PHYSICIAN SPEECH AND MANDATORY ULTRASOUND LAWS: THE FIRST AMENDMENT’S LIMIT ON COMPELLED IDEOLOGICAL SPEECH

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Since Planned Parenthood v. Casey opened the door to more pervasive state regulation of abortions, states have increasingly used their regulatory power to coerce physician speech. The Supreme Court has not yet explained, however, whether and how physicians’ First Amendment rights limit such attempts to coerce state-mandated speech. This Article argues that while the precise contours of physicians’ First Amendment rights have yet to be articulated, physicians certainly retain the core First Amendment right to refuse to speak the state’s ideological messages. I then evaluate whether mandatory ultrasound laws, which require a physician to perform an ultrasound exam and to then display and describe its results to any woman seeking an abortion, impermissibly require physicians to engage in the state’s ideological advocacy. Analyzing the mandatory ultrasound law in Texas, I conclude that the law commandeers physicians into spreading, in their own voice, the state’s value-laden message that pregnancies should be carried to term, and that the law consequently should be subject to strict scrutiny.

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INTRODUCTION

State laws requiring physicians providing abortions to further the state’s ideological agenda through state-mandated speech have proliferated since Planned Parenthood of Southeastern Pennsylvania v. Casey.\footnote{505 U.S. 833 (1992).} By compelling physician speech under the guise of ensuring the woman’s “informed consent,”\footnote{Casey’s recognition of the state’s interest in regulating the abortion procedure throughout pregnancy, see id. at 876, essentially opened the door to more extensive types of state regulations, including those compelling physician speech.} however, such laws raise significant questions about physicians’ First Amendment rights. Ongoing litigation over mandatory ultrasound laws, which require physicians to perform an ultrasound exam on any woman seeking an abortion and to then display and describe its results to her, illustrate the important role that the First Amendment may play in limiting the state’s ability to compel physician speech.

While the state assuredly can regulate some aspects of physician speech without running afoul of the First Amendment, this does not mean that the First Amendment is entirely inapplicable to compelled physician speech. The Supreme Court, however, has yet to articulate the scope and contours of physicians’ First Amendment rights when

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physicians are engaged in the practice of medicine,3 even though the broader First Amendment doctrine clearly protects against state-compelled speech.4 One model of physician’s First Amendment rights, which the Fifth Circuit recently set forth in evaluating a challenge to Texas’s mandatory ultrasound law,5 is that physicians retain virtually no First Amendment rights while they are practicing medicine. Under this model, states have free reign to dictate what physicians must tell their patients as long as the compelled speech is truthful, non-misleading, and relevant to the decision at hand. This model, which has also been adopted by the Eighth Circuit,6 essentially collapses the First Amendment inquiry with Casey’s analysis of women’s substantive due process rights.

Consider, for example, the Eighth Circuit’s recent en banc decision7 upholding South Dakota’s requirement that physicians provide their patients with a written statement informing women contemplating an abortion that a “known medical risk[] of the [abortion] procedure” is an “[i]ncreased risk of suicide ideation and suicide,”8 despite the fact that the best available scientific studies suggest that abortion is “psychologically benign.”9 Given that the significant weight of scientific authority shows that abortion does not increase a woman’s risk of suicide or suicide ideation, and that the increased rate of suicide among women who abort is instead tied to pre-existing conditions.


7 See Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 905 (8th Cir. 2012) (en banc).


factors such as higher rates of mental illness, does this compelled statement violate physicians’ First Amendment rights? Not according to a majority of the judges on the Eighth Circuit. The en banc majority equated the First Amendment inquiry with Casey’s undue burden standard and voted to uphold the statute. After determining that the compelled statement did not suggest evidence of a causal relationship between abortion and an increased rate of suicide, the majority concluded that the statement was not false or misleading under Casey because there remained a theoretical possibility that abortions cause an increased rate of suicide. While the First Amendment implications of compelled physician speech that is contrary to the weight of medical authority will not be a focus of this Article, the en banc decision illustrates the costs of ignoring the First Amendment implications of state laws that compel physician speech. Instead of evaluating whether physicians have an independent right to object to state laws that require them to engage in speech that goes against their best medical judgment and the established medical literature, the en banc court rested its decision on Casey’s undue burden framework.

Imagine, however, if these courts were right that Casey’s undue burden framework sets forth the only constitutional limitation on state laws compelling physician speech. Could a state have required physicians to tell any pregnant patient without health insurance who was contemplating an abortion that she should vote for Barack Obama in the 2012 presidential race if she was concerned about getting access to low-cost health insurance for herself and her unborn child through a state health-insurance exchange? This statement is truthful, non-

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10 The Eighth Circuit panel had concluded that South Dakota’s requirement that physicians disclose the “known” increased risk of suicide required doctors to engage in untruthful and misleading speech, in violation of their First Amendment rights. Planned Parenthood Minn. v. Rounds, 653 F.3d 662, 673 (8th Cir. 2011), vacated in part on reh’g en banc, 662 F.3d 1072 (8th Cir. 2011).

11 This conclusion is simply unsupported by the statutory text given that the physician must provide women with a statement indicating that a “known medical risk[] of the [abortion] procedure” is an “[i]ncreased risk of suicide ideation and suicide.” S.D. CODIFIED LAWS § 34-23A-10.1(1)(e) (emphasis added). As a result, the en banc majority’s conclusion that the statement is not false or misleading under Casey is contradicted by the statute’s text, which falsely represents that there is a “known” causal relationship between abortion and an increased risk of suicide.

12 Rounds, 686 F.3d at 904.

13 Indeed, as discussed supra note 11, this compelled statement is in fact false.

14 Given President Obama’s support for the Affordable Care Act (ACA) during the 2012 campaign, see, e.g., Issues—Health Care—Barack Obama, ORGANIZING FOR ACTION, http://www.barackobama.com/record/health-care?source=primary-nav (last visited June 18, 2013), and Republican candidate Mitt Romney’s campaign vow to fight for the ACA’s repeal upon his election, see, e.g., Health Care, Mitt Romney for President (Sep. 14, 2012 12:26 AM), http://web.archive.org/web/20120914002648/http://www.mittromney.com/issues/health-care (accessed by searching for http://www.mittromney.com/issues/health-care in the Internet Archive), this statement qualifies as a truthful representation of the policy implications of
misleading, and relevant to the patient’s medical decision. Under the model in which physicians’ First Amendment rights are only protected by the Casey framework, this compelled statement raises no constitutional concerns. However, this type of compelled political message directly contravenes the central First Amendment principle that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Yet if physicians have virtually no First Amendment rights when they are engaged in the practice of medicine, they would be unable to object to such instances of compelled political speech. Such a proposition seems untenable with core notions of the First Amendment—although physicians’ speech to patients during the course of medical practice, what I will refer to as “physician speech,” may be regulated without offending the First Amendment, this does not mean that physicians lose their First Amendment rights as ordinary citizens against compelled ideological speech.

