Individual Rights And Government Power In Collision: A Look At Rust V. Sullivan Through The Lens Of Power Analysis

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INDIVIDUAL RIGHTS AND GOVERNMENT POWER IN COLLISION: A LOOK AT RUST V. SULLIVAN THROUGH THE LENS OF POWER ANALYSIS

In Rust v. Sullivan¹ the Supreme Court upheld regulations forbidding abortion counseling in clinics receiving family planning grants.² The Rust decision provoked controversy in part because it limited a doctor's ability freely and fully to advise a patient and it limited a patient's ability to obtain medical information.³ The controversy over the Rust decision rests on the tension between congressional spending power and individual constitutional liberties.⁴ In this arena government has dual roles. On the one hand government must exercise power in order to govern as the representative of the collective political will. On the other hand government must ensure that its exercise of power does not erode the individual citizen's constitutional rights. Tension between government power and constitutional liberties is constant and inevitable.

The Rust decision selects a particular balance between government power and individual rights. However, neither the decision nor the preceding legal discourse explains why the balance should be struck as it was, or as the Rust opponents would have it. The analytical models used by either side in the controversy, the unconstitutional conditions doctrine and the rational basis test of spending power, fail in two ways.⁵ First, they apply labels

³. See ABA Backs Law to End Ban On Clinics' Abortion Advice, WASH. POST, Aug. 14, 1991, at A4 (reporting that American Bar Association unanimously voted to support legislation ensuring that federally funded health clinics could provide full information on medical options relating to pregnancy, including information on abortion); Walter Dellinger, Gag Me with A Rule, NEW REPUBLIC Jan. 6 & 13, 1992, at 14 (criticizing Rust Court for deferring to administrative interpretation that raised constitutional questions and that was contrary to congressional intent); Bradley Miller, Big Nanny Is Watching You: Do the Right Thing, the Court's Way, WASH. POST, June 2, 1991, at D1 (describing Rust decision as Court attempt to dictate morality in contravention of individual rights); Nat Hentoff, A Muzzle on Medicine, WASH. POST, June 1, 1991, at A23 (criticizing Rust decision as inconsistent with traditional protection of doctor/patient speech). By votes of 73-24 in the Senate, 137 CONG. REC. S16124-25 (daily ed. Nov. 7, 1991), and 272-156 in the House, 137 CONG. REC. H9445 (daily ed. Nov. 6, 1991), Congress passed an appropriation bill prohibiting use of funds to enforce the Title X regulations. President Bush vetoed the legislation on November 19, 1991 and the House failed to override. 171 CONG. REC. H10,491, H10,492 (daily ed. Nov. 19, 1991); see generally Carole I. Chervin, Note, The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?, 41 STAN. L. REV. 401 (1989) (arguing that Title X regulations are statutorily invalid, violate First Amendment speech rights of grantees, clinic employees, and patients, and violate Fifth Amendment privacy right of patients to choose abortions). Chervin's commentary predated the Supreme Court's decision in Rust.
⁴. In Rust the precise government power at issue was that of the executive, not of Congress, and of the judiciary to review executive policy in constitutional areas.
⁵. See infra Part II.A (describing analytical failure of unconstitutional conditions doctrine and rational basis test).
rather than analysis and therefore produce inconsistent and illogical results.6 Second, and more fundamentally, the unconstitutional conditions doctrine and the rational basis test miss the issue by focusing on discrete, isolated elements of government power and individual rights rather than on the dynamics of the relationship between the two.7 Government power and citizen autonomy are interdependent and reciprocal; as one changes, so must the other.

This Note suggests a different analytical framework that focuses on the dynamics of the relationship between government power and individual rights and the central role of expression in that relationship. The suggested framework is power analysis, developed in the disciplines of political science and sociology to study the nature and strength of power relationships in social settings ranging in scale from the intimate to the national.8 Power analysis reaches behind the label of doctrine to assess real power and autonomy. Part I of this Note chronicles the Rust legal controversy. Part II examines the analytical failures of the unconstitutional conditions doctrine and the rational basis test of spending power, and offers power analysis as an alternative. The power analysis framework permits genuine analysis and recognizes the critical role of freedom of expression and information in the distribution of power. Part III uses power analysis to describe the effect of the Rust decision on the balance between government power and individual rights inside a clinic receiving federal family planning grants. Part IV applies power analysis to other examples of government intervention, contrasting those power landscapes and legal outcomes to Rust. Part V concludes that Rust goes further than the comparison cases to enhance government power at the cost of individual rights, and offers an observation and a suggestion. The observation is that Rust is not an aberration, but a trend. The suggestion is that power analysis is an appropriate way to monitor the balance between government power and individual liberties, particularly when legal discourse becomes polarized and conclusory.

I. THE RUST DECISION

The Rust dispute involved a complex interplay of congressional spending power, the implementation powers of the executive, and the interpretive powers of the judiciary. The precise government power at issue was that of the executive. An executive agency issued regulations construing a federal statute in a way that raised constitutional questions.9 In 1988 the Secretary

6. See infra notes 59-69 and accompanying text (describing illogical results produced by unconstitutional conditions doctrine and rational basis test).
7. See infra note 70 and accompanying text (describing government power and individual liberty as interdependent and mutually-affecting).
9. Rust v. Sullivan, 111 S. Ct. 1759, 1771 (1991). Ordinarily the Court defers to an agency interpretation of a statute that Congress has authorized it to administer, so long as
of Health and Human Services (HHS) issued new regulations governing Title X family planning grants.\textsuperscript{10} Congress had enacted Title X as part of the Public Health Services Act of 1970 (Act)\textsuperscript{11} in order to give grants to family planning projects offering a broad range of services.\textsuperscript{12} Section 1008 of the Act provided that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."\textsuperscript{13} From enactment of the Act until 1988, Congress and HHS had interpreted the Act to allow grant recipients to offer neutral counseling about abortion as long as the counseling did not have the immediate effect of promoting abortion.\textsuperscript{14}
The 1988 regulations made four fundamental changes. First, they changed the definition of "Title X project funds" to include clinic matching funds and income as well as federal funds, and they changed the definition of "family planning" to exclude pregnancy care and postconception services. Because the regulations applied to the use of "Title X project funds," they applied to private as well as federal funds. Second, the regulations prohibited projects receiving Title X grants from providing any counseling on abortion as a method of family planning, and they required grant recipients to refer pregnant patients to other providers of medical and social services who were either neutral regarding abortion or prochildbirth. Third, the regulations

pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:
- Prenatal care and delivery
- Infant care, foster care, or adoption
- Pregnancy termination.

Id. (emphasis in original). Several times prior to 1988 Congress rejected legislation that would restrict abortion counseling in Title X clinics. See 120 Cong. Rec. 21,687-95 (1974) (stating rejection by House of proposed Title X amendment that would prohibit direct or indirect use of fund for abortion referrals, inter alia); 121 Cong. Rec. 20,863-64 (1975) (stating rejection by House of proposed Title X amendment that would prohibit payment for, promotion, or encouragement of abortions by grantees); 124 Cong. Rec. 37,045 (1978) (stating rejection by House of proposed amendment to Title X that would prohibit grants to entities providing abortions or abortion counseling or referrals).

15. 42 C.F.R. § 59.2 (1991). The regulations provide: "Title X program and Title X project . . . mean the identified program which is approved by the Secretary for support under . . . the Act . . . Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds." Id.

16. 42 C.F.R. § 59.2 (1991). The regulations provide: Family planning means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. . . . Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion.

Id.

17. 42 C.F.R. § 59.8 (1991). The regulations provide:
(a)(1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral
prohibited projects from using "Title X project funds," both federal and private,\textsuperscript{18} for lobbying, disseminating information, and engaging in activities that advocate abortion as a method of family planning.\textsuperscript{19} Fourth, the regulations required complete physical and financial separation of Title X projects from organizations engaging in prohibited activities, including separate financial records, facilities, and personnel.\textsuperscript{20} As a practical matter, the regulations required clinics receiving grants to refrain from abortion counseling,\textsuperscript{21} even with private funds,\textsuperscript{22} and required the clinics to give all providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by 'steering' clients to providers who offer abortion as a method of family planning.

\textit{Id.}

18. \textit{See supra} note 15 and accompanying text (discussing redefinition in HHS regulations of "Title X project funds" to encompass private funds, including clinic matching funds and income).

19. 42 C.F.R. § 59.10 (1991). The regulations provide:

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating materials (including printed matter an audiovisual materials) advocating abortion as a method of family planning.

