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to have had blind spots, and this does not mean that it is wrong to attend to traditions and to their best expositors.

To be sure, there is a freestanding, nonhistorical argument for deliberative democracy as a central political ideal. n24 But for constitutional lawyers, the argument for deliberative democracy should be interpretive (in the sense I have described) rather than freestanding. That argument draws substantial support from historical understandings. All this leaves open a wide range of questions, to say the least; but I think that it helps to explain the interest in republicanism as an historical phenomenon from the standpoint not just of historians, but also of constitutional lawyers in particular. I think that it also helps explain why the constitu [*607] tional lawyer's conception of republicanism need not entirely track that of the historian.

-Footnotes-

n24. See, e.g., Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *The Good Polity* 17, 1826 (Alan Hamlin & Philip Pettit eds., 1990); Jurgen Habermas, *Three Normative Models of Democracy*, 1 *Constellations* 10 (1994).

-End Footnotes-

In his instructive article, Flaherty does not contest the view that the Framers were republicans in a distinctive sense, nor does he challenge the claim that the Framers sought to promote deliberation in government. Insofar as he discusses my views, Flaherty's principal argument is that I have stressed the Framers' emphasis on political deliberation at the expense of their concern about rights and, in particular, about natural rights. This is an important and complex issue, and it is good to see the issue raised at the level of both historical understanding and constitutional theory. n25 By way of response, I offer a few brief remarks here, intended not to resolve this complex issue, but to point to some directions for future inquiry.

-Footnotes-

n25. As to constitutional theory, compare James E. Fleming, *Constructing the Substantive Constitution*, 72 *Tex. L. Rev.* 211 (1993), with Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 *Tex. L. Rev.* 305 (1993).

-End Footnotes-

Of course the Framers were committed to rights, and of course they sometimes spoke in terms of natural rights. No eighteenth-century American or British republican opposed rights, or saw the slightest tension between his commitment to republicanism and his commitment to rights. But - my first point - many of the rights that the Framers prized were in fact a precondition for political liberty and thoroughly understood as such. n26 The right to freedom of speech is the best example, but it is complemented by the right to a jury trial, the right to bear arms, the right to private property, and much more. To this extent, an emphasis on rights, and even natural rights, is not inconsistent with the emphasis on deliberative democracy as a conception of republicanism. On the contrary, a properly-functioning deliberative democracy prizes rights. The Framers well understood this point.

-Footnotes-

n26. See generally Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131 (1991).

- - - - -End Footnotes- - - - -

As Flaherty shows, the Framers did not believe that all rights, to qualify as such, must be associated with political deliberation; and the category of natural rights, extending beyond politics, was one with which the Framers were familiar. But - and this is my second point - we should be extremely careful with the idea of "natural rights" as it was understood in the eighteenth century. It would be interesting to ask random constitutional lawyers a trivia question: How many times does the phrase "natural rights" appear in *The Federalist Papers*? The term occurs not a hundred times, not twenty times, not ten times, but only once - and then in an inconsequential place. n27 The notion of natural rights was much less of a defining theme than many observers think.

- - - - -Footnotes- - - - -

n27. See *The Federalist Concordance* 343 (1988). By contrast, the term "rights" occurs 149 times. *Id.* at 475.

- - - - -End Footnotes- - - - -

Moreover, the phrase "natural rights," when used, had certain complex meanings, and it is important for modern observers to be careful in [*608] reconstructing those meanings. Even those who believed in natural rights need not have thought that there was a correspondence between such rights and the rights guaranteed by the Constitution. Recall that Hume conceived of property rights as part of convention rather than nature. n28 Jefferson thought in the same terms. n29 When the Founding generation spoke of "natural rights," it is not simple for twentieth-century observers to understand what they meant. Often the term "nature" has been identified with the best conception of human flourishing, rather than with what would happen without governmental interference. This is the classical understanding, n30 and it had a strong influence on the Framers. Perhaps the Framers, when speaking of natural rights, were responding to those who spoke of the "divine right" of kings, and perhaps they were deploying the rhetoric of "nature" for the distinct purpose of meeting that way of seeing things. n31

- - - - -Footnotes- - - - -

n28. See David Hume, *A Treatise on Human Nature* 491 (1973) ("Our property is nothing but those goods, whose constant possession is establish'd by the laws and society A man's property is some object related to him. This relation is not natural" *Id.* at 50113.)

n29.

It is agreed by those who have seriously considered the subject, that no individual has, of natural right, a separate property in an acre of land, for instance. By an universal law, indeed, whatever, fixed or movable, belongs to all men equally and in common, is the property for the moment of him who occupies it, but when he relinquishes the occupation, the property goes with

it. Stable ownership is the gift of social law, and is given late in the progress of society.

Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, in *The Life and Selected Writings of Thomas Jefferson* 576 (Adrienne Koch & William Peden eds., 1993).

n30. See Aristotle, *Aristotle's Physics* 2527 (Hippocrates G. Apostle trans., 1980).

n31. I am grateful to Stephen Holmes for this suggestion.

- - - - -End Footnotes- - - - -

Notwithstanding these points, Flaherty is undoubtedly correct to point to the area of eighteenth-century "rights" as one that modern constitutional commentators have inadequately understood, certainly in law. There is a great deal more to do on this important subject. Perhaps Flaherty's essay can help constitutional lawyers to embark on this long overdue task. When they do so, it will probably be as part of their interpretive enterprise, and what I am emphasizing here is that this enterprise has special characteristics that distinguish it from the enterprise of the ordinary historian.

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Columbia Law Review

November, 1995

95 Colum. L. Rev. 1724

LENGTH: 28169 words

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

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SUMMARY:

... In dissenting from the Supreme Court's 1994 decision upholding portions of an injunction against abortion protestors, Justice Scalia wrote: ... 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. ... 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. ... Recognizing, however, that "the Constitution ... accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," 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. ... One could conclude, then, that abortion's potential position as a vice activity in some Justices' eyes affected the outcomes in Rust and Casey despite the joint opinion's protests otherwise. ... 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. ...

TEXT:

[*1724]

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

This 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. n1

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, n2 the Court also pulled apart the fundamental tenets of the First Amendment. At least two decisions, Rust v. Sullivan n3 and Planned Parenthood v. Casey, n4 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 [*1725] clients did not unconstitutionally condition the receipt of those funds. n5 The Casey plurality chose to forego First Amendment analysis altogether and upheld the Pennsylvania statute as a reasonable regulation of the practice of medicine. n6

- - - - -Footnotes- - - - -

n1. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 253435 (1994) (Scalia, J., dissenting) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting)).

n2. This article uses the term "abortion counseling" to encompass advice and information on abortion given to prospective patients by health care providers.

n3. 500 U.S. 173 (1991).

n4. 112 S. Ct. 2791 (1992).

n5. See Rust, 500 U.S. at 19698. 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, 51819 (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).

n6. See Casey, 112 S. Ct. at 2824.

 -----End Footnotes-----

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. n7 Most scholars writing about abortion counseling have focused primarily on the First Amendment aspects of Rust, n8 centering much of their criticism on the Court's unconstitutional conditions analysis. n9 Few scholars have even discussed the First Amendment aspects of Casey, much less linked the case to Rust. n10 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 [*1726] 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.

 -----Footnotes-----

n7. 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).

n8. 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 Dialogue*, 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).

n9. See Sunstein, *supra* note 8, at 11618; Cole, *supra* note 8, at 685; Rohde, *supra* note 8, at 15960; Weeks, *supra* note 8, at 1664.

n10. 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, 21331 (1994); Elizabeth A. Schneider, *Comment, Workability of the Undue Burden Test*, 66 Temp. L. Rev. 1003, 1024 (1993).

- - - - -End Footnotes- - - - -

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* n11 and (2) the Court's rapidly changing view of a woman's constitutional right to terminate her pregnancy.

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n11. 478 U.S. 328 (1986).

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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." n12 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. n13 Prior to 1988, however, Title X programs were not prohibited from engaging in nondirective counseling about abortion. n14 [*1727]

- - - - -Footnotes- - - - -

n12. 42 U.S.C. 300(a) (1988).

n13. *Id.* 300a-6.

n14. 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) ("The 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 that regulations in effect prior to 1988 provided for nondirective counseling about abortion).

- - - - -End Footnotes- - - - -

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. n15 Specifically, the regulations banned Title X projects from "counseling concerning the use of abortion as a method of family planning or providing referral for abortion as a method of family planning." n16 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. n17 These prohibitions applied even if the patient specifically requested information about abortion or abortion providers. n18 In contrast, the regulations required Title X doctors and counselors to refer pregnant clients to appropriate prenatal or social [*1728] 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." n19

- - - - -Footnotes- - - - -

n15. 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.

n16. 42 C.F.R. 59.8(a)(1) (1994) (suspended by President Clinton Feb. 5, 1993).

n17. 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, ... exclude 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, 19698 (1991).

n18. 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).

n19. Id. 59.8(a)(2).

- - - - -End Footnotes- - - - -

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. n20 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. n21 Petitioners recognized that the government had broad discretion to allocate federal funds. n22 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 "aim at the suppression of dangerous ideas." n23 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. n24 [*1729]

- - - - -Footnotes- - - - -

n20. 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, 28102 (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 Gifthouse, 65 N.Y.U. L. Rev. 247, 255 (1990).

n21. See Brief for Petitioners at 1424, Rust v. Sullivan, 500 U.S. 173 (1991) (No. 891391).

n22. 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, 54850 (1983).

n23. 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, 38384 (1984); Speiser v. Randall, 357 U.S. 513, 519 (1958).

n24. 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 107780. 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).

- - - - -End Footnotes- - - - -

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. n25 He also acknowledged the Court's previous decisions holding that government subsidies aimed at suppressing particular ideas violated the unconstitutional conditions doctrine. n26 In addition, the Chief Justice recognized that the regulations were designed to "encourage" women to forego abortions n27 and that they did so by imposing one-sided restrictions on counseling and referral for abortion. n28 Nevertheless, the Rust majority found that the regulations did not discriminate on the basis of viewpoint. In Rehnquist's words, the government could

-Footnotes-

n25. See Rust, 500 U.S. at 192200.

n26. 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)).

n27. 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.' ").

n28. See id. at 19394 (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").

-End Footnotes-

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. n29

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." n30 That is, because the federally funded Title X program was designed to support preventive family planning, the govern [*1730] ment could enact regulations barring speech not directed at such planning. n31

-Footnotes-

n29. 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)).

n30. Id. at 194.

n31. See id. at 195 n.4 ("The regulations are designed to ensure compliance with the prohibition ... that none of the funds appropriated under Title X be used in a program where abortion is a method of family planning.").

-End Footnotes-

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. n32 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. n33 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. n34 [*1731] The Supreme Court has consistently applied the strictest scrutiny even to viewpoint-based regulations of a limited nature. n35

-Footnotes-

n32. See 42 C.F.R. 59.8 (1994) (suspended by President Clinton Feb. 5, 1993); see also supra notes 1618 and accompanying text.

n33. 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) ("Above 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, 198200 (1983) (discussing unconstitutionality of viewpoint-based restrictions on speech).

n34. 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, 46365 (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 19899.

n35. 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 4849, 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)).

- - - - -End Footnotes- - - - -

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. n36 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. n37 The regulations' attempt to control all aspects of what was said in Title X projects regarding abortion made obvious the government's illicit motive. n38 Indeed, the Bush administration made clear from the outset that the regulations "exhibited a [*1732] 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." n39 As one scholar noted, "It would be difficult to imagine a law more clearly aimed at suppressing a dangerous idea than the Title X regulations." n40

- - - - -Footnotes- - - - -

n36. See 42 C.F.R. 59.8(b) (1994) (suspended by President Clinton Feb. 5, 1993); supra note 19 and accompanying text.

n37. See, e.g., *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980) ("When 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.

n38. 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* 23435 (1983) (noting that while the government arguably can add its voice to debate over public matters, it cannot aim to suppress viewpoints with the use of discriminatory funding mechanisms).

n39. 53 Fed. Reg. 2922, 294344 (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.

n40. Cole, *supra* note 8, at 688 n.47.

- - - - -End Footnotes- - - - -

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. n41 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. n42 Similarly, one cannot attribute the *Rust* decision solely to the Court's often confused unconstitutional conditions jurisprudence. n43 [*1733] 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 n44 and, in cases involving actual viewpoint discrimination, it has explicitly acknowledged the regulations' unconstitutionality. n45 Rather, the key to the *Rust* Court's treatment of the regulations lies in its inability to see abortion counseling as speech.

- - - - -Footnotes- - - - -

n41. 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").

n42. See *Rust v. Sullivan*, 500 U.S. 173, 19295 (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, 251719 (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 251819. 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] involved 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.

n43. 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, 34043 (noting the Court's often confused application of the 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, 98101 (1993) (noting that the Court's inability to distinguish between its "coercion" and "free choice" approaches in subsidy cases may have resulted in *Rust*).

n44. See *supra* note 23 and cases cited therein.

n45. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 52829 (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, 22931 (1987); *FCC v. League of Women Voters*, 468 U.S. 364, 38384 (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.

- - - - -End Footnotes- - - - -

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. n46 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 "prohibitions on a project grantee or its employees from engaging in activities outside of the project's scope." n47 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." n48 Such an action is not viewpoint discrimination; it is merely a government decision "to fund one activity to the exclusion of the other." n49 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, [*1734] including speech, which are specifically excluded from the scope of the project funded." n50 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."

-Footnotes-

n46. See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

n47. *Id.* at 194 (emphasis added).

n48. *Id.* at 193 (emphasis added).

n49. *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).

n50. *Id.* at 194-95 (distinguishing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987)) (emphasis added).

-End Footnotes-

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. n51 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.

-Footnotes-

n51. 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).

-End Footnotes-

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, n52 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.

-Footnotes-

n52. 112 S. Ct. 2791 (1992).

