved a lawful activity and thus was governed by *Virginia State Board* and its progeny; Puerto Rico could justify its restriction on casino advertising only by showing that the regulation directly advanced a substantial government interest and was no more extensive than necessary to serve that interest.[112] Puerto Rico's asserted interest in banning advertising of gambling was its desire to decrease the demand for gambling by reducing citizens' awareness that it existed.[113]

After *Virginia State Board,* one would have thought that Puerto Rico's approach was doomed, based as it was upon squelching the free flow of commercial information. Justice Rehnquist, however, saw no constitu-

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108. See *Virginia State Bd.*, 425 U.S. at 763–64. The Court noted that a consumer's interest in drug prices could perhaps be keener than her interest in even the "most urgent political debate," especially given that "[t]hose whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and the particularly aged." Id. at 763.

109. *Central Hudson,* 447 U.S. at 562–63.

110. See Board of Trustees of S.U.N.Y. v. Fox, 492 U.S. 469, 475 (1989); *Central Hudson,* 447 U.S. at 564. *Fox* and *Central Hudson* involved state attempts to regulate the content of commercial speech. Under First Amendment jurisprudence, content-based regulations of political or otherwise fully-protected speech are strictly scrutinized; regulations must be narrowly drawn to meet a compelling state interest. See R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2549 (1992); Widmar v. Vincent, 454 U.S. 263, 269–70 (1981). In contrast, the *Central Hudson/Fox* test requires only that the regulations be no broader than necessary to protect a substantial state interest, giving somewhat less protection to content-based regulations of commercial speech. See Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) ("commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values").

111. See Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 332 (1986).

112. See id. at 340 (citing *Central Hudson,* 447 U.S. at 566).

113. See Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Company*: " 'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful," 1986 Sup. Ct. Rev. 1, 9 (noting that Puerto Rico's method amounted to "[k]eep[ing] the people of Puerto Rico in iguorance [so] . . . they will voluntarily abstain from adding their contributions to the earnings of the wheel, the crap games, blackjack, poker, and the one-armed bandits").

tional infirmity in Puerto Rico's statute. In his view, the legislature's concern that " '[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens' "[114] obviously was a substantial government interest. Indeed, this same government interest had prompted the majority of states to ban casino gambling in the first place.[115] Thus, the only questions were whether the advertising restriction directly advanced that interest and whether it was no broader than necessary to do so. The Court easily disposed of these issues. First, it held that Puerto Rico's statute "directly advance[d]" its interest in protecting morality—relying mainly on the legislature's "reasonable" belief that advertising aimed at Puerto Rico residents would increase the demand for casino gambling.[116] Second, Justice Rehnquist concluded that the restrictions were "no more extensive than necessary" because they were aimed only at Puerto Rico citizens and not tourists.[117] Thus, with only a superficial analysis of the legislature's motives or methods,[118] the Court upheld the ban on casino advertisements.

Had the Court's analysis ended there, one perhaps could have characterized it as an extremely deferential (and, arguably, erroneous) application of traditional commercial speech principles. In addition to traditional analysis, however, the majority opinion fashioned a new free speech principle. Justice Rehnquist noted that although gambling was legal in Puerto Rico, it could have been made illegal at any time. He thus concluded that "the greater power to completely ban casino gambling necessarily include[d] the lesser power to ban advertising of casino gambling."[119] Analogizing to laws regarding solicitation and licensing of prostitution, Justice Rehnquist explained:

> It would . . . surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.[120]

Justice Rehnquist's reasoning framed commercial speech (casino advertising) as merely a subset of economic activity (gambling), which could be regulated under traditional due process analysis as long as the legislature

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114. *Posadas*, 478 U.S. at 341 (quoting Brief for Appellees at 37).

115. See id.

116. Id. at 341–42.

117. Id. at 343.

118. See id. at 341–44; see also Kurland, supra note 113, at 7–12 (noting that, in contrast to *Virginia State Board*, the review given to the Puerto Rico legislature's finding was extremely deferential, with the Court being "satisfied without evidence of record on the basis of mere representations of the State").

119. *Posadas*, 478 U.S. at 345–46.

120. Id. at 346.

acted "reasonably."[121] Indeed, in situations involving vice activities—such as gambling, prostitution, smoking, and the like—the Court apparently believes the government's interest in regulating is at its highest.[122] Under the *Posadas* rationale, then, the state's broad discretion to regulate almost all economic activity (especially that relating to "morals") encompasses regulation of advertising about such activities.[123] In essence, the *Posadas* Court initially recoguized that casino advertising was speech, but ultimately collapsed it into the broader activity of gambling.

The flaw in Justice Rehnquist's analysis, however, is that speech enjoys special protection under the First Amendment even when integral to economic activity.[124] That, after all, was the rationale underlying *Virginia State Board*'s earlier extension of First Amendment protection to commercial speech.[125] This flaw may also be the reason the Court has not cited *Posadas*'s "greater includes lesser" logic in subsequent free speech cases—whether they involved commercial speech[126] or otherwise.[127] Nonetheless, the Court's reasoning in *Rust* and *Casey* bears remarkable similarity to the *Posadas* rationale.

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121. See Kurland, supra note 113, at 14 ("By transmogrifying speech into behavior, it becomes subject to a different—more limited—set of constitutional principles."); cf. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) (regulations of "business and industrial conditions" are constitutionally valid as long as they are "rational").

122. See United States v. Edge Broadcasting Co., 113 S. Ct. 2696, 2703 (1993) (noting that gambling "implicates no constitutionally protected right; rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether"); Epstein, supra note 20, at 67.

123. Numerous scholars have criticized the *Posadas* Court's "greater includes lesser" reasoning. See, e.g., Epstein, supra note 20, at 66 (*Posadas* decision implies that "the first amendment protections afforded commercial speech can he no greater than the meager protections given to economic liberties"); Kurland, supra note 113, at 13 (*Posadas* Court's rationale is a "[gross] perversion of First Amendment law"); David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 359–60 (1991) (*Posadas* decision iguores the autonomy principle underlying the First Amendment).

124. See *Posadas*, 478 U.S. at 354–55 n.4 (Brennan, J., dissenting).

125. See supra note 108 and accompanying text.

126. The Court has cited *Posadas* for numerous other propositions—most of them relating to general commercial speech doctrine. See, e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547 (1992) (citing *Posadas* for the general proposition that commercial speech enjoys less protection than political speech); Board of Trustees of S.U.N.Y. v. Fox, 492 U.S. 469, 474 (1989) (citing *Posadas* for general commercial speech principles); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 535 (1987) (citing *Posadas* for the general proposition that commercial speech enjoys less protection than political speech). As recently as 1993, the Supreme Court expressly refused to rely upon the "greater includes lesser" argument to uphold a federal statute banning radio broadcasts of lottery advertising by licensees located in non-lottery states. See United States v. Edge Broadcasting Co., 113 S. Ct. 2696, 2703 (1993) (upholding the statute as constitutional under *Central Hudson* and refusing to analyze the case under the "greater includes lesser" rationale).