\textit{Id.}

20. 42 C.F.R. § 59.9 (1991). The regulations provide:

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and § 59.8 [prohibiting counseling and referral for abortion services] and § 59.10 [prohibiting activities that encourage, promote or advocate abortion] of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. . . . Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (e.g., treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the title X project are present and signs and material promoting abortion are absent.

\textit{Id.}

21. \textit{See supra} note 17 and accompanying text (discussing prohibition of abortion counseling in HHS regulations).

22. \textit{See supra} note 15 and accompanying text (discussing redefinition of "Title X project funds" to include private clinic funds).
pregnant patients referral information biased toward childbirth.23

Opponents24 of the regulations challenged on First and Fifth Amendment grounds.25 They claimed that the regulations imposed content-discriminatory censorship on recipient clinics and their staffs.26 In a dissenting opinion cited by other circuits, Judge Kearse of the Second Circuit Court of Appeals concluded that because of the combination of mandated probirth information and prohibited abortion information, the regulations facially discriminated on the basis of viewpoint and controlled the content of the grantee's speech.27 Opponents of the regulations argued that whatever the extent of

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23. See supra note 17 and accompanying text (discussing requirement in HHS regulations that recipient clinics refer pregnant patients for prenatal services only).


25. Planned Parenthood, 680 F. Supp at 1467; Massachusetts v. Bowen, 679 F. Supp. at 140; New York v. Bowen, 690 F. Supp. at 1264. In addition to claiming that the regulations violated the First and Fifth Amendments, the challengers claimed that the regulations were invalid on statutory grounds. Planned Parenthood, 680 F. Supp. at 542; Massachusetts v. Bowen, 679 F. Supp. at 140; New York v. Bowen, 690 F .Supp. at 1264. See Rust v. Sullivan, 111 S. Ct. 1759, 1778-80 (1991) (Blackmun, J., dissenting) (arguing that regulations were impermissible construction of statute because they raised constitutional questions where plainly constitutional construction was available); id. at 1788-89 (O'Connor, J., dissenting) (same); id. at 1786-88 (Stevens, J., dissenting) (arguing that regulations were impermissible because they conflicted with unambiguous meaning of statute).


Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds.

... The regulations are also clearly viewpoint-based. While suppressing speech favorable to abortion with one hand, the Secretary compels anti-abortion speech with the other.

Id.
the government's power to condition funding, that power stopped short of imposing conditions that discriminate on the basis of speech content or viewpoint.28

Opponents also argued that the regulations violated the patient's Fifth Amendment liberty interest in choosing whether to continue or terminate her pregnancy.29 The regulations erected an obstacle to a woman's freedom to choose abortion because they interfered with the doctor-patient dialogue, keeping the woman in ignorance of her options regarding appropriate medical care.30 Because the regulations constrained private as well as public funds,31 opponents concluded that the patient was in a worse position than if the government had refrained from providing any subsidies.32 In the absence of government subsidies, according to the opponents, those private funds would be available to provide abortion counseling to the patient.33

In a five-to-four decision, the Supreme Court upheld the regulations.34 Writing for the Court, Chief Justice Rehnquist argued that the regulations

28. Rust, 111 S. Ct. at 1780 (Blackmun, J., dissenting); Planned Parenthood v. Sullivan, 913 F.2d at 1503. See also Massachusetts v. HHS, 899 F.2d at 72-75 (arguing that conditioned public benefit interfering with freedom of speech must pass strict scrutiny test and concluding that new HHS regulations did not pass test).


30. Rust, 111 S. Ct at 1784-86 (Blackmun, J., dissenting); Planned Parenthood v. Sullivan, 913 F.2d at 1500-01; Massachusetts v. HHS, 899 F.2d at 69-70; New York v. Sullivan, 889 F.2d at 417 (Kearse, J., dissenting) aff'd sub nom. Rust v. Sullivan, 111 S. Ct. 1759 (1991). Opponents argued that Roe v. Wade, 410 U.S. 113 (1973) (invalidating state law prohibiting abortions as unduly burdensome on constitutionally protected right to decide to terminate pregnancy), Maher v. Roe, 432 U.S. 464 (1977) (upholding state regulation denying state Medicaid funds for certain medically necessary abortions as not infringing on right to choose abortion), and Harris v. McRae, 448 U.S. 297 (1980) (upholding federal statute denying federal Medicaid funds for certain medically necessary abortions as not infringing on right to choose abortion), established a woman's right to be free of government interference with her decision whether to terminate or continue her pregnancy. Opponents also argued that government manipulation of the doctor-patient dialogue constituted impermissible government interference following Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (invalidating city ordinance requiring doctors to recite cautionary statements to abortion patients as unconstitutional interference with doctor-patient dialogue and with patient's right to decide on abortion) and Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (invalidating state statute requiring doctors to give abortion patients fetal development information and list of agencies providing abortion alternatives as unconstitutional interference with doctor-patient dialogue and with patient's right to decide on abortion).

31. See supra note 15 and accompanying text (discussing redefinition of "Title X project funds" to encompass private funds, including clinic matching funds and income).

32. Massachusetts v. Secretary of HHS, 899 F.2d 53, 70 (1st Cir. 1990) (concluding that by not only refusing to fund abortions, but also restricting nongovernmental money for abortion services, new HHS regulations create additional obstruction to exercise of woman's right to reproductive choice). Besides restricting the amount of private money available to support abortion counseling, the regulations also leave a woman in a worse position because clients pay for clinic services according to income, and therefore clients depart a clinic with reduced ability to purchase other services. Planned Parenthood v. Sullivan, 913 F.2d at 1500.

33. Massachusetts v. HHS, 899 F.2d at 70.

did not interfere with First or Fifth Amendment rights but merely declined to subsidize the exercise of those rights. The Chief Justice rejected the claim that the regulations imposed a viewpoint-discriminatory condition on receipt of a government benefit. Chief Justice Rehnquist concluded instead that the regulations were a legitimate means of implementing a government value judgment to favor and subsidize one activity—family planning services leading to conception and childbirth—and not to favor or subsidize an-

Souter joined in the Chief Justice Rehnquist's opinion for the Court. Id. Justices Blackmun, Marshall, Stevens, and O'Connor dissented. Id.

35. Rust 111 S. Ct. at 1772, 1776-77. The Court relied on Maher v. Roe, 432 U.S. 464 (1977), Harris v. McRae, 448 U.S. 297 (1980), and Webster v. Reproductive Health Services, 492 U.S. 490 (1989) for the proposition that the government decision to fund childbirth services but not abortion services does not violate either the First Amendment right of free speech or the Fifth Amendment right to choose abortion. Rust, 111 S. Ct. at 1776-78. In Maher and Harris the Court upheld laws denying Medicaid funding of certain medically necessary abortions, reasoning that a government value judgment to fund childbirth but not abortion did not infringe on a woman's right to choose abortion. Maher, 432 U.S. at 474; Harris, 448 U.S. at 315; see supra note 30 (discussing use of Maher and Harris by opponents of regulations for proposition that woman has right to be free of government interference with decision whether to terminate pregnancy). Neither Maher nor Harris raised First Amendment issues. In Webster the Court upheld a Missouri law prohibiting the use of public facilities or employees to perform abortions. Webster, 492 U.S. at 499. The law at issue also prohibited the use of public funds, employees, and facilities for encouraging or counseling abortions not necessary to save the client's life. Mo. Rev. Stat. §§ 188.205, 188.210, 188.215 (1986). The Eighth Circuit Court of Appeals struck down this portion of the law, as well as the portion relating to performance of abortions. Reproductive Health Service v. Webster, 851 F.2d 1071, 1079 (8th Cir. 1988), rev'd Webster v. Reproductive Health Services, 492 U.S. 490 (1989). Missouri did not appeal the circuit court decision regarding the use of public facilities and employees for abortion counseling. Webster, 492 U.S. at 503-04. In its appeal of the decision regarding the use of public funds, Missouri stated that the law was directed not at any health care provider, public or private, but rather at those responsible for expending public funds. Id. Therefore, the Webster Court did not address the question of whether the state law could constitutionally prohibit use of publicly subsidized facilities and employees for abortion counseling.

