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# THE FIRST AMENDMENT AND THE FEMALE LISTENER

Loren Jacobson\*

*When the Supreme Court has considered whether laws that affect women's decisions about their health and bodies violate the Free Speech Clause, it has ignored the informational needs of the very women that such laws regulate. I argue that, instead, the Supreme Court should value women's informational and decision-making needs and properly place them at the center of a First Amendment analysis of laws that affect women in particular. Towards that goal, the Supreme Court should take a listener-centered approach to laws that affect women's decision-making. There is a strong basis for a listener-centered approach in the Court's Free Speech precedents, particularly in its commercial speech cases. Following this listener-centered approach would allow the Court to apply the Free Speech Clause in a way that is consistent with these precedents, including the way in which the Court has distinguished speech compulsions and speech restraints. More important, an approach that values the female listener would accord women maximum dignity and autonomy, which is appropriate when laws involve free speech, informed consent, and the decisions women make about their bodies and their health.*

In *National Institute of Family and Life Advocates v. Becerra (NIFLA)*,<sup>1</sup> the Supreme Court found that a California law that required women to be provided information about state coverage for reproductive health care services violated the First Amendment. Yet, in previous decisions, the Court has held that both speech restraints and speech compulsions related to the information women receive about their health care do not violate the First Amendment. In *Rust v. Sullivan*, the Court held that a regulation restricting the information women can get about their reproductive health care options was constitutional.<sup>2</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court held that a law requiring that women get certain information in the context of informed consent for abortions also did not violate the First Amendment.<sup>3</sup> As others have pointed out, the Court's opinions in these cases are not consistent, and in large part the discrepancy can be explained as

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1. 138 S. Ct. 2361 (2018).

2. *Rust v. Sullivan*, 500 U.S. 173 (1991).

3. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

“being about five justices being very hostile to abortion rights and thus women’s reproductive health and rights.”<sup>4</sup> While it is certainly true that the conservative justices’ hostility towards abortion has shaded their ability to fairly apply and interpret the First Amendment, I believe it is just as true that the outcomes in these cases can be explained by the conservative justices’ inability to relate to, understand, and value women. Indeed, when it comes to cases involving laws that affect *women’s* ability to make decisions about their health and bodies, the Supreme Court has portrayed women either in a gender stereotypical fashion as emotionally vulnerable, even hysterical, and in need of paternalistic protection, or has ignored women altogether.

While I have little hope that the Supreme Court’s make up will soon change, and while it may also be the case that the constitutionality of abortion regulations may soon no longer be relevant as abortion could lose constitutional protection, I believe it is still worth considering the Court’s jurisprudence in *NIFLA*, *Rust v. Sullivan*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, because the extent to which the First Amendment applies to speech involving women’s health care decisions remains relevant. After all, neither *NIFLA* nor *Rust* involve speech related to regulating abortion *per se*, but rather involve government efforts to regulate speech related to women’s reproductive health care—efforts that are likely to continue even if abortion loses its status as a constitutional right.

What I consider here, then, is whether there is a way to apply the First Amendment that places women where they should be: at the center, rather than the margins, of decisions involving regulation of their health care. In the cases I examine, the state (or federal government) is regulating the kind of information that women receive when making decisions about their health and their bodies. A proper approach to the First Amendment that values the receiver of information—the listener—will focus on women when analyzing laws relating to speech that affect them in particular. This “listener-centered” method of applying the First Amendment is not novel. Indeed, although the Court has routinely ignored or devalued women as listeners in its post-*Roe v. Wade*<sup>5</sup> approach to laws that affect women’s decision-making, the Court has shown that it is willing to value an autonomous listener when it considers whether laws regulating speech violate the First Amendment.

Scholars such as Burt Neuborne,<sup>6</sup> Helen Norton,<sup>7</sup> and others have also advocated for a First Amendment methodology that values the listener. Indeed, in a recent essay, Helen Norton proposes a listener-centered<sup>8</sup> approach to the First Amendment that would “permit the government to regulate the speech of comparatively knowledgeable or powerful speakers when that expression frustrates their listeners’ autonomy, enlightenment, and self-governance interest,” values she

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4. Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61, 118 (2019).

5. 410 U.S. 113 (1973).

6. See Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 28–29 (1989).

7. See Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 441–42 (2019).

8. *Id.* at 441. Burt Neuborne has alternatively called this a hearer-centered approach. See Neuborne, *supra* note 6, at 26.

says are “at the heart of the Free Speech Clause.”<sup>9</sup> She argues that where speakers enjoy advantages of information or power over their listeners and are in a position to coerce them, the First Amendment should allow the government to regulate such speech in order to help equalize the speaker-listener relationship.<sup>10</sup> According to Norton, one case where the outcome would be different had the Supreme Court taken this listener-centered approach is *NILFA*.<sup>11</sup> Norton argues that the Court’s analysis in that case prioritized the speaker—the crisis pregnancy centers who are opposed to abortion and whose goal is to convince women to continue their pregnancies—and failed to take into account women’s interests as listeners. She explains, “When we take women’s interests as listeners seriously, then we understand the First Amendment to permit the government to require service providers to make truthful disclosures to the women whose choices they seek to shape.”<sup>12</sup>

This effort to take women’s interests as listeners seriously makes sense not only in situations where women are listeners who listen to powerful speakers. It makes sense also when the very object of the regulation is women’s decision-making about their health care and their bodies. In this context, the Supreme Court should follow its precedent in which it has used a methodology that takes into account the listener’s interests. If the Supreme Court were to value the female listener, its jurisprudence not only would be more internally consistent, but also would be consistent with its other First Amendment precedents, including those that consider the differences between speech restraints and compulsions.

In advocating for a First Amendment methodology that values the female listener, I will first show in Section I of this article that such a methodology is not without basis in Supreme Court precedent by examining the strong undercurrent in the Court’s Free Speech decisions involving non-political speech that values a listener-centered approach.<sup>13</sup> A review of these decisions reveals that the Court can imagine specific listeners, will endow the listener with decision-making autonomy, and will consider the setting in which the listener receives information in deciding whether the First Amendment has been violated. In Section II, I will discuss why it makes sense to value the listener, particularly in cases having to do with health care decision-making. In Section III, prior to examining the Court’s devaluing of women in *Rust v. Sullivan*, *Casey*, and *NIFLA*, I will place these cases in context by looking more generally at the Court’s refusal to take a listener-centered approach and instead specifically devaluing, or even ignoring, the female listener—the very object of the regulations the Court considers. I will show that in cases involving the *female* listener only—cases generally having to do with women’s reproductive choices—the Court

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9. Norton, *supra* note 7, at 441–42.

10. *Id.* at 442–43.

11. *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361 (2018).

12. Norton, *supra* note 7, at 466.

13. The Court and many scholars describe the type of speech that I am referring to here as “economic,” see Neuborne, *supra* note 6, at 5–6, “commercial,” or “professional” speech, see Norton, *supra* note 7, at 443–45, 458–59. In *NIFLA*, the Court specifically refused to recognize professional speech as a separate category of First Amendment speech, 138 S. Ct. at 2371–75, and it seems strange to describe speech about women’s reproductive health choices as “economic” or “commercial” speech. Although not entirely satisfactory, I have instead tried to group all of this speech—economic, commercial, professional, personal—in a category I’m calling “non-political speech.”

has largely portrayed the female listener as vulnerable, even hysterical, rather than as a powerful, autonomous decision-maker. This stereotype of the female listener (the female decision-maker) does not just occur in the context of the Court's consideration of laws involving speech related to women's reproductive health care, but can be seen generally in the Court's cases involving women's decision-making about their health and bodies. In Section IV, I demonstrate how the Court's refusal to take a female listener-centered approach has led to serious inconsistencies in the Court's jurisprudence. Finally, in Section V, I advocate for a listener-centered approach to regulations of non-political speech involving women's decision-making that accords women maximum dignity and autonomy, virtues that underlie the Free Speech Clause and also the doctrine of informed consent, which is particularly relevant in a context in which healthcare decision-making is at issue.<sup>14</sup> Finally, I show how this approach changes the analyses and outcomes in *Rust v. Sullivan*, *Casey*, and *NIFLA*.

I posit that with respect to laws that regulate women's decisions about their health and bodies, the Supreme Court can and should follow a listener-centered methodology that values the female listener and also allows the Court to apply the Free Speech Clause in a way that is consistent with its precedents. Specifically, it is possible to apply a listener-centered approach that values the female listener in cases involving non-political speech that leads to outcomes more consistent and predictable among those cases that involve women's decisions about their health care and their bodies, but that also values the Court's general First Amendment approach to non-political speech.

## I. THE SUPREME COURT'S LISTENER-CENTERED JURISPRUDENCE

Although sometimes considered the second-class citizen in Mr. Madison's neighborhood,<sup>15</sup> the listener has been given some primacy in the Supreme Court's First Amendment jurisprudence. The Supreme Court has particularly, although not exclusively, valued a listener-centered approach to the First Amendment in the commercial speech realm, but it has shown favor to the listener in other contexts as well. The discussion of cases here is not a comprehensive review of all of the Court's decisions in which it has shown a willingness to favor the listener, but it illustrates the fact that the Court has been prepared to take a listener-centered approach in applying the First Amendment, and, in doing so, has shown it can imagine specific listeners, will accord the listener dignity and autonomy, and will take into account the milieu in which the listener is receiving the information.

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14. See, e.g., Norton, *supra* note 7, at 442 (citing ROBERT POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 6 (2012)); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) (citing to *Schloendorff v. Soc. of N.Y. Hosp.*, 211 N.Y. 125, 129–30 (1914), *abrogated by Bing v. Thunig*, 143 N.E. 2d 3 (1957), for the proposition that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body" and recognizing that the "notion of bodily integrity" is the principle underlying the requirement of informed consent); *Canterbury v. Spence*, 464 F.2d 772, 784 (D.C. Cir. 1972) (finding a duty of informed consent and emphasizing the need for "[r]espect for the patient's right of self-determination").

15. See Burt Neuborne, *Limiting the Right to Buy Silence: A Hearer-Centered Approach*, 90 U. COLO. L. REV. 411, 411–13 (2019).

**A. Early, Non-Commercial Speech Cases Show the Court's Willingness to Value the Listener, Including the Female Listener**

The Court described the First Amendment as valuing not just the speaker, but the listener, in *Griswold v. Connecticut*,<sup>16</sup> a predicate decision to *Roe v. Wade*,<sup>17</sup> and a case considering women's ability to make reproductive choices. In *Griswold*, the Court held a Connecticut law prohibiting the distribution of contraception to married couples unconstitutional and recognized for the first time a constitutional right to privacy that included the right to decide whether or not to use contraception within the marital relationship.<sup>18</sup> Although the decision located the right to privacy in the Due Process Clause of the Fourteenth Amendment and was not a First Amendment case, the Court held that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, *the right to receive*, [and] *the right to read* . . ."<sup>19</sup> Later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>20</sup> the first case to recognize First Amendment protection for purely commercial speech, the Court described *Griswold* as one of the "numerous . . . expressions to the same effect in the Court's decisions" that the First Amendment protects not just the right to speak, but also the right "to 'receive information and ideas.'"<sup>21</sup>

The same term that *Griswold* was decided, the Court also held that a law allowing the Post Office to detain "communist political propaganda" from foreign countries and requiring those receiving it to request it from the Post Office violated the First Amendment.<sup>22</sup> The Court, in *Lamont v. Postmaster General*, explained that it was not troubled by the fact that the Post Office was controlling and inspecting mail. Instead, it rested its constitutional analysis on the narrow ground that the addressees' right to receive information would be harmed or chilled.<sup>23</sup> The Court said that the fact that the addressee had to request his mail in writing was an unconstitutional abridgement of the addressee's First Amendment rights because the affirmative obligation to request the mail is "almost certain to have a deterrent effect, especially as respects those who have sensitive positions."<sup>24</sup> In its opinion, the Court imagined specific listeners who would be harmed by the law: "Public officials like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason."<sup>25</sup> Because the

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16. 381 U.S. 479 (1965).

17. 410 U.S. 113 (1973).

18. *Griswold*, 381 U.S. at 485.

19. *Id.* at 482 (emphasis added).

20. 425 U.S. 748 (1976).

21. *Id.* at 757 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)).

22. *Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 302, 305 (1965).

23. *Id.* at 306–07.

24. *Id.* at 307.

25. *Id.* Of course, here, unlike in most First Amendment cases, the listeners—those receiving the information—were the litigants challenging the law, not the speakers who were foreigners without First Amendment protection. When the person challenging the law is the listener and is represented by counsel, the Court seems more willing and able to imagine and describe the listener and effectuate his or her

law burdened the free flow of information to this listener and others, the Court held that it was “at war” with the First Amendment.<sup>26</sup>

Four years later, in *Red Lion Broadcasting Co. v. F.C.C.*,<sup>27</sup> the Court found constitutional a requirement that those holding broadcast licenses from the FCC provide a chance for rebuttal to anyone targeted by the broadcaster. In doing so, the Court decided the First Amendment issue by taking a decidedly listener-centered approach. The Court noted that in order to have the broadcast medium function consistently with the “ends and purposes of the First Amendment,” it is “the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”<sup>28</sup> The Court’s decision to prioritize the listener was based on the importance of an “uninhibited marketplace of ideas in which truth will ultimately prevail.”<sup>29</sup> The Court’s listener-centered approach thus understands that the purpose of an uninhibited marketplace of ideas is not only as an unrestricted forum for speakers, but as a marketplace for the listener, who will best be able to make autonomous decisions about her conduct—whether “social, political, esthetic, moral,”<sup>30</sup> commercial, or personal—based on receiving a free flow of information in that marketplace.<sup>31</sup>

## B. Development of a Listener-Based Approach in Commercial Speech Cases

The Court’s emphasis on the listener has been particularly prevalent in the Court’s commercial speech cases, where the “marketplace of ideas” is intimately related to the marketplace itself and consumers’ ability to make rational choices within that marketplace. In emphasizing the needs of the listener, these cases not only show that the Court is willing to give primacy to the listener in its approach to the First Amendment, but also, that the Court can imagine specific listeners and can imagine listeners who are deserving of autonomy rather than paternalistic protection. These cases also show that the Court will look at the relationship between the speaker and the listener in deciding whether a law violates the First Amendment.

In *Bigelow v. Virginia*,<sup>32</sup> a case involving advertising and therefore commercial speech, the Court emphasized the importance of the listener’s access to

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autonomy. See Burt Neuborne, *The Status of the Hearer in Mr. Madison’s Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 902 (2017).

26. *Lamont*, 381 U.S. at 307.

27. 395 U.S. 367, 400–01 (1969).

28. *Id.* at 390.

29. *Id.*; see also Nat’l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2375 (2018). In *Lamont*, Justice Brennan noted in his concurrence that “[i]t would be a barren marketplace of ideas that had only sellers and no buyers.” 381 U.S. at 308 (Brennan, J., concurring).

30. *Red Lion*, 395 U.S. at 390.

31. See also Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (“[T]he right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.”); Neuborne, *supra* note 22, at 901 (“It is the autonomous hearer, after all, vested with the capacity for rational choice and humane judgment, that makes free information markets possible.”). Another area of public discourse where the Court has taken a listener-centered approach is in the context of corporate political speech. See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978); *Citizens United v. FEC*, 558 U.S. 310, 318–19 (2010); Neuborne, *supra* note 25, at 908–09.