I propose an alternative model of physicians’ First Amendment rights that protects a physician’s right to refuse to parrot the state’s beliefs on matters of politics, religion, and morality—or what I describe as the physicians’ right to refuse to engage in compelled “ideological speech.” I conclude that state laws compelling physician speech that spreads the state’s ideological and non-medical message should be subject to strict scrutiny. While this is not the only type of compelled physician speech that raises First Amendment concerns, it is an important limit that has yet to be fully explored in the academic literature. A model of physicians’ First Amendment rights that looks solely to the Court’s undue burden framework in Casey fails to recognize that physicians, just like ordinary citizens, retain a protected autonomy interest in not being forced to be the state’s mouthpiece on matters of ideological opinion and belief. In fact, we might expect physicians to be even more protected against compelled ideological speech than the ordinary speaker, given that patients place a great deal of trust and faith in the integrity of their physicians’ advice and counsel.

I then evaluate whether the mandatory ultrasound law in Texas should

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15 Presumably, this statement could encourage the pregnant woman to vote for Obama and to carry the pregnancy to term.
17 My definition of ideological speech will be discussed further in Part II. See infra notes 64–66 and accompanying text.
18 A notable exception is Dean Robert Post’s 2007 Article in the Illinois Law Review, which will be referenced throughout this Article. See Post, supra note 3.
be subject to strict scrutiny as a result of this limitation on compelled physician speech. I conclude that the Texas law should be subject to strict scrutiny because the law commandeers physicians into spreading, in their own voice, the state's ideological message that pregnancies should be carried to term.

Although the Supreme Court has yet to provide any extensive discussion of physicians' First Amendment rights, the Court did briefly address the petitioners' First Amendment compelled speech claim in *Casey*. Part I of this Article will provide a thorough analysis of the First Amendment claim raised in *Casey* and the Supreme Court's brief resolution of this claim. This Part demonstrates that the Court's discussion in *Casey* should not be interpreted as eviscerating physicians' First Amendment rights, and that state laws compelling speech acts that are distinguishable from the compelled speech at issue in *Casey* may well violate these rights. I conclude that while *Casey* condones state speech that advocates childbirth over abortion, *Casey* says nothing about whether physicians themselves can be forced to express the state's ideological views.

Part II will first situate physicians' First Amendment rights within the First Amendment doctrine, and will then identify the pertinent First Amendment interests served by protecting physicians against compelled ideological speech. This Part demonstrates that compelled ideological speech both violates physicians' First Amendment rights as ordinary citizens, as well as undermines the particular First Amendment values served by physician speech.

Finally, Part III will analyze whether mandatory ultrasound laws, and specifically, Texas's mandatory ultrasound law, require physicians to spread the state's ideological message. I conclude that while it may sometimes be obvious on the face of a statute that a compelled statement is of an ideological nature, the courts will need to engage in a more searching inquiry as to legislative purpose when the ideological nature of the statement is more ambiguous. In particular, I conclude that because of the difficulty of determining whether laws requiring the display of visual images compel the speaker to spread an ideological message, courts must look to the state's actual purpose in mandating the speech in order to decide whether the compelled speech is of an ideological nature. Looking to the text, legislative history, and broader social and historical context of the Texas law, it is clear that the Texas legislature sought to use the mandatory ultrasound law to compel physicians to spread the state's message that pregnancies should be carried to term. Because this purpose inquiry demonstrates that the Texas law requires physicians to engage in the state's ideological speech, I conclude that this law should be subject to strict scrutiny.
While the First Amendment rights of physicians are unclear and opaque given the current doctrine, this Article attempts to provide a thorough discussion of one clear limit on the state’s regulatory power over physician speech. This discussion is perhaps most immediately pertinent to the variety of state laws compelling physician speech in the context of the abortion procedure, however, this principle applies to any state law compelling physician speech, regardless of the particular procedure at issue. I conclude that the state’s valid interest in regulating physician speech in the interest of informed medical decision-making does not mean that the state can use this power to commandeer physicians into serving as mouthpieces for the state’s ideological agenda.

I. WHAT CASEY DOES NOT HOLD

Any discussion of physicians’ First Amendment rights against compelled speech necessarily begins with the Supreme Court’s brief analysis of the First Amendment claim raised in Casey. The joint opinion’s three-sentence disposal of the First Amendment issues raised by Pennsylvania’s statute has been pointed to as evidence of states’ unfettered ability to regulate physician speech. However, given that 1) the First Amendment claims played a minimal role in Casey’s briefing and oral argument, and 2) the Pennsylvania statute at issue did not require the physician to convey the state’s anti-abortion message in her own voice, but rather required the physician to offer the state’s own pamphlet containing this message, the Court’s cursory First Amendment discussion should not be read as giving carte blanche to state laws compelling physician speech. Casey says nothing about the constitutional issues raised by state laws that compel physicians themselves to engage in speech acts that advocate childbirth over abortion.

First, I will present an overview of the so-called “informed consent” provisions which were before the Court in Casey. The Pennsylvania law required physicians to inform women about the nature of the procedure, the medical risks of childbirth and abortion, and the gestational age of the fetus. The law also required the physician, or one of her delegates, to inform a woman: 1) that the state publishes printed materials that describe the unborn child and abortion alternatives and that a copy of these materials will be given to her if she chooses to view them; 2) that “medical assistance benefits may be available” and that more information about these benefits is in the state materials; and 3)
that the father of the child is liable for child support.\footnote{18 PA. CONS. STAT. § 3205(a)(2) (1989).} The statute exempted physicians from compliance if the physician could demonstrate “that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.”\footnote{Id. § 3205(c).}

After concluding that these provisions did not pose an undue burden on a woman’s abortion right because they compelled only “truthful, non-misleading information” that was “relevant . . . to the decision”\footnote{Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).} whether to have an abortion, the Court turned to the petitioners’ argument that these provisions violated physicians’ First Amendment rights against being compelled to engage in state-mandated speech:

All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician’s First Amendment rights not to speak are implicated, see \textit{Wooley v. Maynard}, 430 U. S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. \textit{Whalen v. Roe}, 429 U. S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.\footnote{Id. at 884.}

The joint opinion’s brief treatment of the First Amendment issues raised by the Pennsylvania statute provides minimal information about how the Court views the interplay between the state’s ability to regulate the medical profession and physicians’ First Amendment rights. The first case cited to by the Court, \textit{Wooley v. Maynard}, sets forth the general principle that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”\footnote{430 U.S. at 714.} In \textit{Wooley}, the Court held that New Hampshire’s requirement that all private vehicle owners display license plates with the state motto “Live Free or Die” violated the owners’ First Amendment rights by requiring vehicle owners to be couriers for the state’s ideological message.\footnote{Id. at 717.} The second case cited, \textit{Whalen v. Roe}, is even less helpful, as this case does not even discuss the First Amendment.\footnote{Whalen v. Roe, 429 U.S. 589 (1977). While \textit{Whalen} mentions “the First Amendment” in discussing pertinent case law, there was no First Amendment claim at issue in the case. \textit{Id. at} 608–09 (Stewart, J., concurring).} In this case, the Court concluded that
New York could require physicians to report prescription information to the state, and that this requirement did not violate their patients’ Fourteenth Amendment rights. Neither Wooley nor Whalen discusses the First Amendment rights of physicians, so these citations provide little illumination of the balance between the general First Amendment protections against compelled speech and the state’s power to regulate medical professionals.\textsuperscript{27} If physicians do have First Amendment rights similar to those discussed in Wooley, then strict First Amendment scrutiny would apply to state laws compelling physician speech.\textsuperscript{28} However, the comparison to Whalen suggests that the state has broad discretion to regulate the conduct of professionals, and that this broad discretion \textit{might} extend to regulation of physician speech.\textsuperscript{29} In summary, given the brevity of the discussion and the unhelpfulness of the cited cases, the joint opinion’s paragraph addressing the First Amendment arguments “provides little indication of how to resolve any professional’s First Amendment claim other than the precise one at issue in \textit{Casey}.”\textsuperscript{30}

Moreover, when discussing the First Amendment issues raised by the statute, the Court solely discusses the statute’s requirement that the physician provide “information about the risks of abortion, and childbirth, in a manner mandated by the State.”\textsuperscript{31} The risk information pointed to by the Court assuredly \textit{is} the type of information that a physician already has a duty to give a patient in order to get that patient’s informed consent to the abortion procedure.\textsuperscript{32} Focusing on this portion of the statute allowed the Court to characterize the statute as imposing similar constraints on physician speech as any other reasonable medical regulation, and to sidestep addressing whether any different First Amendment questions were raised by the statute’s additional requirements that the physician inform women of the

\begin{footnotes}
\item[27] See Post, supra note 3, at 946 (“Exactly how the strict First Amendment standards of Wooley are meant to qualify the broad police power discretion of Whalen is left entirely obscure.”).
\item[28] See Wooley, 430 U.S. at 717 (“[W]here the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”).
\item[29] See Daniel Halberstam, \textit{Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions}, 147 U. PA. L. REV. 771, 773–74 (1999) (“The application of Wooley would demand a compelling governmental interest . . . or at least a substantial interest that was unrelated to the content of the speech. It would require that the regulation be narrowly tailored to that interest as well. The passage cited from Whalen, on the other hand, would appear to import only the basic due process limitations on nonspeech regulations of professionals.” (footnotes omitted)).
\item[30] Id. at 774.
\item[32] See, e.g., Canterbury v. Spence, 464 F.2d 772, 782–83 (D.C. Cir. 1972) (holding that a physician has a “duty of reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved”).
\end{footnotes}
availability of state materials that, for example, contained information about abortion alternatives. While the joint opinion’s undue burden analysis makes clear that the Court was aware that the information in the state pamphlet was designed to encourage women to choose childbirth over abortion, the Court never addresses how the state’s ideological purpose, though permissible under the undue burden framework, interacted with physicians’ First Amendment rights. Ultimately, while First Amendment issues were raised in Casey, neither the parties nor the Court fully explored the parameters of physicians’ First Amendment rights against compelled speech.

Despite the incredibly limited First Amendment discussion in Casey, some circuit courts have concluded that Casey holds that any state regulation that complies with the Court’s undue burden framework necessarily does not violate physicians’ First Amendment rights. As discussed in the introduction, the Eighth Circuit has adopted this model of physicians’ First Amendment rights. In Planned Parenthood of Minnesota v. Rounds, the Eighth Circuit, sitting en banc, analyzed a First Amendment challenge to South Dakota’s law requiring physicians to give women a written statement indicating that abortion “will terminate the life of a whole, separate, unique, living human being.” The en banc majority concluded:

[While the State cannot compel an individual simply to speak the State’s ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.

While conceding that the disclosure could be “read to make a point in the debate about the ethics of abortion,” the court found that, in light of the statutory definition of “human being,” the disclosure was truthful, non-misleading, and relevant, and therefore did not violate physicians’ First Amendment rights. The majority’s reasoning rested on its conclusion that since the state can, under Casey, require physicians to offer women a state pamphlet designed to encourage a woman to carry her pregnancy to term, requiring physicians to prepare their own
written materials designed to discourage abortion raises no constitutional concerns as long as the undue burden framework is not violated.

The Fifth Circuit has also essentially collapsed physicians’ First Amendment claims into the analysis of whether the law interferes with a woman’s substantive due process rights. The Fifth Circuit’s opinion in *Texas Medical Providers Performing Abortion Services v. Lakey* makes clear that the court believes the undue burden test is also applicable to any claimed infringement of physicians’ First Amendment rights:

> If the disclosures are truthful and non-misleading, and if they would not violate the woman’s privacy right under the *Casey* plurality opinion, then Appellees would, by means of their First Amendment claim, essentially trump the balance *Casey* struck between women’s rights and the states’ prerogatives. *Casey*, however, rejected any such clash of rights in the informed consent context.39

According to the Fifth Circuit’s opinion addressing a challenge to Texas’s mandatory ultrasound law,40 “[t]he only reasonable reading” of *Casey*’s First Amendment discussion “is that physicians’ rights not to speak are, when ‘part of the practice of medicine, subject to reasonable licensing and regulation by the State[,]’”41 And under the Fifth Circuit’s reading, any type of compelled information that is truthful, non-misleading, and relevant to the decision to undergo an abortion is necessarily a reasonable regulation of the practice of medicine.42

Both the Fifth and Eighth Circuits have expanded *Casey*’s cursory First Amendment discussion into broad holdings that eviscerate physicians’ First Amendment rights within the practice of medicine. Part I.A will briefly dissect the First Amendment claims raised in *Casey* in an effort to demonstrate the narrow scope of the Court’s holding.