-End Footnotes-

B. Planned Parenthood v. Casey

The Casey petitioners challenged several provisions of Pennsylvania's abortion statute, n53 primarily claiming that they violated a woman's Fourteenth Amendment right to privacy. n54 However, petitioners also challenged one provision, the informed consent requirement, n55 as a violation of the First Amendment's protection of speech. n56 As in Rust, the Court [*1735] ignored the speech aspects of the informed consent provision and found it constitutional.

-Footnotes-

n53. 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).

n54. See Casey, 112 S. Ct. at 2803, 282033; see also infra Part III.A.2. for a more detailed discussion of the Court's decision regarding petitioners' Fourteenth Amendment claims.

n55. See 18 Pa. Cons. Stat. Ann. 3205 (Supp. 1995).

n56. See Brief for Petitioners and Cross-Respondents at 5355, Casey, 112 S. Ct. 2791 (Nos. 91-744 and 91-902).

-End Footnotes-

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. n57 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, n58 (2) medical assistance benefits for prenatal care, childbirth, and neonatal care, n59 and (3) information pertaining to the father's legal responsibility to assist with child support. n60 All information must be provided at least 24 hours prior to an abortion n61 and the woman must

certify in writing that she has received it. n62 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. n63

- - - - -Footnotes- - - - -

n57. See 18 Pa. Cons. Stat. Ann. 3205(a)(1) (Supp. 1995).

n58. 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).

n59. See id. 3205(a)(2).

n60. See id.

n61. See id. 3205(a)(1), (a)(2).

n62. See id. 3205(a)(4).

n63. 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 provides 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).

- - - - -End Footnotes- - - - -

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. n64 Specifically, petitioners relied on Wooley v. Maynard n65 and a series of cases which held that the state may not "constitutionally require an individual [*1736] to participate in the dissemination of an ideological message." n66 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. n67 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. n68 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." n69

-Footnotes-

n64. See Brief for Petitioners and Cross-Respondents at 5355, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744 and 91-902).

n65. 430 U.S. 705 (1977).

n66. 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, 1217 (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, 23237 (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 burdened protected speech." Id. at 79798.

n67. See Brief for Petitioners and Cross-Respondents at 5455, Casey, 112 S. Ct. 2791. The district court in Casey similarly noted that "the 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.

n68. See Brief for Petitioners and Cross-Respondents at 5455, Casey, 112 S. Ct. 2791.

n69. Id. (quoting Casey, 744 F. Supp. at 1354).

-End Footnotes-

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. n70 Relying on the Third Circuit's ruling below, n71 respondents argued that commercial speech enjoys less protection than other [*1737] forms of speech, especially when, as here, the government regulation compels disclosure of factual information rather than suppresses information. n72

-Footnotes-

n70. See Brief for Respondents at 7071, 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)).

n71. 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).

n72. See Brief for Respondents at 7071, 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).

-End Footnotes-

Despite briefing of the free speech issues by both sides, the Casey joint opinion n73 dismissed petitioners' First Amendment argument in a few short sentences:

-Footnotes-

n73. 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.

-End Footnotes-

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. n74

Other than a brief citation to Wooley, the joint opinion did not discuss the parameters of the petitioners' compelled speech argument. n75 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.

-Footnotes-

n74. Casey, 112 S. Ct. at 2824 (citing Wooley v. Maynard, 430 U.S. 705 (1977)) (other citations omitted).

n75. Petitioners also briefly raised a second First Amendment argument regarding Section 3205. They argued that the statute

violated 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.

-End Footnotes-

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. n76 The issue before the Court - whether the state could compel physicians to give certain factual, abortion-related information to clients - did not fall squarely [*1738] 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. n77 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. n78 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. n79

-Footnotes-

n76. For a suggested First Amendment analysis of medical counseling, including abortion counseling, see generally Berg, supra note 10, at 24365.

n77. 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 "in the guise of obtaining 'informed consent,' the Pennsylvania Act thrusts health care professionals into the woman's broader decisionmaking process").

n78. 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 135138 and accompanying text.

n79. 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).

- - - - -End Footnotes- - - - -

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. n80 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 [*1739] dents. n81 That the joint opinion lumped together all of the challenged statutory provisions, referring to them as "health regulations" involving "medical procedures," n82 further evidences its confusion of speech and conduct. There was no recognition that one of those medical procedures primarily involved speech. n83

- - - - -Footnotes- - - - -

n80. Casey, 112 S. Ct. at 2824.

n81. 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, 48691 (1955) (holding various regulations pertaining to optometry profession to be consistent with the Due Process and Equal Protection clauses of the Fourteenth Amendment)).

n82. Casey, 112 S. Ct. at 2821.

n83. 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.

- - - - -End Footnotes- - - - -

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 [*1740] 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. n84 The distinction is most important in those situations where the Court must determine whether certain nonverbal conduct, such as flag burning n85 or boycotts, n86 is "expressive." Under Supreme Court jurisprudence, expressive conduct enjoys First Amendment protection, n87 although not always to the same extent as "pure speech." n88 Nonexpressive conduct enjoys no First Amendment protection. n89 [*1741]

-----Footnotes-----

n84. 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." ... The 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").

n85. See *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

n86. See *Claiborne Hardware*, 458 U.S. at 907; *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 214 (1982).

n87. See, e.g., *Johnson*, 491 U.S. at 40506 (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).

n88. 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).

n89. See *supra* note 84 and cases cited therein. At least one commentator has noted that "although the Supreme Court has recognized that some conduct may not be 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, 23940 (1993) (citations omitted). The Court's decision in Mitchell, however, may signal an increased willingness to find certain conduct nonexpressive and, therefore, unprotected.

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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." n90 Similarly, the Pennsylvania informed consent statute in Casey directed doctors to "orally inform" women of certain information pertaining to abortion procedures and alternatives. n91 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. n92 More importantly, they involve speech in the sense used by the Supreme Court in its First Amendment decisions: the direct communication of ideas. n93 To [*1742] 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. n94

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n90. 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").

n91. 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).

n92. 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 usually by clear and specific mention").

n93. 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, 26973 (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.

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, 38286 (1985); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 130928 (1991). Thus, abortion counseling fosters a woman's personal autonomy and individual self-fulfillment. See also Berg, supra note 10, at 23639 (arguing that "doctor-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 23536. 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.

n94. 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.

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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" n95 that they enjoy no First Amendment protection. n96 The Court has reasoned that fighting words such as epithets and other forms of personal abuse are more

akin to physical assaults [*1743] than to speech. n97 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." n98 Abortion counseling simply does not fall within the fighting words doctrine; n99 nor can one say that abortion counseling amounts to "lewd and obscene" speech. n100 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.

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n95. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

n96. 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).

n97. 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").

n98. *Roth v. United States*, 354 U.S. 476, 485 (1957).

n99. 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.

n100. 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).

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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. n101 Thus, even if counseling were akin to conduct, the Court should have scrutinized the provisions for viewpoint discrimination. n102

-Footnotes-

n101. See R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 254547 (1992) (holding that statute banning only racially hateful fighting words was impermissible viewpoint-based discrimination even though fighting words as a whole were proscribable).

n102. 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.

-End Footnotes-

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. n103 Because the Court viewed abortion counseling as integral to the act of abortion, it could not (nor did not) distinguish between the two. [*1744] 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. n104

-Footnotes-

n103. 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.

n104. 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 ... that hardly disqualifies him from protection under the First Amendment").

-End Footnotes-

II. Abortion Counseling As EconomicActivity

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*, n105 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.

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n105. 478 U.S. 328 (1986).

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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" n106 - has enjoyed at least a measure of First Amendment protection. n107 [*1745] 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. n108 Recognizing, however, that "the Constitution ... accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," n109 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. n110 In 1986, however, the Court handed down an aberrant 5-4 decision in *Posadas*.

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n106. *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)).

n107. See *id.* at 76364. 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, 36981 (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).

n108. See Virginia State Bd., 425 U.S. at 76364. 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 "those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and the particularly aged." Id. at 763.

n109. Central Hudson, 447 U.S. at 56263.

n110. 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, 26970 (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").

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Posadas addressed a Puerto Rico statute legalizing casino gambling but outlawing advertisement of that gambling to Puerto Rico residents. n111 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. n112 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. n113

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n111. See Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 332 (1986).

n112. See id. at 340 (citing Central Hudson, 447 U.S. at 566).

n113. 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 "keep[ing] the people of Puerto Rico in ignorance [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").

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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 [*1746] tional infirmity in Puerto Rico's statute. In his view, the legislature's concern that "excessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens' " n114 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. n115 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 advanced" 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. n116 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. n117 Thus, with only a superficial analysis of the legislature's motives or methods, n118 the Court upheld the ban on casino advertisements.

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n114. Posadas, 478 U.S. at 341 (quoting Brief for Appellees at 37).

n115. See id.

n116. Id. at 34142.

n117. Id. at 343.

n118. See id. at 34144; see also Kurland, supra note 113, at 712 (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").

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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 included the lesser power to ban advertising of casino gambling." n119 Analogizing to laws regarding solicitation and licensing of prostitution, Justice Rehnquist explained:

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n119. Posadas, 478 U.S. at 34546.

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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. n120

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 [*1747] acted "reasonably." n121 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. n122 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. n123 In essence, the Posadas Court initially recognized that casino advertising was speech, but ultimately collapsed it into the broader activity of gambling.

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n120. Id. at 346.

n121. 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").

n122. 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.

n123. 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 be 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, 35960 (1991) (Posadas decision ignores the autonomy principle underlying the First Amendment).

-End Footnotes-

The flaw in Justice Rehnquist's analysis, however, is that speech enjoys special protection under the First Amendment even when integral to economic activity. n124 That, after all, was the rationale underlying Virginia State Board's earlier extension of First Amendment protection to commercial speech. n125 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 n126 or otherwise. n127 Nonetheless, the Court's reasoning in Rust and Casey bears remarkable similarity to the Posadas rationale.

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n124. See Posadas, 478 U.S. at 35455 n.4 (Brennan, J., dissenting).

n125. See supra note 108 and accompanying text.

n126. 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).

n127. 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' ").

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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." n128 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.

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n128. 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.

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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, regulations banning counseling about abortion were merely "prohibitions on a project grantee ... from engaging in activities outside of the project's scope." n129 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." n130 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.

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n129. Rust v. Sullivan, 500 U.S. 173, 194 (1991).

n130. Id. at 194; see also Rohde, supra note 8, at 160 (arguing that Rust may herald the return of Posadas).

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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. n131 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 [*1749] 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. n132 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. n133 (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.

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n131. 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).

n132. See supra Part I.A.

n133. 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, 57475 (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").

- - - - -End Footnotes- - - - -

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. n134 Thus, before one can properly apply Posadas's [*1750] 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.

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n134. 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).

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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. n135 Instead, the Court has attempted to determine whether the proposal of a commercial transaction is the "principal type of expression at issue." n136 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 pregnancies rather than on the commercial aspects of their transactions with the physician. n137 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." n138

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n135. 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).

n136. Fox, 492 U.S. at 473; see also McGowan, supra note 107, at 38290 (discussing the Court's definition of commercial speech).

n137. See 42 C.F.R. 59.8 (1994) (suspended by President Clinton Feb. 5, 1993); 18 Pa. Cons. Stat. Ann. 3205 (Supp. 1995).

n138. 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 23942.

-End Footnotes-

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. n139 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. n140 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 [*1751] Constitution, n141 the government could not justify regulating them under its traditional police powers. n142 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. n143

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n139. See supra note 126 and accompanying text.

n140. See Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 34546 (1986).

n141. 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, 48486 (1965) (contraceptive use).

n142. 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 42737. 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.

n143. 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, 81829 (1975) (striking down law prohibiting advertisements pertaining to abortion clinics)).

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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 PosadasFramework

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, n144 its status changed almost completely when the Supreme Court in Roe v. Wade n145 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. n146 [*1752]

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n144. 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, 11718 & n.2 (1973) (noting that at least 29 states had such laws).

n145. 410 U.S. 113 (1973).

n146. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 281821 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490, 51620 (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 recognize, 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, 93137 (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 Government* 11314 (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* 18494 (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 38286 (arguing that the abortion right might be better grounded in the Fourteenth Amendment's Equal Protection Clause rather than in notions of privacy).

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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. n147 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." n148 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. n149 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 pregnancy and protection of potential life became compelling at viability (essentially at the third trimester). n150 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." n151

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n147. 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").

n148. *Id.* at 155 (citations omitted).

n149. See *id.* at 162.

n150. See *id.* at 16264.

n151. Annette E. Clark, *Abortion and the Pied Piper of Compromise*, 68 *N.Y.U. L. Rev.* 265, 316 (1993).

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After Roe, the Court struck down as inconsistent with the trimester framework numerous regulations of medical procedures related to abortions. n152 The Court's protection of the abortion right culminated in the mid-1980s when it expressly reaffirmed Roe's validity and the fundamental [*1753] nature of the woman's right to choose an abortion. n153 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 n154 had shrunk to five to four n155 and several Justices favored revisiting Roe. n156 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. n157

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n152. See, e.g., *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 48182 (1983) (invalidating requirement that all abortions after the first twelve weeks of pregnancy be performed in a hospital as "unreasonably infringing 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).

n153. 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* 1026 (1990); C. Elaine Howard, Note, *The Roe'd to Confusion: Planned Parenthood v. Casey*, 30 *Hous. L. Rev.* 1457, 146775 (1993).

n154. 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).

n155. 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 75971. 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 785814.

n156. See Alan I. Bigel, Planned Parenthood of Southeastern Pennsylvania v. Casey: Constitutional Principles and Political Turbulence, 18 U. Dayton L. Rev. 733, 73840 (1993) (analyzing various Justices' opinions of the Roe decision).

n157. 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 73439 (reviewing Supreme Court Justices' views on abortion in the period leading up to Casey).