32. 421 U.S. 809 (1975).

information in deciding whether a Virginia ban on abortion advertising in publications violated the Constitution. In its decision, the Court considered a Virginia statute that made it a misdemeanor to encourage or prompt the procuring of an abortion in a publication, lecture, advertisement or by any other means.<sup>33</sup> The plaintiff, the editor of a newspaper, was convicted under the statute. The Court found the statute violated the First Amendment, but not because the speaker's speech was curtailed.<sup>34</sup> Instead, central to the Court's decision that the law controlling advertising could be subject to the First Amendment was the fact that the advertisement contained factual material of clear "public interest."<sup>35</sup> The Court stressed that:

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.<sup>36</sup>

In other words, the Court decided that the speech at issue was deserving of First Amendment protection not because of the speaker's right to publish advertising, but because of the importance of listeners' (or here, readers') right to receive the information contained in the advertising and make decisions based on it. Although the Court did not imagine or describe any particular listeners in the case—it only mentioned the "public" interest—because it is women who receive abortion services, the case stands—along with *Griswold*—as a precedent for the Court valuing the *female* listener and her desire for information in instances in which state law impinges on her health care decision-making.

The Court in *Bigelow* also took into consideration the milieu in which the listener received the information. The Court held that the advertising restraint was not justifiable because it appeared in a newspaper, where "[o]bservers would not have the advertiser's message thrust upon them as a captive audience."<sup>37</sup> In other words, the Court found that because the coercive power of the message on the listener was minimal, there was less justification for government interference.

The Court also recognized the primacy of the listener—the consumer who receives information—in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>38</sup> In that case, the Court considered a rule prohibiting licensed pharmacists from publishing the prices of prescription drugs, and for the first time, applied the First Amendment to a rule involving purely commercial speech outside of print publications. In deciding that it was appropriate to evaluate the state's restraint on advertising pursuant to the First Amendment, the Court emphasized not the speaker's (here, the pharmacist's) interest in advertising, but the listener's

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33. *Id.* at 812–13.

34. *Id.* at 829.

35. *Id.* at 822.

36. *Id.*

37. *Id.* at 828.

38. 425 U.S. 748 (1976).



interest in having the information necessary to make informed choices about his purchases. The Court noted that “As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”<sup>39</sup>

Burt Neuborne has posited that the Court has often ignored or undervalued listeners because the Court cannot seem to imagine or understand who they are; listeners do not “have fully developed judicial personalities.”<sup>40</sup> However, in *Virginia State Board*, as in *Lamont*, the Court took into account specific listeners by noting that suppression of drug price information hits “the poor, the sick, and particularly the aged” the hardest.<sup>41</sup> Based on these concerns, the Court rejected the state’s purported interest in protecting consumers, calling it “paternalistic,” and advocated an approach that assumes that “information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”<sup>42</sup> In considering the listener, then, the Court can imagine specific, real listeners and understand them as autonomous beings who can and ought to be able to make decisions for themselves without protection from the state.

The Court will also look at the milieu in which the listener receives information when deciding whether a speech regulation raises First Amendment concerns, particularly whether the setting in which the information is given provides the listener freedom to make autonomous decisions. In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, the Court considered whether several restrictions and requirements related to attorney advertising in the State of Ohio violated the First Amendment.<sup>43</sup> The Court reviewed the constitutionality of several different rules: one that prohibited “self-recommendation”; another that prohibited an attorney from taking employment after giving “unsolicited advice” to a layman that together seemed to prohibit attorneys from advertising; a rule that prohibited the use of illustrations in attorney advertising; and a rule that required attorneys that work on a contingent basis to make clear to clients whether the contingent fee is computed before or after deduction of court costs and expenses.<sup>44</sup>

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39. *Id.* at 763.

40. Neuborne, *supra* note 25, at 899. Neuborne’s comment that listeners—among other “neighbors” of Mr. Madison’s neighborhood—do not have “judicial personalities” means that the justices do not seem to be able to fully imagine or flesh out these other personalities. Whereas Supreme Court opinions are replete with rhetoric about the heroic speaker (*see, e.g.,* *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting)), the listener is more often cast in an enfeebled or critical light (Neuborne, *supra* note 25, at 899 (“On those relatively rare occasions where a hearer makes a featured appearance in a Supreme Court First Amendment opinion, it is usually to be lectured on how important it is to have a thick skin, or to be conscripted as a First Amendment stand-in for a speaker who can not make it on its own.”)).

41. *Va. State Bd. of Pharmacy*, 425 U.S. at 763. Again, this ability of the Court to imagine, describe, and empathize with the listener is likely due in no small part to the fact that it was not pharmacists who challenged Virginia’s law, but prescription drug consumers and consumer groups (the Virginia Citizens Consumer Council) represented by Public Citizen. *Id.* at 753–54 n.10.

42. *Id.* at 770.

43. 471 U.S. 626 (1985).

44. *Id.* at 632–33.

First, the Court ruled that all of the relevant attorney advertising rules related to “commercial speech” and were thus subject to the First Amendment.<sup>45</sup> With respect to the rules that seemed to prohibit attorney advertising altogether, the Court noted that advertising could be accomplished in different mediums, and that some are more justifiably regulated than others. Specifically, the Court distinguished advertising in print, which it stated is “more conducive to the exercise of choice on the part of the consumer” from personal solicitation of the client by the lawyer, which the Court said has “the coercive force of the personal presence of a trained advocate.”<sup>46</sup> In doing so, the Court did not just take a listener-centered approach, but looked at the specific context in which the “listener”—the person receiving the information—is reached. Where the relationship or situation is one that is coercive, it seems the Court is more likely to find government interference acceptable to protect the listener. However, where the relationship between the speaker and listener is such that the listener is in a position to more easily exercise free choice, the Court seems less likely to allow restraints. In *Zauderer*, because the relationship fell in the latter category, the Court held that the state had no role to prevent coercion and the ban on print advertising therefore violated the First Amendment. Thus, the Court seemed more willing to condone a restraint on speech where it would protect the listener from coercion; but where coercion was less of a risk, the Court valued listeners’ ability to receive “accurate information about their legal rights.”<sup>47</sup>

In considering Ohio’s requirement that attorneys notify their clients that they may be liable for significant costs even if their lawsuits are unsuccessful, the Court distinguished this notice requirement, which is a compulsion of speech, from restraints, and noted that there are “material differences between disclosure requirements and outright prohibitions on speech.”<sup>48</sup> The Court noted that where a speech compulsion “prescribe[s] what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force[s] citizens to confess by word or act their faith therein,” it violates the First Amendment.<sup>49</sup> However, where what is compelled is “purely factual and uncontroversial” commercial speech, the First Amendment concerns are minimal.<sup>50</sup> Notably, the Court’s willingness to distinguish between violative restraints and non-violative compulsions is grounded in a listener-centered approach that gives primacy to the person receiving the information. The *Zauderer* Court, relying on *Virginia Pharmacy Board*, stated that attorneys’ constitutionally protected interest in *not* providing any particular factual information was minimal “because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”<sup>51</sup> In other words, in such situations, the listener’s right to receive information outweighs the speaker’s interest in controlling the message. For this reason, the Court noted that when considering whether a factual, noncontroversial disclosure requirement violates the First Amendment, it will look only at whether

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45. *Id.* at 637–38.

46. *Id.* at 642.

47. *Id.* at 643.

48. *Id.* at 650.

49. *Id.* at 651 (citing *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943)).

50. *Id.*

51. *Id.* (citing *Va. Pharm. Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

the government interest in requiring the disclosure is reasonably related to the disclosure requirement.<sup>52</sup> Given that Ohio's disclosure requirement was meant to prevent deception, the Court had no trouble finding that it did not violate the First Amendment.

In sum, the Court has been willing to take a listener-centered approach to the First Amendment. In doing so, the Court has also shown that (1) it can imagine specific listeners; (2) it will accord listeners autonomy and dignity to make decisions; and (3) it will take into consideration the relationship between the speaker and the listener in order to ensure that the listener is in a position to make informed, autonomous decisions. Finally, the Court seems willing to distinguish between speech compulsions that do not involve statements about politics, nationalism, religion, or other matters of opinion—and therefore provide the listener with information helpful to autonomous decision-making—from restraints on speech, which limit the information that can be given to an autonomous listener.

## II. A LISTENER-CENTERED APPROACH IS APPROPRIATE IN EVALUATING REGULATIONS THAT AFFECT WOMEN'S HEALTH CARE DECISIONS

As I have established, the Supreme Court has recognized that one of the values protected by the First Amendment is the right to receive information and has taken into consideration the ability of an autonomous listener to make decisions in its First Amendment analysis. But what is at the heart of this listener-centered approach? Burt Neuborne has argued that the listener should be celebrated “as an autonomous, and rational creature with the ability to process speech through a mental prism, picking and choosing an appropriate behavioral response”<sup>53</sup> because this approach is central to the success of “robust democracies, efficient markets, and free societies.”<sup>54</sup> Neuborne also argues that it is necessary to recognize that listeners have an independent dignitary right to receive information.<sup>55</sup> This is the right that the Court recognized in *Griswold v. Connecticut* and in *Lamont v. Postmaster General*. According to Neuborne, this “right to know” is based on the same three theoretical bases as the speaker's right to speak:

(1) [A] powerful dignitary interest in shaping and defining the hearer's self; (2) an instrumental interest in gaining access to information and ideas that will assist the hearer in making rational, informed choices, whether economic, social, aesthetic, or political; and (3) a fear that government will abuse any power to cut the hearer off from the free flow of dignitary and instrumental speech.<sup>56</sup>

Neuborne argues that “when speech is particularly corrosive of a hearer's dignity, is destructive of a hearers' right to equal treatment, and/or threatens to drown

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52. *Id.*

53. Neuborne, *supra* note 25, at 904.

54. *Id.* at 905.

55. *Id.* at 906.

56. *Id.* at 906–07.

out alternatives, the definition of ‘the freedom of speech’ should reflect proper concern for the hearer.”<sup>57</sup>

This dignitary interest in shaping the self and receiving information in order to make rational, informed choices also lies at the heart of the informed consent doctrine. In *Canterbury v. Spence*, one of the leading cases elucidating the standards for informed consent, Judge Spottswood Robinson wrote that at the root of informed consent lay the concept, “fundamental in American jurisprudence,” that “every human being of adult years and sound mind has a right to determine what shall be done with his own body.”<sup>58</sup> Consent thus is only true if it constitutes “the informed exercise of a choice,” which in turn entails “an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.”<sup>59</sup>

Judge Robinson noted that “it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie.”<sup>60</sup> The basis of this patient-centered approach was “[r]espect for the patient’s right of self-determination.”<sup>61</sup> More important, the court held that informed consent should be measured by the patient’s needs, rather than dictated by the medical profession, because to do otherwise would dilute “the patient’s right to know.”<sup>62</sup> Thus, Judge Robinson held that informed consent required a physician to disclose to a patient all risks of a procedure that a reasonable person in the patient’s position would believe is material to the decision as to whether or not to forego the proposed therapy.<sup>63</sup> The disclosure also had to be “free from imposition upon the patient.”<sup>64</sup> At the heart of the doctrine of informed consent, then, is respect for the capacity of competent adults to make autonomous decisions.<sup>65</sup> The approach to informed consent that Judge Robinson formulated and that has been followed ever since is decidedly patient-centered and therefore listener-centered.

It only seems logical, then, that when the Court considers laws and regulations affecting information given to women in the context of the decisions they make about their health and bodies, a listener-centered approach would be appropriate because those decisions take place at the intersection of the First Amendment and informed consent. In this context, the value of a listener-centered approach recognizes that the listener not only has a dignitary interest in shaping and defining herself, but also that her instrumental interest in gaining access to

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57. BURT NEUBORNE, *MADISON’S MUSIC: ON READING THE FIRST AMENDMENT* 119 (2015).

58. *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) (citing *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)); see also *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (“No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others.”); *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S. 261, 269–80 (1990).

59. *Canterbury*, 464 F.2d at 780.

60. *Id.* at 781.

61. *Id.* at 784.

62. *Id.* at 786.

63. *Id.* at 787.

64. *Id.* at 783.

65. See Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 240 (2009); see also Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L. J. 899 (1994); Dayna Bowen Matthew, *Race, Religion, and Informed Consent—Lessons from Social Science*, 36 J.L. MED. & ETHICS 150 (Spring 2008).

information and ideas will assist her in making rational, informed choices involving things not just economic, social, aesthetic, and political,<sup>66</sup> but also *personal*.

Unfortunately, the Court's approach to the female listener has led it away from the ideals at the heart of both a listener-centered approach to the First Amendment and the doctrine of informed consent. Instead, as described in the next section, the Court's First Amendment jurisprudence concerning regulations that affect women's health care choices has degenerated into what Neuborne has called "a highly paternalistic doctrine that licenses government censors to manipulate information flow in the name of enhancing the social desirability of the hearer's ultimate choice."<sup>67</sup>

### III. DEVALUING THE FEMALE LISTENER

When it comes to cases involving exclusively or almost exclusively listeners who are women, the Court departs from the approach outlined in Section I and does not seem generally to be able to imagine or sympathize with specific female listeners, does not accord female listeners with maximum autonomy and dignity, and does not look at whether the female listener is in a position to make informed, autonomous decisions.

In this section, I will examine the way in which the Court has treated the female listener within the context of its First Amendment cases. But the nullifying of the female listener in these cases cannot be seen in a void. Thus, prior to turning to the Court's First Amendment opinions involving women's decision-making, in order to place those decisions in a larger context, I will look more generally at the Court's opinions having to do with the decisions women make about their health and bodies. Again and again, in cases involving health care decisions made by women, the Court has ignored specific female listeners and shown an inability to imagine the real, lived experiences of women. Instead, the Court has conceived of a general female listener, who it has painted in a gender stereotyped manner as unreliable, hysterical, irrational, and needing of protection. Having taken this view of the female listener, the Court has held that it is permissible for the state to coerce her. This idea of the unreliable female listener—even outside of the Court's First Amendment decisions—gives context to the way the Court has seen and portrayed the female listener within its First Amendment cases.

#### A. The Court's Gendered Approach to the Female Listener

The decisions I examine here are all ones in which the listener who is primarily affected is female. As such, all of these cases have to do with women's reproductive choices, and more specifically, abortion. In these cases, the Court's language shows that the generally male members of the Court—even some who support women's right to choose—often cannot imagine the specific female listener or understand or sympathize with her real, lived experience. Instead, the Court has expressed a gendered and paternalistic view of the general female listener who it

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66. See Neuborne, *supra* note 25, at 906–07.

67. Neuborne, *supra* note 6, at 28–29.

portrays as weak, hysterical, irrational, and in need of protection and direction, rather than as a strong, fully autonomous decision-maker.