127. See, e.g., Meyer v. Grant, 486 U.S. 414, 425 (1988) (Court refused to extend "greater includes lesser" concept to regulation of the political process, where "the importance of First Amendment protections is 'at its zenith' ").

B. *The Resurgence of the "Greater Includes Lesser" Reasoning in* Rust *and* Casey

The similarity in reasoning between *Posadas* and the *Casey* joint opinion is apparent, although *Casey*'s treatment of the First Amendment issue is quite brief. The joint opinion recognized that the informed consent provision implicated a physician's right not to speak under the First Amendment. However, it concluded that the provision was constitutional because any effect on the physician's right to free speech came "*only* as a part of the practice of medicine, subject to reasonable licensing and regulation by the State."[128] Thus, as in *Posadas*, the *Casey* joint opinion conflated a medical activity—abortion—and speech about that activity—abortion counseling. The latter, as part of the former, was easily regulated by the state.

The *Rust* decision is similarly replete with the *Posadas* rationale. In its numerous attempts to explain why the regulations did not discriminate on the basis of viewpoint, the Court consistently treated abortion counseling as merely a subset of the activity of abortion. Thus, regnlations banning counseling about abortion were merely "prohibition[s] on a project grantee . . . from engaging in activities outside of the project's scope."[129] Similarly, the Court made clear that "when the government appropriates public funds to establish a program it is entitled to define the limits of that program."[130] In other words, just as Puerto Rico's greater power to ban gambling included the lesser power to ban advertising of gambling, the government's power to create the Title X project gave it the power to ban discussion by project participants of certain viewpoints about abortion.

Frankly, the appearance in *Rust* of the "greater includes lesser" argument is not surprising since the Court framed the issue as an unconstitutional conditions question. The "greater includes lesser" principle was also at the core of early unconstitutional conditions cases, although it has been abandoned in recent jurisprudence.[131] One could argue that the reemergence of that principle in *Rust* came about mainly as a retrenching of the unconstitutional conditions doctrine and had nothing to

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128. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2824 (1992) (emphasis added). The four remaining Justices voting to uphold Section 3205 did not bother to discuss the First Amendment aspects of informed consent and instead relied on a due process argument to uphold the regulation. See supra note 73. Perhaps even more so than the authors of the joint opinion, these Justices could not distinguish between speech about an activity and the activity itself.

129. Rust v. Sullivan, 500 U.S. 173, 194 (1991).

130. Id. at 194; see also Rohde, supra note 8, at 160 (arguing that *Rust* may herald the return of *Posadas*).

131. See, e.g., Kurland, supra note 113, at 13 (noting that *Posadas*'s reasoning resembles an argument "long since rejected under the rubric of unconstitutional conditions"); Sullivan, supra note 20, at 1415 (noting that current unconstitutional conditions doctrine represents a "triumph" over earlier "greater includes lesser" approach).

do with *Posadas*. That argument, however, fails to recognize that *Rust* purportedly applied current unconstitutional conditions jurisprudence, which explicitly prohibits the government from engaging in viewpoint-based discrimination when doling out government benefits.[132] Of course, *Rust* merely paid lip-service to that tenet while allowing the government to engage in viewpoint-based suppression, an approach much more consistent with *Posadas*. Under the *Posadas* rationale, viewpoint-based suppression of speech simply was not an issue because the Court viewed casino advertising as an activity and not as speech. By transforming advertising into activity regulated under a more lenient due process standard, the *Posadas* Court was able to ignore that the advertising ban was, in essence, viewpoint discriminatory.[133] (That is, *only* advertisements promoting casino gambling were banned; anti-gambling ads were not.) The *Rust* Court's reasoning was similar; because abortion counseling was merely an activity within the Title X project, it was not subject to traditional strictures of the First Amendment. Thus, as casino advertising was to gambling, abortion counseling was to abortion. As "activities," all could be regulated without regard to the First Amendment.

C. Posadas *Does Not Apply to Abortion Counseling*

The threads of *Posadas*'s "greater includes lesser" rationale are apparent in *Rust* and *Casey*. Yet, many factors indicate that *Posadas*'s rationale had no place in the *Casey* and *Rust* decisions. First among these factors is *Posadas*'s tentative precedential value outside of the commercial speech context. The Supreme Court has not used the "greater includes lesser" rationale in cases that do not involve commercial speech; indeed, it has flatly stated that such an application is improper outside of the commercial speech context.[134] Thus, before one can properly apply *Posadas*'s

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132. See supra Part I.A.

133. Justice Brennan, dissenting in *Posadas*, intimated that the advertising ban was viewpoint discriminatory, arguing that it was a "covert attempt by the State to manipulate the choices of its citizens . . . by depriving the public of the information needed to make a free choice." Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 351 (1986) (Brennan, J., dissenting) (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 574–75 (1980) (Blackmun, J., concurring in judgment); see also Cass R. Sunstein, Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 28 (1992) (noting that *Posadas* allowed the government to ban truthful ads for casinos "even though speech that takes the opposite side is freely permitted, in advertisements or elsewhere").

134. In striking down a Colorado law banning the use of paid petition circulators, the Court in Meyer v. Grant refused to apply *Posadas*'s "greater includes lesser" rationale, stating that

> *Posadas* is inapplicable to the present case [because] . . . the speech restricted . . . was merely "commercial speech which does 'no more than propose a commercial transaction. . . .' " Here, by contrast, the speech at issue is "at the core of our electoral process and of the First Amendment freedoms," an area of public policy where protection of robust discussion is at its zenith.

Meyer v. Grant, 486 U.S. 414, 425 (1988).

conflation of speech and conduct to abortion counseling, one must consider such counseling to be a form of commercial speech, which it simply is not.

While one could argue that there are commercial speech aspects to abortion counseling—certainly, it often takes place in the context of a commercial transaction—such counseling still does not fall within the Court's definition of commercial speech. The Court has not held that speech becomes commercial speech merely because it has a profit motive.[135] Instead, the Court has attempted to determine whether the proposal of a commercial transaction is the "principal type of expression at issue."[136] Even though abortion counseling often occurs during a commercial transaction, it does not *principally* involve the proposal of such a transaction. First, the contents of the *Rust* regulations and *Casey* statute belie any such claim: both focus on specific, substantive information to be given to women confronting unwanted preguancies rather than on the commercial aspects of their transactions with the physician.[137] Second, the fact that abortion counseling can take place absent any commercial transaction illustrates that it does not principally involve commercial activity. Finally, the Court has intimated that medical consultations for a fee are not commercial speech because "they do not consist of speech that *proposes* a commercial transaction."[138]

Additionally, applying the *Posadas* rationale to abortion counseling is difficult even if one were to consider counseling to be commercial speech. First, the Supreme Court has been reluctant to apply *Posadas* within the commercial speech context; no commercial speech decision since *Posadas* has applied the "greater includes lesser" rationale.[139] Second, much of the *Posadas* majority's reasoning centered around the fact that gambling was an easily regulated—indeed bannable—activity; thus, the government could regulate advertising of that activity as part of regulating the activity itself.[140] Critically, the *Posadas* Court distinguished between advertising of such activities and advertising of constitutionally protected activities—such as abortion or contraceptive use. As the Court explained, because the latter activities were fundamental rights under the

135. See Board of Trustees of S.U.N.Y. v. Fox, 492 U.S. 469, 482 (1989); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); see also Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (holding that film distributors' profit motive does not strip them of First Amendment protection).