The Rust Court also relied on Regan v. Taxation With Representation, 461 U.S. 540 (1983), for the proposition that the government's refusal to subsidize a right does not infringe that right. Rust, 111 S. Ct. at 1772-75. In Regan the Court upheld a statute that denied tax deductions for contributions to organizations that lobby but granted deductions for contributions to nonlobbying organizations and to any veterans' organizations. Regan, 461 U.S. at 546-49. The Regan Court noted that because the statute allowed a lobbying organization to isolate its lobbying activity in a distinct corporate structure, thereby preserving tax deductibility for contributions for nonlobbying activities, the statute merely represented Congress' refusal to subsidize lobbying and did not unduly burden the First Amendment right of free speech. Id. at 544-47. The Rust Court reasoned that the HHS regulations followed the tax provision in Regan, allowing Title X projects to set up separate organizations to engage in abortion counseling that the government chose not to subsidize, while retaining eligibility for Title X grants for organizations not engaging in abortion counseling. Rust, 111 S. Ct. at 1775. But cf. Rust, 111 S. Ct. at 1780-82 (Blackmun, J. dissenting) (arguing that Regan is inapposite to Rust because Regan rested on content neutrality of lobbying ban, whereas HHS regulations discriminate on basis of viewpoint); Massachusetts v. HHS, 899 F.2d 53, 74-75 (same).

36. Rust, 111 S. Ct. at 1772.
other—promotion or encouragement of abortion. According to the Chief Justice, the regulations did not impose an unconstitutional condition on receipt of grant funds because the regulations did not require clinics or staffs to forsake abortion counseling but only required that such speech be separate from funded activities. Clinic operators and staff members remained free to discuss abortion at other times and in other places, outside the Title X program.

It did not matter, according to Chief Justice Rehnquist, that the regulations imposed the speech restriction on privately funded clinic activities, because the clinics were free to decline the Title X funds. As for clinic employees, Chief Justice Rehnquist argued that the restriction on abortion speech did not involve their First Amendment rights because the restriction was a condition of voluntary employment and applied only at the worksite. The Chief Justice noted that there might be exceptions to the government’s power to control speech through funding conditions, even though speech outside the funded project remains unfettered. One such exception, according to the Chief Justice, might be funding conditions that impinge on the doctor-patient relationship. However, the Chief Justice declined to decided the matter, concluding that the HHS regulations did not impinge on the doctor-patient relationship. Chief Justice Rehnquist reasoned that the regulations did not require doctors to represent any opinion as their own, and that, because the program provided only family planning services, the relationship between clinic doctors and clinic patients was not sufficiently all-encompassing to lead the patient to expect comprehensive medical advice.

37. Id.
38. Id. at 1775.
39. Id. at 1774-75.
42. Rust, 111 S. Ct. at 1776.
43. Id.
44. Id.
45. Id.
46. Id. But see infra notes 114-15 (citing arguments that clinic patient is likely to rely on doctor’s statements as complete and unbiased); infra notes 93-95 and accompanying text (describing state law and professional ethical requirement that doctor fully inform patient of treatment options).
Neither did the Chief Justice find affirmative government interference with the Fifth Amendment right of clinic clients to choose abortions. The Chief Justice reasoned that the government has no duty to subsidize the exercise of a right. Further, according to the Chief Justice, the government places no obstacle in the path of a woman by subsidizing childbirth but not abortion because the refusal to subsidize abortion leaves the woman in no worse position than if the government had chosen to subsidize nothing. Nor did The Chief Justice accept the related argument that, because they interfered with the doctor-patient relationship, the regulations violated a woman's Fifth Amendment right to make informed medical choices. The HHS regulations, Chief Justice Rehnquist reasoned, left unfettered doctor-patient communications outside the Title X program. The Chief Justice noted that clinic patients might find it difficult to go elsewhere for abortion information, but that difficulty was the result of their poverty and not of any state-imposed obstacle. The Chief Justice again concluded that the regulations leave patients no worse off than if the government had not enacted Title X, and therefore did not violate Fifth Amendment rights.

II. Power Analysis

A. Context: The Failure of Familiar Approaches

The arguments of Chief Justice Rehnquist and of opponents of the Rust opinion reveal a polarized dispute in which both sides advocate legal characterizations, each well-supported by precedent. The opponents characterize the regulations as imposing an unconstitutional condition on receipt of a government benefit. The proponents characterize the regulations as

48. Id. at 1776; see supra note 35 and accompanying text (describing Rust Court's reasoning that government has no duty to subsidize exercise of constitutional right).
49. Rust, 111 S. Ct. at 1776-77. But see supra notes 31-33 and accompanying text (describing increased availability of privately-funded services in absence of Title X restrictions).
50. Rust, 111 S. Ct. at 1777-78. Rehnquist distinguished Rust from Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) and Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983), on the basis that these cases imposed communication requirements on all doctors, whether or not they received public funds. Id. at 1777. In contrast, according to Rehnquist, the Rust regulations did not interfere with doctor-patient communications outside the federally subsidized program. Id. But see supra note 30 (discussing opponents' use of Thornburgh and Akron for proposition that government interference with doctor-patient dialogue constituted government interference with right to choose abortion).
51. Rust, 111 S. Ct. at 1777.
52. Id. at 1778.
53. Id.
54. See Alvaro I. Inillo, Note, The National Endowment for the Humanities: Control of Funding Versus Academic Freedom, 45 Vand. L. Rev. 455, 478-79 (1992) (arguing that Rust narrows unconstitutional conditions doctrine but leaves intact constitutional protection against suppression of dangerous ideas); Gary A. Winters, Note, Unconstitutional Conditions
reasonably related to implementation of a legitimate legislative program.\textsuperscript{55} Neither approach is satisfying. They produce inconsistent and illogical results, and, like the blind men and the elephant, they examine pieces rather than the whole.

The \textit{Rust} opponents invoke the unconstitutional conditions doctrine, arguing that government may not condition a benefit on forsaking a constitutional right,\textsuperscript{56} or at least may not do so without compelling reason.\textsuperscript{57} Otherwise, government could eradicate individual rights through inducement or coercion when it could not constitutionally restrict those rights by direct regulation.\textsuperscript{58} The doctrine fails as an analytical tool because it offers no consistent method of deciding whether a government interest is sufficiently compelling, and therefore produces inconsistent results.\textsuperscript{59} The \textit{Rust} opponents used the doctrine to argue that executive responsibility for fiscal and

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\textsuperscript{55} See \textit{supra} note 37 and accompanying text (presenting majority argument in \textit{Rust} that regulations were legitimate means of implementing legitimate government policy).


\textsuperscript{57} \textit{Rust}, 111 S. Ct at 1783-84 (Blackmun, J. dissenting); \textit{Massachusetts v. HHS}, 899 F.2d at 73. See \textit{Fuhr, supra} note 56, at 213 (describing Court's weighing of government interests in imposing conditions impinging on constitutional rights).

\textsuperscript{58} \textit{Perry v. Sindermann}, 408 U.S. 593, 597 (1972); \textit{Frost v. Railroad Comm'n}, 271 U.S. 583, 594 (1926). The \textit{Frost} Court said, "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." \textit{Id.} See \textit{Fuhr, supra} note 56, at 209-10 (describing fundamental question in unconstitutional conditions cases as why government should be able to indirectly achieve waiver of constitutional right when it may not directly limit right without compelling reason); \textit{Sunstein, supra} note 40, at 601 (describing heart of unconstitutional conditions doctrine as principal that government may not do indirectly what it may not do directly).

\textsuperscript{59} \textit{See Fuhr, supra} note 56, at 213 (describing weakness of unconstitutional conditions doctrine as inconsistent analysis of whether condition is permissible).
substantive control of government programs was not a sufficiently compelling justification for government restraint of workplace speech in subsidized programs. However, in other circumstances the Court has applied the doctrine to hold that promoting the efficiency and facial neutrality of the public service is sufficiently compelling to justify government restraint of the private political activities of its employees. By itself, the doctrine does not explain why workplace efficiency justifies restriction of private political participation, but program control does not justify restriction of workplace speech and activities.

The rational basis test of spending power used by the proponents of Rust is also an inadequate analytical tool. Under this test, government may impose conditions on public benefits as long as the conditions reasonably relate to the purpose of the benefit and do not aim primarily at suppressing ideas, and as long as acceptance of the benefit is voluntary. One shortcoming of this test is that it imposes no limits on what constitutes a reasonable relationship between the condition and government purpose. In an earlier case the Court stretched “reasonably related” to encompass the attenuated connection between a state's drinking age and a federal purpose to promote construction of a national highway system. The Rust Court found that the condition that Title X grant recipients refrain from certain unsubsidized activities was a reasonable implementation of the government’s right to fund one activity but not another. On this reasoning, the fact of any government subsidy provides a sufficient basis for prohibiting the recipient from engaging in unsubsidized activities, including unsubsidized speech.