First, the Court's abortion decisions after *Roe v. Wade* show a general inability to imagine and sympathize with specific, individual women or understand their real, lived experiences.<sup>68</sup> For example, in *Maher v. Roe*,<sup>69</sup> decided a mere four years after *Roe v. Wade*, Justice Powell, writing for the majority, decided that a Connecticut law that provided Medicaid beneficiaries coverage for pregnancy, but not abortions that were not medically necessary, was constitutional because it placed "no obstacles absolute or otherwise in the pregnant woman's path to an abortion."<sup>70</sup> Justice Powell further explained, "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires."<sup>71</sup> This statement shows an astonishing lack of sympathy for poor women and ignores their real, lived experiences. As Justice Blackmun admonishingly noted in his dissent, "a distressing insensitivity to the plight of impoverished pregnant women is inherent in the Court's analysis."<sup>72</sup> He further observed that "The stark reality for too many, not just 'some,' indigent pregnant women is that indigency makes access to competent licensed physicians not merely 'difficult' but 'impossible.'"<sup>73</sup>

Justice Powell's lack of sympathy and understanding not only devalued women's experiences, but even worse, led him to conclude that women can be manipulated by the state. In *Maher*, he opined for the majority that Connecticut could permissibly use its funding decisions to try to coerce women to choose to have children.<sup>74</sup> Thus, there is direct link between the inability to value women and the justices' willingness to allow the state to undermine women's autonomy and their right not to have the state interfere with their personal decisions.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>75</sup> Justice Kennedy, writing for the plurality,<sup>76</sup> also seemed unable to imagine specific women affected by the law at issue, and to understand or sympathize with them. In *Casey*, the Court considered whether several provisions of a Pennsylvania law that regulated abortion were constitutional. One of the provisions required a woman to notify her husband that she was going to get an abortion. With respect to its analysis of that provision, Justice Kennedy did take into account evidence that spoke to the real, lived experiences of women. For example, he quoted testimony that the vast majority

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68. For a discussion of the Court's failure to recognize women's real lived experiences in *National Institute of Family Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), see *infra* Section III.B.3, and Chemerinsky & Goodwin, *supra* note 4, at 76–91.

69. 432 U.S. 464 (1977).

70. *Id.* at 474.

71. *Id.*

72. *Id.* at 483 (Blackmun, J., dissenting).

73. *Id.*

74. *Id.* at 474 (The Court found the law constitutional because "The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there.").

75. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

76. He was joined by Justice O'Connor and Justice Souter.

of women do notify their spouses about their abortion decision and cited to studies about family violence.<sup>77</sup> He also acknowledged the district court's finding that "[w]omen of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered."<sup>78</sup>

However, in considering whether a 24-hour waiting period constituted an "undue burden" on a woman's ability to obtain an abortion,<sup>79</sup> Justice Kennedy explicitly ignored the district court's findings with respect to the effect of the waiting period on many women. The district court found "that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be 'particularly burdensome.'"<sup>80</sup> While Justice Kennedy characterized these findings as "troubling," he concluded that "they do not demonstrate that the waiting period constitutes an undue burden."<sup>81</sup> It is hard not to infer that Justice Kennedy and the justices who joined his opinion<sup>82</sup> were able to imagine and sympathize with middle class women, who can be victims of domestic violence, but, as in *Maher v. Roe*, were unable to imagine and sympathize with impoverished women, who are particularly burdened by a waiting period, and understand their particular experiences.<sup>83</sup>

Not only do the justices on the Court seem unable to imagine, understand, or sympathize with particular women—especially economically disadvantaged women—but they also assume that women do not have the emotional strength to make difficult decisions or the intellectual capacity to understand the consequences of those decisions. This, in turn, leads the Court to allow the state to coerce or manipulate women rather than accord them full autonomy. These assumptions play out in the Court's characterization of the abortion decision as stressful and difficult, and as something that can cause women psychological and emotional trauma. In fact, the majority of women do not find the decision to have an abortion very difficult, and studies show that few women regret their decision.<sup>84</sup>

77. *Casey*, 505 U.S. at 888.

78. *Id.* at 889 (internal citations and quotations omitted).

79. In analyzing whether a regulation violates a woman's constitutional right to abortion, the Court uses the "undue burden" test, which looks at whether a "state regulation imposes an undue burden on a woman's ability to make [the] decision" to terminate her pregnancy. *Id.* at 874.

80. *Id.* at 886.

81. *Id.*

82. This includes Justice O'Connor, the first woman on the Court.

83. For a wonderful rewrite of the Court's opinion in *Casey* that does fully imagine and portray the experiences of poor and rural women, see Macarena Sáez, *Commentary on Planned Parenthood of Southeastern Pennsylvania v. Casey*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* 361, 376–81 (Kathryn M. Stanichi, Linda L. Berger, & Bridget J. Crawford eds., 2016).

84. See Jenneke van Ditzhuijzen, Marieke Brauer, Hennie Boeije, & Carolus H. C. J. van Nijnatten, *Dimensions of Decision Difficulty in Women's Decision-Making About Abortion: A Mixed Methods Longitudinal Study*, PLOS ONE (Feb. 22, 2019), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0212611&type=printable> [<https://perma.cc/4NN9-4865>]; see also Corinne H. Rocca, Katrina Kimport, Heather Gould, & Diana G. Foster, *Women's Emotions One Week After Receiving or Being Denied an Abortion in the United States*, 45 PERSP. ON SEXUAL & REPROD. HEALTH 122, 122 (Sept. 2013).

As early as *Planned Parenthood of Central Missouri v. Danforth*, the Court assumed that women may not fully understand the consequences of their own decisions and that the abortion decision is a “stressful” one for women.<sup>85</sup> In finding that Missouri could require patients to provide informed consent to abortion, Justice Blackmun, a strong supporter of women’s constitutional right to abortion, wrote for the majority:

The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.<sup>86</sup>

While Justice Blackmun’s conclusion that it is “desirable and imperative” that a woman’s decision to abort be made “with full knowledge of its nature and consequences” is facially unobjectionable, it is notable that he seemed concerned with the woman knowing about the “nature and consequences” of the abortion, rather than about the risks of the procedure itself.

The purpose of informed consent is to explain to the patient the risks and possible outcomes of a procedure.<sup>87</sup> Justice Blackmun’s suggestion that a woman needs to understand the “nature and consequences” of the procedure rather than its risks, coupled with his emphasis on ensuring that the woman is “aware” of her “decision and its significance,” suggests that even Justice Blackmun, an advocate for women’s rights, was more concerned with ensuring that women understand the purpose and outcome of abortion (i.e. the death of the fetus), rather than the risks of and alternatives to the procedure. Indeed, Justice Blackmun’s language, emphasizing the importance of ensuring the “awareness and significance of the decision,” seems to imply that women are ignorant or uninformed—that they do not know what they are signing up for when they seek an abortion.

Moreover, Justice Blackmun’s emphasis on the fact that the decision to abort “is often a stressful one” is a non sequitur. While it is true that the decision to abort can be stressful, it is not always so for every woman.<sup>88</sup> Justice Blackmun’s choice to emphasize the fact that the situation is “often stressful” is unnecessary and paints a picture of women as weak. After all, a decision to undergo an extremely risky, but life-saving procedure is also stressful, but the level of stress induced by the procedure is not a factor a court generally takes into consideration in deciding whether and to what extent informed consent is appropriate.<sup>89</sup>

This paternalistic idea that women find the abortion decision particularly stressful and difficult and thus need help and protection permeates Justice Kennedy’s

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85. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976).

86. *Id.*

87. *See Canterbury v. Spence*, 464 F.2d 772, 787–88 (D.C. Cir. 1972) (“The topics importantly demanding a communication of information are the inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and the results likely if the patient remains untreated.”).

88. *See van Ditzhuijzen*, *supra* note 84 (showing that about 25–35% of women in study who had an abortion found the decision difficult).

89. *See Canterbury*, 464 F.2d at 787–88.



opinion for the plurality in *Casey* as well. First, in considering whether a requirement that certain information be provided to the woman prior to an abortion, Justice Kennedy stated that it could not be doubted “that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision.”<sup>90</sup> Again, as with the majority opinion in *Danforth*, Justice Kennedy’s language seems to assume that women are ignorant—that they do not know what happens to a fetus when it is aborted and need to be informed of such.<sup>91</sup> Without any evidence, Justice Kennedy also described abortions as able to cause “devastating psychological consequences.”<sup>92</sup> This language is even stronger than the *Danforth* Court’s description of the procedure as “stressful.” Moreover, it is not based on objective reality. A study of women’s emotions after receiving an abortion noted that “While some women experience abortion as a complicated social and personal issue, others experience it as relatively unproblematic.”<sup>93</sup> The study found that while 64% of women who experienced abortion did feel “sadness” after the abortion experience, 83% experienced “relief” and 52% experienced “happiness.”<sup>94</sup> Only 41% felt regret.<sup>95</sup> But given his unfounded assumption that women are ignorant and easily traumatized, Justice Kennedy concluded that the state could ensure not only that a woman’s decision to abort would be “informed,” but also “mature,”<sup>96</sup> as if, without the state’s guidance, a woman would be unable to make a mature, adult decision. He also concluded—unsurprisingly, given his distrust of women’s decision-making power—that it was permissible for the state to coerce a woman into choosing childbirth over abortion.<sup>97</sup>

It is also this phenomenal distrust of women’s decision-making power that underlies the Court’s rationale with respect to finding the 24-hour waiting period constitutional. In addition to ignoring, or at least undervaluing, the effect of the 24-hour waiting period on socio-economically disadvantaged women, Justice Kennedy describes the purpose behind the waiting period as a valid one because it requires women to make “informed and deliberate” decisions.<sup>98</sup> He therefore concludes that “some period of reflection does not strike us as unreasonable.”<sup>99</sup> In other words, Justice Kennedy, joined by Justice O’Connor and Justice Souter, holds that because women cannot be trusted to make rational decisions, it is appropriate to put them in a state-mandated “time-out” to require them to consider the consequences of their actions.

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90. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

91. Linda McClain has called this pronouncement by Kennedy—which he made without any cited support—“remarkable.” See Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 143 (1992).

92. *Casey*, 505 U.S. at 882.

93. Rocca, et al., *supra* note 84, at 122.

94. *Id.* at 126 tbl. 2.

95. *Id.*

96. *Casey*, 505 U.S. at 883 (emphasis added).

97. See Manian, *supra* note 65 at 251 (The Court’s claim in *Casey* to be supporting women’s fully informed, autonomous decisions is belied by its decision to allow the government to use the “informed consent” process “to pressure women to choose childbirth over abortion.”).

98. *Casey*, 505 U.S. at 885.

99. *Id.*

Justice Kennedy's reasoning, as Justice Stevens noted in his separate concurrence, failed to accord women with either the capacity or the ability to exercise "decisional autonomy."<sup>100</sup> Instead, Justice Kennedy's conclusion that women need a time-out period to consider the consequences of their actions "appears to rest on outmoded and unacceptable assumptions about the decision-making capacity of women,"<sup>101</sup> specifically, "the notion that a woman is less capable of deciding matters of gravity."<sup>102</sup> Justice Blackmun, in his concurring opinion in *Casey*, agreed with Justice Stevens' conclusion that the Court's holdings with respect to the informed consent and waiting-period were based on sex-stereotyped assumptions about women.<sup>103</sup> Recognizing the lived experience of women, he noted that the "vast majority of women will know this information" (i.e. that a fetus is destroyed when she has an abortion), and that a waiting period was not likely to ensure that women make more informed decisions.<sup>104</sup>

Maya Manian has called *Casey* a "turning point where abortion law explicitly began treating women as decision-makers less capable than other competent adults."<sup>105</sup> While I disagree that *Casey* was the "turning point," given the Court's earlier language in *Danforth* and *Maher*, it certainly moved the Court further away from imagining specific, real women to whom it would accord full decisional autonomy and towards conceptualizing a general woman who is weak, psychologically and emotionally unstable, ignorant, and unable to make reasoned, rational decisions. This conception of the woman—the female listener—reached its apex in *Gonzales v. Carhart*.<sup>106</sup>

In *Carhart*, Justice Kennedy, writing for the majority, deciding that a federal ban on a specific abortion procedure was constitutional, looked at the supposed effect that learning about the procedure—which is undoubtedly gruesome—would have on the woman seeking an abortion. The decision uses exceptionally gendered language that fetishizes the mother-child relationship and, without any shred of support, portrays the woman who decides to abort as wracked

100. *Id.* at 916 (Stevens, J., concurring in part and dissenting in part) ("Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family; but it must respect the individual's freedom to make such judgments.").

101. *Id.* at 918.

102. *Id.* at 919. Interestingly, while arguing vociferously for respecting women's autonomy and decision-making power, Stevens also assumed that all women find the abortion decision psychologically devastating. He called the decision "traumatic and yet empowering." *Id.* at 916.

103. *See id.* at 934, 937 (Blackmun, J., concurring in part and dissenting in part).

104. *Id.* at 938. Not only is there no evidence that having women wait makes them make "better" or "more informed" decisions, there is empirical evidence that showing women an ultrasound of the fetus and making them wait also has virtually no effect on a woman's decision to abort. Laws that make the physician show the woman an ultrasound of the fetus are also ostensibly based on the notion that this will "inform" the women's decision. But a study showed that even among women with medium to low decisional certainty about having an abortion, only 7.4% changed their mind and decided to continue the pregnancy after seeing an ultrasound. Mary Gatter, Katrina Kimport, Diana G. Foster, Tracy A. Weitz, & Ushma D. Upadhyay, *Relationship Between Ultrasound Viewing and Proceeding to Abortion*, 123 OBSTETRICS & GYNECOLOGY 81, 81, 85 (2014).

105. Manian, *supra* note 65, at 252.

106. 550 U.S. 124 (2007).

with psychological trauma and possible regret. In deciding that the procedure could be banned in order to eliminate any possible psychological trauma on the woman, Justice Kennedy contended that “Respect for human life finds an ultimate expression in the bond of love the mother has for her child.”<sup>107</sup> Based on this supposed “natural” and “essential” bond, he concluded that while there was no “reliable data” to show as much, “some women come to regret their choice to abort the infant life they once created and sustained.”<sup>108</sup> According to Justice Kennedy, this could lead to “severe depression and loss of esteem.”<sup>109</sup> Justice Kennedy thus assumed that because of the naturally strong bond between a mother and her “child,” women who make the abortion decision would inevitably suffer severe psychological harm. Indeed, in other portions of the decision, he describes the abortion decision as “fraught with emotional consequence”<sup>110</sup> and the woman as “struggl[ing] with grief more anguished and sorrow more profound.”<sup>111</sup>

Based on an assumption of women’s inherent psychological weakness—call it hysteria—Justice Kennedy further concluded that doctors would act paternalistically to protect women from this harm by purposefully choosing not to disclose details about the abortion procedure to them.<sup>112</sup> He thus held that, rather than ensuring that women have all the information they need in order to choose whether to undergo the procedure, in order to protect women from the psychological consequences of the decision, it was valid for the government to ban the procedure altogether. As Maya Manian has put it, the Court’s “woman-protective reasoning portrays women who are ‘mothers’ as too emotionally unstable to make significant decisions and it treats pregnant women as ‘hysterical’ and childlike.”<sup>113</sup> Indeed,

107. *Id.* at 159.

108. *Id.* Of course, “some women” also regret other decisions they make: the choice to get married, to have children, to go into the military, to attend law school, or to become a long-haul trucker.