136. *Fox*, 492 U.S. at 473; see also McGowan, supra note 107, at 382–90 (discussing the Court's definition of commercial speech).

137. See 42 C.F.R. § 59.8 (1994) (suspended by President Clinton Feb. 5, 1993); 18 Pa. Cons. Stat. Ann. § 3205 (Supp. 1995).

138. *Fox*, 492 U.S. at 482. For a thorough discussion of the inapplicability of commercial speech principles to abortion counseling, see Berg, supra note 10, at 239–42.

139. See supra note 126 and accompanying text.

140. See Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 345–46 (1986).

Constitution,[141] the government could not justify regulating them under its traditional police powers.[142] If the government could not regulate an activity under its police powers, it similarly could not use those powers to regulate advertising about the activity.[143]

The Court's implicit use of the *Posadas* "greater includes lesser" rationale to uphold the counseling provisions in *Rust* and *Casey* thus suggests a change in the status of abortion as a fundamental right. As an analysis of the Court's recent decisions reveals, that is exactly what happened.

III. Placing Abortion Counseling in the *Posadas* Framework

A. *The Supreme Court's Changing Abortion Jurisprudence*

The status of a woman's right to terminate her pregnancy has changed dramatically over the past 25 years. Originally a criminal act in most states,[144] its status changed almost completely when the Supreme Court in *Roe v. Wade*[145] held abortion to be a fundamental constitutional right. Most recently, however, the Court has retreated from its *Roe* holding, leaving the right to terminate a pregnancy some, but not much, constitutional protection.[146]

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141. See id. at 345. At the time *Posadas* was decided, both abortion and contraceptive use were considered to be fundamental constitutional rights. See Roe v. Wade, 410 U.S. 113, 154 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (contraceptive use).

142. See *Posadas*, 478 U.S. at 345. Fundamental rights—those "having a value . . . essential to individual liberty"—enjoy special protection under our Constitution. 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law Substance and Procedure § 15.7, at 427 (2d ed. 1992). The Court carefully scrutinizes government attempts to limit the exercise of such rights. See id. at 427–37. In contrast, activities not deemed to be fundamental rights may be subject to substantial government regulation, which the Court reviews under a deferential standard. See supra note 121.

143. See *Posadas*, 478 U.S. at 345 (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (striking down ban on advertising or display of contraceptives) and Bigelow v. Virginia, 421 U.S. 809, 818–29 (1975) (striking down law prohibiting advertisements pertaining to abortion clinics)).

144. Prior to 1973, numerous state statutes made it a crime to "procure an abortion" unless necessary to save the life of the mother. See Roe v. Wade, 410 U.S. 113, 117–18 & n.2 (1973) (noting that at least 29 states had such laws).

145. 410 U.S. 113 (1973).

146. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2818–21 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490, 516–20 (1989). A discussion of the propriety of the Court's recent decisions curbing *Roe v. Wade* is beyond the scope of this article. Part III of this article is meant only to examine the current status of the abortion right in order to explain the outcome of the speech issues in *Rust* and *Casey*. I recoguize, however, that numerous scholars have argued that *Roe* was wrongly decided and should be overruled. Some scholars, for example, argue that the Constitution simply does not establish a right of privacy broad enough to justify the right to an abortion. See, e.g., John Hart Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920, 931–37 (1973). Others argue that the *Roe* Court engaged in political judgment rather than constitutional decisionmaking. See, e.g., Archibald Cox, The Role of the Supreme Court in American

1. *From* Roe *to* Casey. — In 1973, the *Roe* Court first held that the right to privacy based on the Fourteenth Amendment's Due Process Clause encompassed a woman's fundamental right to terminate her pregnancy.[147] Accordingly, all government attempts to regulate that right were subject to the Court's strict scrutiny; regulations were to be "narrowly drawn" to meet a "compelling state interest."[148] While the Court deemed a woman's decision to terminate her pregnancy a fundamental right, it also held that at least two "important and legitimate" interests existed for regulating that right: protecting the mother's health and protecting potential human life.[149] Those interests, however, were not always compelling; while neither interest was sufficient to support regulations of abortion in the first trimester of pregnancy, the state's interest in protecting the mother's health became compelling during the second trimester of preguancy and protection of potential life became compelling at viability (essentially at the third trimester).[150] Thus, the *Roe* Court's now-famous trimester framework was, in effect, merely "the Court's shorthand way of expressing the result of the strict scrutiny standard."[151]

After *Roe*, the Court struck down as inconsistent with the trimester framework numerous regulations of medical procedures related to abortions.[152] The Court's protection of the abortion right culminated in the mid-1980s when it expressly reaffirmed *Roe*'s validity and the fundamental

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Government 113–14 (1976). Even scholars who favor the abortion right have criticized the *Roe* decision. See, e.g., Catherine MacKinnon, Toward a Feminist Theory of the State 184–94 (1989) (arguing that *Roe* Court's grounding of abortion right in right to privacy was wrong and harmful to women); Ginsburg, supra note 93, at 382–86 (arguing that the abortion right might be better grounded in the Fourteenth Amendment's Equal Protection Clause rather than in notions of privacy).

147. See *Roe*, 410 U.S. at 153 ("right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

148. Id. at 155 (citations omitted).

149. See id. at 162.

150. See id. at 162–64.

151. Annette E. Clark, Abortion and the Pied Piper of Compromise, 68 N.Y.U. L. Rev. 265, 316 (1993).

152. See, e.g., Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 481–82 (1983) (invalidating requirement that all abortions after the first twelve weeks of pregnancy be performed in a hospital as "unreasonably infring[ing] upon a woman's constitutional right to obtain an abortion") (citing Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 439 (1983)); Planned Parenthood v. Danforth, 428 U.S. 52, 79 (1976) (invalidating a provision banning the use of saline amniocentesis after the first twelve weeks of pregnancy because it was "arbitrary" and "designed to inhibit . . . the vast majority of abortions after the first 12 weeks").