A second shortcoming of the rational basis test is that it imposes no practical limit on the meaning of the term “voluntary.” The rationale of the voluntariness standard is that as long as an individual is free to decline

60. Rust, 111 S. Ct. at 1783-84 (Blackmun, J., dissenting).
62. FCC v. League of Women Voters, 468 U.S. 364, 407 (1984) (Rehnquist, J., dissenting). According to then-Justice Rehnquist, “[W]hen the Government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that it is not primarily aimed at the suppression of dangerous ideas.” Id. (citation omitted). See Rust v. Sullivan, 111 S.Ct. 1759, 1772-73 (1991) (finding reasonable relationship between funding condition and program purpose, and concluding that regulations do not aim at suppression of dangerous ideas).
63. See Rust, 111 S. Ct. at 1775, 1775 n.5 (describing acceptance as voluntary on part of grant recipients and their employees).
65. Rust, 111 S. Ct. at 1772-73.
66. See id. (arguing that government may prohibit grantee from engaging in activities outside program scope because “[w]ithin far broader limits than petitioners are willing to concede, when the government appropriates public funds to establish a program it is entitled to define the limits of that program”).
a government benefit, a condition requiring waiver of a constitutional right is not coercive. However, when government subsidies reach virtually all essential services, the term "voluntary" loses its meaning. The *Rust* Court is disingenuous in describing as voluntary an employee's decision to refrain from certain speech rather than forego the benefit of keeping her job.

Both the spending power rational basis test and the unconstitutional conditions doctrine share a more fundamental analytical failure. Both are flawed by tunnel vision; they look at discrete, isolated pieces of constitutional rights and government power rather than at the dynamics of the reciprocal relationship between rights and government power. The question concerns the allocation of power, and the allocation is dynamic; a change in the kind or amount of power held by either the government or the individual changes the kind and amount of power held by the other. An adequate analytical framework will encompass this dynamic relationship and will account for forces contributing to changes in it, particularly the very pervasive role of information.

**B. A New Approach: Power Analysis**

The framers of the Bill of Rights recognized the interconnection between power and information: the free speech guarantee of the First Amendment restrains government power and protects citizen political autonomy by preventing government interference with the free flow of information.

67. Fuhr, supra note 56, at 214-15; see *Rust v. Sullivan*, 111 S. Ct. 1759, 1775, 1775 n.5, 1777-78 (1991) (describing Title X grant recipients, employees, and patients as free to decline benefits of government grants). *But see Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (describing benefit granted or denied based on exercise of constitutional rights as penalizing and inhibiting right); *supra* note 40 (citing commentary critical of voluntariness standard); sources cited *infra* note 68 (criticizing distinction between voluntariness and coercion).

68. See *Fuhr*, supra note 56, at 214-15 (describing failure of characterizations based on offer or threat to distinguish between constitutional and unconstitutional conditions on government benefits); Sullivan, *supra* note 40, at 1451-56 (arguing that pervasiveness of government activity and government monopoly over some essential services increases coerciveness of conditioned government benefits); Sunstein, *supra* note 40, at 604 (arguing that distinction between subsidies and penalties fades in light of omnipresent government funding).

69. See *Rust*, 111 S. Ct. at 1775 (describing speech restrictions on clinic employees as condition of voluntary employment).

70. See *Mark G. Yudof, When Government Speaks* 23-24 (1983) (arguing that communication is essential element of organization and action and that communication and control between government and individuals is dynamic and mutually affecting); see *also* Leedes, *supra* note 9, at 112-120 (criticizing *Rust* decision for exacerbating concentration of power in politically unaccountable bureaucracies that disempower individual and advocating discourse ethics model of open, moral communication and participation in policy decisions).

71. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (reasoning that First Amendment protects freedom of discussion about all matters on which individuals need information); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (arguing that "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.")); *David S. Bogen, Bulwark of Liberty:*...
Commentators and courts have recognized that government interference with information and expression can undermine citizen political autonomy. In the same way, freedom of expression and the subsequent free flow of information underlie any citizen liberty or right of decision, and government restriction of information and expression poses a threat to liberty. The connection between information and individual autonomy is the basis for the Court's decision in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council. The Virginia Pharmacy Court struck down a state

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72. See Janet Benshoof, The Chastity Act: Government Manipulation of Abortion Information and the First Amendment, 101 Harv. L. Rev. 1916, 1923 (1988) (arguing that First Amendment is check on government indoctrination which undermines democratic self-governance and individual liberty); Farber, supra note 26, at 556-62 (using economic analysis to draw connection between free speech and information, particularly political information, as public good); Yuroff, supra note 70, at 6-12 (summarizing dangers government expression poses for democratic process); supra note 71 (listing cases and source that recognize government interference with expression as threat to liberty). Benshoof examines government-mandated information bias under the Adolescent Family Life Act (Act). Id. The Act provided grants for programs serving adolescents, and required grantees to stress sexual abstinence and adoption and to refrain from counseling about abortion. Id. at 1917-18. Benshoof argues that the speech restrictions constituted unconstitutional censorship and viewpoint discrimination aimed at a particularly vulnerable population. Id. at 1923, 1925-26. Benshoof concludes that the government information manipulation denied women the right to make informed choices and denied the democratic process the benefits of free and open debate. Id. at 1936.

73. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (noting First Amendment purpose to preserve free marketplace of ideas). The Red Lion Court said: It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC. Id. See supra notes 71-72 (citing cases and sources that recognize government interference with expression as threat to liberty).

statute prohibiting pharmacists from advertising prescription drug prices, reasoning that the free flow of price information was essential to intelligent and well-informed private economic decisions.\textsuperscript{75}

The English sociologist Steven Lukes has developed a model of power analysis comprehensive enough to encompass both the dynamic relationship between government power and individual rights and the special role of expression and information in creating and limiting power.\textsuperscript{76} Lukes’s framework traces power in three dimensions: decisional power, agenda power, and manipulative power.\textsuperscript{77} The first dimension, decisional power, is the ability to decide the outcome of an issue in conflict.\textsuperscript{78} This dimension of power supports the concept of democratic pluralism in which persons of equal individual power join together to form blocks of greater or lesser power based on membership size.\textsuperscript{79} Lukes’s second dimension, agenda power, is the ability to determine what issues will and will not be raised for decision.\textsuperscript{80} To the extent that A has agenda power over B, A can negate B’s first dimension power to make decisions by foreclosing B’s decision

\textsuperscript{75} Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976). The Virginia Pharmacy Court reasoned that even purely commercial speech contributes to the public interest in free flowing information because such information is essential to intelligent opinions relevant to self-governance as well as to private economic decisions. \textit{Id.} at 763-65.

\textsuperscript{76} Lukes, supra note 8. Lukes defines power as follows: “A exercises power over B when A affects B in a manner contrary to B’s interests.” \textit{Id.} at 27 (citation omitted).

\textsuperscript{77} Id. at 11-45. Lukes labels the power dimensions “first,” “second,” and “third,” rather than “decisional,” “agenda,” and “manipulative.” The latter terms, used here for clarity and convenience, also convey simplicity and mutual exclusion inconsistent with Lukes’ conception of the three dimensions. Lukes’ three dimensions are not discrete, but rather are overlapping and interactive aspects of a dynamic power system. \textit{Id.} at 27. See John Gaventa, \textit{Power and Powerlessness}, 20-25 (1982) (describing interrelationships among Lukes’ three dimensions of power).


\textsuperscript{79} Lukes, supra note 8, at 11-12. See Polsby, supra note 78, at 123-32 (arguing that apparent concentration of decision making among elite leaders masks underlying participation by community members in policy decisions).

making opportunities. A special aspect of these two dimensions of power is that they function in circumstances of overt conflict.

Unlike decisional and agenda power, third dimension power does not operate in a climate of conflict, but rather prevents circumstances of overt conflict from occurring by creating a manipulated consensus. Manipulative power is the ability to shape the wants and perceptions of another. This power operates primarily through manipulation of information. Third dimension power is the most effective form of power because it insidiously gains the support, or at least the neutrality, of others even to their own detriment. A, by manipulating B's perceptions, can eviscerate any power that B might have to contribute to the agenda or make decisions.