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The Court's internal dissension over the abortion right resulted in the badly splintered 1989 decision, Webster v. Reproductive Health Services. n158 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. n159 Although a majority of the Court upheld the provisions, no single opinion garnered a majority. A plurality of Chief Justice Rehnquist and [*1754] Justices White and Kennedy argued that Roe's "rigid trimester analysis" should be overturned. n160 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. n161 Thus, they would have upheld the statutory provisions as "permissibly furthering the State's interest in protecting potential human life." n162 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. n163

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n158. 492 U.S. 490 (1989).

n159. 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).

n160. Webster, 492 U.S. at 51718.

n161. 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").

n162. Webster, 492 U.S. at 51920.

n163. See *id.* at 521.

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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*" n164 and would have expressly overruled *Roe*. n165 Justice O'Connor also voted to uphold the challenged provisions, although her reasoning differed from the plurality's and Justice Scalia's. n166 She believed the provisions were valid because they did not impose an "undue burden" on a woman's right to an abortion. n167 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. n168 After *Webster*, then, the status of the abortion right was unclear at best. n169 [*1755] 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.

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n164. *Id.* at 537 (Scalia, J., concurring in part and concurring in the judgment).

n165. See *id.* at 532.

n166. See *id.* at 52231 (O'Connor, J., concurring in part and concurring in the judgment).

n167. 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).

n168. See *Webster*, 492 U.S. at 53760 (Blackmun, J., concurring in part and dissenting in part) (joined by Justices Brennan and Marshall); *id.* at 56072 (Stevens, J., concurring in part and dissenting in part).

n169. 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 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: 54 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.

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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, n170 a parental consent provision, n171 a spousal notification provision, n172 various reporting requirements, n173 and a definition of the term "medical emergency." n174 The Court had previously relied on Roe to strike down several similar provisions. n175 Thus, Casey presented an opportunity not only to reconsider those particular provisions but also to reconsider, and possibly overrule, Roe. n176 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 [*1756] voted to maintain the fundamental status of the abortion right; n177 the remaining seven Justices did not elevate abortion to that status.

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n170. See 18 Pa. Cons. Stat. Ann. 3205 (Supp. 1995).

n171. See id. 3206.

n172. See id. 3209.

n173. See id. 3207(b), 3214(a), (f).

n174. See id. 3203.

n175. See Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 43951 (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, 76568 (1986) (striking down reporting requirements).

n176. 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) ("It 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).

n177. Justices Blackmun and Stevens voted to uphold Roe in its entirety. See Casey, 112 S. Ct. at 283843 (Stevens, J., concurring in part and dissenting in part); id. at 284355 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

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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." n178 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"; n179 indeed, the word "liberty" appeared frequently throughout the joint opinion's discussion of the abortion right. n180 But the joint opinion never once used the word "fundamental" to describe that liberty, n181 even though a significant aspect of Roe was its explicit recognition of the fundamental nature of the abortion right. n182 The Justices' reluctance to describe the abortion right as fundamental suggests that they considered that right to have less than fundamental status.

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n178. 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.

n179. See id. at 280408.

n180. 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 281011 ("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.").

n181. 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).

n182. See supra notes 147149 and accompanying text.

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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 [*1757] favor of the "undue burden" standard, n183 which gives greater weight to the state's interest. n184 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. n185 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. n186

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n183. See Casey, 112 S. Ct. at 281820. 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 287879 (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 149192 (noting that Casey slightly relaxed earlier versions of the "undue burden" standard). The authors of the joint opinion firmly stated, however, "We set out what in our view should be the controlling standard." Casey, 112 S. Ct. at 2820.

n184. See Casey, 112 S. Ct. at 2817 (Roe "established 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.

n185. 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.").

n186. 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 confounds 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").

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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. n187 As Justice Rehnquist explained: [*1758]

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n187. 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 Webster and uphold the challenged provisions of the Pennsylvania statute in their entirety.") (citation omitted).

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The 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. n188

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. n189

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n188. Id. at 2867 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

n189. See id. at 286773.

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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. n190 Furthermore, this alliance went beyond Webster (which merely upheld the Missouri statute) to overrule prior precedent. n191 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.

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n190. The three authors of the joint opinion, who believed this provision to be unduly burdensome, see id. at 282631, combined with Justices Stevens and Blackmun, who believed that the provision was unconstitutional under Roe, see id. at 283843 (Stevens, J., concurring in part and dissenting in part) and id. at 284355 (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.

n191. 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 281617, 282226.

-End Footnotes-

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 [*1759] view as are regulations of gambling. n192 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. n193 Thus, abortion may be much more like gambling than the "undue burden" standard facially implies.

-Footnotes-

n192. 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.

n193. 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").

-End Footnotes-

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" n194 activity rather than a run-of-the-mill economic activity. n195 Moreover, that aspect of Posadas - the idea that gambling is different - likely drove the majority's opinion. n196 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. n197 Thus, many people are more likely to equate abortion [*1760] with vice activities such as gambling or prostitution than with mundane economic activities, like running a pharmacy or an optical shop. n198

-Footnotes-

n194. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 346 (1986).

n195. 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.

n196. 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.

n197. 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 24 (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, 8992 (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 4257 (1984); Elizabeth Mensch & Alan Freeman, The Politics of Virtue: Animals, Theology and Abortion, 25 Ga. L. Rev. 923, 93138 (1991). Still others adhere to 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, 63441 (1990); see also Faye D. Ginsburg, *Contested Lives: The Abortion Debate in an American Community* 21218 (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, 93337.

n198. 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 1516. 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 "make abortion illegal again." Michael Matza, *Throw This Man In Jail*, *Phila. Inquirer*, June 26, 1988, *Features Inquirer Magazine*, at 21.

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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." n199 Numerous scholars have noted that such personal views inform judicial decisionmaking despite the continuing belief that judges are neutral arbiters of justice. n200 One could conclude, then, that abortion's potential position as a vice activity in some Justices' eyes affected the outcomes in *Rust* and *Casey* n201 despite the joint opinion's protests otherwise. n202 The Court's explicit approval of government attempts to discourage the exercise of the abortion right n203 lends further credence to the concept that the Court views abortion as something other than mundane economic activity. [*1761]

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n199. *Casey*, 112 S. Ct. at 2806.

n200. See generally Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court And The Attitudinal Model* 6473 (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).

n201. 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 20405. 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.

n202. See Casey, 112 S. Ct. at 2806.

n203. 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 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.").

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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 n204 and artistic projects, n205 distinguishing Rust as inapplicable to their situation. Additionally, although the Fourth Circuit in Rosenberger v. Rector and Visitors of the University of Virginia n206 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. n207 Significantly, the Supreme Court recently reversed the Fourth Circuit's decision in Rosenberger, finding that the denial of funds constituted impermissible viewpoint discrimination under [*1762] the First Amendment and specifically distinguishing Rust. n208 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.

- - - - -Footnotes- - - - -

n204. See Board of Trustees of Leland Stanford Junior Univ. v. Sullivan, 773 F. Supp. 472, 47879 (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.

n205. 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 "take 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).

n206. 18 F.3d 269, 28186 (4th Cir. 1994), rev'd, 115 S. Ct. 2510 (1995).

n207. 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.

n208. See *Rosenberger*, 115 S. Ct. at 251819. For a discussion and criticism of the *Rosenberger* majority's explanation of the differences between *Rust* and *Rosenberger*, see *supra* note 42.

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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.*, n209 for example, the Court upheld portions of an injunction against abortion protesters, ruling that they did not violate the First Amendment. n210 Similarly, the Court in *Frisby v. Schultz* n211 upheld against First Amendment challenges a time, place, and manner regulation aimed at abortion protestors. n212 In both cases, the Court recognized obvious free speech issues and analyzed them accordingly, n213 thus potentially casting doubt on my argument. [*1763]

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n209. 114 S. Ct. 2516 (1994).

n210. See *id.* at 2530.

n211. 487 U.S. 474 (1988).

n212. See id. at 488.

n213. 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 "burdened no more speech than necessary to serve a significant government interest." Id. at 2525. Justice Stevens dissented, arguing 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.

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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. n214 They are almost inherently "political" speech, which is at the core of the First Amendment. n215 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, n216 it does explain how the Court subsumed abortion counseling, but not abortion protests, into the activity of abortion.

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n214. 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, 11213 (1969) (reversing convictions of individuals prosecuted for gathering to protest segregation); Cox v. Louisiana, 379 U.S. 536, 55758 (1965) (same); Edwards v. South Carolina, 372 U.S. 229, 23738 (1963) (same). Such gatherings

"reflect an exercise of ... basic constitutional rights in their most pristine and classic form." Edwards, 372 U.S. at 235.

n215. 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, 4445 (1976) (limitations on "core First Amendment rights of political expression" must satisfy "exacting" scrutiny).

n216. See supra Part I.C.

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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. n217 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. [*1764]

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n217. 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.").

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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." n218 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. n219 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.

-Footnotes-

n218. 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, 2223 (1971) (rejecting notion that "states, acting as guardians of public morality, may properly remove ... offensive words 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.").

n219. 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.

-End Footnotes-

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Columbia Law Review

May, 1994

94 Colum. L. Rev. 1369

LENGTH: 11782 words

CORRUPTION, EQUALITY, AND CAMPAIGN FINANCE REFORM

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SUMMARY:

... Why should we want to reform the way political campaigns are financed? Two reasons are customarily given. ... But many commentators agree with Buckley that the concern of campaign finance reform should be the elimination of corruption; some do not even consider the promotion of equality to be worth discussing. ... In fact it is far from clear that campaign finance reform is about the elimination of corruption at all. ... In Part II, I will address some of the problems that arise in securing equality, or reducing the supposed dangers of interest group politics, for purposes of campaign finance reform. Contrary to the Court's statement in Buckley, there is nothing wrong with equality as an aspiration for campaign finance reform. ... Again, that is because a voter is forced to express approval or disapproval of a candidate's entire record, while a contributor has the opportunity to limit her approval or disapproval to specific actions. ... A campaign contribution or expenditure, like a vote, is in part an effort to influence the outcome of an election. ... Here the two true targets of campaign finance reform - not corruption, but inequality and interest group politics - must be separated. ...

TEXT:

[*1369]

Why should we want to reform the way political campaigns are financed? Two reasons are customarily given. One objective of reform is to reduce corruption, understood as the implicit exchange of campaign contributions for legislators' votes or other government action. The other objective is to promote equality: people who are willing and able to spend more money, it is said, should not have more influence over who is elected to office.

The Supreme Court's view of these two objectives can be summarized quickly: Corruption is a permissible target of reform legislation; inequality is not. That summary is not quite right, because some of the Court's decisions allow measures that seem to be directed at inequality. n1 But Buckley v. Valeo, n2

famously or notoriously, said - and the Court has repeated many times n3 - that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." n4 By contrast, "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." n5 This was one of the principal bases for Buckley's determination to permit restrictions on campaign contributions, which might be corrupting, but not on independent campaign expenditures. n6

-Footnotes-

n1. For example, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which upheld a restriction on campaign-related expenditures, the Court asserted that the restriction was concerned with "corruption" but defined "corruption" in a way that made it essentially equivalent to inequality. See *id.* at 660; see also Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 Sup. Ct. Rev. 105, 10913.

n2. 424 U.S. 1 (1976).

n3. See, e.g., *Meyer v. Grant*, 486 U.S. 414, 426 n.7 (1988); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 79091 (1978).

n4. 424 U.S. at 4849.

n5. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 49697 (1985).

n6. See 424 U.S. at 5859. Another important basis for this distinction is that contributions, because they enlist the efforts of another speaker, are, according to the Court, a less pure form of speech than expenditures. See, e.g., *id.* at 1922.

-End Footnotes-

Buckley, of course, has been widely criticized. But many commentators agree with Buckley that the concern of campaign finance reform [*1370] should be the elimination of corruption; n7 some do not even consider the promotion of equality to be worth discussing. n8 And even among those who advocate the promotion of equality, there seems to be little dissent from the proposition that reducing corruption is also an imperative goal. n9

-Footnotes-

n7. See, e.g., Larry J. Sabato, *Paying for Elections: The Campaign Finance Thicket* 6 (1989); Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 *Hofstra L. Rev.* 301, 302 (1989).

n8. See, e.g., Lowenstein, *supra* note 7; Michael W. McConnell, *Redefine Campaign Finance "Reform,"* *Chi. Trib.*, June 29, 1993, 1, at 15; David B. Magleby & Candice J. Nelson, *The Money Chase* 3, 197 (1990); Henry C. Kenski, *Running With and From the PAC*, 22 *Ariz. L. Rev.* 627, 64344 (1980).

n9. See, e.g., Sabato, *supra* note 7; David Adamany, PACs and the Democratic Financing of Politics, 22 *Ariz. L. Rev.* 569, 57071 (1980); Joel L. Fleishman & Pope McCorkle, Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform, 1 *J.L. & Pol.* 211 (1984); J. Skelly Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 *Colum. L. Rev.* 609, 61620 (1982).

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In fact it is far from clear that campaign finance reform is about the elimination of corruption at all. That is because corruption - understood as the implicit or explicit exchange of campaign contributions for official action - is a derivative problem. Those who say they are concerned about corruption are actually concerned about two other things: inequality, and the nature of democratic politics. If somehow an appropriate level of equality were achieved, much of the reason to be concerned about corruption would no longer exist. And to the extent the concern about corruption would persist under conditions of equality, it is actually a concern about certain tendencies, inherent in any system of representative government, that are at most only heightened by quid pro quo campaign contributions - specifically, the tendency for democratic politics to become a struggle among interest groups.

The true targets of campaign reform, therefore, are inequality and certain potential problems of interest group politics that are endemic to representative government. Efforts to root out implicit quid pro quo "corruption" are justifiable only insofar as they are means to those ends. Reformers who, following the Supreme Court's lead, focus on corruption and ignore inequality either have things backward or are after bigger game than they acknowledge: they are concerned with features that may be inherent in the democratic process itself rather than in any system of campaign finance. The task of campaign finance reform is not so much to purify the democratic process as to try to save it from its own worst failings.