### A. The First Amendment Arguments Presented in *Casey*

*Casey* marks the first time43 that First Amendment issues raised by compelled physician speech were squarely before the Court. Despite the

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39 667 F.3d 570, 577 (5th Cir. 2012).
40 First Amendment challenges to mandatory ultrasound laws will be discussed in detail. See infra Part III.
41 Lakey, 667 F.3d at 575 (second alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992)).
42 Id.
43 Although Justice O’Connor had referenced the possibility that state “informed consent” laws might violate the First Amendment in two dissents in abortion cases leading up to *Casey*, First Amendment arguments were not before the Court in these cases. First, in *Akron v. Akron Center for Reproductive Health*, the Court confronted an “informed consent” ordinance that required physicians to recite a litany of state-mandated “information” to women seeking an
novelty of this claim, the parties, the amicus curiae, and the Court gave minimal attention to the First Amendment issues raised by the Pennsylvania statute.

In the court below, the panel had reached the First Amendment issues raised by the petitioners, upholding the statute under Zauderer v. Office of Disciplinary Counsel, a 1985 case holding that rational basis scrutiny applies to state laws compelling the inclusion of purely factual and uncontroversial information in commercial speech. The petitioners, however, had a clear Supreme Court strategy: to preserve the core due process holding of Roe, and to make Roe’s fate a political issue in the 1992 presidential election. The First Amendment arguments were consequently not a focus of the petitioner’s briefing. Nevertheless, the petitioners still raised the First Amendment issues, albeit cursorily, in their opening brief before the Court. They argued that Pennsylvania’s statute violated the principles set forth in Wooley abortion, including the statement that “the unborn child is a human life from the moment of conception.” 462 U.S. 416, 444 (1983); see also Akron Codified Ordinances § 1870.05(B) (1978), invalidated by Akron Ctr. for Reproductive Health, 462 U.S. 416. The Court held that the Akron ordinance violated women’s Fourteenth Amendment rights by adopting a theory of when life begins, placing obstacles in the place of the physicians, and impermissibly attempting to influence a woman’s choice. Akron, 462 U.S. at 444–45. In dissent, Justice O’Connor noted the possible First Amendment issues raised by an ordinance mandating that the physician communicate the state’s ideology, but she did not deal with this argument in detail since it had not been raised in the court below. Id. at 472 n.16 (O’Connor, J., dissenting).

In Thornburgh v. American College of Obstetricians, Justice O’Connor again noted the potential First Amendment issues raised by the statute. 476 U.S. 747, 830 (1986) (O’Connor, J., dissenting). In Thornburgh, the Court struck down a Pennsylvania statute that was very similar to the statute at issue in Casey, concluding that the statute’s “informed consent” provisions were “poorly disguised elements of discouragement for the abortion decision,” that violated women’s Fourteenth Amendment rights. Id. at 763 (majority opinion). In dissent, Justice O’Connor again noted the possibility that the statute violated physicians’ First Amendment rights, id. at 830 (O’Connor, J., dissenting), but she did not develop her analysis any further since the argument, while raised in the court below, had not been raised in the parties’ briefs before the Court.

Justice O’Connor’s dissents in Akron and Thornburgh suggest that she believed the First Amendment, rather than women’s substantive due process rights, provided a stronger basis for grounding the constitutional objections to “informed consent” statutes.


46 The petitioners’ strategy is best exemplified by the plaintiffs’ petition for certiorari, which was filed just three weeks after the Third Circuit issued its decision in an attempt to get the Supreme Court to issue its ruling before the impending election. The petition presented just one question: “Has the Supreme Court overruled Roe v. Wade, holding that a woman’s right to choose abortion is a fundamental right protected by the United States Constitution?” See Petition for Writ of Certiorari at i, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (No. 91-744). For a discussion of the plaintiffs’ Supreme Court strategy, see JEFFREY TOOBIN, THE NINE 49 (2007). Toobin argues that the plaintiffs’ lead attorney, Kathryn Kolbert, “crafted a single question in the most provocative way she could,” in an attempt to force both the Supreme Court and the general public to confront the political realities of overturning Roe. Id.
and West Virginia State Board of Education v. Barnette, the 1943 case that first set forth the principle that compelled speech can violate the First Amendment by requiring physicians to be couriers for a government message. However, the opening brief did not 1) distinguish the Pennsylvania statute from ordinary laws affecting physician speech; 2) explain what portions of the statute required physicians to recite the government’s ideological message; nor 3) make any distinction between what the physicians were required to convey verbally in their own voice, and what they were required to make available to the women through the state’s written pamphlets. And perhaps most telling of the subsidiary nature of the First Amendment claim was the opening brief’s complete omission of the Third Circuit’s conclusion that physicians are engaged in commercial speech and can therefore be required to make state-mandated disclosures under the Court’s commercial speech precedents. The omission is particularly noteworthy given that the Third Circuit’s opinion claimed that the petitioners had conceded the commercial nature of physician speech, a concession that the petitioners had never made. Had the First Amendment claim been an important component of the petitioners’ argument, one would expect their opening brief would have at least mentioned the Third Circuit’s erroneous characterization of their position on whether physicians were engaged in commercial speech. While the petitioner’s reply brief did respond to the commercial speech arguments, the brief again made little attempt to discuss the nuances of physicians’ First Amendment rights.

In sum, the petitioners’ briefing before the Court demonstrates that the First Amendment arguments were not a main focus. Surely even the petitioners recognized that physicians are subject to some forms of valid state regulation affecting their speech. However, since the First Amendment claim was subsidiary to the rest of the case, they did not

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47 319 U.S. 624 (1943).
48 In Barnette, a family of Jehovah’s Witnesses challenged the West Virginia State Board of Education’s requirement that schoolchildren begin the day by reciting the pledge of allegiance and saluting the flag. The Court struck down this requirement as interfering with “the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” Id. at 642.
51 The State’s response brief had put the commercial speech arguments front and center by pointing to the Third Circuit’s conclusion that rational basis scrutiny applies to the “informed consent” provisions of Pennsylvania’s law in light of the commercial nature of physician speech. Brief for Respondents at 71, Casey, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006423. The petitioners then responded to the commercial speech arguments in their Reply Brief, see Casey Petitioner Reply, supra note 50, at 21 n.39.
have the opportunity to develop a more complex argument about the First Amendment rights of physicians. Perhaps most importantly, the petitioners failed to make any distinction between the different types and forms of speech compelled by the statute: the petitioners did not distinguish between the risk information the physicians had to convey orally, and the information about abortion alternatives that the physicians had to make available to patients through the state’s written pamphlet.