An example will illustrate Lukes's power analysis. In 1976 when California voters were about to vote on a referendum on commercial nuclear power, the United States Energy Research and Development Administration (ERDA) produced and distributed to voters thousands of pamphlets designed to influence voters with misleading information about nuclear reactor safety. In this situation the voters as a group held the first dimension power of the ballot. More accurately, those voters who were members of the majority held first dimension power to decide the outcome. Although it is not clear who held second dimension power to get the issue on the decisional agenda or to exclude other issues, it is likely that some group of citizens, helped or hindered by government institutions, exercised enough agenda power to force the referendum. ERDA tried to exercise third dimension power to shape the perceptions of the voters. It distributed biased information under circumstances that were likely to induce belief in the audience. ERDA was a government agency with specialized knowledge, so its pamphlets carried the authority of official, and thus apparently neutral, expertise. However, much other information reached the voters through other communication channels at no cost to the voter. Therefore, in spite of its efforts, ERDA

81. BACHRACH & BARANTZ, POWER AND POVERTY, supra note 80, at 7, quoted in Lukes, supra note 8, at 16.
82. Lukes, supra note 8, at 15, 20.
83. Id. at 23.
84. Id. According to Lukes, "A may exercise power over B by getting him to do what he does not want to do, but he also exercises power over him by influencing, shaping or determining his very wants." Id. See GAVENTA, supra note 77, at 68-81 (explaining absence of rebellion among appalachian miners, in spite of brutal exploitation by mine operators, on basis of mine operators' and regional government entities' exercise of third dimension power).
85. Lukes, supra note 8, at 23. Lukes identifies control of information, the mass media, and socialization as three examples of third dimension power in action. Id. See GAVENTA, supra note 77, at 15-20 (discussing mechanisms of third dimension power including information control and psychological adaptations to powerlessness).
86. Lukes, supra note 8, at 23-24.
87. Id.
88. Zeigler, supra note 71, at 583 (relying on U.S. ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION, SHEDDING LIGHT ON FACTS ABOUT NUCLEAR ENERGY (1976), reproduced in GENERAL ACCOUNTING OFFICE REPORT No. B-130961 (Sept. 30, 1976)).
was unlikely to have exercised enough third dimension manipulative power to undermine the right of voters to decide how to vote.

This example also illustrates that third dimension power to manipulate perceptions and decisions rests on control of information and increases under two conditions. First, third dimension power increases along with increases in monopoly control of expression, either through control of the channels of expression or through control of the source of relevant information. A monopoly may exist as to some listeners because of the cost or risk of seeking other information. For example, the ban on price advertising in *Virginia Pharmacy* did not prohibit customers from going from pharmacy to pharmacy to learn and compare prices. However, individualized comparison shopping carries a cost in effort, time, and possibly risk to the health of a customer in immediate need of a prescription. Therefore, even though other sources were available, the customer’s local pharmacy held some monopoly control of price information. The second condition increasing third dimension power is an aura of trustworthiness attached to information. When the speaker is respected, holds official authority, is an expert, or is otherwise likely to induce belief, the speaker has greater power to shape the perceptions of the listeners.

III. POWER ANALYSIS OF A TITLE X CLINIC

Power analysis allows one to look inside a Title X clinic and to identify the nature and amount of power allocated to each participant in a doctor-patient consultation. The analysis focuses on the right of the patient to decide her treatment, her first dimension decisional power. The analysis necessarily examines another right, that of the doctor to decide what to say during the consultation, because the patient’s power to decide depends on what her doctor tells her. As long as the patient retains first dimension decisional power, she retains a real right to choose her medical treatment.

Prior to *Rust*, the legal relationship between doctor and patient rested on the common-law principles of ethical professional practice embodied in the informed consent doctrine. This doctrine encompassed two interde-
pendent principles. First, the patient had a right to make her own medical decisions with the advice of her doctor, and second, her decisions did not constitute valid consent unless she understood reasonable medical alternatives and risks. The doctor had a legal and ethical duty to fully inform her of medical alternatives and risks even when the doctor did not perform the medical treatment, but rather referred the patient elsewhere. The primary federal role in the doctor-patient relationship prior to Rust was providing subsidies for certain treatments and services.

Whether the patient held real first dimension power to decide her treatment depended on the distribution and operation of agenda power and manipulative power, which turned on freedom of expression and on practical


94. See Cruzan, 110 S. Ct. at 2847-48 (recognizing patient's right of self-determination in medical decisionmaking); Thornburgh, 476 U.S. at 759 (invalidating state requirements relating to abortion as state "effort to deter a woman from making a decision that, with her physician, is hers to make"); Akron 462 U.S. at 433-44 (invalidating city requirements interfering with doctor's duty to inform abortion patients and constituting government effort to influence woman's informed choice); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 (1976) (upholding state requirement that patient give written consent for abortion because state had legitimate interest in ensuring patient's full knowledge and consent); sources cited supra note 93 (supporting legal consent doctrine).

95. See sources cited supra notes 93-94 (supporting informed consent doctrine).


97. President's Commission, supra note 93, at 2; AMA, Current Opinions of the Council on Ethical and Judicial Affairs 8.08 (1992) (hereinafter AMA) (stating that doctor has ethical obligation to help patient make choices from among therapeutic alternatives consistent with good medical practice).

98. See Schroeder v. Perkel, 432 A.2d 834, 839-40 (N.J. 1981) (holding that pediatrician of child with hereditary disease had duty to inform parents that future children were at risk, even though pediatrician would not have provided prenatal medical care); AMA, supra note 97, at 3.05 (imposing full ethical duties on doctor even though doctor chooses to limit practice to specialized services).

99. See Harris v. McRae, 448 U.S. 297, 312-26 (1980) (upholding congressional authority to refuse Medicaid funding for certain abortions); see also supra note 35 and accompanying text (describing government authority to subsidize one activity but not another, even when unsubsidized activity is constitutionally protected).
availability of and control over information. For the patient, the clinic doctor held a monopoly on information relevant to her decision. The relevant information was specialized and patient-specific, so the patient could not obtain it by visiting a library or talking to neighbors. Only a doctor could give it to her. A patient could see alternative doctors only by incurring significant economic cost and potential health risk of delayed treatment. Further, the speech of the doctor had a high degree of apparent trustworthiness. The doctor was an expert bound by law and ethics to look after the interests of the patient. The combination of monopoly control of information and apparent trustworthiness gave the doctor second dimension power to set the patient’s agenda of treatment choices and third dimension power to manipulate the patient’s decision.

However, government intervention under the traditional informed consent doctrine limited the doctor’s ability to exercise third dimension power by undermining the doctor’s information monopoly. State law required the doctor to set an agenda broad enough to encompass all reasonable treatments and to convey information sufficient for the patient to understand her options and make an informed decision. Although the doctor had broad discretion to express recommendations and preferences, the law required the doctor to convey complete, factually neutral information relevant to the patient’s decision. The purpose and effect of government intervention in doctor-patient expression was to enhance the patient’s autonomy in deciding her treatment.

In contrast, government intervention in medical expression under Rust does not mitigate the potential effects of third dimension power, but instead forces the doctor to exercise second and third dimension power in a way contrary to the patient’s real interests. The federal government now has

100. See supra part II.B (describing interrelationships of first, second, and third dimension power and role of information).
101. See Planned Parenthood Fed’n of America v. Sullivan, 913 F.2d 1492, 1500-01 (10th Cir. 1990) (noting that Title X patients are unlikely to possess adequate medical knowledge about abortion and have no access to such knowledge outside Title X clinics).
102. See Massachusetts v. HHS, 899 F.2d 53, 67, 70 (1st Cir. 1990) (noting that some Title X patients cannot obtain abortion information outside Title X clinics and that clinic fee schedules increase with patient’s capacity to pay, thereby diminishing patient’s ability to obtain other medical services).
103. See Rust v. Sullivan, 111 S. Ct. 1759, 1785 (1991) (Blackmun, J., dissenting) (noting that doctor-patient relationship embodies special trust and that patient relies on information from doctor as complete and in patient’s best interest); Planned Parenthood v. Sullivan, 913 F.2d at 1500 (arguing that statutory promise of comprehensive family planning services lures women into using Title X clinics and into relying on clinic advice as complete).
104. See supra notes 93-94 and accompanying text (describing informed consent doctrine as mandating that doctor inform patient of relevant information and treatments).
105. See supra notes 83-91 and accompanying text (describing second and third dimension power and role of information).
106. See supra notes 93-95 and accompanying text (describing doctor’s duties under informed consent doctrine).
107. It is significant to questions of federalism that the Rust decision shifted power to
Rust-approved power, if it chooses to provide a partial subsidy of medical services, to promote one treatment option by requiring the doctor both to present information favorable to that option and to refrain from discussing other options. Doctors providing all-encompassing medical services might be immune under the First Amendment, but “all-encompassing” service may be a difficult standard to meet. In Rust, “a broad range of acceptable and effective family planning methods and services” was insufficiently all-encompassing to invoke First Amendment protection. The doctor’s duty to disclose options and relevant information under state law and professional ethics still exists but is limited to those areas not governed by federal funding conditions.