In Part I, I will try to show that "corruption" in the system of campaign finance is a concern not for the reasons that true corruption, such as conventional bribery, is a concern, but principally because of inequality and the dangers of interest group politics. I will also discuss the possibility that so-called corruption is objectionable not because of what [*1371] contributors do to the political system but because of the danger that the contributors themselves will be subjected to coercion.

In Part II, I will address some of the problems that arise in securing equality, or reducing the supposed dangers of interest group politics, for purposes of campaign finance reform. Contrary to the Court's statement in *Buckley*, there is nothing wrong with equality as an aspiration for campaign finance reform. Rather, the problems arise at a more practical level. So far as interest group politics is concerned, the principal problem is to distinguish between pernicious interest group struggle and normal democratic deliberation. While it may be possible to draw such a distinction in the abstract, distinguishing in practice between good and bad interest group activity is difficult to do in a way that is not highly controversial and partisan.

Finally, there is the question whether campaign finance reform is worth the cost. The debate over campaign finance reform has, to a degree, suffered from a lack of clarity about the precise objectives of reform, and from the

too-simple assumption that quid pro quo exchanges of contributions present the same problem as bribery. As a result, there may have been insufficient attention directed to the difficult question whether campaign finance reform can make sufficient progress toward either of its two genuine objectives - the reduction of inequality and the dampening of interest group politics - to warrant what might be a substantial cost.

I. Corruption as a Derivative Evil

A. Corruption and Inequality

The best way to understand the relationship between corruption and equality is to consider what the corruption problem, so-called, would look like if the inequality problem were solved. Since the inequality problem will never be solved to everyone's satisfaction, this requires a suspension of disbelief. But one might suppose, for example, a scheme that equalizes people's ability to make contributions (and expenditures; for these hypothetical purposes there is no difference) by multiplying contributions by a factor inversely related to the contributor's income. n10 The idea would be that a contribution of, say, one percent of any individual's income would be either supplemented or taxed by the government so that, no matter what the person's income, the same amount would be made available to the candidate. Assume, for the sake of argument, that such a scheme would implement an acceptable notion of equality and that it would be constitutional. (Both assumptions may be incorrect, of course.) [*1372]

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n10. This notion, analogous to the "district power equalization" proposal for school finance reform, see John E. Coons et al., Private Wealth and Public Education (1970), is discussed in Edward B. Foley, Equal Dollars Per Voter: A Constitutional Principle of Campaign Finance, 94 Colum. L. Rev. 1204 (1994).

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Suppose that in such a world, contributions made to politicians' campaigns were overtly "corrupt" in the sense in which that term is used in discussions of campaign finance reform. That is, individuals (and PACs) promised contributions explicitly contingent on a legislator's voting in a certain way; explicitly rewarded legislators for past votes; punished legislators by reducing contributions for legislative actions that the contributors opposed; made contributions during campaigns with the intention of reminding the candidate to whom they contributed of their support and redeeming their "IOU"; and so on. This is the anti-corruption nightmare scenario.

Many of those who see corruption as the central problem treat such a state of affairs as self-evidently unacceptable. Legislators should respond to constituents' wishes, their own judgments of good policy and the public interest, or some mixture of the two. But in a "corrupt" system, legislators respond to those who pay them, and to the amount they are paid. They have sold

their office and thus breached their duty to the people. n11

-Footnotes-

n11. See, e.g., Kenski, supra note 8, at 64344; Lowenstein, supra note 7, at 30535.

-End Footnotes-

That is certainly true when the corruption takes the form of standard bribery - a payment that goes into the representative's pocket. But there is a difference between straightforward bribery and corruption, on the one hand, and even the nightmare scenario I described above. Campaign contributions are not, or need not be, the same thing as bribes. Campaign contributions can be spent only on a campaign. They can be spent only in order to gather votes, directly or indirectly. They do not go into the legislator's pocket. Of course, in reality, the line is not always so distinct, and there may be limits on how clearly this line can ever be drawn. n12 But it is at least plausible that we could have a regime in which campaign contributions, by and large, were spent to gather votes and for no other purpose.

-Footnotes-

n12. For example, when a candidate is willing to spend her own money on a campaign, contributions may replace the candidate's own money and thereby, in effect, personally enrich her. But this problem will occur only if contributions cause the candidate to end up spending less of her own money than she otherwise would (instead of simply adding the contributions to what she was already planning to spend from her own resources). And contributions replace the candidate's own resources dollar-for-dollar only to the extent that the total expenditures made on the campaign do not exceed the amount the candidate was willing to spend from her own wealth. Suppose, for example, a candidate who would have been willing to spend \$ 10,000 of her own money receives contributions of \$ 100,000 and decides to spend none of her own money. Only one-tenth of the dollars contributed to her effectively ended up in her pocket, so the \$ 100,000 in contributions is not equivalent (in its corrupting effects) to a \$ 100,000 bribe. If she decides to spend her own \$ 10,000 in addition to the contributed \$ 100,000, none of the contributions ends up in her pocket.

-End Footnotes-

That means that these "bribes" have only a certain kind of value to the recipient. In a sense they are like vouchers, redeemable only for a certain purpose. To obtain a bribe, a legislator might deliberately cast a [*1373] vote that she knew would ruin her chances of reelection. But it would be irrational for a legislator to cast such a vote in return for a campaign contribution - since the most the contribution can do is to improve her chances of reelection.

This is an important difference, not a technical point. The conventional form of corruption occurs when elected officials take advantage of their position to enrich themselves. In effect they convert their public office into private wealth. But when the quid pro quo for an official action is not a bribe but a campaign contribution, the official has used the power of her office, not for personal enrichment, but in order to remain in office longer. In a

democracy that is not necessarily a bad thing for an official to do. In some circumstances, of course, it is problematic, as I will discuss; but it is not problematic for the same reasons as bribery. Speaking of "corruption" in the context of campaign contributions tends to blur this distinction.

It follows that, leaving inequality aside, promising a campaign contribution to a legislator if she takes a certain side on an issue is in many ways similar to promising to vote for her if she takes that side. The latter practice is not only legitimate but arguably an important feature of democratic government. If equality is secured, then because campaign contributions are valuable only as a means to get votes, rewarding a legislator with a contribution is, in important ways, similar to the unquestionably permissible practice of rewarding her with one's vote. Even assuming there is a direct relationship, so that the more money raised for a campaign, the more votes the candidate will receive, making a campaign contribution is roughly equivalent to delivering a certain number of votes to the legislator - and nothing more.

In other words, each dollar contribution (making relatively crude, but good enough, assumptions) is a fraction of an expected vote. A legislator who receives a contribution has increased her expected number of votes by a certain amount (where "expected number of votes" means the number of votes discounted by the probability of receiving them). This is only approximately correct, both because greater campaign expenditures might not directly translate into more votes and because a contribution to one candidate can be offset by a contribution to another. The important point, however, is that at most a contribution amounts to delivering a certain expected number of votes. The legislator does not get anything more out of the contribution than that.

Considerations of equality aside, therefore, when a milk producers' PAC, for example, threatens to withhold a contribution, it is doing something that is in principle similar to threatening to mobilize milk producers to vote against the legislator in the next election. When it rewards a legislator with a contribution, its behavior is similar in principle to "delivering" the milk producers' vote. If, by hypothesis, everyone has equal power to make contributions, then the making of contributions is arguably just another way of casting votes. [*1374]

In some respects, in fact, "delivering votes" by means of contributions is superior to delivering them by mobilizing the membership - superior in the sense that it is a better way of aligning officials' actions with popular sentiment. For one thing, a system of contributions mitigates the bundling problem: a voter is likely to approve of some positions a candidate takes and disapprove of others, but she can only vote in favor of or against the candidate's entire package.ⁿ¹³ Contributions can be more discriminating. A contributor can make a legislator's reward depend precisely on the degree to which the legislator has taken positions of which the contributor approves, and the contributor (in a "corrupt" system) can tell the legislator which positions will produce greater contributions. In that way, a system of delivering contributions might better reflect popular sentiment than a system of delivering votes.

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n13. On the bundling problem in voting for candidates, see, e.g., James D. Gwartney & Richard E. Wagner, Public Choice and the Conduct of Representative Government, in Public Choice and Constitutional Economics 10 (James D.

Gwartney & Richard E. Wagner eds., 1988). I am indebted to Julie Roin for discussions of this point.

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Second, and related, contributions allow voters - that is, contributors - to register the intensity of their views.. At the ballot box, a voter has a difficult time showing how enthusiastically she supports a candidate. She can vote for or against, or she can abstain. (Sometimes voting for a third party candidate may also be a way of expressing a weak preference for one of the major candidates.) By contrast, a contributor can spend her money in direct proportion to the intensity of her views.

Third, illegal old-fashioned machine practices aside, votes cannot be delivered as reliably as contributions. A legislator knows that even if an organization asks its members to vote against her (and even if there is no bundling problem, because the members do not care about any other issues strongly enough), not all of the members will receive the message, and not all will remember to act on it. A contribution, however, can be given to an intermediary organization and thereby placed under its direct control if the individual contributor so chooses, and so can be reliably "delivered." n14

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n14. Of course, the contribution does not necessarily translate directly into votes, so to that extent this point must be qualified.

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It might be objected that this kind of reliability is not a good thing but rather a serious problem. Many contributions are controlled not by individuals but by intermediaries, notably PACs. This important difference, however, has complex implications, and they point in different directions. People contribute to PACs (or other intermediary organizations) because they believe the PACs will more effectively further their objectives in the political arena. n15 PACs can take advantage of economies of scale and, perhaps more important, can overcome the problems [*1375] faced by unorganized individual actors. n16 PACs can acquire information about legislative events that are likely to affect their contributors, approach legislators and convey clear messages, distribute contributions among legislators, and so on. If a "corrupt" system of contributions is similar to a system of voting, then the collective organization of contributions permits people to cast more effective "votes" - contribution-votes that reflect superior information and that are better targeted than votes cast at the ballot box.

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n15. See Magleby & Nelson, supra note 8, at 7576; Bruce Ackerman, Crediting the Voters: A New Beginning for Campaign Finance, Am. Prospect, Spring 1993, at 71, 74.

n16. The classic statement of these problems is Mancur Olson, The Logic of Collective Action (2d ed. 1971).

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Finally, a system in which citizens deliver votes by means of contributions, instead of at the ballot box, is arguably superior because it funds the democratic process. At least in theory (and surely to some degree in practice), campaign contributions will be spent on things that a representative government needs to function well - conveying information and arguments from candidates to citizens. This is not true of conventional bribes, and it does not happen when a citizen simply promises a vote, instead of giving a contribution, to a candidate. No one should be too Panglossian about the level of discourse in political campaigns. But by the same token there is something useful, even commendable, about giving a candidate money so that she can better explain herself to the electorate.

B. Corruption and Democracy

Assuming equality, then, the real problem of "corruption" through campaign contributions is not the problem of conventional corruption; the problem is not that representatives sell their offices and betray the public trust for personal financial gain. In fact, assuming equality, there are substantial arguments that a regime in which official action is exchanged for campaign contributions is superior to one in which it is exchanged for votes. But even in a regime of equality, the anti-corruption nightmare scenario I described above still seems to be a nightmare. What accounts for that intuition?

The answer, I believe, is that even in a regime of equality, the nightmare scenario presents a heightened version of certain problems that are endemic to any representative government. The first problem is that a "corrupt" system of campaign contributions will tie representatives closely to their constituents' wishes. In a sense this is the dark side of reducing bundling problems. To some extent representatives are supposed to reflect their constituents' wishes. But on any plausible conception of representative government, elected representatives sometimes should exercise independent judgment. n17 A representative who need only answer at the ballot box every few years is relatively free to exercise [*1376] independent judgment. A representative who must act with an eye toward campaign contributions, which can be awarded or withheld in precise measure for specific actions that the representative takes, has much less freedom. She must pay close attention to her potential contributors' views on each issue, and she will pay a price each time she defies them.

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n17. The classic statement of this view is Edmund Burke, Speech to the Electors of Bristol, in 2 The Works of Edmund Burke 89, 9597 (3d ed. Boston, Little, Brown 1869).

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The point should not be overstated. People can (and no doubt do) make contributions to representatives because they believe the representative exercises good independent judgment, or because of the representative's position on a range of issues, rather than because of particular positions the representative has taken. Conversely, people sometimes vote for or against

representatives because of the representative's position on particular issues. Campaign contributions do not create the possibility that representatives will follow instead of lead; that is an unavoidable (and to some extent desirable) part of any democracy. But because contribution-votes can be so much better targeted than votes at the ballot box, a system in which contributions are implicitly or explicitly exchanged for official action will accentuate this tendency of representative government.

Second, a system of quid pro quo campaign contributions is likely to exacerbate the tendency of politics to become a process of accommodation among groups with particular selfish interests, instead of an effort to reach the best decisions for society as a whole. This seems likely to occur for two reasons. First, contributions can be put directly under the control of interest groups; while interest groups also promise to deliver votes, they deliver them much less efficiently and reliably. Second, and more subtly, voting at the ballot box rather than through contributions may encourage voters to concern themselves with the public interest, or at least with a range of issues, rather than with their more narrow group interests. Again, that is because a voter is forced to express approval or disapproval of a candidate's entire record, while a contributor has the opportunity to limit her approval or disapproval to specific actions. n18

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n18. The ceremonial aspects of voting - the fact that it is to some degree a self-conscious act of citizenship - may also contribute to this effect.

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In addition, a voter looking for a PAC to contribute to - an intermediary that can spend her contribution more effectively than she herself might - may be hard pressed to find a "public interest" PAC. Small groups whose members are intensely interested in an issue have an organizational advantage over larger groups whose members have a more diffuse interest. n19 That makes it more likely that intermediary groups reflect [*1377] narrow interests. A potential contributor wishing to take advantage of an intermediary, unlike a voter, may have to choose among various groups that represent narrow interests.