The only real exceptions to the Court's strict protection of the abortion right appeared in decisions about government funding, see, e.g., Maher v. Roe, 432 U.S. 464, 474 (1977) (holding that while the government cannot place obstacles in the path of a woman seeking an abortion, it is not required to fund such abortions) and, to some extent, minors, see, e.g., H.L. v. Matheson, 450 U.S. 398, 413 (1981) (upholding state statute requiring that parents or guardians of a minor be notified, if possible, prior to performing abortion).

nature of the woman's right to choose an abortion.[153] Although a majority of the Court consistently reaffirmed the fundamental nature of the abortion right in post-*Roe* cases, dissension among the Justices increased. By 1986, the seven to two margin in favor of *Roe*[154] had shrunk to five to four[155] and several Justices favored revisiting *Roe*.[156] Moreover, the Reagan Administration's appointment of two conservative (and presumably anti-*Roe*) Justices in the late 1980s cast *Roe*'s viability further in doubt.[157]

The Court's internal dissension over the abortion right resulted in the badly splintered 1989 decision, *Webster v. Reproductive Health Services*.[158] At issue in *Webster*, as in so many previous cases, was the constitutionality of several state regulations of the abortion procedure which did not totally ban abortion, but imposed significant restrictions on it.[159] Although a majority of the Court upheld the provisions, no single opinion garnered a majority. A plurality of Chief Justice Rehnquist and

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153. See Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) ("Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental."); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 420 n.1 (1983) ("Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.").

For a more thorough discussion of the decisions, background, and history of *Roe* and its progeny, see Laurence H. Tribe, Abortion: The Clash of Absolutes 10–26 (1990); C. Elaine Howard, Note, The *Roe*'d to Confusion: Planned Parenthood v. Casey, 30 Hous. L. Rev. 1457, 1467–75 (1993).

154. Justices Blackmun, Brennan, Marshall, Powell, Douglas, and Stewart and Chief Justice Burger voted to strike down the Texas law in *Roe*. Justices White and Rehnquist dissented from the majority position, arguing that a woman's right to terminate her pregnancy was beyond constitutional protection. See Roe v. Wade, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting); Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting).

155. Justices Blackmun, Brennan, Marshall, Powell, and Stevens voted in the majority to strike down the *Thornburgh* regulations as violations of a woman's right to terminate her pregnancy. See *Thornburgh*, 476 U.S. at 759–71. Justices Rehnquist and White, the original dissenters in *Roe*, were joined by Chief Justice Burger, who had concurred in the *Roe* outcome, and Justice O'Connor, who had been appointed to replace Justice Stewart. See id. at 785–814.

156. See Alan I. Bigel, *Planned Parenthood of Southeastern Pennsylvania v. Casey*: Constitutional Principles and Political Turbulence, 18 U. Dayton L. Rev. 733, 738–40 (1993) (analyzing various Justices' opinions of the *Roe* decision).

157. President Reagan appointed Justices Scalia and Kennedy in 1986 and 1988 respectively. See Tribe, supra note 153, at 17 (discussing change in the Court's makeup from *Roe* through *Thornburgh*); Bigel, supra note 156, at 734–39 (reviewing Supreme Court Justices' views on abortion in the period leading up to *Casey*).

158. 492 U.S. 490 (1989).

159. Those restrictions included a requirement that physicians perform viability testing on any fetus believed to be at least twenty weeks old and a complete ban on the use of public employees and facilities to perform nontherapeutic abortions. See Mo. Rev. Stat. §§ 188.029, 188.210, 188.215 (1986).

Justices White and Kennedy argued that *Roe*'s "rigid trimester analysis" should be overturned.[160] Additionally, they argued that the right to terminate a pregnancy was merely a "liberty interest protected by the Due Process Clause" rather than a fundamental right.[161] Thus, they would have upheld the statutory provisions as "permissibly further[ing] the State's interest in protecting potential human life."[162] Because the Missouri statute did not criminalize all abortions, the plurality refused to overrule *Roe* entirely, claiming that the issue was not precisely before the Court.[163]

Justice Scalia, concurring in the judgment, took issue with the plurality's unwillingness to dismantle completely "the mansion of constitutionalized abortion law, constructed overnight in *Roe v. Wade*"[164] and would have expressly overruled *Roe*.[165] Justice O'Connor also voted to uphold the challenged provisions, although her reasoning differed from the plurality's and Justice Scalia's.[166] She believed the provisions were valid because they did not impose an "undue burden" on a woman's right to an abortion.[167] The remaining four Justices—Blackmun, Brennan, Marshall, and Stevens—dissented from the judgment and reaffirmed their position that the right to terminate a pregnancy was fundamental.[168] After *Webster*, then, the status of the abortion right was unclear at best.[169]

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160. *Webster*, 492 U.S. at 517–18.

161. Id. at 520. Chief Justice Rehnquist's description of the abortion right as a mere "liberty interest" is reminiscent of his dissent in *Roe*. See Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (noting that the Court's "sweeping invalidation of any restrictions on abortion during the first trimester [was] impossible to justify under the [rational relation] standard, and the *Roe* majority's conscious weighing of competing factors . . . [was] far more appropriate to a legislative judgment than a judicial one").

162. *Webster*, 492 U.S. at 519–20.

163. See id. at 521.

164. Id. at 537 (Scalia, J., concurring in part and concurring in the judgment).

165. See id. at 532.

166. See id. at 522–31 (O'Connor, J., concurring in part and concurring in the judgment).

167. See id. at 530. The parameters of Justice O'Connor's standard in *Webster* are not clear. In previous opinions, she articulated that a government regulation imposed an undue burden "in situations involving absolute obstacles or severe limitations on the abortion decision, not wherever . . . [the] regulation may 'inhibit' abortions to some degree." Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting) (quoting Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting)). Nevertheless it is unclear which type of regulation imposes an "absolute obstacle[ ] or severe limitation[ ]," especially given that Justice O'Connor rarely voted to strike down abortion regulations under this standard. See Dorothy E. Roberts, Sandra Day O'Connor, Conservative Discourse, and Reproductive Freedom, 13 Women's Rts. L. Rep. 95, 98 (1991).

168. See *Webster*, 492 U.S. at 537–60 (Blackmun, J., concurring in part and dissenting in part) (joined by Justices Brennan and Marshall); id. at 560–72 (Stevens, J., concurring in part and dissenting in part).

169. In fact, *Webster's* import was so unclear that both pro-life and pro-choice advocates claimed it as a victory and as a defeat. For example, pro-choice advocates acknowledged that *Webster* represented a *small* victory because it stopped short of

Although four members of the Court believed in the fundamental nature of that right, the remaining five members were only willing to accord it something less than fundamental status.