Under these circumstances the government uses the doctor’s monopoly control of information and apparent trustworthiness for the purpose of manipulating the patient’s decision. The patient remains vulnerable to this power for the same reasons that she was vulnerable before Rust. The agenda and information biases are invisible to the patient. As the patient listens to her doctor speak, she has no reason to suspect that the doctor is concealing information about a treatment that might better serve her interests or promoting a treatment that the doctor may not believe is best.

Regulate doctor-patient communication from the states to the federal government. See infra note 112 (describing HHS position that regulations supersede conflicting state law). However, from the perspective of the patient manipulated by third dimension power, it matters little whether the manipulator is a state or nation.

108. See supra notes 36-41 and accompanying text (describing Rust reasoning allowing speech conditions on grant recipients and employees of subsidized programs); supra notes 65-66 and accompanying text (describing reach of rational basis test encompassing funding conditions that prohibit unsubsidized activities).

109. See supra notes 42-43 and accompanying text (describing Court dictum implying special first amendment protection against speech-based funding conditions for certain doctor-patient relationships).


111. See supra notes 44-47 and accompanying text (describing Court reasoning that Title X clinic doctors did not provide sufficiently all-encompassing services to create doctor-patient relationship warranting special first amendment protection from funding conditions affecting speech).

112. Public comments filed on the proposed regulations included objections based on the regulations’ conflict with state laws regarding informed consent. 53 Fed. Reg. 2928-29 (1988). The Secretary of HHS dispensed with these objections by saying that to the extent the regulations were inconsistent with state law, the regulations would prevail under the supremacy clause. 53 Fed. Reg. 2933 (1988).

113. The government made clear its intent to prevent abortions, stating, “Family planning, as supported under this subpart, should reduce the incidence of abortion.” 42 C.F.R. § 59.2 (1988). See Rust v. Sullivan, 111 S. Ct. 1759, 1785 (1991) (Blackmun, J. dissenting) (noting that “[i]t is crystal clear that the aim of the challenged provisions—an aim that the majority cannot escape noticing—is not simply to ensure that federal funds are not used to perform abortions, but to reduce the incidence of abortion’’).

114. See Planned Parenthood Fed’n of America v. Sullivan, 913 F.2d 1492, 1501 n.3 (10th Cir. 1990) (arguing that in context of neutral medical consultation, doctor’s failure to mention one treatment option may cause patient to conclude option is not legal or medically appropriate).
circumstances of the consultation room induce the patient to believe and rely on her doctor's statements.115 Even if the patient suspects that other information and treatments might be available, she has no way to find out about them without incurring cost and risk.116 For poor patients there are no second opinions and no private doctors.117 Therefore, the patient's first dimension power to decide treatment is illusory.118

115. See id. (noting patient's likely reliance on doctor's statements and omissions to fairly represent legal and medical options); Rust v. Sullivan, 111 S. Ct. 1759, 1785 (1991) (Blackmun, J., dissenting) (noting that patient is likely to rely on doctor's statements as fully representing her medical options). Justice Blackmun argued:

Although her physician's words, in fact, are strictly controlled by the Government and wholly unrelated to her particular medical situation, the Title X client will reasonably construe them as professional advice to forgo her right to obtain an abortion... The specialized nature of medical science and the emotional distress often attendant to health-related decisions requires that patients place their complete confidence, and often their very lives, in the hands of medical professionals.

Id.

116. See supra notes 10, 32 (giving economic status of clinic patients and describing effect of income-based clinic fees on patient ability to seek medical information elsewhere). The regulations' prohibition on providing abortion information may go as far as to prohibit clinics from allowing patients access to the yellow pages phone directory, lest patients use it to discover names of abortion providers. Critics of the proposed regulations complained that the regulations prohibited clinics from keeping the yellow pages. 53 Fed. Reg. 2922 (1988). The Secretary of HHS responded that the regulations did not prohibit "keeping" yellow pages. Id. at 2941. In its majority opinion, the Second Circuit Court of Appeals interpreted "keeping" to include "providing" yellow pages to clinic patients upon request. New York v. Sullivan, 889 F.2d 401, 406 n.1 (2d Cir. 1989). The concurring and dissenting opinions disagreed with the majority, arguing that the Secretary's use of "keeping" did not include "providing," and therefore under the regulations clinics could not give patients access to the yellow pages. Id. at 415 (Caramone, J., concurring); id. at 416-17 (Kearse, J., dissenting) (noting that Secretary of HHS stated in oral argument that clinics could not provide yellow pages to patients).

Of course, a woman could seek abortion information by consulting a yellow pages directory outside a Title X clinic, but "a telephone book seems a poor substitute for the advice of one's doctor." Id. at 416 (Kearse, J., dissenting). However, for a clinic patient, poverty and the fact that she has just paid an income-based clinic fee effectively exclude her from private providers and second opinions.

117. See supra notes 10, 32 (giving economic status of clinic patients and describing effect of income-based clinic fees on patient ability to seek medical information elsewhere). Rust exacerbates the two-tiered health care system under which prosperous women received full services and information on family planning but poor women did not. One intent of Congress in enacting Title X was to eliminate this two-tiered system. See Planned Parenthood Fed'n of Am. v. Bowen, 680 F. Supp. 1465 (D. Colo. 1988), aff'd sub nom. Massachusetts v. Secretary of HHS, 899 F.2d 53 (1st Cir. 1990) (finding congressional intent expressed in Congressional Record to eliminate two-tiered system of family planning services, and concluding the HHS regulations contravene congressional intent).

118. See Rust v. Sullivan, 111 S. Ct. 1759, 1785 (1991) (Blackmun, J. dissenting) (arguing that "by suppressing medically pertinent information and injecting an ideological message unrelated to considerations of maternal health, the Government places formidable obstacles in the path of Title X clients' freedom of choice... Both the purpose and result of the challenged Regulations is to deny women the ability voluntarily to decide their procreative destiny. For these women, the Government will have obliterated the freedom to choose as surely as if it had banned abortions outright.")
Power analysis thus reveals the truly devastating impact of the *Rust* decision: *Rust* does not strike a balance between government power and the individual right to choose medical treatment; rather, it permits government power to eradicate the exercise of an individual right. In the *Rust* clinic the government holds effective power to manipulate patient agreement to a particular treatment.\(^9\) The next part compares the *Rust* power relationships to three other circumstances in which the Court has looked at government intervention in expression.

IV. COMPARISON POWER ANALYSES

A. *Virginia Pharmacy*

A case in which power relationships are similar to those in *Rust* is *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*\(^{120}\) In *Virginia Pharmacy*, consumers challenged a state statute prohibiting pharmacists to advertise the price of prescription drugs,\(^{121}\) claiming that it violated their right to receive information that pharmacists may wish to communicate, and therefore violated the First and Fourteenth Amendments.\(^{122}\) The state argued that the ban on advertising was necessary to maintain professionalism among state-licensed pharmacists\(^{123}\) and to avoid price competition that might undermine the quality of pharmacy services and the continuity of relationships between pharmacists and customers.\(^{124}\) The *Virginia Pharmacy* Court reasoned that the First Amendment protects not only the speaker, but also the communication and the recipient,\(^{125}\) and that both the individual citizen and society as a whole have interests in the

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119. See Leedes, supra note 9, at 112 (arguing that *Rust* decision furthered massive government intrusion into private spheres of freedom by using censored speech to manipulate individuals into conforming with government policy). *But see* Edward G. Reitler, Note, *The Title X Family Planning Subsidies: The Government's Role in Moral Issues*, 27 HARV. J. ON LEGIS. 453, 456-57 (1990) (arguing that HHS Regulation do not violate First Amendment because they do not foster entrenchment of political party, drown out other viewpoints, or overwhelm patient's capacity to make individual choice).

120. 425 U.S. 748 (1976).


122. Id. at 753-54.

123. Id. at 747.

124. Id. at 767-68. In addition to justifying the statute on the basis of professionalism and quality of service, the state argued that advertising of prices was commercial speech and therefore not protected by the first amendment. Id. at 758. The *Virginia Pharmacy* Court held that even purely commercial speech that does no more than propose a commercial transaction enjoys some first amendment protection. Id. at 762.

125. Id. at 756; *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (stating that free speech rights of broadcast audience are paramount to those of broadcasters).
free flow of commercial information. The Court concluded that the ban on advertising was a state attempt to protect citizens by keeping them in ignorance, a paternalistic approach that the First Amendment forbids.