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n19. See Olson, supra note 16, at 5357; see also Dennis C. Mueller, Public Choice II: A Revised Edition of Public Choice 30810 (1989). Certain party or electoral structures might counteract this tendency. For example, in a society with sharply differentiated ideological parties, contributors might be more concerned with advancing the broad range of policies supported by one party. (If there is a strongly ideological pro-business party opposed by an ideological anti-business party, for example, business contributors will be less concerned with specific issues than with maintaining the pro-business party in power.) But in our system there seems to be little to counteract the tendency for groups to coalesce around specific issues.

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Again, however, a "corrupt" system of campaign contributions does not create this problem; it only heightens it. Even if private campaign contributions and

expenditures were banned altogether, voters would still sometimes vote according to narrow group interests. This arguable dysfunction of representative government - the degeneration of the process from the pursuit of some conception of the public interest into a conflict among interest groups - seems more likely to occur in a system in which contributions are exchanged for official action. But the problem is endemic to democracy in any form. And again it is not a problem of "corruption" in the sense of outright bribery.

In these ways, campaign contributions might be problematic even if equality were secured. But the problem arises because, in an important sense, allowing "votes" to be cast by means of contributions is only a way of providing a more refined and efficient system of democracy. Contribution-votes allow citizens to do more effectively what they would like to do with their ballot box votes - influence elected representatives to do the things that the voters, perhaps selfishly, most want them to do. The problems of representatives' failure to exercise independent judgment and of special interest fragmentation - if in fact they are problems - are features of representative government that might be heightened, but are not created, by a "corrupt" system of campaign finance.

Still, one might say that the danger of exacerbating these problems is itself sufficient reason, apart from equality, to reform the system of campaign finance. While exchanges of official action for campaign contributions are not corrupt in the sense that bribes are, it might be said, they are corrupt in a more traditional sense. They corrupt the political process by helping it to degenerate in the ways I have described. Therefore the central goal of the anti-corruption reform agenda - to eliminate implicit quid pro quo exchanges of contributions for government action - should remain intact, although for a different reason.

Unfortunately, the matter is not that simple. The question of how responsive a representative should be to the electorate is notoriously difficult, and it is not clear that the greater responsiveness that comes from allowing contributions will make matters worse. There are both theoretical questions - what mix of responsiveness and independence do we want? - and empirical questions - exactly how much more independence will we get if we reform campaign finance?

Similarly, the question of how far we should go in trying to remedy the interest group character of democratic politics raises extremely difficult theoretical and empirical issues. The problem is not, as some seem to suggest, on the conceptual level of defining a difference between interest group politics and the effort to promote some version of the public good. Plainly there is a difference between a struggle among groups overtly pursuing selfish interests and a deliberative effort to promote the good of the whole, or a just society. The problem comes in practice. Few people admit that they are simply trying to promote their selfish interests instead of seeking the good of society. As a result, without an elaborate and controversial normative theory, it is difficult in practice to distinguish between pernicious interest groups and politically active good citizens.

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n20. For perhaps the best-known discussion, see Robert A. Dahl, A Preface to Democratic Theory (1956).

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Compare, to use a common example, civil rights groups and, say, the lobby for agricultural subsidies. Both are well-organized groups. Both purport to be concerned with the good of society and to be trying to implement a vision of social justice, not just promoting their own selfish interests. Of course, we do not have to take the claims of every interest group at its word. Many people hold a normative view according to which some groups (such as the civil rights groups) are trying to promote the public good and others (such as the farm lobby or the gun lobby) are acting out of narrow self-interest. But the examples show how controversial any such theory will be. One side's chief examples of narrow and self-interested groups will be the other side's examples of groups that pursue the public interest. If campaign finance reform is intended to restrict the power of supposedly narrow and pernicious interest groups, while not disadvantaging supposedly public-interested interest groups, then reform necessarily takes on an extremely partisan cast.

This problem might be avoided by saying that the goal of reform should simply be to limit the power of all well-organized intermediary groups, without trying to differentiate between good and bad interest groups. Certain systems of public financing would have this effect, for example if they involved the distribution of funds directly from the Treasury, perhaps keyed to a formula that reflected a candidate's popular support. Because the funds would be transferred directly to the candidate - with no opportunity to pass through the hands of intermediary organizations - the influence of those organizations would be reduced.

This, too, unfortunately, is not a perfect solution. That is because the public interest might in the end be better promoted by allowing, rather than dampening, interest group activity. The question is a very complicated one. Intermediary organizations increase the advantages of people with intense preferences, and arguably more intensely felt positions should be accorded more weight in the democratic process. In addition, some positions on certain issues may be less well represented in the public debate than their merits warrant; intermediary organizations, by speaking forcefully for these interests, might improve the quality of [*1379] public deliberation over what would prevail if intermediaries were discouraged. For many, gay and lesbian groups, or anti-abortion groups, are examples.

In addition, as I noted above, people give to intermediary organizations precisely because they believe those organizations will transmit their views more effectively. If people think their views will be more effectively promoted by contributing to a PAC instead of contributing directly to a candidate, reformers should at least hesitate before concluding that the system would be more democratic if people were denied the chance to do so. n21

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n21. The German Constitutional Court, for example, has concluded that unrestricted public subsidies of political parties are unconstitutional partly because they are undemocratic: "The parties must remain dependent upon citizen approval and support not only politically but economically and organizationally as well. Public funds thus may not be permitted to liberate individual parties from the risk of failure of their efforts to obtain sufficient support from the voters." 85 BVerfGE 264, 287 (1992), as quoted in David P. Currie, *The*

Constitution of the Federal Republic of Germany (forthcoming 1994) (chapter 4, manuscript at 38 n.155, on file with author).

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Finally, and related, intermediary organizations are likely to be relatively sophisticated consumers. That is again a principal reason why people trust these organizations with their money: they think it will be better spent by the intermediary. One would expect intermediary organizations to be affected less by political appeals based on slogans and the manipulation of images, and more likely to make sound judgments on matters of substance. This is just a result of the division of labor and the benefits of organization.

The case for reforming campaign finance in order to curb the possibly bad tendencies of democracy is, therefore, a complex and difficult one to make. That is not to say it cannot be made. There is no reason (at least in the account I have given so far) to indulge a presumption against reform. It certainly may be the case that there are reforms that can significantly improve the quality of democratic politics by reducing the influence of certain kinds of destructive interest groups. But that task should be undertaken with full awareness both of the objective - the reduction of representatives' responsiveness and of interest group influence, not the elimination of bribery-like corruption - and of the complexities involved.

All of this suggests that the issues raised by campaign finance reform are much larger than many think. The implicit vision of many reformers is that there is, underneath the layers of corruption precipitated by campaign contributions, a well-functioning system of representative government. The job of reform is to strip away the corruption and restore the normal processes. I have suggested, instead, that campaign contributions heighten certain of the characteristic tendencies of representative government. Part of the task of campaign finance reform is to try to determine what kind of representative government we want - which aspects of [*1380] representative government we want to suppress, which we want to encourage, and at what cost.

C. The Coercion of Contributors

In at least one respect, corruption in campaign finance cannot be reduced to a problem of inequality or interest group politics. In a system in which campaign contributions are freely exchanged for official action, there is a danger that representatives may coerce potential contributors, in effect extorting contributions by the threat that they will act against the contributor's interests. Although some such extortion might be possible if the currency were votes, instead of campaign contribution dollars, votes are cast in secret and can go only to one side; the dangers of extortion are therefore far greater when contributions are allowed. To the extent this danger exists, contributors, instead of being predators as they are in the usual anti-corruption story, become the victims. Instead of the contributor working her will on the representative, who feels obligated to comply with the contributor's request in order to obtain money, the representative forces an unwilling citizen to make a contribution. When extortion of this form occurs, the problems I have already mentioned - inequality and interest group domination - can develop; in addition, there is unfairness to the extorted contributor, and there are possible inefficiencies.

The clearest example of extortion of this kind is an elected judge who solicits campaign contributions from the parties to a case before her, or a regulatory official with adjudicative power who solicits the firms she regulates. In these cases an outright ban on contributions seems an appropriate solution. But if extortion can occur in those cases, it will also be at least a theoretical possibility in the case of legislators and other elected representatives. For example, chair of a legislative subcommittee that has jurisdiction over a bill that would help, say, the railroad industry at the expense of the trucking industry, will be in a good position to gain contributions from both industries. The slightest hint on the part of the representative, falling far short of a solicitation that would be independently criminal, might be enough to make the contributors think they had better ante up. Even if the representative has no intention of extorting contributions at all, the contributors might decide to make a contribution in order to protect their interests.

It is of course difficult to determine how frequently extortion or quasi-extortion of this kind occurs. Some of the data - notably the high level of contributions to incumbents with safe seats - suggest that it is quite common. n22 To whatever extent it does occur, it presents the [*1381] problems I have already canvassed, although in a slightly different and possibly less severe form. If inequality exists, those with more resources will be better able to satisfy the implicitly or explicitly extortionate demand. Well-organized groups will also be better able to satisfy these demands. Oddly, however, in some situations the possibility of extortion might curb the advantage that well-organized groups are thought to have. That is because only a group or individual with an intense interest will be subject to extortion. A diffuse, unorganized group, none of whose members individually has a strong interest in an outcome - consumers of subsidized agricultural products, for example - presents an impossible target for extortion. There is no way for a representative to coerce contributions from them even if she wants to. n23

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n22. See Frank J. Sorauf, Inside Campaign Finance: Myths and Realities 6097 (1992). For an argument to the effect that extortion of this kind is always a danger in the absence of strict limits on legislative authority, see Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. Legal Stud. 101 (1987); see also Jamin Raskin & John Bonifaz, The Constitutional Imperative and Practical Superiority of Democratically Financed Elections, 94 Colum. L. Rev. 1160, 1176-77 (1994) (noting inordinate advantages of incumbency in campaign finance).

n23. See Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L.J. 31, 40 n.36 (1991); Fred S. McChesney, Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation, 20 J. Legal Stud. 73, 8589 (1991).

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In addition to those problems, extortion introduces the independent problem of unfairness to the contributors, or (in the case of firms who pass the costs through) to those who end up paying increased prices to underwrite the contributions. There are also likely to be allocative inefficiencies (because the effective cost of activities that lead to a person's being subject to

extortion will be artificially increased). These problems of unfairness and inefficiency would also be an appropriate target of campaign finance reform. Again, however, the problem of corruption is derivative from these problems. In fact, this is nearly the opposite of the way corruption is usually characterized: to the extent extortion is a concern, the goal of campaign finance reform becomes the protection of private moneyed interests from the democratic process instead of vice versa.

Somewhat surprisingly, there is little sentiment for reform on this ground. Most of those interested in campaign finance reform do not identify extortion as an evil. n24 Nor do those groups who are likely targets of extortion call for reform to eliminate it (at least in the United States). Indeed, one would expect to see agreements among rival groups not to give in to implicitly extortionate demands - in effect, a buyers' cartel in the market for political favors. Those groups (such as the railroad and trucking industry trade associations, in the example above) are often well-organized, and they often have repeated dealings with each other, so such an agreement would be relatively easy to enforce. But so far as I know, such agreements are not common. It may be that reaching and enforcing such agreements is in most cases too difficult, or it may be that the intermediary associations who distribute campaign contributions have interests at odds with those for whom they speak; a system in which there were fewer contributions exchanged for government action would [*1382] be one in which the intermediaries and their employees would be less important.

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n24. See Sorauf, supra note 22, at 6073, 9697.

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In any event, this is an independent respect in which corruption, so-called, is a derivative problem. At least some instances of potentially coerced contributions - such as the case of judges or adjudicatory officials - are surely worth trying to eliminate. In other instances the problem may or may not be severe enough to be worth attacking; one would have to know more about the magnitude of the problem and the possible solutions before reaching a firm conclusion. But in any event, we again will not have a good handle on the problem unless we recognize that it is not just an easy-to-condemn matter of officials enriching themselves by selling their offices, but rather a different and more complex issue.

In sum, corruption, in the sense of a system in which campaign contributions are exchanged for specific acts by representatives, is a derivative problem. It is a problem because of inequality, or because it promotes interest group politics, or because it can lead to the coercion of potential contributors. But outside the core case of officials with judicial or quasi-judicial authority, the problem of extortion is complex and its magnitude is uncertain. Interest group politics is endemic to democracy, and while a "corrupt" system of campaign finance almost certainly heightens it, the questions whether it is truly a problem and, if so, what should be done to reduce it, are fraught with theoretical and empirical difficulties.

The objective that remains, as a potentially clear-cut goal of campaign finance reform, is equality. It presents complexities of a different order from the questions of interest group politics. A strong argument can be made that -

contrary to Buckley v. Valeo - promoting equality in campaign finance is more consistent with democratic ideals (a stronger and simpler argument than could be made in the interest group context). But there are practical difficulties in implementing the ideal of equality, and there is ultimately a question whether the game of campaign finance reform will be worth the candle. I address those issues in the next section.

II. The Pursuit of Equality and the Problem of Cost

The counter-slogan to the Buckley v. Valeo dictum about equality - "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment" n25 - is, of course, "one person, one vote." That principle of equality, reformers say, should extend from actual voting to campaign finance. n26 [*1383]

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n25. 424 U.S. 1, 4849 (1976).

n26. See, e.g., David Cole, First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance, 9 Yale L. & Pol'y Rev. 236, 24344, 24748 (1991); Foley, supra note 10, at 123-125; Wright, supra note 9. The "one person, one vote" principle derives from Reynolds v. Sims, 377 U.S. 533, 55461 (1964).