2. Planned Parenthood v. Casey. — The Court's ambivalence about the abortion right culminated in *Casey*, its most recent pronouncement on the issue. In addition to the informed consent provision discussed above, *Casey* involved several amendments to Pennsylvania's Abortion Control Act of 1982, including a 24-hour waiting period requirement,[170] a parental consent provision,[171] a spousal notification provision,[172] various reporting requirements,[173] and a definition of the term "medical emergency."[174] The Court had previously relied on *Roe* to strike down several similar provisions.[175] Thus, *Casey* presented an opportunity not only to reconsider those particular provisions but also to reconsider, and possibly overrule, *Roe*.[176] A majority of the Court agreed to uphold all but one of the statutory provisions but, as in *Webster*, no majority agreed on the rationale. Perhaps more significantly, only two of the Justices

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overruling *Roe*. See Ruth Marcus, The Next Battleground on Abortion Rights: Groups Focus on State Constitutions, Courts, Wash. Post, July 10, 1989, at A4. However, pro-choice advocates also conceded "the fragility of their claim [after *Webster*] that abortion has been established as a 'right.' " Mary McGrory, The Uneasy Politics of Abortion, Wash. Post, June 10, 1990, at C1, C5. Similarly, some pro-life advocates initially hailed *Webster* as an "historic ruling." Al Kamen, Supreme Court Restricts Right to Abortion, Giving States Wide Latitude for Regulation: 5–4 Rulings Stops Short of Overturning 'Roe,' Wash. Post, July 4, 1989, at A1, A6. Nevertheless, some pro-life proponents cautioned that the decision "did not fully recognize the right to life of the unborn child." Catholic Bishops' Reaction to Supreme Court Ruling: Legislatures Urged to Restrict Abortion, L.A. Times, Aug. 12, 1989, § 2, at 6.

170. See 18 Pa. Cons. Stat. Ann. § 3205 (Supp. 1995).

171. See id. § 3206.

172. See id. § 3209.

173. See id. §§ 3207(b), 3214(a), (f).

174. See id. § 3203.

175. See Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 439–51 (1983) (striking down informed consent provision, parental consent provision, and 24-hour waiting period requirement); see also Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 765–68 (1986) (striking down reporting requirements).

176. The State of Pennsylvania as Respondent and the United States as Amicus Curiae urged the Court to dispose of *Roe* altogether. See Brief of Respondent at 105, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744 and 91-902) ("[I]t remains true that *Roe* is a deeply flawed decision, and it may be that the time has come to reconsider it."); see also Brief for United States as Amicus Curiae at 8, *Casey*, 112 S. Ct. 2791 ("*Roe v. Wade* was wrongly decided and should be overruled.").

After the dissension in *Webster*, and with the appointment of Justice Thomas by President Bush, the overruling of *Roe* was a distinct possibility. Although then-nominee Thomas refused to state his position on abortion during his Senate confirmation hearings, see Ruth Marcus, Abortion-Rights Groups Expect to Lose: Supreme Court Hears Arguments Today in Pennsylvania Case, Wash. Post, April 22, 1992, at A1, A19, once appointed to the Court, Thomas manifested his position on abortion by joining the dissenting opinions of Justices Rehnquist and Scalia in *Casey* which called for the overturning of Roe v. Wade. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2855, 2873 (1992).

voted to maintain the fundamental status of the abortion right;[177] the remaining seven Justices did not elevate abortion to that status.

Justices O'Connor, Kennedy, and Souter, authors of the *Casey* joint opinion, voted to uphold all but the spousal notification provision, but nevertheless reaffirmed "the essential holding of *Roe v. Wade*."[178] Apparently, although never explicitly stated, they did not believe that *Roe*'s "essential holding" embraced the notion of abortion as a fundamental right. Significantly, the joint opinion began its reaffirmation of *Roe* with a lengthy discussion of the Fourteenth Amendment's concept of "liberty";[179] indeed, the word "liberty" appeared frequently throughout the joint opinion's discussion of the abortion right.[180] But the joint opinion never once used the word "fundamental" to describe that liberty,[181] even though a significant aspect of *Roe* was its explicit recognition of the fundamental nature of the abortion right.[182] The Justices' reluctance to describe the abortion right as fundamental suggests that they considered that right to have less than fundamental status.

The joint opinion's abandonment of *Roe*'s trimester framework further evidences the changed nature of the abortion right. Blaming *Roe*'s trimester framework for the Court's undervaluation of the state's interest in potential life in cases following *Roe*, the joint opinion abandoned it in

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177. Justices Blackmun and Stevens voted to uphold *Roe* in its entirety. See *Casey*, 112 S. Ct. at 2838–43 (Stevens, J., concurring in part and dissenting in part); id. at 2843–55 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

178. Id. at 2804. The joint opinion believed the essential holding of *Roe* had three parts:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Id.

179. See id. at 2804–08.

180. See, e.g., id. at 2804 ("The controlling word in the case before us is 'liberty.' "); id. at 2808 ("It was this dimension of personal liberty that *Roe* sought to protect."); id. at 2810–11 ("Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty."); id. at 2817 ("The woman's right to terminate her pregnancy before viability is . . . a rule of law and a component of liberty we cannot renounce.").

181. See Clark, supra note 151, at 321 n.278 (noting that the word "fundamental" appears only twice in the joint opinion and, in both cases, does not refer to the abortion right).

182. See supra notes 147–149 and accompanying text.

favor of the "undue burden" standard,[183] which gives greater weight to the state's interest.[184] Under this standard, state laws placing an undue burden on a woman's right to abort prior to fetal viability are unconstitutional; absent such a burden, regulation of abortion is valid if reasonable.[185] Thus, the joint opinion's abandonment of the trimester framework—which was merely a way of expressing *Roe*'s application of strict scrutiny—impliedly acknowledged that the abortion right no longer enjoyed fundamental status.[186]

The three authors of the joint opinion were not alone in their view that abortion should be accorded less than fundamental status. Chief Justice Rehnquist and Justices White, Scalia, and Thomas went further than the joint opinion's "undue burden" standard, voting to overturn *Roe* and to subject regulations of abortion to rationality review.[187] As Justice Rehnquist explained:

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183. See *Casey*, 112 S. Ct. at 2818–20. The Court defined "undue burden" as "a state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Id. at 2820. Some commentators, and some of the Justices themselves, have noted that the undue burden standard articulated in *Casey* is slightly different from those previously set forth. See *Casey*, 112 S. Ct. at 2878–79 (Scalia, J., dissenting) (noting that previous articulations of the "undue burden" standard required that the obstacle to abortion be "absolute" or "severe" rather than merely "substantial"); Howard, supra note 153, at 1491–92 (noting that *Casey* slightly relaxed earlier versions of the "undue burden" standard). The authors of the joint opinion firmly stated, however, "[W]e set out what in our view should be the controlling standard." *Casey*, 112 S. Ct. at 2820.

184. See *Casey*, 112 S. Ct. at 2817 (*Roe* "establish[ed] not only the woman's liberty but also the State's 'important and legitimate interest in potential life.' That portion of the decision in *Roe* has been given too little acknowledgement and implementation by the Court in its subsequent cases.") (citation omitted). The joint opinion specifically singled out Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), as an example of later Courts' misapplication of *Roe*. See *Casey*, 112 S. Ct. at 2817.

185. See *Casey*, 112 S. Ct. at 2821 ("Unless it [is a substantial obstacle to] her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.").