109. *Id.*

110. *Id.*

111. *Id.* Of course, none of these assumptions about women’s attitudes towards abortion are empirically correct. Most women who have abortions suffer no emotional consequences and have no regrets. One study shows that of women who choose to have abortions, only about a quarter “experience[] primarily negative emotions over one week post-abortion,” and even “95% [of those women] still [feel] that the abortion was the right decision.” Corinne H. Rocca, Katrina Kimport, Sarah C. M. Roberts, Heather Gould, John Neuhaus & Diana G. Foster, *Decision Rightness and Emotional Responses to Abortion in the United States: A Longitudinal Study*, PLOS ONE, at 2 (July 8, 2015), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0128832> [<https://perma.cc/VPP9-32VT>]. Moreover, “Women in th[e] study overwhelmingly felt that the abortion decision was the right one for them: at all time points over three years, 95% of participants reported abortion was the right decision, with the typical participant having a >99% chance of reporting the abortion decision was right for her.” *Id.* at 10. A 2017 study showed that no abortion-related variables, including history of multiple abortions, second-trimester abortion, preabortion decision difficulty or uncertainty, and postabortion negative emotions, were associated with a specific incident of a mental disorder or with recurrent mental disorders. Jenneke van Ditzhuijzen, Margreet ten Have, Ron de Graaf, Carolus H.C.J van Nijnatten & Wilma A.M. Vollebergh, *Correlates of Common Mental Disorders Among Dutch Women Who Have Had an Abortion: A Longitudinal Cohort Study*, 49 PERSP. ON SEXUAL & REPROD. HEALTH 123, 127–29 (2017).

112. *Carhart*, 550 U.S. at 159. Of course, this assumption is ridiculous, as physicians would be violating their ethical norms and could be subject to malpractice suits for failing to provide women with accurate information about the procedure.

113. Manian, *supra* note 65, at 258.

Justice Kennedy's justification for the majority decision was not based on any evidence from the real, lived experiences of women nor did it accord women autonomous decision-making power. Instead, the decision was based on paternalistic, gender-based stereotypes of women that sees them as incapable of being reliable listeners and decision-makers. As Justice Ginsburg wrote in her dissent, the majority's "way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."<sup>114</sup>

## B. Devaluing the Female Listener in Applying the First Amendment

When it comes to regulations that involve women's choices, then, the Court generally ignores the experiences of particular women and when it imagines the typical woman, conceives of her on the basis of gender stereotypes as weak, vulnerable, irrational and needing of protection. This view of women also plays out in the Court's First Amendment cases. In a trilogy of cases—*Rust v. Sullivan*, *Casey*, and *NIFLA*—the Court has completely failed to consider what kind of information an autonomous female listener would want to receive in order to inform her decision-making.

### 1. *Rust v. Sullivan*

In *Rust v. Sullivan*, Justice Rehnquist, writing for the majority, considered whether a prohibition on speech placed on health care providers serving women in the Title X program violated the First Amendment.<sup>115</sup> Title X "provides federal funding for family-planning services."<sup>116</sup> The Act makes clear that "[n]one of the funds appropriated for [Title X can] be used in programs where abortion is a method of family planning."<sup>117</sup> In the late 1980s, the Health and Human Services Secretary Sullivan promulgated regulations prohibiting any health care provider receiving Title X grants "from referring a pregnant woman to an abortion provider, even upon specific request."<sup>118</sup> The regulations also prohibited a Title X project from "encourag[ing], promot[ing] or advocat[ing] abortion as a method of family planning," including through lobbying, disseminating materials about abortion, funding speakers who discuss abortion or using legal action to make abortion available.<sup>119</sup> A group of Title X grantees and doctors sued on behalf of themselves and their patients, arguing among other things, that the "gag rule" violated the First Amendment because it constituted viewpoint-based discrimination.<sup>120</sup> The majority

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114. *Carhart*, 550 U.S. at 185 (Ginsburg, J., dissenting).

115. 500 U.S. 173, 174 (1991).

116. *Id.* at 178; Title X of the Public Health Service Act, 42 U.S.C. §§ 300–300a-6.

117. 42 U.S.C. § 300a-6.

118. *Rust*, 500 U.S. at 180; 42 C.F.R. § 59.8(b)(5) (1989). In 1993, President Clinton signed an executive order rescinding the regulations, including the ban on abortion referrals, but in March 2019, the Trump Administration put into place new regulations reimposing the ban on abortion referrals in Title X programs. See Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714, 7716-17 (to be codified at 42 C.F.R. pt. 59).

119. *Rust*, 500 U.S. at 180; 42 C.F.R. § 59.10(a) (1989).

120. *Rust*, 500 U.S. at 192. Viewpoint-based discrimination is a form of regulation that "suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech."

held that the ban did not violate the First Amendment. In doing so, it took a primarily speaker-centered approach to the First Amendment, and to the extent that it considered the female listener, showed a clear misunderstanding of what kind of information a woman in a Title X program would know and want.

First, Justice Rehnquist intimated that the ban on abortion-speech was not a regulation of speech, but of conduct. He noted that Title X funds grantees and projects engaged in family planning services, not abortion, and thus the ban on counseling or referring for abortion was not a prohibition on speech, but “a prohibition on a project grantee or its employees from engaging in activities outside of the project’s scope.”<sup>121</sup> Second, looking at whether the rights of the health care provider *speakers* were infringed, Justice Rehnquist concluded that the ban on abortion referrals did not unduly burden the speech rights of health care providers within the program because the regulations did not force grantees to “give up abortion-related speech entirely”; they just could not engage in such speech within the program.<sup>122</sup> Justice Rehnquist held that because employees of Title X programs “remain free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X program,” the proscription of their speech within the federal program did not raise First Amendment concerns.<sup>123</sup> In other words, Justice Rehnquist saw the proscription of speech within the Title X program as the government regulating its own speech, meaning the limitation on speech was constitutionally permissible because it applied only within the government program, and did not limit speech outside of that program.

Setting aside the fact that Justice Rehnquist narrowly construed who the speakers are and their rights, it is notable that the majority’s approach in this case involving information provided to *women* to make decisions about their health care and their bodies completely fails to take into consideration the information-receiving interests of the female listener. Indeed, the majority seems utterly unconcerned with whether the female listener would have enough information to understand who is providing her with information (e.g. a medical practitioner circumscribed by a government program) and could even get an answer when she asks, “Where can I get an abortion?”

Moreover, when Justice Rehnquist considered whether the First Amendment provides protection to utterances within the doctor-patient relationship, he completely ignored, or at the very least, minimized the interests of the female listener. Justice Rehnquist noted that although First Amendment concerns *might* be raised within the doctor-patient relationship, he would not address the issue in the case because the Title X program regulations did not “significantly impinge upon the doctor-patient relationship” since nothing in the regulations required the doctor to represent “as his own any opinion that he does not in fact hold.”<sup>124</sup> Again, what mattered to Justice Rehnquist was the speaker and what he or she would be forced to

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See *id.* at 207 (Blackmun, J., dissenting) (citing *Speiser v. Randall*, 357 U.S. 513, 518–19 (1958)). Such regulations are generally considered the purest example of laws abridging freedom of speech. *Id.* at 208 (citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383–84 (1984)).

121. *Id.* at 194.

122. *Id.* at 196.

123. *Id.* at 198.

124. *Id.* at 200.

say, not the listener, who would not be getting complete information about her health care options.

Finally, Justice Rehnquist also noted that there were no First Amendment concerns raised by the Title X regulations because, according to him, the doctor-patient relationship established by the Title X program was not “sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice.”<sup>125</sup> Justice Rehnquist, then, finally did turn to the patient—the female listener—and her expectations. However, he concluded that a woman seeking health care from a health care provider should not have an expectation of receiving comprehensive medical advice or even a truthful answer to the question of where she could get an abortion. This conclusion shows the majority’s minimal regard for and understanding of the female listener. After all, the decision did not contemplate a situation in which a woman asks a family planning counselor for a referral completely unrelated to family planning—for example, to see an ophthalmologist (a referral, by the way, not explicitly prohibited by the Title X regulations). Abortion is a service intimately related with family planning and pregnancy, and a woman seeking family planning guidance through the Title X program surely *would* expect that even if the program could not provide her with an abortion, it could tell her where to get one. In his dissent, Justice Blackmun contended that this “truthful information regarding constitutionally protected conduct” would be “of vital importance to the listener.”<sup>126</sup>

Thus, in *Rust*, Justice Rehnquist writing for the majority not only largely ignored the female listener, but when he did finally consider her, completely failed to understand what her real, lived expectations would be. Instead, the majority undervalued the kind of information the female listener would expect, want, and need to make autonomous choices within the scope of the Title X program. Justice Blackmun, writing in dissent, called this “deny[ing] women the ability voluntarily to decide their procreative destiny.”<sup>127</sup>

## 2. *Planned Parenthood of Southeastern Pennsylvania v. Casey*

I have already described the Court’s general approach to the female listener in *Casey*, which portrays women as emotionally fragile and in need of protection from the state (including a “time out” to make decisions), rather than as strong, autonomous listeners capable of making rational decisions. This conceptualization of the female listener mainly exists in Justice Kennedy’s discussion of whether the Pennsylvania regulations violate the Due Process Clause of the Fourteenth Amendment (whether they constitute an undue burden on the woman’s ability to access abortion). With respect to its cursory First Amendment analysis in the case, the majority completely ignores the female listener.

The Pennsylvania law at issue in *Casey* required physicians to notify a woman seeking an abortion that the State “publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided

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125. *Id.*

126. *Id.* at 215 (Blackmun, J., dissenting).

127. *Id.* at 217.

to her free of charge.”<sup>128</sup> The law also required physicians to tell their patients seeking abortion that “[m]edical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the [State].”<sup>129</sup> In considering whether this compelled disclosure law violated the First Amendment, Justice Kennedy took a speaker-centered approach.<sup>130</sup> He acknowledged that the law implicated physicians’ First Amendment right not to speak, but concluded that the law did not regulate speech directly, and instead compelled speech incidental to conduct, specifically “as part of the practice of medicine.”<sup>131</sup> Relying on the Court’s jurisprudence holding that states may “reasonably” regulate speech that is incidental to conduct—here the practice of medicine—Justice Kennedy summarily found that there was “no constitutional infirmity” in the compelled disclosure requirement.<sup>132</sup> This conclusory analysis that information provided as part of informed consent is conduct rather than speech not only nullified the rights of the speaker in this instance, but completely ignored the female listener altogether.

### 3. *National Institute of Family and Life Advocates v. Becerra*

In *National Institute of Family and Life Advocates v. Becerra*, the Supreme Court considered whether a law requiring providers of pregnancy-related services to post a sign notifying patients that the state provides free or low-cost services, including abortions, violated the First Amendment.<sup>133</sup> Justice Thomas, writing for the majority, found that it did. At issue was the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the “FACT Act”).<sup>134</sup> The FACT Act required licensed facilities<sup>135</sup> that provide two or more types of services, including obstetric ultrasounds, sonograms, prenatal care, counseling about contraception, pregnancy testing or diagnosis abortion services; or collection of health information from patients to post a notice in the facility. The notice stated: “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of

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128. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 903 (1992).

129. *Id.*

130. To be fair, the Court likely viewed the issue from a speaker-based lens because petitioners in the case were the clinics providing abortions and physician who provided abortions, rather than women affected by the regulations. *See id.* at 845 (noting petitioners were “five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services”).

131. *Id.* at 884.

132. *Id.* (citing *Whalen v. Roe*, 429 U.S. 589, 603 (1977)).

133. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018).

134. CAL. HEALTH & SAFETY CODE §§ 123470–123473 (2018).

135. The FACT Act was introduced and passed mainly because of concerns that crisis pregnancy centers were engaged in deceptive practices, providing women seeking their services with false information about contraception and abortion. *Reproductive FACT Act: Hearing on A.B. 775 Before the Assemb. Comm. on Health*, 2015 Leg., 2015-16 Sess. 4 (Cal. 2015). Crisis pregnancy centers are pro-life, largely Christian belief-based, organizations that offer a limited range of free pregnancy options—such as pregnancy test and ultrasound confirmations—counseling, and other services. *Id.* They are non-profits and receive substantial funding from pro-life umbrella organizations. *Id.* They typically do not offer services that conflict with pro-life views, like abortion referrals or procedures. *Id.*

contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [relevant telephone number].”<sup>136</sup> The notice could be posted in the waiting room, printed and distributed to clients, or provided digitally at check-in.<sup>137</sup> The FACT Act exempted certain types of facilities from the notice requirement—namely those linked to the public programs referenced in the required notice, including clinics enrolled as Medi-Cal providers and clinics that participated in California’s Family PACT program, a program that provides comprehensive reproductive health care services for low-income women.<sup>138</sup> Clinics operated by the United States or a federal agency were also exempted.<sup>139</sup> The FACT Act also required unlicensed facilities to notify their patients that the facility is not licensed.<sup>140</sup>

Although the disclosure requirement in the FACT Act was similar to the Pennsylvania requirement in *Casey* that women be informed that the state provided free or low-cost coverage for reproductive health services, in finding the FACT Act unconstitutional, Justice Thomas held that it regulated speech, rather than speech that was incidental to conduct. Justice Thomas characterized the law as “a content-based regulation of speech” subject to strict scrutiny—the highest form of judicial scrutiny—because it “compelled individuals to speak a particular message” and therefore altered the content of their speech.<sup>141</sup> He also distinguished the notice requirement in the FACT Act from two categories of speech that receive intermediate, rather than strict, scrutiny: commercial speech regulations that require disclosure of “noncontroversial” information related to the services provided and laws that regulate professional conduct “even though that conduct incidentally involves speech.”<sup>142</sup>

First, Justice Thomas claimed that the notice required by the FACT Act should not receive intermediate scrutiny because it neither related to the services provided nor was “uncontroversial.”<sup>143</sup> He found the notice “in no way” related to the services provided by the licensed clinics challenging the law because the FACT Act required notice of the availability of state-sponsored services, while the services provided by the clinic were not state-sponsored.<sup>144</sup> This conclusion completely ignores *why* women go to crisis pregnancy centers. They are not looking for “private” or non-state sponsored services. They are looking for reproductive health services. To conclude that a sign giving a woman information about state resources to cover *the very services she is seeking at the crisis pregnancy center* is not “related” to the services she is seeking shows the *NIFLA* majority’s ignorance of women’s real, lived

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136. HEALTH & SAFETY § 123472(a)(1).

137. *Id.* § 123472(a)(2).

138. *Id.* § 123471(c); see also FAMILY PACT, *Family Planning, Access, Care, and Treatment* (Sept. 17, 2020), <https://familypact.org/> [<https://perma.cc/KSR3-26AV>].

139. HEALTH & SAFETY § 123472(c).

140. *Id.* § 123472(b)(1). I will not be considering the Court’s analysis of this issue here.

141. Nat’l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018).

142. *Id.* at 2372.

143. *Id.*

144. *Id.* He found this even though the licensed clinics challenging the law provided “free pregnancy options, counseling, and other services to individuals” who visit them, and the required notice provided information about access to prenatal care. *Id.* at 2368.



experiences.<sup>145</sup> Moreover, Justice Thomas concluded that because the notice included the word “abortion,” and the clinics were opposed to abortion, it was not “uncontroversial.”<sup>146</sup> Again, this conclusion takes the perspective not of women who may visit the licensed clinics, but of the speakers—here, the crisis pregnancy centers that oppose abortion.