Nor did most of the amicus briefs in the case mention—nevermind focus upon—the petitioners’ First Amendment claim. Of the nine amicus briefs in support of the petitioners, only one brief even mentions the First Amendment issues raised by Pennsylvania’s law. The oral argument transcript provides additional proof of the subsidiary nature of the First Amendment arguments. Neither the petitioners nor the state brought up the First Amendment claim during their respective arguments. The First Amendment issues were only discussed, and very briefly, in response to questions posed by Justice O’Connor. As demonstrated by the parties’ briefing, the amicus briefing, and oral argument, the First Amendment claims were not pressed by the

52 Brief of Amicus Curiae 178 Organizations in Support of Planned Parenthood of Southeastern Pennsylvania at 26, Casey, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006405. Even this brief, however, gives no analysis of how the Pennsylvania law violates physicians’ freedom of speech. See id. The brief poses the following hypothetical: “If the informed-consent provisions at issue in this case were upheld, would the First Amendment provide any constraint on what a state could compel doctors to tell their patients before performing abortions?” Id. The brief, however, does not attempt to outline what these constraints are, or any general principles for analyzing how the First Amendment limits regulations on professional speech. An examination of the nineteen amicus briefs in support of the State of Pennsylvania reveals that only two mention the First Amendment claims. The amicus brief of the United States argues that the statute affects commercial speech, but its entire discussion of the First Amendment is confined to a footnote. See Brief for the United States as Amicus Curiae Supporting Respondents at 21 n.18, Casey, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006421. The only other amicus brief to reference the First Amendment makes a brief commercial speech argument, equating abortion clinics with one-hour eyeglass outlets at a retail mall. See Brief of Feminists for Life of America et al. as Amici Curiae in Support of Respondents and Cross-Petitioners at 19, Casey, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006409.

53 It is unsurprising that Justice O’Connor was the person who initiated the discussion of the First Amendment claims since she had previously shown interest in the ways in which informed consent statutes might implicate physician’s First Amendment rights. See supra note 43 and accompanying text. Justice O’Connor asked the petitioners’ attorney whether the statute raised any First Amendment issues, and the attorney gave a brief response, but the discussion was cut short as the attorney’s allotted oral argument time expired shortly after Justice O’Connor posed her question. See Transcript of Oral Argument at *51–52, Casey, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 691955. During the State’s oral argument, Justice O’Connor asked the State to explain its commercial speech argument, expressing some skepticism with the State’s argument, but the State’s time expired before the attorney was able to respond to her line of questioning. Id. at *36–39.
plaintiffs, and the Court was given little elaboration, from either side, of the First Amendment rights of physicians.

B. A Narrow Reading of Casey’s First Amendment Holding

Given the subsidiary nature of the First Amendment claim before the Court in Casey, the joint opinion’s one-paragraph analysis of the free-speech concerns raised by the Pennsylvania statute should not be interpreted as a broad rebuke of physicians’ First Amendment rights. Instead, the Court’s holding should be read in context: the particular Pennsylvania statute before the Court, which did not require the physician to spread the state’s anti-abortion message as though it was the physician’s own opinion, did not violate the First Amendment.

The state pamphlet at issue in Casey included information about 1) the fetus at various different gestational ages, 2) the availability of medical assistance benefits for childbirth, 3) the father’s liability for child support, and 4) a list of organizations, including adoption agencies, providing assistance to pregnant women. Although the Pennsylvania statute also required physicians to convey some information orally, this information was less problematic from a First Amendment perspective, because the compelled speech did not require the physician to adopt the state’s ideological viewpoint. First, though the physician was required to inform the woman of the gestational age of the fetus and the relevant medical risks of abortion and childbirth, these requirements track closely with traditional notions of informed consent. Second, while the physician, or the physician’s agent, was also required to inform women orally of the existence of a state pamphlet providing information about 1) the unborn child and abortion alternatives, and 2) medical assistance benefits for prenatal care, childbirth, and neonatal care, these oral speech requirements were in the context of the physician informing the woman about what information was located in the state pamphlet. The physician herself was not required to give this information about abortion alternatives and medical assistance benefits—she was just required to make the patient aware that this information could be found in the state pamphlet.

55 Id. § 3205(1).
56 A physician’s duty to get her patient’s informed consent to a procedure requires the physician to explain to her “patient in nontechnical terms . . . what is at stake: the therapy alternatives open to him, the goals expectably to be achieved, and the risks that may ensue from particular treatment and no treatment.” Canterbury v. Spence, 464 F.2d 772, 782 n.27 (D.C. Cir. 1972).
The only oral speech requirement that comes close to requiring the physician to engage in ideological advocacy supporting childbirth over abortion was the statute’s requirement that the physician, or the physician’s agent, inform the woman of the father’s liability for child support, which was presumably motivated by the state’s desire to encourage the woman to carry the pregnancy to term.\textsuperscript{58} Again, however, this compelled statement was in the context of the physician’s informing the woman of the availability of the state materials and the information contained in those materials.\textsuperscript{59} Importantly, the \textit{Casey} joint opinion completely glosses over this part of the statute, demonstrating that the Court viewed the compelled speech about child support to be part of the physician’s offer of the state’s published materials.\textsuperscript{60} As discussed above, the secondary nature of the First Amendment briefing and argument in the case certainly did not highlight for the Court the fact that the compelled statement about child support did not explicitly note that more information about child support could be found in the state pamphlet. In sum, the Court’s holding in \textit{Casey} permits the state to express its own preferences for childbirth in state-produced materials, but it does not say anything about whether the state can require the physician to express this preference in her own voice.

Some district courts have reached exactly this conclusion, recognizing that \textit{Casey}’s brief treatment of the First Amendment claims does not provide a framework for analyzing laws that go beyond the Pennsylvania statute by requiring physicians to personally convey the state’s anti-abortion and nonmedical message, and that more thorough analysis of the First Amendment rights of physicians is warranted. The U.S. District Court for the Western District of Texas in \textit{Lakey} rejected the state’s argument that \textit{Casey} and the state’s power to regulate the practice of medicine completely forecloses “any challenge to compelled speech in a professional setting.”\textsuperscript{61} After the Fifth Circuit reversed the

\textsuperscript{58} Id.