186. Many scholars agree that the joint opinion's undue burden standard established something less than strict protection of the abortion right. See G. Sidney Buchanan, A Very Rational Court, 30 Hous. L. Rev. 1509, 1570 (1993) (noting that authors of the joint opinion "rejected the close scrutiny analysis of *Roe*"); Clark, supra note 151, at 321 n.278 ("By adopting the undue burden standard, which entails something less than strict scrutiny analysis, the joint opinion abandoned at least implicitly *Roe*'s holding that the right to terminate a pregnancy is a fundamental right."); Sheldon Gelman, "Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights, 78 Minn. L. Rev. 585, 607 (1994) (In creating the undue burden standard, the joint opinion "seemingly confound[s] the distinction between strict scrutiny and rationality review."); Kathleen M. Sullivan, The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 34 n.70 (1992) (noting that the joint opinion's undue burden standard engaged in "quantitative assessments . . . usually associated with intermediate rather than strict standards of scrutiny").

187. See *Casey*, 112 S. Ct. at 2855 ("We believe that *Roe* was wrongly decided, and that it can and should be overruled . . . . We would adopt the approach of the plurality in

> [T]he Constitution does not subject state abortion regulations to heightened scrutiny. Accordingly, we think that the correct analysis is that set forth by the plurality opinion in *Webster*. A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.[188]

Using rationality review, the Justices voted to uphold *all* of the challenged provisions, even the spousal notification provision found to be unduly burdensome by the authors of the joint opinion.[189]

The authors of the joint opinion and the Justices joining the Rehnquist concurrence formed an uneasy alliance—their seven votes combined to uphold all portions of the Pennsylvania statute except the spousal notification provision.[190] Furthermore, this alliance went beyond *Webster* (which merely upheld the Missouri statute) to overrule prior precedent.[191] Thus, *Casey* not only continued, but cemented, *Webster*'s trend away from *Roe*. The unmistakable conclusion after *Webster* and *Casey* is that, although they cannot agree on the exact nature of the abortion right, seven of the nine Justices believe that it is no longer fundamental. This view of abortion had a significant impact on the Court's treatment of the First Amendment issues in *Rust* and *Casey*.

B. *Abortion as a Vice Activity*

Once one recognizes the implications of the Court's recent abortion jurisprudence, the *Rust* and *Casey* Courts' use of the *Posadas* "greater includes lesser" rationale becomes easier to understand. The *Posadas* Court reasoned that Puerto Rico could regulate casino advertising under a lenient Due Process standard because such advertising was essentially part and parcel of the economic activity of gambling. Similarly, the Court's recent willingness to view abortion as less than a fundamental right may have spurred it to equate abortion and abortion counseling. Of course, after *Casey*, regulations of abortion are not subject to mere rationality re-

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Webster and uphold the challenged provisions of the Pennsylvania statute in their entirety.") (citation omitted).

188. Id. at 2867 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

189. See id. at 2867–73.

190. The three authors of the joint opinion, who believed this provision to be unduly burdensome, see id. at 2826–31, combined with Justices Stevens and Blackmun, who believed that the provision was unconstitutional under *Roe*, see id. at 2838–43 (Stevens, J., concurring in part and dissenting in part) and id. at 2843–55 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part), to create a 5-4 majority striking down the provision.

191. The *Casey* joint opinion joined the Rehnquist camp and expressly overruled *Akron* and *Thornburgh* to the extent they were inconsistent with *Casey*'s recognition that the 24-hour waiting period, informed consent provision, and reporting requirements were constitutional. See id. at 2816–17, 2822–26.

view as are regulations of gambling.[192] Given abortion's higher position in the hierarchy of constitutional rights, one could argue that *Posadas* had no place in *Casey* and *Rust*. However, the nature of the "undue burden" standard is vague at best, leaving judges to interpret it in whatever manner they see fit.[193] Thus, abortion may be much more like gambling than the "undue burden" standard facially implies.

Perhaps more important to understanding the resurgence of *Posadas*'s reasoning in *Rust* and *Casey* is the special nature of gambling and, arguably, abortion as vice activities. The *Posadas* Court clearly viewed gambling as a "vice"[194] activity rather than a run-of-the-mill economic activity.[195] Moreover, that aspect of *Posadas*—the idea that gambling is different—likely drove the majority's opinion.[196] Abortion, too, is different. Unlike much routine economic activity, it has serious moral and ethical implications. It is an activity that many people find abhorrent and corrupt.[197] Thus, many people are more likely to equate abortion

192. The joint opinion's undue burden standard, while arguably stripping abortion of fundamental status, at least facially establishes something more than rational basis review—probably something more akin to an intermediate standard of review. See supra note 186.

193. See *Casey*, 112 S. Ct. at 2878 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that the undue burden standard "will conceal raw judicial policy choices concerning what is 'appropriate' abortion legislation").

194. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 346 (1986).

195. One could argue that the Court previously faced the problem of vice activities and free speech without resurrecting *Posadas*. For example, cases involving the regulation of nude dancing, see Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), or adult movie theaters, see Young v. American Mini Theatres, 427 U.S. 50 (1976), arguably presented vice issues. Such cases, however, are different from *Posadas*, *Rust*, and *Casey*. In the latter cases, the issue before the Court was how to treat speech *related to* a vice activity. In the former cases, the vice activity (e.g., nude dancing) is also the speech or expression. Thus, in *Barnes* and *Young*, the Court could not and did not forego First Amendment analysis by subsuming the speech into a separate activity as the *Posadas*, *Rust*, and *Casey* Courts did.

196. Professor Epstein has noted that *Posadas* probably "should be understood not as an ordinary commercial speech case, but as a police power morals case. . . . [It] should stand only for the proposition that constitutional protection of speech is at its lowest ebb in the morals cases." Epstein, supra note 20, at 67. Similarly, Professor Kurland has suggested that the *Posadas* majority might have "intended to further a new moral code, which tolerates government restraint not only on speech that is conducive to illegal behavior but also on speech that may lead to immoral though legal conduct." Kurland, supra note 113, at 15.

197. People have widely divergent reasons for believing that abortion poses serious moral and ethical problems. Many abhor abortion largely based upon their religious beliefs that it is morally corrupt or akin to murder. See Timothy A. Byrnes and Mary C. Segers, Introduction, *in* The Catholic Church and the Politics of Abortion 2–4 (Timothy A. Byrnes & Mary C. Segers eds., 1992); John W. Whitehead, Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis, 48 Wash. & Lee L. Rev. 77, 89–92 (1991). Others argue that abortion is inherently a moral issue. These people, including some feminists, criticize the courts for basing their reasoning in abortion cases in vindicating rights and bodily autonomy, and as a result, ignoring the moral issues of abortion. See Kathleen McDonnell, Not An Easy Choice: A Feminist Re-Examines Abortion 42–57 (1984); Elizabeth Mensch & Alan Freeman, The Politics of Virtue: Animals, Theology and Abortion, 25 Ga. L. Rev. 923, 931–38 (1991). Still others adhere to

with vice activities such as gambling or prostitution than with mundane economic activities, like running a pharmacy or an optical shop.[198]

Supreme Court Justices are not immune from such personal views. As a portion of the Court has indicated, "Some of us as individuals find abortion offensive to our most basic principles of morality."[199] Numerous scholars have noted that such personal views inform judicial decisionmaking despite the continuing belief that judges are neutral arbiters of justice.[200] One could conclude, then, that abortion's potential position as a vice activity in some Justices' eyes affected the outcomes in *Rust* and *Casey*[201] despite the joint opinion's protests otherwise.[202] The Court's explicit approval of government attempts to discourage the exercise of the abortion right[203] lends further credence to the concept that the Court views abortion as something other than mundane economic activity.