Power analysis demonstrates that the situation of the drug customer in Virginia Pharmacy is analytically similar to the clinic patient in Rust. In Virginia Pharmacy the first dimension power at issue was the customer's right to decide where to buy prescription drugs. Because only pharmacists could sell prescription drugs, they held a practical monopoly on price information; the government ban on price advertising fostered that monopoly by suppressing information from sources other than the customer's own pharmacist. Both Virginia Pharmacy and Rust involve circumstances of information monopoly. In the former, a state statute created the opportunity for some private producers to create a limited information monopoly and prevented competition from breaking that monopoly; in the latter, federal regulations force service providers to use a preexisting information monopoly to limit information. In Virginia Pharmacy, the favored choice was the family pharmacist; in Rust, the favored choice is childbirth.

Even so, the Virginia Pharmacy customer was in a more powerful position than the Rust patient. The Virginia Pharmacy ban applied only to advertising, not to all speech. Therefore, unlike the Rust doctor, the pharmacist was free to disclose prices to a potential customer. With some effort and little cost, customers could call or visit pharmacies to obtain information from a number of sources. Further, price information is easy to understand and equally applicable to all customers. Therefore one customer could successfully disseminate relevant information to other customers. In contrast, information about the availability, scope, and effectiveness of alternative medical treatments is complex to a layperson and is more likely to be patient-specific. Treatment information appropriate for one patient may not be appropriate for another. A clinic patient could obtain information relevant to her own decision only from another doctor and, therefore, only at significant economic cost.

Furthermore, the circumstances of the Virginia Pharmacy customer and the Rust patient differ in the apparent trustworthiness of the speaker. A pharmacist holds special credentials in pharmacology, not in economics. The decision of the drug customer was economic and, therefore, did not

126. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763-64 (1976). In addition to holding that the First Amendment protects the information interests of the individual and society, the Court noted that the Virginia statute was unnecessary to preserve professionalism among pharmacists because the level of professionalism among pharmacists was protected by the state's rigorous licensing requirements, id. at 768, and that price advertising had no direct effect on professional standards. Id. at 769.

127. Id. at 770.

128. Id. at 752.

129. Id.

130. See supra notes 10, 32 and accompanying text (describing doctor's medical information monopoly and patient's economic inability to consult nonclinic doctor).
require the pharmacist's special expertise. The customer had no reason to believe that one pharmacist was more economically trustworthy than another. In contrast, the clinic doctor did speak with apparent trustworthiness on matters relevant to her patient's choice of medical treatment. compared to rust, the government exercised less effective third dimension power in virginia pharmacy because it controlled a weaker information monopoly with less apparent trustworthiness.

A final difference between the Virginia Pharmacy customer and the rust patient is the nature of their decisions. The drug customer is not choosing a form of medical treatment; presumably she decided to accept a treatment when she accepted a prescription from her doctor. The customer is deciding whether to buy from one supplier or another, a decision that carries no special constitutional protection. The rust patient is choosing a medical treatment, and her right to decide on abortion carries fifth amendment protection. however, in spite of her constitutional protection, the rust decision subjected her to greater government power to manipulate her choice through manipulation of information. The Virginia Pharmacy Court dismantled government support of a partial information monopoly that impaired individual economic decisions. The rust Court considered a more egregious information monopoly, more vulnerable decision maker, and more important decision, yet allowed the government to use the monopoly to deliver its own message and exclude competing messages.

B. Broadcast Regulation

An enduringly controversial area of government intervention in expression is the regulation of broadcasting. the communications act established an independent agency, the Federal Communications Commission (FCC), with authority to license and regulate use of broadcast airwaves consistent with the public interest. The fairness doctrine requires broadcasters to provide broadcast time for a variety of views on public issues, 

131. See supra notes 114-15 and accompanying text (describing likelihood that patient will rely on doctor's statements as complete).

132. See supra note 30 (citing cases establishing constitutional protection for abortion decision).


to ensure equal time for targets of personal attacks,\textsuperscript{137} and to provide reasonable and equivalent access to political candidates.\textsuperscript{138} The Court justifies federal regulation of broadcast content as a means of enhancing public debate and the First Amendment right of free speech.\textsuperscript{139}

In \textit{Red Lion Broadcasting v. FCC}\textsuperscript{140} the Court upheld an FCC decision requiring a broadcaster to air a particular message.\textsuperscript{141} The broadcaster had aired a program critical of an author and refused the author's request for free air time to reply.\textsuperscript{142} The FCC found that the broadcast was a personal attack and ordered the station to provide reply time in accordance with the fairness doctrine.\textsuperscript{143} The station claimed that the FCC's action and the fairness doctrine violated its First Amendment right of free speech.\textsuperscript{144} The Court reasoned that because of the scarcity of available airwaves, the

\begin{itemize}
  \item \textsuperscript{137} 47 C.F.R. §§ 73.1920, 73.1930 (1989). See \textit{Red Lion}, 395 U.S. at 369-70 (describing fairness doctrine requirements).
  \item \textsuperscript{138} 47 U.S.C. §§ 315(a)(7), 73.1940 (1988). See \textit{Red Lion}, 395 U.S. at 369-70 (describing requirements for fairness doctrine); Zwerling, supra note 133, at 221-22 (summarizing content of and justifications for fairness doctrine).
  \item \textsuperscript{139} See \textit{CBS, Inc. v. FCC}, 453 U.S. 367 (1981)(holding constitutional statutory requirement of reasonable access for all federal candidates to broadcast forum as proper balance of first amendment rights of candidates, public, and broadcasters); \textit{Red Lion Broadcasting v. FCC}, 395 U.S. 367, 386-400 (1969) (upholding fairness doctrine regulation of broadcast content against First Amendment challenge because doctrine prevented monopoly of limited airwaves and because First Amendment rights of listeners were paramount to those of broadcasters).
  \item Although the avowed purpose of broadcast content regulation is to expand debate and access to broadcast forums, in practice regulation has often achieved the opposite result. In an ironic distortion of the purpose of broadcast regulation, the FCC delayed approval of the tremendous increase in access offered by cable services. Powe, supra note 130, at 55. The courts have allowed the FCC and Congress to prohibit broadcasting of controversial material, including songs that might promote drug use, \textit{Yale Broadcasting Co. v. FCC}, 478 F.2d 594 (D.C. Cir.), \textit{cert. denied}, 414 U.S. 914 (1973), explicit discussions of sex, \textit{Illinois Citizens Comm. for Broadcasting v. FCC}, 515 F.2d 397 (D.C. Cir. 1975), and cigarette advertising, \textit{Capital Broadcasting Co. v. Acting Attorney General}, 405 U.S. 1000 (1972), \textit{aff'd mem. Capital Broadcasting Co. v. Mitchell}, 333 F.Supp. 582 (D.D.C. 1971). The ban on broadcast of cigarette advertising was statutor. \textit{Public Health Smoking Act of 1969}, 15 U.S.C. § 1335 (1970). Congress enacted the statute after the District of Columbia Circuit Court upheld an FCC determination that cigarette advertising represented one side of a controversial issue of public importance. Bazhaf v. FCC, 405 F.2d 1082 (D.C. Cir 1968), \textit{cert. denied}, 396 U.S. 842 (1969). The balanced programming and equal time requirements of the fairness doctrine also discourage broadcasters from airing highly controversial issues, for fear of demands for reply time. Finally, the process of issuing and renewing licenses exerts subtle pressures on broadcasters to keep the content of their programming within the ideological territory of the politically powerful. See Bazelon, supra note 133 (discussing First Amendment objections to broadcast regulation and suggesting alternatives). Chief Judge Bazelon describes informal pressures exerted on licensees by the FCC as "raised eyebrow" regulation, \textit{id.} at 216-17, and reports specific instances in which officials in the Nixon administration used the licensing process to suppress critical commentary and punish political opponents. \textit{id.} at 214, 235, 244-251.
  \item \textsuperscript{140} 395 U.S. 367 (1969).
  \item \textsuperscript{141} \textit{Red Lion Broadcasting v. FCC}, 395 U.S. 367, 375 (1969).
  \item \textsuperscript{142} \textit{Id.} at 371-72.
  \item \textsuperscript{143} \textit{Id.} at 372.
  \item \textsuperscript{144} \textit{Id.} at 370-71, 386.
government had a responsibility to ensure airing of a variety of views. 145 Some individuals necessarily would not receive licenses, 146 but their First Amendment protection was no less than that enjoyed by the licensees. 147 Therefore, the government could, consistent with the First Amendment, require licensees to share broadcast capability with others. 148 The fundamental First Amendment interest, according to the Court, was that of the listeners to have access to a wide variety of ideas and experiences. 149 The Court reasoned that the purpose of the First Amendment was to preserve an unfettered marketplace of ideas, not to establish a licensee monopoly on access to broadcasting. 150

Power analysis looks at the broadcast listener’s ability to exercise a right of autonomous decision—for example the decision on how to vote. The broadcast listener’s power landscape under Red Lion is very different from that of the patient in a Rust clinic. First, the broadcast listener does not face a monopoly on information relevant to her voting decision. Many channels of relevant communication reach her, including competing broadcasting; print media; informal social, professional, or political networks; and common experience. These alternate channels are available at no cost to the listener, and the relevant voting information is easy to understand and freely exchangeable. Furthermore, the speakers enjoying government-mandated access are no more apparently trustworthy than other speakers.