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The analogy to reapportionment is on one level a powerful argument against Buckley; but on another level, it actually lends support to the conclusion the Supreme Court reached in that case. In any event, that analogy points to a theoretical way out of the conundrum of how to ensure that reforms enacted by the political branches actually promote equality instead of protecting incumbents. Whether this theoretical way out will materialize in practice is another matter. Finally, there are important questions, not yet fully answered, about whether a large-scale reform effort would be worth the expense.

A. Equality in Voting and Spending

As stated - the notion of equalizing "speech" that takes the form of campaign contributions and expenditures is "wholly foreign to the First Amendment" - the Buckley Court's dictum seems demonstrably incorrect. That is not to say the conclusion is wrong. Possibly the political branches should not be allowed to attempt equalization in this realm. But "one person; one vote" is indeed the decisive counterexample to the suggestion that the aspiration itself is foreign to the First Amendment.

We do not think of "one person, one vote" as an example of reducing the speech of some to enhance the relative speech of others, but that is only because the principle seems so natural. When legislatures were malapportioned, rural voters had a more effective voice than urban voters. Reapportionment reduced their influence to enhance the relative influence of others. We might

unreflectively say that the rural voters were deprived of voting power that was not rightfully theirs, while my ability to make a campaign contribution is rightfully mine unless the government has a good reason to take it away. But this formulation begs the question, of course. We have to explain why superior spending power is rightfully mine but superior voting power is not. If equalization is a legitimate (in fact mandatory) reason for rearranging voting rights, it is not clear why it is an illegitimate reason for rearranging other rights to political participation.

Needless to say, voting is not exactly the same thing as speech. But campaign contributions and expenditures are also not exactly the same thing as speech, and voting has much in common with campaign contributions. A campaign contribution or expenditure, like a vote, is in part an effort to influence the outcome of an election. A contribution or expenditure also has an expressive value, in the sense that people might value the opportunity to affirm their views by making a contribution even if the contribution is very unlikely to have any effect on outcomes. But voting, too, is a statement or affirmation of the voter's views. People's willingness to make relatively small contributions, even though the likely effect on the outcome is minimal, is parallel to the "voter's paradox" - [*1384] their willingness to vote even though the likely effect of their single vote is also minimal. n27

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n27. On the voter's paradox, see, e.g., Anthony Downs, *An Economic Theory of Democracy* 20776 (1957); Dennis C. Mueller, *The Voting Paradox*, in *Democracy and Public Choice* 77 (Charles K. Rowley ed., 1987).

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It might be objected that a vote is purely an artificial creation, while a contribution consists of the contributor's own money. The government may distribute its own artificial creations in a way designed to bring about equality, but it may not go so far in limiting how people use their own property in expressive activities. As stated, this objection overlooks the basic insight that property rights too are a creation of the state. n28 Property rights are created to serve certain purposes, and they are limited (by tax laws and the law of nuisance, for example) in order to promote certain objectives. There is no necessary reason that they cannot be limited further to promote political equality. It would not be "wholly foreign," or even mildly questionable, to argue for a progressive income tax on the ground that disparities of wealth can undermine democracy.

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n28. See, e.g., Cass R. Sunstein, *The Partial Constitution* 5053 (1993); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470, 490 (1923).

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Of course, it does not follow that the state is constitutionally entitled to do whatever it wants with property rights, any more than it can do whatever it wants with voting rights. In particular, one must not overstate the implications of the point that property rights are created by the state. It is certainly

plausible that the regulation of property affects certain interests in a way that the regulation of voting does not.

A common objection to campaign finance reform, for example, is that people differ not only in the amount of money they have but in the amount of other assets that might be valuable to a political campaign - celebrity, skill, cheap leisure time, and so on. If the use of money is to be regulated in a way that promotes equality, why shouldn't these other assets be regulated in the same way? n29 There are many possible answers, one of which, perhaps, is the autonomy value at stake. In a sense, the right to use one's skills or celebrity is also a state creation. The state could in theory forbid it, or could in theory (probably at very great cost) restructure the society and the economy so that that particular skill or form of celebrity is no longer valuable. But it would still be problematic for the state to restrict the use of skills or celebrity. Such a restriction would, at least arguably, burden people's autonomy in a way that restricting the use of money does not. By the same token, it might be argued, restricting the use of money in order to promote equality impairs autonomy interests in a way that equalizing votes does not. [*1385]

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n29. See, e.g., Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 Mich. L. Rev. 939, 948-9 (1985) (reviewing Elizabeth Drew, *Politics and Money: The New Road to Corruption* (1983)); see also Ackerman, *supra* note 15, at 76 (rejecting this argument for other reasons).

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This argument is difficult to evaluate, because what one perceives as an affront to one's autonomy depends in part on what one is accustomed to. If we are used to spending our money to support the candidate or position of our choice, being told that we can no longer do so will probably feel like an affront to our autonomy. But in the same way, when property qualifications on the franchise were removed, property holders who became less powerful might also have felt that an important aspect of their autonomy - their ability to exercise great influence over who was elected - was being infringed. Perhaps it does not follow automatically, from the constitutional requirement of "one person, one vote," that equality is mandatory in campaign finance. But contributions seem enough like votes to permit us to say that when equality is the constitutionally required distribution of one form of state-created rights used for political participation and expression, it is difficult to see why, as Buckley held, it should be a constitutionally forbidden aspiration for the regulation of another form of state-created rights - property rights - when used for those same purposes.

B. Reapportionment or Gerrymandering?

The problem with promoting equality in campaign finance occurs not at the level of aspiration, as the language from Buckley suggests, but at the level of institutional specifics. In particular, the problem is to design and implement a workable conception of equality without jeopardizing other values. "One person, one vote" is an example of just such a workable conception of equality. "One person, one vote" is not the necessary or inevitable rule for voting in a democracy. The critics of the early reapportionment decisions pointed this

out, n30 and nearly everyone accepts supermajority rules that are difficult to square with the "one person, one vote" principle. The great virtue of that principle is that it is a plausible account of democratic equality that is, relatively speaking, very easy to administer. The challenge for advocates of equality in campaign finance reform is to devise an analogue - a plausible conception of equality that is sufficiently clear that it does not open the door for abuses.

-Footnotes-

n30. See, e.g., 377 U.S. at 59091 (Harlan, J., dissenting).

-End Footnotes-

If "one person, one vote" shows why Buckley's dictum about equality is incorrect, then a different analogy to voting rights - gerrymandering - shows why Buckley's conclusion is not so easily rejected. Reapportionment, under the standard of "one person, one vote," has apparently been a success story, in the sense that there are no longer any grossly malapportioned legislatures. The experience with gerrymandering has been the opposite. It is notoriously difficult to define administrable standards to control gerrymandering. The result has been, by most accounts, a system in which incumbent protection is the order of the day. n31 Unless campaign finance reform reflects a clear and plausible conception of equality, we may well end up with the gerrymandering experience, rather than the reapportionment experience. That is, simply turning Congress loose to promote "equality," without providing a reasonably precise definition of what equality is, could just lead to measures that give even more protection to political incumbents or other favored interests. In fact it would be a little surprising if it did not lead to such a result.

-Footnotes-

n31. See, for some examples, Andrew P. Miller & Mark A. Packman, The Constitutionality of Political Gerrymandering: Davis v. Bandemer and Beyond, 4 J.L. & Pol. 697 (1988); Daniel D. Polsby & Robert D. Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale L. & Pol'y Rev. 301 (1991); Adam J. Chill, Note, The Fourteenth and Fifteenth Amendments With Respect to the Voting Franchise: A Constitutional Quandary, 25 Colum. J.L. & Soc. Probs. 645 (1992) (discussing Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991)). See also the essays collected in Political Gerrymandering and the Courts (Bernard Grofman ed., 1990).

-End Footnotes-

Buckley is sometimes said to represent a revival of the approach of Lochner v. New York. n32 So far as the dictum about equalization is concerned, the accusation seems mostly on the mark. But the more satisfactory understanding of the conclusion in Buckley - as opposed to the dictum about equality - is different. The point is not that the market ordering is, as the Lochner approach would have it, inviolate because it is theoretically optimal. The market ordering may be far from optimal in a theoretical sense. That is (this defense of Buckley would go), there is nothing intrinsically desirable about a system in which people who are willing to spend more have more influence over the

results of elections. The only thing to be said for that system is that the alternative - a legislative rearrangement of political participation rights according to an unenforceable criterion of equality - is likely to be worse. The market ordering is preferable not because it is theoretically good but because the market - which reflects the decisions of many people, acting for different purposes - is not subject to some of the evils that can result when a decision is made by a single, purposive actor like the government. n33

-Footnotes-

n32. 198 U.S. 45 (1905); see John Rawls, Political Liberalism 36263 (1993); David A.J. Richards, Toleration and the Constitution 219 (1986); Cass R. Sunstein, Democracy and the Problem of Free Speech 9798 (1993); Ackerman, supra note 15, at 7879.

n33. For a well-known general statement of this idea, see Friedrich A. Hayek, The Constitution of Liberty 2230 (1960).

-End Footnotes-

The crucial step in a justification for campaign finance reform designed to pursue equality, then, is to define a conception of equality that is plausible and reasonably easy to administer. An ounce of administrability is worth a pound of theoretical perfection. That is, even if the conception of equality is not especially good as an account of what political equality is, we might still accept it if it is easy to enforce as a constitutional standard to guard against incumbent protection and other abuses. So long as it is easy to administer, the only question is whether it is better than the market ordering: and there is no reason to think the market ordering is intrinsically good at all. [*1387]

In the end, however, the comparison with reapportionment may be a cause for pessimism. There is no shortage of proposals for relatively simple, administrable conceptions of equality that might apply to campaign finance reform. n34 But in the area of campaign finance reform, unlike reapportionment, there is little reason to think that the courts will be willing to take the lead and impose a benchmark of equality to which legislation must conform. The task may be too formidable, and today the federal judiciary, at least, seems disinclined to do something so adventuresome. The judicial role would have to be something quite different: it would be to insist that whatever reform measures the legislature adopts reflect not a grab-bag of plausible-sounding reforms - which could be an incumbent-protecting gerrymander - but rather a coherent and clear conception of equality. The realities of legislative politics may make such a coherent reform program difficult to enact. If so, then the choice would be between insisting on such a relatively coherent program, thus perhaps preventing any substantial reform, and risking reforms that protect incumbents and other insiders. That is not an easy choice.

-Footnotes-

n34. See, e.g., Dan Clawson et al., Money Talks: Corporate PACs and Political Influence 20012 (1992); Ackerman, supra note 15; Foley, supra note 10.

-End Footnotes-

C. The Problem of Cost

Finally, there is the question whether comprehensive campaign finance reform would be worth the cost. Many comprehensive reform proposals would require large expenditures of public funds. Today, of course, raising taxes is politically very difficult. If, for example, a billion dollars in taxes must be raised to finance a voucher plan for campaign contributions, n35 one has to ask whether there is not some better use for the money.

-Footnotes-

n35. See, e.g., Ackerman, supra note 15, at 73 (suggesting a \$ 10 voucher for each of the 130 million registered voters).

-End Footnotes-

The necessary accounting will be quite difficult. To begin with, while most funding today (the presidential campaign subsidy is the principal exception) is nominally voluntary, surely some of it is extorted in the sense I described earlier. People and groups contribute to candidates because they fear some action or inaction that will harm their economic interests. Some reform proposals (such as public financing) would limit the amount of such extortion that could go on. But whether that would make people willing to pay more in taxes is at least questionable. Some of the supposed victims of the extortion might prefer a system in which they must pay more in contributions but can be sure of favorable outcomes, to a system in which they pay more in taxes but must take their chances.

Perhaps more important, a necessary target of any egalitarian campaign finance reform is large contributions by wealthy individuals, which are unlikely to be an example of this kind of extortion. Contributions of [*1388] this kind are more likely to be truly voluntary, and to be made out of a desire to promote the individual's own political agenda. At the same time, for people to use their exceptionally large personal wealth to promote their private political agenda is the clearest breach of the "one person, one vote" ideal. Any reform scheme seeking to promote equality will, of necessity, substitute public, tax-raised money for these voluntary expenditures.

One likely effect of comprehensive campaign finance reform, therefore, will be to load an additional burden on a population already highly resistant to taxation. In the end, one would expect that burden to fall (for example in the form of cuts in public spending) on those least able to defend themselves in the political process.

In the abstract one might be inclined to say that the very health of the nation's political system is of course worth a billion dollars, indeed much more, even if that diverts tax revenues from other worthy uses. Moreover, campaign finance reform might result in substantial net savings, if it reduces wasteful public spending on projects fostered by interest groups. But then the question arises about just how much good reform will do. Here the two true targets of campaign finance reform - not corruption, but inequality and interest group politics - must be separated.

Reform proposals like vouchers, or other "one person, one dollar" schemes, certainly address the problem of inequality. But in order to decide whether they are worth the cost, one must determine how severe a problem this is. If there is a bias in the system toward the interests of the well-to-do, how pronounced is it, and how much of it is attributable to campaign contributions? That the wealthy make contributions does not by itself answer these questions. The contributions may offset each other, or they may not promote the distinctive interests of the wealthy. To the extent that the problem of inequality is that Hollywood stars make contributions so that candidates will promote environmental causes, that is not obviously a problem that needs to be remedied, whether or not the contributions are offset by those of wealthy business executives opposed to environmental regulation. The problem of inequality is more serious than that, but we need to know how serious it is in order to decide how much the cure is worth.

In addition to ascertaining how serious a problem inequality is, we have to determine how much of a difference campaign finance reform would make in correcting it. Here at least two considerations should not be overlooked. First, disclosure alone would provide some corrective. Few candidates want to be seen as catering to the rich, or to be vulnerable to attack on that ground. Second, and related, it is possible that even campaign finance reform would not significantly curb the capacity of wealthy people to influence candidates. There are many opportunities for the subtle use of wealth to gain influence - personal loans to candidates at below-market terms, advantageous investment opportunities, the use of vacation homes, the prospect of gifts from wealthy benefactors af [*1389] ter the official leaves office, and so on. If campaign contributions were restricted, both people with money and public officials would have an incentive to add to this list. Campaign contributions, publicly disclosed, are one of the cleaner ways in which influence is exerted.