In distinguishing the FACT Act from the informed consent laws that the Court held in *Casey* regulated speech incidental to conduct, Justice Thomas found that the FACT Act regulated speech, rather than conduct that incidentally burdens speech. He found the FACT Act’s notice requirement was not an informed consent requirement or a regulation of professional conduct, as the notification requirements were in *Casey*, but a regulation of “speech as speech” because the notice requirement applies “to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed.”<sup>147</sup> In other words, under Justice Thomas’s analysis, disclosure requirements count as “conduct” and are proper only if they are closely related to the underlying conduct, and according to Justice Thomas, informed consent requirements are proper only when related to the specific medical procedure sought.

Of course, this position once again myopically views the reasons why women go to crisis pregnancy centers and completely misunderstands women’s experiences there. Women go to crisis pregnancy centers when they think they are pregnant and need confirmation of the pregnancy. If the pregnancy is not confirmed, many women will want contraception to ensure no future unplanned pregnancies. If confirmed, they either need prenatal care or an abortion. To say that a sign letting women know that most of the services they may be seeking are covered by the state is not sufficiently related to the conduct that occurs at the clinic again shows an astonishing contempt for reality and women’s experiences.

After distinguishing the FACT Act from the two categories of regulation subject to intermediate rather than strict scrutiny, Justice Thomas then provided an exposition on the need for strict scrutiny to apply to content-based regulations of professional speech. Specifically, citing *Sorrell v. IMS Health, Inc.*,<sup>148</sup> a decision that dealt with a law providing content-based *restrictions* on speech, he noted that the Court “has stressed the danger of content-based regulations ‘in the fields of medicine and public health, where information can save lives.’”<sup>149</sup> Ironically—in light of his discussion of *Casey* and his analysis of the relationship between the notice requirement and the services provided by the clinics—Justice Thomas also suggested that content-based restrictions on the speech of health care practitioners are particularly concerning because “Doctors help patients make deeply personal decisions, and their candor is crucial.”<sup>150</sup> He argued that when the government polices the content of professional speech, it interferes with the marketplace of ideas and “the people lose when the government is the one deciding which ideas should

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145. Or, less generously, utter contempt for women’s real, lived experiences.

146. *NIFLA*, 138 S. Ct. at 2372.

147. *Id.* at 2373–74. This was so, even though the clinics at issue only provide health care services—namely, pregnancy related sonograms, ultrasounds, diagnostic tests, and counseling. *Id.* at 2369–70.

148. 564 U.S. 552 (2011).

149. *NIFLA*, 138 S. Ct. at 2374 (quoting *Sorrell*, 564 U.S. at 566).

150. *Id.* at 2374 (quoting *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1328 (11th Cir. 2017)).

prevail.”<sup>151</sup> For these reasons, he concluded that professional speech should not be treated as a special category of speech exempted from normal First Amendment principles.<sup>152</sup> In other words, after so vividly ignoring the experiences of women who visit crisis pregnancy centers, Justice Thomas turned to a listener-centered justification for applying strict scrutiny to the notice requirement.

Ironically, Justice Thomas’s application of higher scrutiny to the notice requirement then completely *ignored* what information “the people”—specifically women seeking reproductive health care—would need or want in order to make autonomous decisions in that context. Instead, he looked at which speakers the regulation applied to in deciding that the law violated the First Amendment. Justice Thomas held that if the FACT Act’s purpose was to provide low-income women with information about state-sponsored services, the notice requirement was not sufficiently related to that purpose, since it exempted paid clinics, federal clinics, and Family PACT providers and was therefore “wildly underinclusive.”<sup>153</sup> Moreover, he concluded that the FACT Act was not sufficiently related to its purpose of informing women about subsidized reproductive health services, because California could inform low-income women about these services itself, even though California had made clear that it had tried this approach and failed.<sup>154</sup>

The majority opinion in *NIFLA* shows a complete failure to value and understand the female listener and accord her dignity and autonomy to have all of the information she needs to make decisions about her health and body. This impulse is so strong, that as Justice Breyer pointed out in his dissent, it caused the majority to ignore large swaths of its First Amendment precedent.

Justice Breyer, in a dissent joined by Justices Ginsburg, Sotomayor, and Kagan, excoriated the majority’s approach to analyzing the FACT Act, pointing out that the Court has historically given social and economic laws considerable deference.<sup>155</sup> Justice Breyer argued that Justice Thomas had done nothing to explain why the FACT Act was not such a “health regulation” to which the Court typically gives rational-basis deference.<sup>156</sup> Rather, by applying heightened scrutiny to the FACT Act, the majority was putting at risk a whole host of other professional disclosure laws that are not closely related to the professional’s own services or conduct.<sup>157</sup>

Justice Breyer argued that the FACT Act should be analyzed similarly to other “disclosure laws relating to reproductive health,”<sup>158</sup> and more specifically, that its disclosure requirements were indistinguishable from those approved by the Court in *Casey*.<sup>159</sup> He noted that the FACT Act regulates “medical personnel engaging in activities that directly affect a woman’s health—not significantly different from the

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151. *NIFLA*, 138 S. Ct. at 2374–75.

152. *Id.* at 2375.

153. *Id.* at 2375–76.

154. *Id.* at 2376.

155. *Id.* at 2381 (Breyer, J., dissenting).

156. *Id.* at 2381.

157. *Id.* at 2380.

158. *Id.* at 2383.

159. *Id.* at 2385.

doctors at issue in *Casey*.<sup>160</sup> Moreover, just like the law at issue in *Casey*, the FACT Act required health care providers to give women the kind of information that the *Casey* court held aids in providing “informed consent.”<sup>161</sup> The Pennsylvania law required physicians to tell patients that the state covered certain pregnancy-related services, just as California’s law did.<sup>162</sup> Finally, Justice Breyer scoffed at the majority’s argument that the disclosure in the FACT Act was not relevant to a “medical procedure,” because it applied to clinics providing pregnancy care rather than abortion. He pointed out that seeking medical care or counseling for pregnancy is no different from seeking services for other reproductive health procedures, and therefore, a woman would need to provide informed consent to receive such care.<sup>163</sup> Thus, if the law in *Casey* regulated speech as part of the practice of medicine, California’s law was no different.<sup>164</sup>

Justice Breyer also took aim at the Court’s conclusion that the law was underinclusive because it did not apply to private pay clinics. Recognizing specific female listeners, he explained that one of the purposes of the law was to ensure that low-income women are apprised of all of their reproductive health options. He noted, “That those with low income might lack the time to become fully informed and that this circumstance might prove disproportionately correlated with income is not intuitively surprising.”<sup>165</sup> He therefore concluded that whatever underinclusiveness there was, its purpose was not to harm speakers, but to aid female listeners—“the patients the group generally serves and the needs of that population.”<sup>166</sup>

Justice Breyer also criticized the majority’s conclusion that the Court’s decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*<sup>167</sup> was inapplicable. As discussed above, in *Zauderer*, the Court found constitutional a rule requiring contingent-fee lawyers who advertise their services to disclose that clients might be required to pay fees and costs.<sup>168</sup> The *NIFLA* majority concluded *Zauderer* did not apply to the FACT Act because it involved a commercial advertising requirement and required disclosure of “purely factual and uncontroversial information” about the services provided.<sup>169</sup> As explained, Justice Thomas did not believe the required notice was “uncontroversial” because it included the word “abortion.”<sup>170</sup> Justice Breyer argued that the majority’s interpretation of *Zauderer* was too narrow. According to Justice Breyer, the purpose of commercial speech restrictions is not limited to the advertising context, but shows concern for the “value to consumers of the information such speech provides.”<sup>171</sup> Thus, as long as a law only requires the provision of “truthful and nonmisleading

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160. *Id.*

161. *Id.* at 2385–86.

162. *Id.* at 2383, 2385.

163. *Id.* at 2386.

164. *Id.*

165. *Id.*

166. *Id.*

167. 471 U.S. 626, 651 (1985).

168. *Id.* at 650–53.

169. *NIFLA*, 138 S. Ct. at 2372.

170. *Id.*

171. *Id.* at 2387 (Breyer, J., dissenting) (quoting *Zauderer*, 471 U.S. at 651).

information” that would be helpful to a consumer, it does not violate the First Amendment.<sup>172</sup> Justice Breyer concluded that the FACT Act’s required notice may have included the word “abortion,” which is a controversial topic, but “the availability of state resources is not a normative statement or a fact of debatable truth.”<sup>173</sup> Instead, the disclosure “includes information about resources available should a woman seek to continue her pregnancy or terminate it, and it expresses no official preference for one choice over the other.”<sup>174</sup> Thus, the marketplace of ideas is fostered, not hindered, by the disclosure requirement.<sup>175</sup>

In sum, Justice Breyer showed that a listener-centered approach to the FACT Act would be appropriate and would take into account the value of the information to the female listener in making her personal health care decisions. He also demonstrated that such an approach would ensure consistency between the Court’s decision and its previous precedents *Casey* and *Zauderer*.<sup>176</sup> Indeed, while the majority opinions in *Rust*, *Casey*, and *NIFLA* are consistent in their devaluing of the female listener, they are inconsistent in their application of the First Amendment.

#### IV. THE FIRST AMENDMENT ABORTION CASES’ INCONSISTENCIES

The analyses and outcomes in *Rust*, *Casey*, and *NIFLA* are consistent only in that they ignore or undervalue the female listener and her decision-making autonomy. Besides the majority conservative justices’ personal views on abortion and their disdain for the female listener, there is no way to explain the analyses in these three decisions in a way that is coherent and consistent. If the majority in *NIFLA* had followed *Rust*, arguably *NIFLA* would come out quite differently. Furthermore, *NIFLA* is completely inconsistent with *Casey*.

*NIFLA* and *Rust* both concern a speech regulation that applies to providers that are regulated by the government. In *Rust*, the providers received funding from the federal government and were regulated because of that funding. In *NIFLA*, the clinics were all licensed by the state and were regulated pursuant to the licensing. Thus, in both cases, the regulations were incidental to receiving some form of government authorization to provide services. In both cases, too, the regulations at issue were content-based: in *Rust*, the regulations prohibited referrals for abortion;<sup>177</sup> in *NIFLA*, the regulations required notice that the state funded abortions.<sup>178</sup> Thus, both *Rust* and *NIFLA* involve content-based regulations involving speech about abortion, which Justice Thomas has held is a “controversial” topic.<sup>179</sup> Yet in *Rust*, the Court held the speech regulation did not violate the First Amendment, while in *NIFLA*, it held that it did.

172. *Id.* at 2388.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 2386; *see also* Chemerinsky & Goodwin, *supra* note 4, at 99–110.

177. *Rust v. Sullivan*, 500 U.S. 173, 178–80 (1991).

178. *NIFLA*, 138 S. Ct. 2368–69.

179. *Id.* at 2372; *see also Rust*, 500 U.S. at 210 (Blackmun, J., dissenting) (arguing that the Title X regulations are “clearly restrictions aimed at the suppression of ‘dangerous ideas’”).

In *Casey*, the Court held that regulation of professional speech incidental to conduct did not violate the First Amendment. In *NIFLA*, the Court held that regulation of professional speech incidental to conduct did violate the First Amendment. Although the majority tried to distinguish *Casey* by suggesting that regulation of information provided by physicians to patients as part of informed consent constitutes conduct, while the hosting of a notice in a clinic office constitutes speech, the regulations in *Casey* and *NIFLA* were essentially the same. In both cases, the clinician was forced to provide information to the patient about what health care services were covered by the government.<sup>180</sup> Moreover, the information required to be provided in *Casey* about the state's coverage of prenatal care given to a woman who is seeking abortion is no more closely related to the services being sought than providing information about abortion coverage to a woman who is seeking confirmation of a pregnancy or other pregnancy-related counseling or services. In *Casey* and *NIFLA*, the health care providers are providing reproductive health services to women, and in both, the information provided is related to state coverage of such services.

These inconsistencies, no doubt, can be explained by the majority conservative Court's aversion to abortion, but they also can be explained by the majority's devaluing and ignorance of women's experiences, particularly their reproductive health experiences, and of women themselves.<sup>181</sup> If the Court were to take a listener-centered approach to the First Amendment that valued women's experiences and gave precedence to their dignitary rights and decisional autonomy, not only would the Court's opinions involving women's decision-making be consistent among themselves, but more important, such an approach would lead the Court to remain more true to its First Amendment precedents.

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180. In *Casey*, the regulation required, in part, that the physician notify the patient that "medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 903 (1992) (app. to op. of O'Connor, Kennedy, and Souter, JJ.). In *NIFLA*, the FACT Act required that a licensed clinic must provide notice, either with a sign or in paperwork provided to the patient, that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [relevant telephone number]." 138 S. Ct. at 2369.

181. We have seen a similar illustration of men's ignorance about women's real, lived experiences and reproductive health in male lawmakers' recent efforts to pass increasingly restrictive abortion laws. For example, in Alabama, a sponsor of a law banning all abortions after six weeks, stated that, "I'm not trained medically, so I don't know all the proper medical terminology and timelines and that sort of thing . . . but from what I've read, what I've been told, there's some period of time before you can know that a woman is pregnant." See Christina Cauterucci, *Ignorance Is Blessed*, SLATE (May 15, 2019), <https://slate.com/news-and-politics/2019/05/alabama-abortion-law-republican-ignorance-female-reproduction.html> [<https://perma.cc/D3TZ-QVG9>]. Another male lawmaker in Ohio introduced a bill that would prohibit any insurance coverage of abortion but would allow such coverage for ectopic pregnancies to "reimplant the fertilized ovum into the pregnant woman's uterus." *Id.* No such procedure exists. And, of course, the most notorious example is that of Missouri representative Todd Akin, who said a woman who is raped cannot get pregnant because "the female body has ways to try to shut that whole thing down." *Id.*

## V. VALUING THE FEMALE LISTENER IN APPLYING THE FIRST AMENDMENT PROPERLY ACCORDS THE FEMALE LISTENER WITH AUTONOMY AND LEADS TO MORE CONSISTENCY IN THE COURT'S NON-POLITICAL SPEECH JURISPRUDENCE

A listener-centered approach to the First Amendment “views the individual as a powerful autonomous presence, capable of accepting or rejecting wide varieties of speech . . . as part of a rational formation of individual preferences and world view.”<sup>182</sup> Such an approach that values female listeners would not have to vary greatly from the listener-centered approach the Court has taken in other cases. It would (1) imagine specific female listeners; (2) accord such listeners autonomy and dignity to make decisions; and (3) take into consideration the relationship between the speaker and the listener in order to ensure that the listener is in a position to make informed, autonomous decisions.

Moreover, taking a listener-centered approach to the First Amendment that values the female listener does not mean abandoning the Supreme Court’s First Amendment jurisprudence that is not listener-centered. Instead, this listener-centered approach should occur within the parameters the Court has established in evaluating the constitutionality of speech regulations. Specifically, when taking a listener-centered approach, the Court has been willing to distinguish between speech restraints and speech compulsions, and a listener-centered approach therefore can, and ought, to take into account this distinction, as well as the distinctions the Court has made between regulations that affect speech and those that affect speech incidental to conduct. In fact, these distinctions can be understood to *value* the listener. When a listener-centered methodology is used to explain these distinctions and then evaluate speech regulation, it can provide a jurisprudence that not only accords women full autonomy, but also provides consistency with the Court’s precedents.