\textsuperscript{59} In addition, the physician herself was not required to engage in this speech—she could delegate this task to “a qualified physician assistant, health care practitioner, technician or social worker.”\textit{Id}.

\textsuperscript{60} See Planned Parenthood of Se. Pa. v. \textit{Casey}, 505 U.S. 833, 881 (1992) (“[T]he statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the ‘probable gestational age of the unborn child.’ The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the state describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.” (quoting 18 PA. CONS. STAT. § 3205(a)(1)(ii))).

\textsuperscript{61} Tex. Med. Providers Performing Abortion Servs. v. \textit{Lakey}, 806 F. Supp. 2d 942, 973 (W.D. Tex. 2011), \textit{vacated in part}, 667 F.3d 570 (5th Cir. 2012). Instead, the district court concluded that the Supreme Court had rejected the First Amendment challenge in \textit{Casey} because the Pennsylvania statute was a reasonable medical regulation, not because the Supreme Court believed that physicians have no First Amendment rights.\textit{Id}. In fact, the district court
district court’s preliminary injunction on Texas’s mandatory ultrasound law, the district court sharply criticized the Fifth Circuit’s reasoning, expressing disbelief that “the Supreme Court would have modified decades of First Amendment jurisprudence, through the incorporation of Casey’s Fourteenth Amendment undue burden inquiry, without an explicit statement to that effect.” Recognizing that the panel’s First Amendment analysis left little room for physicians to challenge any compelled speech requirements, no matter how ideologically biased, the court made the following observation:

As this Court reads the panel’s opinion, an extended presentation, consisting of graphic images of aborted fetuses, and heartfelt testimonials about the horrors of abortion, would be “truthful, nonmisleading, and relevant.” Accordingly, the government could apparently require doctors personally to make such presentations prior to performing abortions, all under the rubric of “reasonable regulation of medical practice”—but only to the extent such presentations did not impose an undue burden on the pregnant woman’s right to an abortion. The concept that the government may make puppets out of doctors, provided it does not step on their patients’ rights, is not one this Court believes is consistent with the Constitution, in the abortion context or otherwise.

As the district court acknowledged in Lakey, an expansive reading of the joint opinion’s First Amendment holding imposes little, if any, restraint on the state’s ability to commandeer physicians into being the state’s anti-abortion advocates. Such a reading, however, is simply not supported by the text of the opinion, especially given the context in which the First Amendment claims were litigated. When a statute goes further than the Pennsylvania law by requiring the physician to not just believed that the First Amendment claim in Casey was “meritless, if not frivolous, under the facts of that case.”

62 Tex. Med. Providers Performing Abortion Servs. v. Lakey, No. A-11-CA-486, 2012 WL 373132 at *2 (W.D. Tex. Feb. 6, 2012). The court observed that the panel’s analysis has made the doctor’s “right to speak, or not to speak . . . wholly dependent on the contours of a woman’s right to an abortion.”

63 Id. at *3 (footnote omitted). A North Carolina district court reached a similar conclusion when evaluating a First Amendment challenge to that state’s mandatory ultrasound law. In Stuart v. Huff, the district court expressed skepticism that the Casey joint opinion, in its brief discussion of physicians’ First Amendment rights, “decided by implication that long-established First Amendment law was irrelevant when speech about abortion is at issue.” 834 F. Supp. 2d 424, 430 (M.D.N.C. 2011) (footnote omitted). The district court determined that physicians retain First Amendment rights and applied strict scrutiny after concluding that the ultrasound law “compels the provider to physically speak and show the state’s non-medical message to patients unwilling to hear or see.” Id. at 432. While recognizing that the Court might “apply some intermediate standard to compelled speech in the ordinary informed-consent context, given the historical interest the state has in regulating certain aspects of medical care,” the court found the mandatory ultrasound law went far beyond the ordinary informed-consent context. Id. at 431.
make the state’s anti-abortion information available to patients, but to personally deliver this information in her own voice, such laws raise entirely different First Amendment concerns that are not addressed by the joint opinion.

II. PHYSICIANS’ FIRST AMENDMENT RIGHTS AGAINST COMPelled IDeological SPEECH

Given that Casey leaves so many open questions about the First Amendment rights of physicians, Part II will attempt to situate physicians’ free speech rights within the First Amendment doctrine, and to identify the pertinent First Amendment interests implicated by compelled ideological speech. I conclude that physician speech serves important First Amendment values, and that physician speech consequently does receive protection under the First Amendment. I also conclude that regardless of the particular level of protection that physician speech receives under the First Amendment, physicians undoubtedly retain the constitutional right as citizens to refuse to be commandeered into parroting the state’s ideological beliefs.

Before delving further into this limitation on compelled physician speech, it is important to specify precisely what I mean by “ideological.” I use the term “ideological speech” to refer to speech that expresses a “point of view” on matters of opinion—speech that adopts a position on questions of politics, religion, or morality. The Court’s language in West Virginia State Board of Education v. Barnette in setting forth the principles of the compelled speech doctrine aptly describes what falls within ideological speech—speech that “prescribe[s] what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” Speech that adopts a “moral position[] or argument[]” with respect to a matter of opinion that is debated in the public sphere qualifies as ideological speech. Accordingly, speech that expresses opposition to abortion, or a preference for childbirth, qualifies as ideological speech, given that support for abortion rights is a highly contested question of politics, values, and religion.

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64 Wooley v. Maynard, 430 U.S. 705, 715 (1977) (“Here . . . we are faced with a state measure which forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.” (emphasis added)).
A. An Analogy to Commercial Speech

As evidenced by the Third Circuit’s holding in Casey, some courts have improperly characterized the speech between a physician and her patient as falling within the First Amendment’s commercial speech doctrine. While it is assuredly difficult to develop a precise definition of commercial speech, a physician’s conversation with her patient during the course of medical practice does not qualify. However, analogizing to the commercial speech doctrine helps to explain why it is simply untenable to claim that physician speech is not protected by the First Amendment: even commercial speech, which is protected because of its informational value to consumers, is protected by the First Amendment. Assuredly physician speech, which provides patients with incredibly important expert knowledge and advice that patients would otherwise be unable to access, deserves at least as much protection, if not more, than commercial speech.