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anti-abortion views because of their belief that women and men are intrinsically different and that abortion interferes with men's and women's traditional roles. See David M. Smolin, Why Abortion Rights Are Not Justified by Reference to Gender Equality: A Response to Professor Tribe, 23 J. Marshall L. Rev. 621, 634–41 (1990); see also Faye D. Ginsburg, Contested Lives: The Abortion Debate in an American Community 212–18 (1989) (arguing that abortion is a part of the struggle over competing notions of women's roles in society). For an excellent survey of competing views on abortion, see Sylvia A. Law, Abortion Compromise—Inevitable and Impossible, 1992 U. Ill. L. Rev. 921, 933–37.

198. Even after *Rust* and *Casey*, abortion, unlike gambling, cannot be made illegal. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804 (1992) ("Before viability, the State's interests are not strong enough to support a prohibition on abortion . . . ."). Nevertheless, many people would like it to be. The Catholic Church, for example, has long stated that its goals regarding abortion include gaining constitutional protection for the life of the unborn child and reversing all Supreme Court decisions that impede that goal. See Byrnes & Segers, supra note 197, at 15–16. Similarly, Randall Terry, the leader of Operation Rescue, a nationally organized anti-abortion group, has stated that the group's rescue efforts are an attempt to overburden the legal system to convince the government to "mak[e] abortion illegal again." Michael Matza, Throw This Man In Jail, Phila. Inquirer, June 26, 1988, Features Inquirer Magazine, at 21.

199. *Casey*, 112 S. Ct. at 2806.

200. See generally Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court And The Attitudinal Model 64–73 (1993) (arguing that Supreme Court decisionmaking is best explained by reference to judges' attitudes toward issues rather than strict adherence to legal principles); Harold J. Spaeth & Stuart H. Teger, Activism and Restraint: A Cloak for the Justices' Policy Preferences, *in* Supreme Court Activism and Restraint 277, 278 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (suggesting that judges allow personal preferences to guide certain judicial decisions, such as the decision to exercise judicial deference).

201. The view of abortion as akin to a vice activity may explain Professor Berg's concern that the Court has not formulated a coherent First Amendment theory pertaining to medical counseling. See Berg, supra note 10, at 205. As Professor Berg notes, *Rust* and *Casey* are the only two cases in which the Court has had the opportunity to consider the free speech implications of medical counseling. See id. at 204–05. Perhaps if the Court had confronted medical counseling in a situation not involving a vice activity, it would have formulated a coherent First Amendment theory. In other words, the Court was unable to develop such a theory precisely because *Rust* and *Casey* involved abortion.

202. See *Casey*, 112 S. Ct. at 2806.

203. The *Casey* joint opinion, for example, reiterated that the state may take measures to discourage abortion. See id. at 2821 ("[A] state measure designed to persuade [a

That other courts have refused to apply *Rust* outside of the abortion context also supports my argument that the vice aspects of abortion drove the *Rust* and *Casey* decisions. For example, some lower courts have struck down restrictions on funding for scientific research[204] and artistic projects,[205] distinguishing *Rust* as inapplicable to their situation. Additionally, although the Fourth Circuit in *Rosenberger v. Rector and Visitors of the University of Virginia*[206] upheld a public university's denial of student activity funds to student religious groups, it did so by focusing primarily on the university's desire to avoid an Establishment Clause violation. The Fourth Circuit could have used *Rust* to dismiss the petitioners' First Amendment argument, claiming that selective funding of specific groups falls within the university's discretion to allocate its funds. Instead, the Fourth Circuit searched for a "compelling" interest—which it found in the university's fear of entanglement with religion—to justify selective exclusion from student funds.[207] Significantly, the Supreme Court recently reversed the Fourth Circuit's decision in *Rosenberger*, finding that the denial of funds constituted impermissible viewpoint discrimination under

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woman] to choose childbirth over abortion will be upheld if reasonably related to that goal."); id. ("To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that a woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.").

204. See Board of Trustees of Leland Stanford Junior Univ. v. Sullivan, 773 F. Supp. 472, 478–79 (D.D.C. 1991) (striking down federal government regulation conditioning receipt of government funds for scientific research on grantee's agreement to submit all research results to government for publication approval). The *Sullivan* court made explicit its disapproval of the *Rust* decision:

> The *Rust* decision opened the door to government review and suppression of speech and publications in areas which had theretofore been widely thought immune from such intrusion . . . . This Court, like all lower courts, is of course bound by the *Rust* decision. But . . . the Court will not, without explicit appellate direction, further narrow the speech and expression rights of citizens and organizations, or subject to government censorship the publications of institutions of higher learning and others engaged in legitimate research.

Id. at 478.

205. See Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1470 (C.D. Cal. 1992) (ruling unconstitutional statute requiring that government grants for artistic endeavors "tak[e] into consideration general standards of decency"); see also Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 785 (C.D. Cal. 1991) (refusing to uphold NEA requirement that grant recipients pledge not to create "obscene" works).

206. 18 F.3d 269, 281–86 (4th Cir. 1994), rev'd, 115 S. Ct. 2510 (1995).

207. See id. In justifying its search for a "compelling" interest, the Fourth Circuit relied on Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987), which held that the government can condition the receipt of certain government benefits based upon the content of speech only when the "regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Id. at 231. Given that *Rust* is a more recent unconstitutional conditions precedent and also provides the simplest method for denying the petitioners' claims, the Fourth Circuit's reliance on *Ragland*, which applies a more stringent standard of scrutiny to speech regulations, was odd, to say the least.

the First Amendment and specifically distinguishing *Rust*.[208] That the outcome of these cases did not depend upon the *Rust* Court's reasoning reveals that *Rust* was less about unconstitutional conditions than it was about abortion.

C. *Distinguishing Between Counseling and Protest*

There is a response to my argument that the driving force behind *Rust* and *Casey* was the Court's inability to distinguish between abortion and abortion-related speech. One need only point to several recent decisions in the abortion protest context which arguably belie my assertion. Just last year in *Madsen v. Women's Health Center, Inc.*,[209] for example, the Court upheld portions of an injunction against abortion protesters, ruling that they did not violate the First Amendment.[210] Similarly, the Court in *Frisby v. Schultz*[211] upheld against First Amendment challenges a time, place, and manner regulation aimed at abortion protestors.[212] In both cases, the Court recognized obvious free speech issues and analyzed them accordingly,[213] thus potentially casting doubt on my argument.