### A. A Listener-Centered Approach That Recognizes the Difference Between Speech Restraints and Speech Compulsions: *Rust vs. NIFLA*

The Court has generally recognized that compelled speech should be treated differently from prohibitions on speech,<sup>183</sup> and this makes sense when taking both a

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182. Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein’s Democracy and the Problem of Free Speech*, 62 U. CHI. L. REV. 423, 444 (1995).

183. See *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct.*, 471 U.S. 626, 650–51 n.14 (1985) (“Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized.”); *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 249 (2010) (holding that where the purpose of the challenged provisions “is directed at misleading . . . speech [and] impose[s] a disclosure requirement rather than” a restraint, “the less exacting scrutiny described in *Zauderer*” applies). Notably, Justice Thomas, who wrote the majority opinion in *NIFLA*, wrote a concurrence in *Milavetz*, a case that found constitutional a speech compulsion, arguing that there is no difference between restraints and disclosure requirements. He noted he would be “willing to reexamine *Zauderer* and its progeny in an appropriate case to determine whether” those precedents distinguishing between speech compulsions and speech restrictions “provide sufficient First Amendment protection against government-mandated disclosures.” *Milavetz*, 559 U.S. at 256. In *NIFLA*, his failure to distinguish between the speech

speaker-based and a listener-based approach to the First Amendment. From the speaker's perspective, a compulsion of speech is less constitutionally suspect as long as the speaker's activity is not a "coherent speech product"<sup>184</sup> and it leaves room for the speaker to provide not only the state's message, but her own. A speech prohibition, on the other hand, prevents the speaker from giving her message, and thus more profoundly raises First Amendment concerns.

From the listener's perspective, a speech compulsion does not necessarily prevent the listener from getting the information she needs to make autonomous decisions. A speech restriction does. Moreover, if the compulsion involves only facts and leaves room for the speaker to make clear whether the message comes from the state or otherwise, there is also little concern that the listener will be confused about whose message she is receiving, and so she remains in a position to evaluate the reliability and importance of the speech and make decisions based on it. Of course, a speech compulsion can also be problematic from a listener's perspective if the speech does not serve the listener's dignitary, informational, or autonomy interests. But overall, if a listener-centered approach is based on the recognition that listeners "have a powerful interest in receiving information that enhances their capacity for informed choice"<sup>185</sup> and that "the free flow of information enhances autonomous decision making"<sup>186</sup> by listeners, then from a listener-centered perspective, restrictions on speech should be constitutionally more circumspect than speech compulsions. Looking at the First Amendment from a perspective that takes into account the difference between speech compulsions and speech restrictions with respect to the female listener would lead to the opposite outcomes in *Rust* and *NIFLA*.

*Rust* concerns a speech prohibition, while *NIFLA* concerns a speech compulsion. Thus, the regulation in *Rust*—which banned physicians from giving women information about their health care options—should automatically raise more First Amendment concerns than the law in *NIFLA*, which required licensed clinics to provide women with information about their health care options. In *NIFLA*, the majority, citing *Sorrell*,<sup>187</sup> argued that content-based regulations are particularly dangerous "in the fields of medicine and public health, where information can save lives."<sup>188</sup> In *Sorrell*, the Court found that a Vermont law that prohibited drug marketers from purchasing information about physicians' prescription practices violated the First Amendment. Notably, then, the Court's dicta about content-based regulations was made in the context of a *restriction* on the dissemination of information. Although *Sorrell* was decided long after *Rust*, if in *Rust* the Court had taken into account the fact that withholding information from listeners in a health context can be harmful, as it did in *Sorrell*, it would have concluded in *Rust* that the "gag rule" raised serious First Amendment concerns. By contrast, the Court failed to

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compulsion in the FACT Act and the restriction in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), reflects this position, but also indicates a failure to take the listener into account when it comes to applying the First Amendment.

184. See Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 358 (2018).

185. Burt Neuborne, *supra* note 6, at 28.

186. *Id.* at 29.

187. See 564 U.S. 552, 566 (2011).

188. See *NIFLA v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011)).

recognize in *NIFLA* that the concerns raised in *Sorrell* about the effect of speech restrictions on listeners did not apply with equal force to the speech compulsion in the FACT Act. Indeed, the Court's analysis in *NIFLA* neglected to distinguish between laws that require disclosure, and therefore ostensibly aid in ensuring a robust marketplace of ideas<sup>189</sup> and the decision-making of a listener, from laws such as those in *Sorrell* that prohibit the provision of information, lead to less information being accessible in the marketplace of ideas, and therefore harm the listener's ability to make decisions. This failure to recognize the difference between a speech compulsion's effect on a listener and a speech restriction's effect on a listener led to an ironic outcome in which the Court argued that "information can save lives" and then struck down a restriction providing women with information.

A First Amendment analysis that is specifically listener-centered would distinguish between speech compulsions and speech restrictions, but this is only a starting point. The analyses in *Rust* and *NIFLA* would also look entirely different if they had not just recognized this distinction, but had also honored specific, autonomous female listeners and had taken into account their dignitary and informational rights.

1. *Rust – Analyzing a Speech Restriction from a Female Listener-Centered Perspective*

As discussed in Section III.B.1, in *Rust*, the Court largely ignored the female listener, but to the extent that it took her into consideration, it scoffed at the notion that a female listener in a Title X program would have a reasonable expectation of receiving "comprehensive medical advice," which the Court seemed to mean advice about where to get abortion services.<sup>190</sup> This view of the female listener shows either complete ignorance of or complete disdain for her expectations within the context of the Title X program. It also shows particular ignorance of and disdain for poor women and women of color.

Title X is a "family planning" program, but it provides services well beyond just contraception. According to the Office of Population Affairs, which administers the program, Title X:

[I]s designed to provide contraceptive supplies and information to all who want and need them, with priority given to persons from low-income families. In addition to offering a broad range of effective and acceptable contraceptive methods on a voluntary and confidential basis, Title X-funded service sites provide contraceptive education and counseling; breast and cervical cancer screening; sexually transmitted disease (STD) and human immunodeficiency virus (HIV) testing, referral, and prevention education; and pregnancy diagnosis and counseling.<sup>191</sup>

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189. See *id.* at 2374–75.

190. See *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

191. OFF. OF POPULATION AFF., TITLE X FAMILY PLANNING ANNUAL REPORT: 2017 NATIONAL SUMMARY at ES-1 (2018), <https://opa.hhs.gov/sites/default/files/2020-07/title-x-fpar-2017-national-summary.pdf> [<https://perma.cc/VPK2-JS55>].



Title X programs also provide infertility services.<sup>192</sup> In 2017, over 4 million individuals obtained family planning services at a Title X funded site.<sup>193</sup> The majority of those seeking Title X care—67%—had family incomes at or below the poverty level.<sup>194</sup> Of those who sought services at a Title X site in 2017, about 9 out of 10, or 88%, were women.<sup>195</sup> Among those women, 54% self-reported their race as being white, and 22% self-reported their race as being African-American.<sup>196</sup> Thirty-four percent reported their ethnicity as being Hispanic or Latino, including 18% of those who reported their race to be white.<sup>197</sup> Women also seek services beyond birth control at Title X clinics. Eighteen percent of women who sought services at a Title X clinic had a cervical screening, and 25% had a breast cancer screening.<sup>198</sup> More than half of all women who sought services at a Title X clinic sought testing for sexually transmitted infections.<sup>199</sup>

With these facts in mind, analyzing whether a gag rule placed on health care providers in a Title X program violates the First Amendment, a listener-centered approach that values the female listener would first recognize that women in the Title X program have a First Amendment right to receive information related to their reproductive health care.<sup>200</sup> Second, this approach would recognize that Title X serves primarily economically disadvantaged women and that about half of all women seeking services from a Title X program are women of color. Similar to the listeners fully recognized and credited in *Virginia State Board*, then, suppression of information about *all* of their reproductive health care options, including where they could get an abortion, would hurt these poor women the most.<sup>201</sup> Third, if, as the facts set forth above suggest, what women are seeking when they visit a Title X clinic includes not just birth control, but comprehensive reproductive health care, then it is clear that information about abortion, and at the very least a referral upon request, is not only closely related to the services they are seeking, but would be expected. Indeed, if a woman came to a Title X clinic and asked for a form of birth control that the clinic did not provide, she would want and expect information about where she could get that form of birth control and whether it would be covered by the government. Abortion is no different. Even if Title X clinics are themselves barred from providing abortions, a woman has an instrumental interest when seeking

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192. See OFF. OF POPULATION AFF., PROGRAM REQUIREMENTS FOR TITLE X FUNDED FAMILY PLANNING PROJECTS 5 (2014), <https://www.nationalfamilyplanning.org/document.doc?id=1462> [<https://perma.cc/Y23T-M4RQ>].

193. See Laurie Sobel, Alina Salganicoff, & Brittni Frederiksen, *New Title X Regulations: Implications for Women and Family Planning Providers* (Mar. 8, 2019), <https://www.kff.org/womens-health-policy/issue-brief/new-title-x-regulations-implications-for-women-and-family-planning-providers/> [<https://perma.cc/ND88-RZLE>]; OFF. OF POPULATION AFF., *supra* note 191, at ES-1.

194. See Sobel et al., *supra* note 193.

195. OFF. OF POPULATION AFF., *supra* note 191, at ES-2.

196. See *id.* at 12.

197. See *id.* at 13 exhibit 7.

198. See *id.* at 41.

199. See *id.* at 43–48.

200. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

201. See *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). About 9% of women who sought care in a Title X program in 2017 were pregnant or seeking to get pregnant. OFF. OF POPULATION AFF., *supra* note 191, at ES-2.

reproductive health care to get information about *all* of her legally available options and a dignitary right to have all of her options presented to her so that she can make a decision about what is best for herself and her family.

Finally, when a woman seeks professional health care and information at a Title X clinic, she is in a situation that features what Helen Norton calls “inequalities of information.”<sup>202</sup> A health care provider at a Title X clinic as a speaker will know more than her listener about the services the clinic does and does not provide and where services that it does not provide can be sought.<sup>203</sup> Moreover, there is an inherent knowledge and power differential between the health care provider and the female listener.<sup>204</sup> One could even consider the relationship a coercive one, or at least a potentially coercive one: the female listener is a “captive” audience, and because of the knowledge and power differential, is more likely to be influenced by information given (or withheld) from her.<sup>205</sup> In these circumstances, the female listener when asking about abortion and being told that the provider cannot make a referral, may understand this to be a negative judgment on her decision to consider terminating her pregnancy. Indeed, if told “the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortions,”<sup>206</sup> what else is she supposed to conclude?

The speech restriction in *Rust* is also particularly problematic because the female listener does not have enough information to evaluate whether, in fact, she is getting independent medical advice from her health care provider. As Norton has pointed out, part of the problem with the gag rule is that because the government does not identify itself as the source of the message to the female listener in these circumstances, the female listener is not even in a position to know whether the information she is receiving comes from her health care provider, and therefore, cannot evaluate its merit.<sup>207</sup> In this situation, the speech *restriction* on information is particularly harmful to the female listener because she may perceive that she is being judged and patronized by the health care provider she trusts, and she will not be given all of the information she needs to make an autonomous decision about her health care and the well-being of her family. Rather than maximizing patient dignity and autonomy by ensuring that the patient has all of the information she needs to make an informed decision, the gag rule limits the female listener’s information, treating her as less than a powerful, fully autonomous person able to make her own rational decisions. An approach to the regulation in *Rust* that understands and puts at its

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202. Norton, *supra* note 7, at 466.

203. *See id.*

204. *See, e.g.,* 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, 225–26 (1994) (“[T]he purpose and structure of the doctor-patient relationship vests physicians with immense authority and power in the eyes of patients.”).

205. *See, e.g.,* *Bigelow v. Virginia*, 421 U.S. 809, 828 (1975) (showing that the Court is willing to take into consideration the relationship between the speaker and the listener/receiver of information not only in cases involving speech compulsions, but also in cases involving speech restrictions).

206. *Rust v. Sullivan*, 500 U.S. 173, 180 (1991) (citing 45 C.F.R. § 59.8(b)(5) (1989)).

207. *See* Helen Norton, *Pregnancy and the First Amendment*, 87 *FORDHAM L. REV.* 2417, 2420–21 (2019).

center the female listener would therefore find the restriction on speech to violate the First Amendment.

2. *NIFLA – Analyzing a Speech Compulsion from a Female Listener-Centered Approach*

The Court’s opinion in *NIFLA*, as stated, is also flawed when analyzed from a female listener-centered perspective because it fails to distinguish between speech restrictions and speech compulsions. Unlike in *Rust*, in *NIFLA*, the female listener is not harmed because no information is being withheld from her; indeed, the FACT Act ensures that the female listener has all the information she needs to make an autonomous decision. When a compulsion contributes to enhancing the marketplace of ideas, it is not as harmful from a First Amendment perspective as a speech restriction, which narrows the information available in the marketplace, and thereby harms the listener who is making her choices based on that information.<sup>208</sup>

Moreover, the *NIFLA* Court ignored one of the main reasons the Court has held that speech restrictions are more constitutionally suspect than speech compulsions: because speech compulsions can leave room for the speaker to give and the listener to receive more information.<sup>209</sup> Pursuant to the FACT Act, licensed clinics were compelled to provide information to their patients about low-cost and no-cost health care services provided by the state, including abortion, but they were not prohibited from providing their opinions about abortion or even discouraging their patients from seeking abortion care. Thus, the law provided no risk to the speaker that her message would be confused with the state’s.<sup>210</sup> Moreover, it also raised no risk that the *listener* would confuse the speaker’s message with the state’s.

When it comes to speech compulsions, the Court generally examines the extent to which the compulsion interferes with the speaker’s “expressiveness.” Thus, the Court will look at whether the speaker is engaged in expression or expressive conduct;<sup>211</sup> whether the state is compelling the speaker to provide a particular political, moral, or religious opinion as opposed to being required to provide factual information;<sup>212</sup> and the extent to which the speaker’s own message is affected by the speech the speaker must accommodate.<sup>213</sup> A listener-centered approach to the same issue would consider whether the listener, in evaluating the information she receives from the speaker, would identify the message with the speaker and therefore not properly be able to evaluate the quality and reliability of the speech. All of these factors—whether the speaker is engaged inherently in speech, the information being

208. See *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

209. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

210. Of course, this distinguishes the FACT Act from the examples Justice Thomas gives of the dangers of manipulating the content of doctor-patient discourse. The Cultural Revolution, the Soviets, Nazi Germany, and Nicolae Ceausescu were all totalitarian dictatorial regimes that not only required physicians to carry out government objectives, but left no room for physicians to provide their own perspective or opinions or to make clear to their patients that they disagreed with the government’s objectives or policies. See *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (citing Berg, *supra* note 4, at 201–02).

211. See, e.g., *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 65–66 (2006).

212. See, e.g., *Zauderer v. Office of Disciplinary Couns. of Sup. Ct.*, 471 U.S. 626, 650–51 (1985).

213. See *Rumsfeld*, 547 U.S. at 63.

required to be spoken, and the extent to which the speaker can distance herself from the required speech—also all ought to be taken into account in analyzing whether the listener is in a position to properly evaluate the information she is receiving.