In the 1976 case Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Court first extended the First Amendment’s protections to commercial speech, defined in Virginia Pharmacy as “speech which does no more than propose a commercial transaction.”67 The Court recognized that a “consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate,”68 and struck down Virginia’s statute prohibiting pharmacists from advertising the price of prescription drugs. While the Court has subsequently set forth broader definitions of what qualifies as “commercial speech,” describing it as speech that is “related solely to the economic interests of the speaker and its audience,”69 and setting forth a variety of factors to consider in Bolger v. Youngs Drug Products Corp.,70 the category of commercial speech has proven to be notoriously difficult to define.71

67 425 U.S. 748, 762 (1976) (internal quotation marks omitted).
68 Id. at 763.
69 Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 562 (1980). It is important to note that this definition has been criticized since speech that is economically motivated often receives full First Amendment protection. See, e.g., Rubin v. Coors Brewing Co., 514 U.S. 476, 493–94 (1995) (Stevens, J., dissenting) (criticizing the Court’s definition of commercial speech in Central Hudson: “[E]conomic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors and artists who sell their works would be correspondingly disadvantaged.”).
70 463 U.S. 60 (1983). In Bolger, the Court analyzed whether a condom manufacturer’s informational pamphlets about venereal disease that discussed the desirability and availability of prophylactics in general, without mentioning the manufacturer’s products by name, qualified as commercial speech. Id. at 62. The Court sets forth a variety of factors that are relevant to the analysis: whether the speech is an advertisement, whether the speech refers to a specific product, and whether the speakers had an economic motivation for engaging in the speech. Id. at 66–67. After noting that all of these factors were present in the informational pamphlets, the
The boundaries of the commercial speech definition are fuzzy at best. Although I have argued elsewhere that the commercial speech definition should not be dependent upon the presence of any one factor, and that courts should evaluate the commercial nature of a speech act’s content and context,\(^7\) a physician’s speech during the provision of medical care falls outside of this definition. Looking to the *Bolger* factors, a physician’s conversation with her client during the course of medical treatment is not an advertisement for a product or service, is not solely concerned with the sale of a product, and has little to do with the physician’s economic motivations.\(^73\) In fact, one piece of information that can be gleaned from *Casey’s* brief First Amendment discussion is the Court’s skepticism of the Third Circuit’s conclusion that the regulation affected commercial speech. The Court explicitly did not characterize the speech at issue as commercial speech, which is telling given the holding of the court below. As Dean Robert Post argues, while “the communication between a professional and her client might concern commercial matters, its regulation would almost certainly not be conceptualized as an issue of First Amendment commercial speech doctrine.”\(^74\)

However, this does not mean that the commercial speech doctrine is irrelevant. As discussed above, the Court extended the First Amendment’s protections to commercial speech because of the informational value of this speech to consumers. The Court, in fact, was explicit in recognizing how the free flow of information, even commercial information, serves the First Amendment’s goal of

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\(^7\) See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 7 (2000) (“[T]he impossibility of specifying the parameters that define the category of commercial speech has haunted its jurisprudence and scholarship.”); see also Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 638–39 (1990) (arguing that the Court’s definition of commercial speech “starts breaking down” when the commercial nature of more complicated speech acts is analyzed); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1184–85 (1988) (“[T]he Supreme Court, for all it has said about commercial speech, has conspicuously avoided saying just what it is.”).


\(^72\) A physician’s advertisements and solicitation of clients certainly does fall within the definition of commercial speech, but that physician’s speech with a patient during the course of medical treatment is no longer a commercial solicitation. See Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 241 (1994) (“[T]he Court has suggested that professional advertising and solicitation, which it has relegated to the category of commercial speech, do not include communication occurring after the formation of a professional relationship.”).

\(^74\) Post, *supra* note 71, at 23.
“enlighten[ed] public decisionmaking in a democracy.” The constitutional protections applied to commercial speech, therefore, can be justified based on the social value of this speech, tracking closely with Alexander Meiklejohn’s democratic self-governance theory of the First Amendment. For Meiklejohn, and other proponents of this theory, the First Amendment’s ultimate goal is a better-informed citizenry that can make wise voting decisions, thereby ensuring the viability and success of democratic self-governance. The motivation behind protecting commercial speech is not that this information will directly translate into more informed voting behavior, but rather that a well-informed citizenry, even on issues that are tangentially related to politics, is necessary to the success of democratic self-governance. Just as commercial speech has informational value for consumers, physician speech during the course of medical treatment has informational value for patients. Physician speech provides patients with expert information about medical conditions, procedures, risks, and appropriate courses of treatment. Assuredly this information is even more important to a well-informed citizenry than an advertisement for retail goods. The notion, therefore, that physician speech rests completely outside of the First Amendment because of the state’s power to regulate the medical profession is quickly dispelled once one considers the First Amendment’s protection of commercial speech.

B. Does a "Professional Speech" Doctrine Exist?

Another possibility is that physician speech, while not resting completely outside the First Amendment, should be subject to a separate set of First Amendment principles that apply to “professional speech.” However, while the term “professional speech” has entered into the doctrine and academic commentary, the degree of protection such speech should receive is unclear—“the phrase has been used by Supreme Court Justices only in passing.”

It is, of course, unquestionable that states have an interest in regulating professional practices within their borders: “[A]s part of their power to protect the public health, safety, and other valid interests [states] have broad power to establish standards for licensing

76 Post, supra note 71, at 14.
77 See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16 (1948); see also ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960) (“What is essential is not that everyone shall speak, but that everything worth saying shall be said.”).
78 Post, supra note 71, at 14.
practitioners and regulating the practice of professions.”80 Justice White’s concurrence in Lowe v. SEC81 is often invoked as setting forth the contours of the “professional speech doctrine,” to the extent such a doctrine exists.82 Under Justice White’s formulation:

One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client’s individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional’s speech is incidental to the conduct of the profession. If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny.83

Justice White’s concurrence, however, provides little discussion of what limits the First Amendment places on professional speech regulations that extend beyond general licensing requirements. Moreover, as the Court later observed: “Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by [professionals] the strongest protection our Constitution has to offer.”84 The relationship between the First Amendment and physicians’ professional speech unfortunately remains undeveloped and unclear.85

The academic literature, however, has devoted some attention to the First Amendment’s interaction with professional speech. The first Article that delved into this topic was a 1999 Article by Daniel Halberstam: Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions.86 In this article, Halberstam notes that the “courts have failed to develop a general method for reviewing restrictions on professional speech,”87 but he concludes that the few cases that have addressed professional speech regulations can be read as applying “a contextual approach centered around the social roles