Broadcast regulation reduces agenda and manipulative power residing in private hands by reducing monopolies on communication channels and enforcing a standard of information neutrality similar to that which the traditional informed consent doctrine imposes on doctors. 151 In contrast to Rust, government intervention in broadcast speech does not exploit an information monopoly to carry a government message, but rather prevents concentrated control of a particular channel of communication and expands the variety of information available from private speakers. 152 The purpose and effect of broadcast regulation is to enhance the listener’s power to make an autonomous decision. Broadcast regulation prevents formation of private information monopolies that might threaten the autonomy of individual decisions. In contrast, Rust allows government to use an existing private monopoly to subvert the autonomy of an individual decision in favor of a government-preferred choice.

145. Id. at 396-400; see supra note 139 and accompanying text (presenting scarcity of frequencies as one justification for regulation of broadcast content).
147. Id. at 389.
148. Id.
149. Id. at 390.
150. Id.
151. See supra notes 93-94 and accompanying text (describing fairness doctrine requirements and rationale).
152. See supra notes 136-39 and accompanying text (noting purpose and general effect of broadcast regulation is to expand access to and variety of information).
C. Mandated Access to Private Property for Speech

Another controversial example of government intervention in expression is the requirement that under some circumstances the owner of private property make the property available to the public for purposes of speech. Ordinarily the First Amendment forbids the government to require a private person to express a particular message either by compelling the person to say the message or by compelling the person to use his property to communicate the message. However, not all private property is immune from government-imposed speech requirements. If the owner voluntarily opens property to public use, in some circumstances the government may require the owner to make the property available for the speech of third parties. In *Marsh v. Alabama* the Court required the owners of a company town to allow third parties to use the town’s shopping district to address the public. The Court reasoned that the owner’s use of the property as a shopping center was subject to state regulation and that the owner’s rights must yield to the First Amendment rights of the public.

In *PruneYard Shopping Center v. Robins* the Court upheld a state law that required shopping center owners to allow public access for speech purposes. The shopping center had ejected individuals who were soliciting

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157. *Id.* at 507.

158. *Id.* at 509. Court decisions regarding mandated access have been inconsistent. See generally Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) (holding that first amendment protected informational picketing at shopping center); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (holding that First Amendment did not protect distribution of handbills at shopping center that were unrelated to shopping center activities); Hudgens v. NLRB, 424 U.S. 507 (1976) (overruling *Logan Valley* because discrimination based on content of speech violated First Amendment).

159. 447 U.S. 74 (1980).

160. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980). The issue decided by the *PruneYard* Court was not the extent of First Amendment protection of the shopping center speakers, but was rather whether a state could grant greater free speech rights to individuals than they enjoyed under the First Amendment, without violating the speech and property rights of the shopping center owners. *Id.* at 88. See cases cited supra note 158 (presenting inconsistent decisions regarding First Amendment protection of access to private property).
support for a political cause, and the individuals sought to enforce the state law giving them access. The owner of the shopping center claimed that the law violated property and speech rights guaranteed by the Constitution. The Court disagreed, reasoning that the access requirement did not significantly impinge on the owner's property rights because the public already had access, and the owners were free to impose reasonable time, place, and manner restrictions on the speakers. Furthermore, according to the Court, under these circumstances listeners were unlikely to attribute the speech to the property owner because the property was not dedicated to his personal use and because the owner was free to disclaim agreement with the speech. The Court concluded that the state statute did not violate the property or speech rights of shopping center owners.

The power relationships in cases of mandated access to private property for speech are similar to those in broadcast regulation. The patron of a shopping center has the right to make an autonomous decision regarding political choices. Like the broadcast listener, the PruneYard patron does not face a monopoly on information relevant to a particular political decision. The shopping center patron has access to a wide variety of communication channels at no cost or risk, and information relevant to the voting decision is easily understandable and transferrable. As with broadcasting, the speakers enjoying government-mandated access appear no more trustworthy than other speakers. Also like broadcast regulation and unlike Rust, government intervention in expression prevents concentrated control of a particular channel of communication and expands the variety of information available from private speakers.

Therefore, in mandating access to private property for third-party speech, the government does not assume second or third dimension power, but rather disables whatever such power would otherwise reside in the property owner. The effects are to expand the agenda of issues raised for public debate and to increase the amount and sources of information available to the listener. The result is an increase in the listener's real first dimension power to decide how to vote.

Both PruneYard and Red Lion involved nonmonopoly channels of communication that were sufficiently dominant that the Court required

162. Id. at 82, 85.
163. Id. at 83.
164. Id.
165. Id. at 87.
166. Id. The PruneYard Court distinguished the shopping center access requirement from the compelled speech cases because, first, the access requirement was content neutral and did not involve a government-mandated message. Id. Second, the Court reasoned that, unlike the situation in the compelled speech cases, the access requirement would not chill the owner's speech nor impel the owner to speak when he otherwise would not. Id. at 88. But see supra note 154 and accompanying text (describing Court decisions involving compelled speech).
168. See supra Part IV.B (describing power relationships in broadcast regulation).
property rights to yield to the individual's rights of expression and need for information. The Court moved in the opposite direction in Rust. Rust requires a private, although partly subsidized, communication channel that is essentially a monopoly and carries information essential to an important individual decision, to suppress information in favor of a government message.

V. CONCLUSION

Power analysis shows that the Rust decision sets the balance of government power and individual rights grossly in favor of government. The decision allows government to exercise manipulative power to undermine the individual's right to make a decision.\(^\text{169}\) Government intervention in two other areas of expression—broadcast regulation and mandated access to private property—has the reverse effect. In these two areas government acts to expand both the amount of information and number of communication channels reaching the individual, and therefore to enhance the individual's power to exercise decisional rights.\(^\text{170}\) The case of Virginia Pharmacy presented similar power relationships to those in Rust, but with a looser monopoly on relevant information, a less apparently trustworthy speaker, no biased government message, and no constitutional protection for the individual's decision.\(^\text{171}\) Nonetheless, the Virginia Pharmacy Court held that the government intervention in expression impermissibly undermined the ability of individuals to make decisions.\(^\text{172}\)

The Rust exercise of manipulative government power is not limited to medicine. In the area of legal services, the District of Columbia Circuit invoked Rust in dictum to justify the prohibition on redistricting advocacy by organizations and their staffs receiving federal legal aid subsidies.\(^\text{173}\) In a suit in which documentary filmmakers challenged cancellation of their grants, the Department of Justice sent copies of the Rust decision to the judges.\(^\text{174}\) The Department of Justice also invoked Rust in a case involving the discussion of homosexuality in AIDS education materials\(^\text{175}\) and invoked it to prohibit university researchers from discussing the results of their work on artificial hearts.\(^\text{176}\)

\(^\text{169}\) See supra Part III (describing power relationships in traditional doctor-patient consultation and in Rust clinic).
\(^\text{170}\) See supra Part IV.B and IV.C (describing power relationships in broadcast regulation and in government-mandated access to private property).
\(^\text{171}\) See supra Part IV-A (describing power relationships in Virginia Pharmacy).
\(^\text{172}\) See supra note 127 and accompanying text (describing conclusion of Virginia Pharmacy Court that government attempt to keep citizens in ignorance violates First Amendment).
\(^\text{175}\) Id.
\(^\text{176}\) Id.
Each of these examples represents a conflict between an individual liberty, typically speech, and the federal government's power to achieve certain goals through spending. Moreover, these goals involve particular ideological choices over matters that are the subject of highly charged and unresolved political debate rather than broad consensus. So far, legal resolution of this conflict has resorted to legal labels that obscure analysis and dictate a particular conclusion. Power analysis avoids legal labelling. It is one means of examining the elements of a conflict and of understanding the effects of a particular solution. Power analysis compellingly suggests that, at a minimum, any significant federal exercise of third dimension power endangers the ability of individuals to exercise rights based on autonomous decision making.

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