With respect to the first factor, arguably the crisis pregnancy clinics in *NIFLA* were not being forced to speak, but were rather being required to *host* speech. In *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*, the Court held that the Solomon Act, which required educational institutions receiving federal funds to allow military recruiters to speak on their campuses, did not violate the First Amendment, mainly because it required law schools to *host* speech, and therefore regulated speech incidental to conduct—rather than speech.<sup>214</sup> Specifically, the Court held that “a law school’s recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter’s message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.”<sup>215</sup> The Court noted that where there was little likelihood that a speaker’s views would be confused with the government’s, and where the speaker was not being “compelled to affirm a belief in any governmentally prescribed position or view,” any First Amendment concerns were minimal.<sup>216</sup> This was due, in part, to the *listeners’* perception of the speech. Because the speech was hosted, the Court held that *listeners* in the case—law school students—could “appreciate the difference” between “speech a school sponsors and speech the school permits because legally required to do so.”<sup>217</sup> Thus, the Solomon Act was subject to the *Albertini* test, which considers whether the regulation “promotes a substantial government interest that would be achieved less effectively absent the regulation.”<sup>218</sup>

Likewise, in *NIFLA*, the crisis pregnancy centers are not essentially engaged in speech. While they do provide counseling services, licensed facilities also offer patients pregnancy tests, ultrasounds to confirm pregnancy, “consultation with a licensed medical professional,” and testing for sexually transmitted diseases and infections.<sup>219</sup> Indeed, the FACT Act defined “licensed facilities” to include only those facilities that had a “primary purpose” of “providing family planning or pregnancy-related services.”<sup>220</sup> Thus, although licensed crisis pregnancy centers do have an expressive purpose—to oppose and dissuade women from having abortions—they are not engaged in conduct, like a parade or a newspaper, that is essentially expressive. Moreover, the FACT Act did not require crisis pregnancy centers to engage in speech; it merely required that they “host” the state’s speech by posting a sign or otherwise providing the state-sponsored information to their patients. Given these facts, it seems obvious that female listeners would not confuse the information required to be provided by the FACT Act with licensed facilities’

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214. *See id.* at 64.

215. *Id.*

216. *See id.* at 65 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980)).

217. *Id.* (citing *Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990)).

218. *United States v. Albertini*, 472 U.S. 675, 689 (1985).

219. *See, e.g.*, CARE NET, *What Is a Pregnancy Center*, <https://www.care-net.org/what-is-a-pregnancy-center> [<https://perma.cc/VTL7-KUNE>].

220. CAL. HEALTH & SAFETY CODE ANN. § 123471(a) (West 2018).

positions about abortion.<sup>221</sup> Indeed, following *FAIR*, it would be incredibly paternalistic and sexist to conclude that law student listeners can appreciate when their schools' speech is compelled by the state, but that adult women listeners cannot distinguish between crisis pregnancy centers' speech and the notification the state requires in the FACT Act.<sup>222</sup>

With respect to the second factor, which looks at the nature of the information being required to be spoken, the Court in compelled speech cases has looked at whether the state is compelling the speaker to provide a particular political, moral, or religious opinion, or whether the speaker is merely being required to provide factual information.<sup>223</sup> In the former instance, the Court has found such compelled speech unconstitutional, mainly because of concerns that the listener will not understand that the speaker is being forced to spout the state's opinion, rather than his own, but it has been more deferential to the latter type of compelled speech, which leaves room for more speech and is less likely to confuse a listener. A listener-centered approach thus appropriately understands "purely factual and uncontroversial" not to mean, as the majority in *NIFLA* holds, dealing with a subject matter that is politically uncontroversial,<sup>224</sup> but to mean containing information "factually uncontroversial" or "factually uncontroverted."<sup>225</sup> Because the FACT Act does not require crisis pregnancy centers to provide a particular message or opinion about abortion—e.g. "abortions should be safe and legal"—but only requires that licensed centers let patients know that the state may cover reproductive health care, including abortion, there is little risk that listeners—the crisis pregnancy centers' patients—will confuse the state's message about what services it covers with the centers' own anti-abortion position.

This is particularly true because the FACT Act does not prohibit the licensed facilities from disagreeing with or distancing themselves from whatever message they believe the information required by the FACT Act provides. In *FAIR*,

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221. A recent study of women who have visited crisis pregnancy centers shows that most women know and understand that they are pro-life and promote only pro-life options. Katrina Kimport, Rebecca Kriz & Sarah C.M. Roberts, *The Prevalence and Impacts of Crisis Pregnancy Center Visits Among a Population of Pregnant Women*, 98 *CONTRACEPTION* 69, 71 (2018).

222. Under this approach, the FACT Act would also be subject to the *Albertini* test. 472 U.S. at 689. In *FAIR*, the Court held that under the *Albertini* standard, the Court would not consider whether proposed other methods of military recruiting could be provided. Instead, it called the Court of Appeals' proposed alternative methods of recruiting "beside the point." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 67 (2006). The Court held that the Solomon Act was "not invalid because there was some imaginable alternative that would be less burdensome on speech." *Id.* Following this precedent, the majority in *NIFLA* never should have considered whether the State of California could itself inform low-income women about its services. See *National Inst. of Fam. & Life Advoc. v. Becerra*, 138 S.Ct. 2361, 2376 (2018).

223. *Zauderer v. Off. of Disc. Couns. of Sup. Ct.*, 471 U.S. 626, 651 (1985) (distinguishing cases in which the state has attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" from being forced to provide "factual information" in advertising); see also *Rumsfeld*, 547 U.S. at 62 ("Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it does.").

224. See 138 S.Ct. at 2372.

225. Norton, *supra* note 7, at 467–68.

the Court distinguished the Solomon Act from cases in which it had found compelled speech violations, finding that “The compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate.”<sup>226</sup> Like the Solomon Act, the FACT Act’s notice requirement does not affect a crisis pregnancy center’s own message. A crisis pregnancy center is free to provide the required notice to a patient and then to say, “Even though the state may provide funds to cover an abortion, we think you ought to strongly consider keeping your baby.” Since the FACT Act does not prohibit this messaging and allows the crisis pregnancy centers to distinguish the state’s message from their own, under the third factor, the Court considers when evaluating whether a speech compulsion violates the First Amendment, the crisis pregnancy centers’ own message is minimally affected by the speech the speaker must accommodate, and more important from a listener-centered perspective, there is little risk that the female listener will believe that information about her reproductive health care coverage comes from the center.

Under this reasoning, then, in *NIFLA*, the speech compulsion is less constitutionally circumspect than the speech restriction in *Rust* because (1) it helps contribute to the “marketplace” by providing the listener with *more* information to aid her decision-making; and (2) there is little risk that the female listener will believe that a sign posted or other information provided about the state’s coverage of reproductive health services reflects the crisis pregnancy center’s beliefs since the compulsion requires hosting of factual speech and does not prevent the crisis pregnancy center from distancing itself from the information required to be provided. Under a listener-based analysis that properly distinguishes between speech restrictions and speech compulsions and also fully takes into account the effect of the compulsion on the listener, the restriction in *Rust* would not pass constitutional muster, but the compulsion in *NIFLA* would.

Not only is the law in *NIFLA* constitutionally sound from a listener-centered approach, but it is especially so when looked at in a way that imagines the specific female listener, considers her autonomy, and considers the milieu in which she receives the information. To engage in this analysis, it is important to understand the specific women who would seek services at a crisis pregnancy center.

It is unclear whether crisis pregnancy centers attract women of a particular race or ethnicity or of a particular socio-economic class. A recent survey of women seeking prenatal and abortion care found that only 5-6% of them had visited a crisis pregnancy center, mainly to get a confirmation of pregnancy.<sup>227</sup> However, in passing the FACT Act, the California legislature was particularly concerned that poor women, who are disproportionately affected by unintended pregnancy and its consequences and often do not know that they may be eligible for state coverage for prenatal and reproductive health care.<sup>228</sup> In its brief in the case, the State noted:

Despite “statewide marketing campaigns, community mobilization, provider training, and targeted efforts to reach

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226. *Rumsfeld*, 547 U.S. at 63.

227. Kimport et al., *supra* note 221, at 70–71.

228. *Reproductive FACT Act: Hearing on A.B. 775 Before the Assemb. Comm. on Health*, 2015 Leg., 2015-16 Sess. 4 (Cal. 2015).

vulnerable populations who may be newly eligible for coverage,” many eligible Californians do not know about their publicly funded healthcare options. Of special pertinence to the Legislature’s efforts to provide early care for pregnant women, each year thousands of women are unaware of relevant public health programs when they learn that they are pregnant. A woman’s ability to learn about and obtain needed medical services in such circumstances may be especially limited if she is low-income, since such women are likely to have limited time and money for travel, may have difficulty attending multiple appointments, may be ill-equipped to research options, and will find it difficult to pay for services.<sup>229</sup>

Justice Thomas, writing for the majority in *NIFLA*, took no account of these particular women. But if Justice Thomas had valued them—as Justice Breyer did in his dissent<sup>230</sup>—it would lead to the conclusion that the law raises no First Amendment concerns. After all, it is meant to provide women, including those disproportionately affected by unplanned pregnancies, with all the information they need to make an autonomous decision about whether and how to continue their pregnancies. As Helen Norton puts it, “Pregnant women considering their next steps are generally interested in accurate information about relevant services that can help them regardless of who provides those services.”<sup>231</sup>

The law in *NIFLA* also raises no concerns about coerciveness, because the notice requirement in the FACT Act does not take place within the physician-patient relationship. The notice is posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in.<sup>232</sup> When the female listener receives the notice, she is not in a “captive” situation. Ironically, it is this fact that the information is provided outside of the health care provider’s office that led Justice Thomas to conclude that notice requirement could be considered speech, rather than conduct, and subject to the First Amendment. But from a listener-centered approach to the First Amendment, it makes the law *less*, not more, suspect.

Viewing the FACT Act from a perspective that imagines the particular women it was meant to assist, accords those women full autonomy, and ensures they are in a position to make fully informed, autonomous decisions leads ineluctably to the conclusion that the Act is permissible under the First Amendment.

#### **B. A Female Listener-Centered Approach to Speech Compulsions That Regulate Conduct vs. Speech Compulsions That Regulate Speech: *NIFLA* vs. *Casey***

In *Casey*, the Pennsylvania law at issue required physicians to notify a woman seeking an abortion that “the department publishes printed materials which

229. Brief for the State Respondents, *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, No. 16-1140, 2018 WL 1027815, 5–6 (U.S. Feb. 20, 2018) (internal citations omitted).

230. *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S.Ct. 2361, 2386 (2018) (Breyer, J., dissenting).

231. Norton, *supra* note 7, at 467.

232. CAL. HEALTH & SAFETY CODE ANN. § 123472(a) (West 2018).

describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge.” It also required physicians to say that “medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.”<sup>233</sup> The law was characterized as an informed consent requirement, but the Court held that it did not regulate speech, it regulated conduct (or speech incidental to conduct).<sup>234</sup> But does the regulation at issue in *Casey* regulate conduct?

In *NIFLA*, the Court distinguished *Casey* by arguing that the speech required by the FACT Act was not closely enough related to the medical care provided by the clinic to mean that the Act regulated conduct, rather than speech. In contrast, it held that *Casey*’s informed consent requirements were closely enough related to a medical procedure to mean that what was being regulated was conduct, rather than speech. Thus, the Court concluded that while the law in *Casey* regulated conduct, the FACT Act regulated “speech as speech.”<sup>235</sup> In fact, as I set forth above, the law in *NIFLA* arguably regulated conduct—the hosting of speech incidental to the provision of services—while I believe the law in *Casey* arguably regulates speech.

In *Virginia State Board of Pharmacy*, the state argued that the restrictions on advertising related to professional conduct, not speech.<sup>236</sup> The Court disagreed, finding that the restrictions on pharmacists’ advertising was regulation of speech, not conduct.<sup>237</sup> Indeed, while generally the profession of pharmacy was being regulated, the purpose and effect of the regulation was to control the information—speech—provided by the pharmacists. Similarly, regulations related to informed consent control speech—the “dissemination of knowledge” as Robert Post puts it—rather than conduct, the “dispensation of medical care.”<sup>238</sup> A diagnosis is speech that is incidental to conduct; explanation of symptoms is speech that is incidental to conduct; a referral is speech that is incidental to conduct. But providing information to the patient as part of informed consent is dissemination of knowledge and, in fact, happens prior to the conduct.<sup>239</sup> Thus, regulation of informed consent is regulation of “speech as speech.”

Of course, the problem with this argument is that it could render “ordinary informed consent doctrine constitutionally questionable.”<sup>240</sup> But if First Amendment concerns are not triggered where there is no infringement of the listener’s rights, then the majority of informed consent law—whose very purpose is to ensure the dignity of the listener patient and to provide the patient with information necessary to make

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233. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 903 (1992) (appendix).

234. *Id.* at 2824.

235. 138 S.Ct. 2373–74 (2018).

236. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 768 (1976).

237. *Id.*

238. Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 UNIV. ILL. L. REV. 939, 972 (2007).

239. *Id.*

240. *Id.* at 973.



autonomous decisions<sup>241</sup>—would not raise constitutional concerns. In the end, a First Amendment approach to laws that regulate women’s health care decision-making that values the female listener will not be as concerned with whether what is being regulated is speech or speech incidental to conduct, but rather the *effect* of the regulation on the dignitary and informational interests of the female listener. Thus, for example, the question of whether the speech is clearly “hosted” matters because in such situations, it is evident to the female listener that the speech is compelled and she is in a position to evaluate the trustworthiness of the speech. This, of course, is what distinguishes *NIFLA* from *Rust*: it is not just that one involves a speech compulsion and the other a speech restriction. In *NIFLA*, the speech requirement would not leave a female listener confused as to whether it is the crisis pregnancy center or the government speaking. In *Rust*, the female listener *would* be confused as to whether the information she is receiving (or is not receiving) is from her physician or is government speech.

Returning to *Casey*, then, the important point is that the laws at issue regulated speech that directly affected female listeners and thus raise First Amendment concerns.<sup>242</sup> Thus, a consideration of *Casey* must focus on imagining the specific female listener, according her autonomy and dignity to make decisions, and would take into consideration the relationship between her and the speaker to make sure she is in a position to receive all the information she needs to make informed, autonomous decisions.

One critique of *Casey* is that when the Court considered the “woman question”<sup>243</sup>—examining how women have been disadvantaged or absent from the law—the Court contemplated a “mythical woman with unlimited human and economic resources, with no disabilities, no connections to anyone, and no responsibilities.”<sup>244</sup> As discussed above, the only instance in *Casey* in which the Court imagines specific women is when it considers whether the spousal notification requirement constitutes an undue burden on victims of domestic violence.<sup>245</sup> With respect to engaging in a listener-centered First Amendment analysis, imagining specific women would mean knowing that 60% of women who seek abortions are young—in their 20s.<sup>246</sup> Moreover, women seeking abortions are racially and ethnically diverse. In 2014, 39% were white, 28% were black, 25% were Hispanic, 6% were Asian or Pacific Islander, and 3% were of some other race or ethnicity.<sup>247</sup>

241. See *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) (citing *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)); see also *Union Pac. RY. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (“No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . .”); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269–80 (1990).

242. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 903 (1992).

243. See generally Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

244. Macarena Sáez, *Commentary on Planned Parenthood of Se. Pa. v. Casey*, in *FEMINIST JUDGMENTS* 361, 362 (Kathryn M. Stanchi, Linda L. Berger, Bridget J. Crawford eds., 2016).

245. *Casey*, 505 U.S. at 879.

246. Jenna Jerman, Rachel K. Jones, & Tsuyoshi Onda, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INST. (May 2016), <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014> [https://perma.cc/44JL-666B].

247. *Id.*

Moreover, about three-quarters of women who seek abortions are socio-economically disadvantaged. In 2014, 49% of all women seeking abortion lived below the poverty level, while another 26% lived at the poverty level or up to two times the poverty level.<sup>248</sup> A study from the early 1990s indicates that for women below the poverty level, 60 percent of births are unintended (compared with only 30 percent of unintended births for women above 200 percent of the poverty level).<sup>249</sup> As Justice Breyer noted in his dissent in *NIFLA*, low-income women typically lack information about state coverage for services.<sup>250</sup>

Thus, to the extent that the Pennsylvania law in *Casey* required that physicians tell their patients that information was available about state coverage of reproductive health care services, such a speech compulsion seems to be helpful, rather than harmful, to the real women who seek abortions. As Justice Breyer said with respect to the notice requirement in the FACT Act:

That those with low income might lack the time to become fully informed and that this circumstance might prove disproportionately correlated with income is not intuitively surprising. Nor is it surprising that those with low income, whatever they choose in respect to pregnancy, might find information about financial assistance particularly useful.<sup>251</sup>

The statement is equally applicable to the provision in Pennsylvania law requiring physicians to notify their patients of the same. In both cases, too, because the health care provider is not reading or providing the information itself, but rather providing a factual notice (in *Casey*, letting the patient know there is a state pamphlet that contains that information; in *NIFLA*, posting a notice or providing a print out), there is little risk in either situation, as there is in *Rust*, of the female listener confusing the state's message about health care coverage with a judgment or opinion of the provider.<sup>252</sup> Thus, from a First Amendment perspective that values the female-listener, neither requirement is constitutionally concerning.

But what of the Pennsylvania provision considered in *Casey* that required the physician to tell the patient that the state “publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge”?<sup>253</sup> From a listener-centered perspective, this requirement seems unobjectionable. The way in which the information is offered again makes clear that the information comes from the state, the message is a purely factual one, and there is room for the physician to distance herself from the message, ensuring

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248. *Id.*

249. Stephen E. Radecki, *A Racial and Ethnic Comparison of Family Formation and Contraceptive Practices Among Low-Income Women*, 106, No. 5, PUB. HEALTH REPS. 494, 500–01 (1991).

250. Nat'l Inst. of Fam. & Life Advoc. v. Becerra, 138 S.Ct. 2361, 2386 (Breyer, J., dissenting).

251. *Id.*

252. See, e.g., *Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2014) (“Informing a patient that there are state-issued materials available [as in *Casey*] is not ideological, because the viewpoint conveyed by the pamphlet is clearly the state’s—not the physician’s.”).

253. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 903 (1992).

that the female listener knows where the information is coming from and can evaluate the reliability and relevance of the information to inform her decision.

However, we cannot forget the context in which this information is being provided. The speech compulsion only occurs when a woman is seeking an abortion (not a pregnancy confirmation). The information provided about the “unborn child” and alternatives to abortion assume that a woman seeking abortion is likely to change her mind. This assumption is in line with the Court’s normal characterization of women as having a difficult time deciding to have abortions. But if the Court could imagine or understand the real, lived experience of women, it would know that this characterization of the abortion decision as particularly fraught is a false one. Rather, studies show that most women do not have a difficult time deciding whether to have an abortion. For example, a study of 500 women in Utah who sought abortions found that their decisional uncertainty about the procedure was “comparable to or lower than those found in other studies of women making healthcare decisions, such as mastectomy after a breast cancer diagnosis . . . prenatal testing after infertility . . . or antidepressant use during pregnancy.”<sup>254</sup> The study also showed that women’s decisional uncertainty about having an abortion was also lower than the decisional uncertainty of “men and women making decisions about reconstructive knee surgery” and “men deciding on prostate cancer treatment options.”<sup>255</sup> Given that the vast majority of women seeking abortion seem quite certain of their decision, requiring them to be told that the state provides information about the unborn child and options other than abortion is unnecessary and impinges on the values of autonomy and dignity underlying the First Amendment.

Indeed, as I have emphasized, it is not enough when considering the First Amendment implications of laws that affect women’s healthcare decision-making to simply imagine the specific women who are affected by the law. The Court must also, as it has in other contexts, consider the effect of the law on the autonomy of the female listener. When the law has a “corrosive”<sup>256</sup> effect on the female listener’s dignity or autonomy, or fails to aid her in making political, social, economic, or personal decisions, it should raise First Amendment concerns.

The Court’s decision in *Casey*, its language in *Carhart*, and Courts of Appeals’ decisions about other informed consent laws that require physicians to provide women seeking abortions with information about the fetus generally or specifically suggest that a woman should have this information because she does not understand the implications of an abortion. Language from the Sixth Circuit’s decision in *EMW Women’s Surgical Center, P.S.C. v. Beshear* is illustrative:

[W]e hold that H.B. 2 provides relevant information. The information conveyed by an ultrasound image, its description, and the audible beating fetal heart gives a patient greater knowledge of the unborn life inside her. This also inherently provides the patient with more knowledge about the effect of an abortion procedure: it shows her what, or whom, she is consenting to terminate. That this

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254. Lauren J. Ralph, Diana Greene Foster, Katrina Kimport, David Turok & Sarah C.M. Roberts, *Measuring Decisional Certainty Among Women Seeking Abortion*, 95 *CONTRACEPTION* 269, 276 (2017).

255. *Id.*

256. *NEUBORNE*, *supra* note 57, at 87.

information might persuade a woman to change her mind does not render it suspect under the First Amendment. It just means that it is pertinent to her decision-making.<sup>257</sup>

The idea that a woman does not know “what” or “whom” she is terminating when she seeks an abortion is utterly paternalistic and wholly corrosive to a woman’s dignity and autonomy, as is the notion that she should be allowed to be coerced. It is common sense that women know they are seeking the termination of a fetus when they seek abortion. Studies also show that viewing an ultrasound and getting more information about the fetus does not change women’s minds about having the procedure. In one study of more than 15,000 patients who sought abortion and viewed an ultrasound of the fetus, 98.4% “proceeded to termination after viewing.”<sup>258</sup> This is not surprising in light of the study already discussed that shows that when women seek abortions, they are generally quite certain about their decisions.<sup>259</sup>

Laws that require physicians to give women ultrasounds and describe the fetus (or a fetus) to them—even if they do not want the information, turn their heads away, and cover their ears<sup>260</sup>—rest on a gendered, stereotypical assumption that women are so stupid or incompetent that they do not know what an abortion is when they seek one,<sup>261</sup> or are so weak and malleable that they will change their minds when given information that the law assumes they do not know. Under a listener-centered approach that values women as powerful, autonomous listeners who can make decisions for themselves and understand the consequences of their actions, these laws are suspect under the First Amendment because the information they require to be provided does not aid female listeners’ decision-making and instead undermines women’s autonomy and dignity.

Another concern about the law in *Casey* (and in the Courts of Appeals’ opinions in *Rounds*, *Lakey*, and *Beshear*, which dealt with similar laws compelling

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257. 920 F.3d 421, 430 (6th Cir. 2019). The Supreme Court denied certiorari in *Beshear* on Dec. 9, 2019, leaving in place a decision that follows the Court’s legacy of ignoring, disadvantaging, and condescending to women when it comes to their First Amendment interests. See *EMW Women’s Surgical Ctr. P.S.C. v. Meier*, 140 S. Ct. 655 (2019) (mem.).

258. Gatter et al., *supra* note 104, at 85.

259. Ralph et al., *supra* note 254, at 276.

260. See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 573 (5th Cir. 2012); *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 665–66 (8th Cir. 2008).

261. *Cf. Muller v. Oregon*, 208 U.S. 412, 421–22 (1908) (“[The woman is] placed in a class by herself.” The Court further articulated: “Though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.”).

physician speech),<sup>262</sup> as in *Rust*, is that it regulates information provided to a woman in a situation in which she is a “captive” listener within the health care provider’s office. In these situations, there are inequities of information and power, because the health care provider has knowledge and expertise that the patient does not have.<sup>263</sup> Thus, the health care provider’s speech can have more of a coercive effect on the listener-patient. In *Zauderer*, the Court showed that it would take into consideration the milieu where speech takes place and the degree of coerciveness of the speech in deciding whether regulation of professional speech raised First Amendment concerns.<sup>264</sup> A listener-centered approach to *Casey* would recognize that a requirement that the health care provider give the patient information about what services the state covers is not circumspect under the First Amendment because unlike the speech restriction in *Rust*, it does not raise the risk that the patient will understand the physician to be making a judgment about her decision. However, the requirement that the physician tell the patient that the state offers alternatives to abortion is a closer call.

On the one hand, the requirement is not particularly related to informed consent and thus may be understood by the female listener to constitute a judgment on her choices. Generally, informed consent requires that a health care provider disclose:

[A] diagnosis and description of the patient’s medical condition, description of the proposed treatment and its nature and purpose, risks and possible complications associated with the treatment, alternative treatments or the relative merits of no treatment at all, and the probability of success of the treatment in comparison with alternatives.<sup>265</sup>

If a patient comes to a health care provider seeking an abortion, in order for her to receive proper information to consent, her pregnancy must be confirmed, she must be provided with information about what abortion procedures are available to her (e.g. a medication abortion, a D&C, or a D&E), a description of each procedure, and the risks and possible complications of each procedure. The question is whether she must be told about “alternatives” or “the merits of no treatment.” An abortion is not a “treatment” for an illness; it has a specific purpose, which is to terminate a pregnancy. From this perspective, there are no “alternate treatments” because any alternative (e.g. continuing the pregnancy) does not accomplish the purpose of her “treatment.” Thus, providing information about alternatives is not required by informed consent and if the health care provider is required to give the patient information about state alternatives to abortion, there is a risk that the patient will

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262. Under a female listener-centered approach, the laws at issue in *Rounds*, *Lakey*, and *Beshear* would all be suspect under the First Amendment because they undermine the autonomy and dignity of the female listener. An analysis of those laws would not even need to take into account the milieu in which they are provided.

263. See Berg, *supra* note 206, at 225–26 (“[T]he purpose and structure of the doctor patient relationship vests physicians with immense authority and power in the eyes of patients.”).

264. See *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct.*, 471 U.S. 626, 642 (1985).

265. Am. Coll. of Obstetrics & Gynecology Comm. on Ethics, *Informed Consent*, No. 439 (Aug. 2009, reaffirmed 2015).

understand the conveyance of that information to constitute a judgment about her decision to abort. On the other hand, the law at issue in *Casey* is a speech compulsion that does not prevent the provider from distancing herself from the speech requirement. Overall, then, the coerciveness of the speech is minimal, although as set forth above, it still raises First Amendment concerns because of its effect on the listener's dignity and autonomy.

In sum, an application of the First Amendment that values the dignity and autonomy of the female listener would mean that laws requiring that information about women's health care choices be withheld would immediately be suspect, while laws that promote providing women with the information they need to make health care decisions would seem proper so long as the information required to be provided does not smack of paternalism or otherwise corrode the dignity and autonomy of female decision-makers.

## VI. CONCLUSION

Currently, the Court's First Amendment jurisprudence regarding whether information provided to women that informs their decision-making about their health and bodies is entirely inconsistent not only among those decisions, but also with respect to the Court's First Amendment jurisprudence involving speech that does not affect women's reproductive health care choices. *Rust* seems a departure from general First Amendment law that frowns upon content-based and viewpoint-based restrictions on speech<sup>266</sup> and is inconsistent with the Court's pronouncements in *Sorrell v. IMS*.<sup>267</sup> *NIFLA* departs from the Court's precedent in *Casey*, *Virginia State Board of Pharmacy*, and *Zauderer*.

One way to ensure consistency in the Court's approach to non-political speech is for the Court to value listeners, not just speakers, as it traditionally has in commercial speech and other cases, and to place women at the center of any analysis that involves their decision-making, particularly decision-making about their health and bodies. An approach that values the female listener when her decision-making is affected is not without basis in the principles that undergird the Free Speech Clause—autonomy and self-governance—and is also not without precedent in the Supreme Court's opinions. Indeed, *Griswold*<sup>268</sup> and *Bigelow*,<sup>269</sup> decided in the 1960s and 70s, are valuable in showing that even before and just after *Roe v. Wade*, the Court was able to see women as autonomous decision-makers entitled to the information they need to make decisions about their bodies in a non-coercive setting.

While the current conservative majority on the Court is unlikely to give importance to the female listener in applying the First Amendment, for those who believe that the Court's existing First Amendment jurisprudence devalues and even ignores women, a future litmus test for Supreme Court justices should not only include commitment to *Roe v. Wade*, but more broadly should ensure that a prospective justice can and is willing to take an approach to the First Amendment that considers listeners, can imagine and sympathize with the real, lived experiences

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266. See, e.g., *Turner Broad. Sys., Inc. v. Fed. Comm. Comm'n*, 512 U.S. 622, 641–42 (1994).

267. 564 U.S. 552, 566 (2011).

268. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

269. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

of women, and is committed to considering women fully autonomous decision-makers, even if they make decisions that the justice disagrees with.

Moreover, while the continued vitality of *Roe v. Wade* is looking uncertain, it is unclear whether the Supreme Court will overrule its precedent or whether it will turn to a version of the “undue burden” test that will essentially consider the vast majority of regulations of abortion as not being “undue.” If this becomes reality, litigants may have to increasingly rely on the First Amendment as a means to challenge at least some of those regulations. While the Court’s current jurisprudence is not particularly helpful in that regard, it may be possible to convince lower courts, based on *Griswold*, *Bigelow*, and the analysis here that a female listener-centered approach to the First Amendment is not only solidly based in an interpretation of the Supreme Court’s Free Speech jurisprudence that maintains consistency, but that it is the proper and appropriate way to analyze the constitutionality of regulations that affect women and the decisions they make about their bodies and their health care.<sup>270</sup>

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270. This invitation to the lower courts is not far-fetched. At least some circuit judges have been willing to interpret both *Casey* and *NIFLA* to find speech compulsions related to abortion unconstitutional. *See, e.g.*, *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 447 (6th Cir. 2019) (Bowie Donald, J., dissenting). Moreover, the Courts of Appeals have been willing to so creatively interpret Supreme Court abortion jurisprudence as to launch a full-frontal assault on it. *See, e.g.*, *June Med. Servs. v. Gee*, 905 F.3d 787 (5th Cir. 2018), *rev’d*, 140 S. Ct. 2103 (2020) (holding constitutional a law almost identical to the one found unconstitutional in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)). Asking courts to use an interpretation of the Supreme Court Free Speech decisions in a way that values female listeners is thus not a stretch.