To the extent the target of campaign finance reform is interest group politics, parallel questions arise. The first is whether the proposed reform will really change the interest group nature of politics. Even if citizens have equal resources to spend on politics, they may choose to give money to special interest groups, because the groups can spend the money more effectively. The groups will reflect the number and intensity of their contributors, rather than their wealth, but that will do little to prevent the familiar interest group problems from replicating themselves.

Moreover, even if money is taken out of the hands of individual citizens and distributed to candidates or parties directly (for example through a system of public financing), relatively small, intensely-interested groups will still have an advantage over larger, more diffusely-interested groups in organizing and delivering votes. Finally, there are the questions, which I canvassed earlier, about whether efforts to dampen the influence of interest groups will be on balance desirable. It is certainly possible that they will be, but until we know how effective such efforts will be, how desirable they are, and what the cost will be, we will not know whether reform is a good idea.

Conclusion

Most people recognize that the practical and institutional issues raised by proposals for campaign finance reform are very complex. The complexity of the theoretical issues, however, may be underrated. I have tried to suggest that corruption, understood as implicit exchanges of campaign contributions for official actions, is not in itself an appropriate target of campaign finance reform. Corruption, so understood, is a problem only to the extent that other things are problems: primarily inequality and the interest group character of politics, and secondarily the coercion of potential contributors.

Sometimes those who propose reforms are not entirely clear on which of these objectives they are pursuing. Moreover, none of these objectives is unproblematic; while inequality is certainly a problem in the abstract, we do not yet have a good sense of how severe a distortion it introduces into the political system, or of how far reforms can go in remedying it. The role of interest groups in politics may not be, on balance, a problem at all; and again, if it is, there is the question of how far one can attribute it to the way in which campaigns are financed. Campaign finance reform may be a worthy or even an imperative task. But if it proceeds without a good sense of its objectives, there is no reason to expect it to succeed.

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Columbia Law Review

MARCH, 1993

93 Colum. L. Rev. 374

LENGTH: 62584 words

ARTICLE: "WOMEN UNDERSTAND SO LITTLE, THEY CALL MY GOOD NATURE 'DECEIT'": A
FEMINIST RETHINKING OF SEDUCTION.

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-----Footnotes-----

* Assistant Professor of Law, Northwestern University School of Law. I owe special thanks to Jonathan Knee. For generous and thoughtful comments on earlier versions of this Article, I am also indebted to Ron Allen, Randy Barnett, Mary Becker, Lisa Brush, Mary Coombs, Mary Lou Fellows, Dirk Hartog, Linda Hirshman, Elena Kagan, Gary Lawson, Larry Marshall, Beth Mertz, Michelle Oberman, Richard Posner, Jon Rosenblum, Ray Solomon, Steve Schulhofer, Clyde Spillenger, Gerald Torres, Peter Yu, and the members of the Chicago Feminist Law Professors Colloquium. Lyn Schollett and Ann Springer provided intrepid research assistance. Finally, I gratefully acknowledge research support from the Bruce M. Gordon Fund of the Northwestern University School of Law.

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SUMMARY:

... In public piety we frown on seduction even as many secretly admire the seducer. ... I begin from the premise that sexual fraud leads to nonconsensual sex because it deprives the victim of control over her body and denies her meaningful sexual choice. ... Unlike the repressive sexual ideology that undergirded the Victorian seduction tort, the theory behind the modern tort of sexual fraud proposed here respects the broadest range of noncoercive sexual expression and will potentially increase the quality (and perhaps even the quantity) of sexual interaction. ... I argue for consent as a means and sexual autonomy as the end of a feminist sexual politics, and offer what I hope will be a useful discussion of the difficult relationship between ideal and reality, and between female desire and vulnerability, in feminist sexual thought. ...

TEXT:

[*375] INTRODUCTION

DONNA ELVIRA: What can you say after such a vile deed? In my house you enter furtively, and by dint of art, of promises and of charm you finally seduced my heart; you inspire me with love, oh, cruel one! You called me your wife, and then failing in the most sacred rights of heaven and earth, three days after, you leave Burgos, you abandon me, you avoid me, and leave me with remorse and my tears, for the sake, may be, of having loved you so much. . . .

DON GIOVANNI: Oh, as to this matter I had my reasons! . . . It is love. He who is faithful to one alone is cruel toward all the others. I, who feel in me such a big heart, I love them all. And because women understand so little, they call my good nature "deceit." n1

-Footnotes-

n1 Lorenzo da Ponte, Don Giovanni, act 1, sc. 2; id. act 2, sc. 1 (music by Wolfgang Amadeus Mozart, Marie-Therese Paquin trans., Les Presses de l'Universite de Montreal 1974) [hereinafter Don Giovanni].

-End Footnotes-

In public piety we frown on seduction even as many secretly admire the seducer. In Mozart's opera, Don Giovanni, the Don is a scoundrel but still the opera's hero. Perserving against all obstacles, inventive in his strategies, clever at detecting and exploiting his victim's complicity or foolishness, the Don seduces the opera audience into guilty admiration. His servant, Leporello, brags in the famous "Catalogue" aria to Donna Elvira about the Don's exploits as a seducer:

You are not, you were not, and you will not be the first nor the last; look here, this not small book filled with the names of his fair ones; every town, every village, every country, is witness to his feminine ventures. Little lady, this is the catalogue of the Ladies that my master has loved. It is a catalogue that I have made myself. Observe, read it with me. In Italy, 640; in Germany, 231; 100 in France; in Turkey, 91; but in Spain, there are already 1003! n2

-Footnotes-

n2 Id. act 1, sc. 2.

-End Footnotes-

Watching Mozart's opera, a lighthearted account of three of the Don's many Spanish seductions, we find ourselves judging the seducer by his own standards, however unfeeling to the women involved. Don Giovanni's audience does not find him an especially sympathetic character, nor does Mozart portray the Don as the exemplar of right moral [*376] conduct. n3 Rather, the Don's sexual obsession, amorality, and voracity seem like a force of nature crashing against the cultural seawalls of manners and morality, sweeping up and stranding women in its wake. His sexual cruelty takes on the qualities of the cruelty of nature -- lawless and unstoppable, thrilling for its vitality, yet ruthless in its disregard for the human bulwarks of religion, morality, society, and law. The message of the opera is that men's sexual exploitation of women, although cruel, is an irremediable fact of nature. Don Giovanni exemplifies our culture's predominant narrative of seduction: "In the waste of sensuality, boredom, compulsion," critic Elizabeth Hardwick tells us, "the Don never shows love or pity for the women. That we soon accept, aesthetically, as the frame of the plot of his existence; we are then free to go the next step with him." n4

-Footnotes-

n3 The Don Juan figure is a morally complex and ambiguous image of male sexuality, unusual in its revelation of the spiritual poverty as well as the

sensual pleasures of sexual aggression. Don Juan mingles the sexual freedom of the outlaw, the social unaccountability of a member of the dominant class ("How can I believe a nobleman guilty of such a crime?" asks the fiance of Donna Anna when she tells him that she was raped), and the emotional emptiness of the obsessive or addict. The seduction narrative of which Don Juan is the hero/anti-hero itself embodies a volatile mix of cultural tensions, pitting nature against culture, man against woman, individual against community, and liberty against order. The opposition of these forces marks Don Juan and the seduction narrative as products of classical liberalism, for which these specific dualities are definitional. See Roberto Unger, Knowledge and Politics 191-235 (1976).

n4 Elizabeth Hardwick, Seduction and Betrayal: Women and Literature 175, 178 (rev. ed. 1990).

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But what of the seducer's victims? In contrast to our intense fascination with the seducer in this story, our response to the seduced women is pale and confused. The opera's audience feels not only pity but also secret contempt for the oft-betrayed Donna Elvira. We do not want to identify with her. We grow impatient with her naivete and gullibility, her tears and wails, her slowness to realize when she is once again being taken in by the Don. "Why does she keep believing his lies?" we wonder. "Why doesn't she better protect herself?" In silent judgment we conclude, "She is either a hopeless fool or she secretly wants to be seduced."

Hours later, as the spell of the opera wears off, perhaps we wonder, "Why so little compassion for Donna Elvira?" Don Giovanni deliberately lies to Elvira, and so changes her life forever, and for the worse. Because Elvira believes false promises, she is intimate with a man plainly unsuited to her. By his betrayal, she is humiliated and diminished as a person, and the course of her life is forever changed. Not even Mozart's beloved happy ending offers much hope for Donna Elvira: In the opera's last scene, both Donna Anna -- raped by Don Giovanni, her father's murderer -- and Zerlina -- whom the Don attempts to seduce, only to be thwarted by the efforts of others -- plan to marry. Donna Elvira -- seduced and abandoned by the Don -- goes to a [*377] convent. n5

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n5 Don Giovanni, act 2, sc. 5.

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Similar themes appear in the literary genre of the nineteenth-century novel. In their classic accounts of seduction and betrayal, many of these novels retell Donna Elvira's story with a much deeper narrative engagement with the experience of the seduced woman. Yet the sense of inevitability about women's destruction through sex carries through from Mozart's opera to the novels. Hardwick calls this canonical story of seduction "the plot of sex and its destructive force for women . . . a pattern of social destiny, deeply woven into the cloth of life." n6 Seduction leads to public exposure of the liaison (often because of a pregnancy), and quickly thereafter to the lover's abandonment of the woman he has seduced. This betrayal seals her fate. The seduced woman is exiled from respectable society, left alone to face the often devastating consequences of

sexual relations.

-Footnotes-

n6 Hardwick, supra note 4, at 206.

-End Footnotes-

In the great novels of seduction, this fate (like Donna Elvira's) is miserable and pitiable. The seduced woman murders her lover and is executed. n7 She kills her baby and is exiled to a penal colony. n8 Her baby dies and she becomes a drunken and impoverished prostitute. n9 She is imprisoned as a sexual criminal. n10 She is forced to marry a much older man whom she does not love in order to hide her pregnancy. n11 She kills herself. n12

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n7 Tess in Thomas Hardy, *Tess of the d'Urbervilles* 377, 390 (Bantam Books 1984) (1891).

n8 Hetty Sorel in George Eliot, *Adam Bede* 379-80 (John Paterson ed., Houghton Mifflin Co. 1968) (1859).

n9 Maslova in Leo Tolstoy, *Resurrection* 25, 27 (Rosemary Edmonds trans., Penguin Books 1985) (1899).

n10 Hester Prynne in Nathaniel Hawthorne, *The Scarlet Letter* 38 (Harcourt Brace Jovanovich 1984) (1850).

n11 Charity Royall in Edith Wharton, *Summer* 260-78 (Harper & Row 1979) (1918).

n12 Anna Karenina in Leo Tolstoy, *Anna Karenina* 695 (George Gibian ed., Louis Maude & Aylmer Maude trans., W.W. Norton & Co. 1970) (1878).

-End Footnotes-

The grim destiny of seduced women in the novels is to suffer social disgrace and isolation. This, we are told, is a woman's sexual fate. n13 Equally inevitable is that the men suffer few sexual consequences. The seducer remains welcome in respectable society, his reputation and prospects intact. Sex neither determines a man's fate nor burdens his future. At most, the woman's seducer feels regret or guilt when he learns of the misery to which his brief, thoughtless sexual passion has [*378] brought her. n14 More commonly, however, he feels hounded or trapped by the threat of moral accountability the seduced woman comes to represent. n15

-Footnotes-

n13 This harsh message was even more bluntly conveyed in nineteenth-century literature of less lasting artistic merit. Barbara Welter documents the morality that prevailed in the highly popular magazine short stories and romance novels of the era, in which social humiliation, depravity, illness, madness, spiritual decline, and even death awaited the young woman who indulged in sex before marriage. See Barbara Welter, *The Cult of True Womanhood, 1820-1860*,

18 Am. Q. 151, 154-59 (1966).

n14 See, e.g., Prince Nekhlyudov in Tolstoy, supra note 9, at 95-96; Alexander D'Urberville in Hardy, supra note 7, at 301-02.

n15 See, e.g., Lucius Harney in Wharton, supra note 11, at 229-30; Reverend Dimmesdale in Hawthorne, supra note 10, at 138; Count Vronsky in Tolstoy, supra note 12, at 669; Captain Arthur Donnithorne in Eliot, supra note 8, at 367-68.

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Should we have expected a different story from the nineteenth-century novel than from Mozart's opera? n16 Many nineteenth-century writers in the seduction genre favored female emancipation, n17 and the topic of seduction allowed them openly to criticize the dominant constructions of gender and sexuality in their societies. n18 Yet even as these writers convey deep sympathy for the seduced female characters in their novels, the feelings the novels invoke in the reader are more of pity than of outrage. Aware of the social condemnation facing women who broke with convention, these authors dramatize the sense of inevitability about sexual exploitation that blunted their societies' moral judgment of seduction as a form of sexual conduct. n19 Whereas it is a woman's fate in these novels to be destroyed by sex, it is a man's prerogative to escape its consequences. The seduction narrative thus naturalizes [*379] men's sexual exploitation of women as part of the sexual difference itself.