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208. See *Rosenberger*, 115 S. Ct. at 2518–19. For a discussion and criticism of the *Rosenberger* majority's explanation of the differences between *Rust* and *Rosenberger*, see supra note 42.

209. 114 S. Ct. 2516 (1994).

210. See id. at 2530.

211. 487 U.S. 474 (1988).

212. See id. at 488.

213. Both *Madsen* and *Frisby* generated a fair amount of dissent on the Court. In *Madsen* the Court disagreed about the standard of review to apply to a content-neutral injunction against anti-abortion protestors. The majority recognized that injunctions carry "greater risks of censorship and discriminatory application than do general ordinances," but refused to reject the injunction out of hand. 114 S. Ct. at 2524. Instead, the Court reviewed the injunction to determine whether it "burden[ed] no more speech than necessary to serve a significant government interest." Id. at 2525. Justice Stevens dissented, argning that the injunction should be reviewed under a more lenient standard than legislation. See id. at 2531 (Stevens, J., concurring in part and dissenting in part). Justice Scalia, also dissenting, argued that the injunction was "*at least* as deserving of strict scrutiny as a statutory, content-based restriction." Id. at 2538 (Scalia, J., concurring in the judgment in part and dissenting in part).

Frisby addressed the constitutionality of an ordinance prohibiting picketing "before or about" any residence. 487 U.S. at 477. The majority upheld the content-neutral ordinance because it was "narrowly tailored to serve a significant government interest, and [left] open ample alternative channels of communication." Id. at 481 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). Justice Brennan, on the other hand, would have upheld only controls on the size, time, and volume of the picketers. See id. at 496 (Brennan, J., dissenting). Justice Stevens also argued that the ordinance was overly broad and would have upheld only those ordinances directed at "conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose." Id. at 499 (Stevens, J., dissenting).

This Article does not presume to discuss the correctness of the decisions in either *Madsen* or *Frisby*; rather, it cites them for the proposition that the Court at least recognized the First Amendment issues therein.

Madsen and *Frisby*, however, involved far different situations from those in *Rust* and *Casey*. The former cases involved abortion *protests* while the latter involved abortion *counseling*. Protests of any kind raise classic free speech issues.[214] They are almost inherently "political" speech, which is at the core of the First Amendment.[215] Thus, even though the *Madsen* and *Frisby* protests related to abortion, the political nature of the speech involved made obvious the First Amendment implications. Abortion counseling, on the other hand, is more closely related to the act of abortion itself and has no exterior trappings to make it obviously political speech. While the more private nature of abortion counseling does not make it any less speech,[216] it does explain how the Court subsumed abortion counseling, but not abortion protests, into the activity of abortion.

In fact, the *Posadas* Court essentially foretold the distinction between political speech about a vice activity (abortion protest) and speech integrally related to that activity (abortion counseling). As part of its reasoning, the *Posadas* majority read Puerto Rico's ban as applying only to direct advertisements of gambling rather than to speech that might incidentally touch on or encourage such gambling. The former, according to the *Posadas* Court, was simply part of the economic activity of gambling and, therefore, not subject to First Amendment scrutiny; the latter fell within the legitimate protection of the First Amendment.[217] That reasoning incorporated into the abortion counseling context leaves us with two distinct categories of cases. On the one hand we have *Rust* and *Casey*, which viewed abortion counseling as equivalent to direct advertising of gambling and a problem involving the regulation of a vice activity. On the other hand we have *Madsen* and *Frisby*, which viewed abortion protests for what they were—speech and expression protected by the First Amendment.

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214. Several Supreme Court decisions recognize the right of citizens to gather and express their views. See, e.g., Gregory v. City of Chicago, 394 U.S. 111, 112–13 (1969) (reversing convictions of individuals prosecuted for gathering to protest segregation); Cox v. Louisiana, 379 U.S. 536, 557–58 (1965) (same); Edwards v. South Carolina, 372 U.S. 229, 237–38 (1963) (same). Such gatherings "reflect an exercise of . . . basic constitutional rights in their most pristine and classic form." *Edwards*, 372 U.S. at 235.

215. See, e.g., Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 483 (1988) ("Political speech, we have often noted, is at the core of the First Amendment."); Boos v. Barry, 485 U.S. 312, 318 (1988) (clause prohibiting the display of protest signs within 500 feet of an embassy "operates at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech"); see also Buckley v. Valeo, 424 U.S. 1, 44–45 (1976) (limitations on "core First Amendment rights of political expression" must satisfy "exacting" scrutiny).

216. See supra Part I.C.

217. See Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 340 n.7 (1986) ("The narrowing construction of the statute and regulations announced by the Superior Court effectively ensures that the advertising restrictions cannot be used to inhibit either the freedom of the press in Puerto Rico to report on any aspect of casino gambling, or the freedom of anyone, including casino owners, to comment publicly on such matters as legislation relating to casino gambling.").

CONCLUSION

The *Rust* and *Casey* Courts, like the *Posadas* Court before them, simply got the free speech issue wrong. If the First Amendment stands for anything, it stands for the principle that the government cannot "deliberately deny[ ] information to people for the purpose of influencing their behavior."[218] If the government wishes to restrict gambling or abortion, it should do so. Such paternalistic actions are generally within its police powers. Banning speech in order to manipulate citizens' behavior in accordance with the government's notions of morality, however, is antithetical to notions of autonomy and self-realization underlying the First Amendment's protection of speech.[219] Outside of the abortion counseling and gambling advertising contexts, the Court has recognized the dangers of such manipulation. At the very least it has recognized that speech issues were involved. Because abortion and gambling pose particularly divisive issues regarding regulation of vice activities, however, the Court has been less willing to extend First Amendment protection to speech related to those activities. But speech is no less speech merely because it is related to a vice activity. Had the Court recognized that fact, it might have taken a more straightforward approach to the speech issues in *Rust* and *Casey*. An approach that acknowledged the free speech implications of abortion counseling and that engaged in meaningful First Amendment analysis would have strengthened the decisions in those cases, regardless of their outcome. Hiding behind the "greater includes lesser" rationale in cases involving speech integral to vice activity simply made the Court look result-oriented and weak.

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218. Strauss, supra note 123, at 355; see also supra note 93 (discussing autonomy as a fundamental value that the First Amendment seeks to protect). Professor Strauss terms this concept the "persuasion principle." Strauss, supra note 123, at 335. A number of the Court's decisions embody the "persuasion principle." See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) ("It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."); Cohen v. California, 403 U.S. 15, 22–23 (1971) (rejecting notion that "[s]tates, acting as guardians of public morality, may properly remove . . . offensive word[s] from the public vocabulary"); see also Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 460 (1985) ("The communication of a fact or value judgment relating to a matter of public concern cannot be prohibited solely on the ground that the communication . . . erodes moral standards.").

219. Professor Strauss argues that autonomy-based considerations best justify the persuasion principle. In his view, attempts by the government to manipulate information "infringe human autonomy . . . by, in part, taking over [people's] thinking processes." Strauss, supra note 123, at 356.