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n16 Opera has been described as a genre of stories that glorify female destruction:

[O]n the opera stage women perpetually sing their eternal undoing. . . . Little by little, dead women, suffering women, women who are torn, have appeared before me; it was like an immense plot coming out of the depths of time, created to make one see these women preyed on by their womanhood, adored and hated, figures who simulate a society that is all too real. . . . Opera concerns women. No, there is no feminist version; no, there is no liberation. Quite the contrary: they suffer, they cry, they die. . . . Not one of them escapes with her life, or very few of them do. Catherine Clement, Opera, or the Undoing of Women 5, 9, 11 (Betsy Wing trans., Univ. of Minn. Press 1988) (1979).

n17 See Sandra M. Gilbert & Susan Gubar, The Madwoman in the Attic: The Woman Writer and the Nineteenth-Century Literary Imagination 82-83 (1984).

n18 Writing in the first decades of the twentieth century, Virginia Woolf, for example, used the seduction motif to protest the historical silencing of women writers. In her imagined story of "Shakespeare's sister," Woolf fantasizes that "Judith Shakespeare" shared her brother Will's talent and, like him, ran away to London to become a poet-playwright. In London, however, Woolf predicts very different fates for Judith and Will. Finding that her only access to the theater is through a sexual relationship with the stage-manager, Judith would be seduced, become pregnant, then kill herself. Woolf bitterly asks, "[W]ho shall measure the heat and violence of the poet's heart when caught and tangled in a woman's body?" Virginia Woolf, A Room of One's Own 46-48 (1981) (1929).

n19 Sandra Gilbert and Susan Gubar observe that Victorian women novelists seem unable to imagine workable solutions to the problems of patriarchal oppression that their novels so vividly illustrate. In the novels of Charlotte Bronte, for example, they note that the "indecisive endings" of both Jane Eyre and Villette suggest that Bronte "was able to act out that passionate drive toward freedom which offended agents of the status quo, but in none [of her novels] was she able consciously to define the full meaning of achieved freedom. . . ." Gilbert & Gubar, supra note 17, at 369.

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Resignation to sexual fate, then, forms the denouement of the canonical seduction story. The seduced woman becomes a heroine if she bears her suffering stoically n20 -- or dies, a still more exalted fate. n21 If she struggles against her fate, protesting her treatment or seeking to call her seducer to account, she seems undignified, even comic, like Mozart's Donna Elvira. The message is clear: Women are to suffer in silence the consequences of sex, while men must get on with their lives.

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n20 For example, in Hawthorne, supra note 10, Hester Prynne accepts her lover's abandonment, the birth of her illegitimate child, imprisonment, and the sentence to wear the letter A on her breast like a martyr. The novel suggests that she is chosen either by God or by fate to bear this unusual hardship, touched, as Elizabeth Hardwick puts it, by a "strange and striking stardom." Hardwick, supra note 4, at 180.

n21 See, e.g., Tess in Hardy, supra note 7, at 387-90; Anna Karenina in Tolstoy, supra note 12, at 809-16.

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Like the ambivalent strains of the seduction narrative in literature and opera, the legal treatment of seduction in the nineteenth and twentieth centuries has reflected a tension between acquiescence and condemnation. Although seduction has been regarded as morally wrong, any effort to stop it threatens to upset the existing balance of power between women and men, as well as that between individuals and the state. At common law, seduction was a tort carrying with it the risk of substantial civil damages; some jurisdictions made seduction a crime. Nineteenth-century feminists embraced opposition to seduction as a political cause, seeing in the fate of "ruined" women an instance of the hypocrisy of a society that demanded sexual restraint from women while condoning the sexual misconduct of men. Since at least the 1930s, however, the tort of seduction has come to represent an outdated sexual puritanism. Contemporary American society encourages sexual responsiveness rather than sexual restraint in women, and birth control and abortion have lowered the social costs to women of nonmarital sexual activity. Now that women are expected to be sexual, and sex involves fewer (or at least less visible) life-changing consequences, n22 condemnation of seduction has lost both popular support and its political constituency among feminists. Not surprisingly, cultural messages about the inevitability of lies and betrayal in sex are again influential. n23

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n22 In the past decade, growing awareness of the risks of sexually transmitted disease has begun to renew the fear of sexual consequences.

n23 See, e.g., Shulamith Gold, Don Juan in Court: Would Reviving Seduction Suits Keep Lovers Honest?, Chic. Trib., Jan. 5, 1993, @ 5, at 1 ("Don't these feminists know that everything in romance is lying and delusion and that judgment goes out the window in sexual matters?") (quoting Camille Paglia).

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In this Article, I seek to reinvigorate the debate over seduction and to redefine the boundaries of sexual coercion by reconceiving seduction as a viable tort. Sexual fraud, as I have named the tort for modern [*380] purposes, is an act of intentional, harmful misrepresentation made for the purpose of gaining another's consent to sexual relations. Throughout this Article, I use the term "fraud" in this precise legal sense, not as the term is sometimes loosely used to refer to other, vaguely wrongful behavior. My purpose is to craft a legal vehicle that will address the physical and emotional injuries caused by deceptive inducement into sex. I begin from the premise that sexual fraud leads to nonconsensual sex because it deprives the victim of control over her body and denies her meaningful sexual choice. Like other sexual acts that are not fully consensual, sex induced by fraud has the potential to cause grave physical and emotional injury.

In proposing the tort of sexual fraud, however, my goal is not only to compensate genuine injuries. I also hope to strengthen the theoretical underpinnings of a larger feminist agenda -- one that cultivates women's sexual autonomy -- and to challenge and reshape commonplace and accepted sexual values and practices. The theory of sexual fraud strengthens the principle that the exercise of consent is the proper boundary between lawful and unlawful sexual conduct. At the same time, it highlights personal security and freedom of action as the indispensable foundation for an approach to legal regulation that nurtures rather than represses sexual expression. More broadly, the theory challenges the adversarial image of sexual relations between women and men that currently prevails in the law, n24 and counterposes a model of mutuality and reciprocity in the form of a minimal obligation to deal fairly and honestly with a sexual partner. Unlike the repressive sexual ideology that undergirded the Victorian seduction tort, the theory behind the modern tort of sexual fraud proposed here respects the broadest range of noncoercive sexual expression and will potentially increase the quality (and perhaps even the quantity) of sexual interaction.

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n24 Because the image of sexual relations prevalent in the law is almost exclusively heterosexual, my discussion of sex in this Article focuses on male-female sex. By this emphasis, I do not wish to imply that "sex" necessarily means "heterosex." See Sexual Orientation and the Law, at Intro.-1 to Intro.-2 (Roberta Achtenberg et al. eds., 5th ed. 1992) (describing harm caused by lesbians and gays' invisibility in legal system). Lesbian and gay sexual relationships have their own dynamics and differ in important and varied ways from heterosexual relationships. Respecting this difference, I make no attempt here to determine the extent to which the adversarial model of

relationship I critique in this Article also characterizes sexual relationships between lesbian women and between gay men. The tort proposed in this Article, however, is not inherently restricted to male-female relationships, and it may apply equally to fraudulent same-sex interactions.

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By taking a fresh look at feminists' historical attitudes toward the seduction tort, Part I disrupts the simplistic belief that the tort is inextricably linked with the sexual repression of women. The complex historical evolution in the legal treatment of seduction shows that a modern tort of sexual fraud need not entail a sexist, paternalist, or repressive [*381] ideology. Part II explores the theoretical implications of my proposal. I argue that our existing system of adjudication can adequately identify the absence of authentic consent required under my theory of sexual fraud. The current legal regime lacks not a conceptual foundation for addressing the problem, but rather a willingness to compensate what are misperceived as practically irreparable injuries. Finally, by adapting the model of the existing tort of intentional misrepresentation, Part III shows how the theory of sexual fraud can be translated into the language of a cause of action. The well-developed body of misrepresentation law provides a flexible and balanced tool for compensating the injuries that are the natural and proximate result of deceptive coercion into sex. Most importantly, the practicability of my theory serves to reemphasize this Article's larger argument: Contemporary feminists must begin the work of crafting a sexually nonrepressive, yet interventionist, regime of sexual regulation in the interests of women.

I. THE TORT OF SEDUCTION: A FEMINIST HISTORY

By drawing on unexamined assumptions about the history of the seduction tort, many observers mistakenly conclude that legal remedies cannot advance authentically feminist and "pro-sex" ends. Although the common law tort of seduction and the modern sexual fraud action rest on discrete theories of legal wrong, they are understandably linked in the minds of both lawyers and the public. Popular understanding of the idea of deception into sex as a legal wrong remains fixed on a set of historical artifacts: the nineteenth-century narrative of seduction shaped by Victorian repression of women's sexual passion and independence, and the suffocating paternalist regime of sexual regulation that protected only those women who presented themselves as innocent, helpless victims. Because of these encrusted notions, feminists naturally fear that revival of a related legal remedy may reactivate a latent cultural prudishness, thereby undermining women's sexual autonomy and sexual tolerance in the society at large.

An understanding of seduction in its shifting social and historical contexts should largely assuage such fears. The identification of the tort of sexual fraud with women's passivity and with hostility to sex is not a necessary one, but rather reflects the convergence of contingent social and historical forces. At different historical junctures, feminists have been both advocates of the seduction action and among its most influential opponents. The "feminist" position on sexual deception has thus been neither unanimous nor static over 150 years of organized women's political activism in the United States. Rather, feminist strategies against women's sexual abuse and subordination have changed along with the surrounding sexual, political, and legal cultures. Neither support for nor opposition to efforts to regulate sexual fraud can be

[*382] unambiguously linked with progress or decline in women's social status and sexual autonomy.

By untangling the seduction tort from its negative historical associations, I hope to make possible a reconception of the tort from a fresh theoretical perspective consistent with current social and sexual conditions. Like the law of rape, the seduction tort developed as a means to enforce men's property interests in women's bodies and sexuality. n25 Over time, however, the concept of rape evolved into legal recognition of a woman's right to control sexual access to her body. Despite the patriarchal, property-based origins of the law of rape, feminists have been a major force in reconceiving rape as an injury to the bodily integrity, sexual autonomy, and personal dignity of women. n26 With this Article, I advance a parallel theoretical rethinking and restructuring of legal remedies for seduction, arguing for a new and decidedly feminist understanding of the tort.

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n25 The evolution of the law of rape and seduction are strikingly parallel. See James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* 148, 209-10 (1987). Roman law (and the parallel prohibitions in the canon law) originally considered "rape" to denote the abduction of a daughter without her father's consent. Under this definition, if a woman was forced to have sexual relations with a man against her will (but with her father's proper consent), she was not raped. Likewise, if a woman willingly eloped with her lover, but the couple could not gain her father's consent to marriage, the act was by law a rape. Thus the historical focus of the crime of rape was on the damage done to the household or to the father's authority rather than on the personal injury suffered by the victim. See *id.* at 48. Under the law of classical Athens, seduction was actually a worse offense than rape because the wrongful sexual act at issue engaged the emotions as well as the body of the appropriated daughter or wife. See *id.* at 13-14.

n26 The first suggestion in Western law that rape represented a personal injury to the woman herself occurred in the twelfth century, when the canon law (the roots of the common law of sexual crimes) recognized a distinction between rape and seduction. See Brundage, *supra* note 25, at 249.

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A. The Common Law Tort of Seduction

1. Fathers and Daughters. -- Although the tort of seduction arose in property law, it evolved in the nineteenth and twentieth centuries into a hybrid of family and tort law. The origins of the action for seduction lie in the Roman law notion that some individuals may hold property interests in the bodies and sexuality of others. n27 The seduction action exemplified the proprietary character of master-servant law, which allowed a master to sue someone who injured his servant (defined to include his child) for loss of services. n28 By the mid-seventeenth century [*383] in Britain, a father's common-law right to sue his daughter's seducer -- typically, when a pregnancy had resulted -- was established under this "loss of services" framework. n29

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n27 See Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 Mich. L. Rev. 177, 179-81 (1916).

n28 Seduction originates in the common law action to recover loss of services (action "per quod servitium amisit") for the master's loss when another person enticed away or beat his servant. See 3 William Blackstone, *Commentaries on the Laws of England* 139-42 (U. Chi. Press 1979) (1768). As master of the family, the father had a legal right to claim the household labor of his children. Thus a father could sue his daughter's lover for having deprived him of her services, in the same sense as with any of his other servants. See 8 W.W. Holdsworth, *A History of English Law* 428 (1926). If the father was dead or absent, other persons acting in a parental capacity could bring the seduction action, including female persons such as a widowed mother. See M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 Law & Ineq. J. 33, 36-37, 41-45 (1987).

n29 See 8 Holdsworth, *supra* note 28, at 428; Sinclair, *supra* note 28, at 35.

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A working-class family faced serious financial hardship when an unmarried daughter earning wages outside the home became pregnant and lost her income. Moreover, because access to the marriage market was economically crucial for women, the daughter's loss of opportunity to marry was of still greater consequence. n30 As a result, working-class and poor families brought the greater number of seduction actions. n31 Nineteenth-century seduction plaintiffs thus sought both a remedy for economic loss and a recompense for injured social status.

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n30 Working women rarely earned a living wage in the eighteenth and nineteenth centuries. See Barbara M. Wertheimer, *We Were There: The Story of Working Women in America* 102-03 (1977). An unmarried mother without assistance from her birth family (or from charity) could not support herself at respectable work. Unmarried mothers often were forced into prostitution, see *id.*; to have abortions, see John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 64 (1988); or to commit infanticide, see Constance B. Backhouse, *Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada*, 34 U. Toronto L.J. 447, 448 (1984). See generally John R. Gillis, *Servants, Sexual Relations and the Risk of Illegitimacy in London, 1801-1900*, in *Sex and Class in Women's History* 114 (J. Newton et al. eds., 1983) (discussing economic hardship of single mothers in Victorian Britain); Rachel G. Fuchs, *Poor and Pregnant in Paris: Strategies for Survival in the Nineteenth Century* (1992) (same for France).

n31 See Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* 61-62 (1991) [hereinafter Backhouse, *Petticoats and Prejudice*]. Some of the best research on seduction in nineteenth-century common law has been done by Professor Backhouse, who focuses on the Canadian experience. Most of the provinces of Canada, like virtually all the states of the United States, were part of the Anglo-American common-law system. Moreover, nineteenth-century Canada shared with the United States, Britain, and Australia a "Victorian" culture embodying distinctive views of sexuality and sex roles. Extending across national borders, Victorian values were shared by