83 Lowe, 472 U.S. at 232 (White, J., concurring).
85 See Post, supra note 3, at 944.
86 Halberstam, supra note 29, at 838.
87 Id. at 834–35.
of speaker and listener.” 88 Thus, Halberstam does not argue that a coherent professional speech doctrine exists, but rather attempts to identify the principles that should guide the courts when confronting First Amendment challenges to regulations of professional speech. Halberstam believes that professional speech should receive at least as much protection under the First Amendment as commercial speech. In fact, he believes that given the “deeper relationship between physician and patient” 89 than that between the commercial speaker and his audience, professional speech should, in some cases, be protected even more than commercial speech. 90 Dean Robert Post’s 2007 Article, Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech, provides an even more focused analysis of the First Amendment rights of physicians. 91 Dean Post concludes that information communicated by physicians to their patients within the informed consent context facilitates enlightened public decision-making in a democracy, and that state laws requiring physicians to engage in ideological or false speech raise significant First Amendment questions.92

Thus, even if a distinct “professional speech doctrine” does not exist, we can still identify the First Amendment interests served by physician speech, and the particular First Amendment rights that physicians retain even when they are engaged in the practice of medicine. While certain types of state laws affecting physician’s speech should be constitutionally permissible in light of the state’s compelling interest in regulating the practice of medicine, such a conclusion does not mean that the First Amendment is inapplicable to physician speech.

88 Id. at 835.
89 Id. at 838.
90 Id.
91 Post, supra note 3. A few other articles have also explored the First Amendment rights of physicians. See Berg, supra note 73; Christina E. Wells, Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724 (1995).
92 Post, supra note 3, at 939–40, 978. Dean Post concludes that ideological speech does not form part of the legitimate practice of medicine, and that the state’s efforts to compel this type of speech, therefore, are subject to ordinary First Amendment principles. See id. at 952–53. Dean Post’s subsequent book Democracy, Expertise, and Academic Freedom also discusses the First Amendment rights of physicians, but within the context of his broader analysis of “the relationship between the First Amendment and the practices that create and sustain disciplinary knowledge.” See ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE ix–x (2012).
C. What Are the First Amendment Interests at Stake in Regulating Physician Speech?

As the Ninth Circuit concluded when reviewing a challenge to the federal policy restricting physicians from recommending the use of marijuana for medical purposes: “Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights.” Certain First Amendment principles may, however, apply differently within this context because of the particular First Amendment values at stake.

The most obvious distinction between the values at stake in protecting a physician’s professional speech to her patient versus speech outside this context is that the marketplace of ideas metaphor, ordinarily a powerful theory animating the First Amendment, applies with little force. Under the marketplace metaphor, the First Amendment ensures that our society will be one of robust debate—by protecting speech, even speech promoting falsehoods, the truth will ultimately prevail. As the Court observed in *New York Times v. Sullivan*, quoting the philosopher John Stuart Mill, “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’”

However, a physician’s office should not be a marketplace of ideas—we expect that professionals will be punished if they spread falsehoods or untruths in the course of their practice. A physician’s...
speech to her patient is not an unbounded conversation in a public square where public debate may lead to the discovery of the truth.97 A physician’s conversation with her patient is what Halberstam refers to as a “bounded speech practice”—the communicative relationship between the physician and the patient is meaningful precisely because it is within a professional context in which the patient can trust that the physician is giving her truthful, accurate, and expert medical advice.98

Instead, as discussed when analogizing to the commercial speech doctrine, a more persuasive rationale for extending the First Amendment to physician speech can be found in the democratic self-government theory championed by Alexander Meiklejohn. Under this theory, the First Amendment’s scope should be interpreted in light of the amendment’s ultimate goal: a well-informed citizenry that can make wise voting decisions, thus ensuring the success of democratic self-government. While the expert medical information a physician conveys to her patient may not necessarily translate directly into more educated voting behavior,99 this information may be relevant to the patient’s world-view. It is hard to imagine how commercial advertisements for retail products could be more important to enlightened public decision-making in a democracy than a physician’s conversation with her patient about the health consequences of that patient’s use of tobacco and alcohol. As Dean Post argues:

[The knowledge conveyed by physicians to their patients] is relevant to how we think about the provision of medical care generally, including our views about whether and how the medical system ought to be regulated by the government. In this way, information communicated by physicians in private doctor-patient relationships can become important for enlightened “public decisionmaking in a democracy.”100

97 See, e.g., Halberstam, supra note 29, at 845 (“[T]he social practice of seeking treatment from a physician, or even a second opinion, is not a general unbounded scholarly investigation, but the placing of trust in, and the recognition of the authority of, one or more physicians.”).

98 Id. at 844.

99 However, it is entirely possible that some information conveyed during a medical appointment could directly influence voting behavior. As just one example, the information a doctor gives to her patient about the health effects of the patient’s tobacco use may influence that patient’s view of the state’s role in regulating the tobacco industry.

100 Post, supra note 3, at 978 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976)). In Conant v. Walters, the Ninth Circuit quoted, with approval, the district court’s discussion of the ways in which restrictions on physician speech might influence their patients’ ability to participate meaningfully in public debates over whether regulations affecting health and welfare are sound public policy: “[M]any patients depend upon discussions with their physicians as their primary or only source of sound medical information. Without open communication with their physicians, patients would fall silent and appear uninformed. The ability of patients to participate meaningfully in the public
Accordingly, given that the democratic self-government theory justifies the First Amendment's application to commercial speech, physician speech should receive at least as much, if not more, of the amendment's protections as the intermediate scrutiny that applies to commercial speech.\(^{101}\)

Assuredly some aspects of physician speech do not affect a patient’s world-view, and instead provide that patient with expert knowledge that is primarily relevant to that patient’s personal decisions about her medical care. This type of physician speech, however, still furthers First Amendment values by serving the amendment’s goal of both producing and spreading truth and knowledge.\(^{102}\) As the Court has observed, the First Amendment plays an important “role in affording the public access to discussion, debate, and the dissemination of information and ideas.”\(^{103}\) Along these same lines, physician speech provides patients with access to medical expertise and personalized advice that the ordinary lay patient would otherwise be incapable of obtaining. Thus, while the democratic self-government theory may not provide a full account of the First Amendment values served by physician speech, the theory’s underlying concern with knowledge production and dissemination helps to explain how physician speech that is irrelevant to “enlightened public decision-making” still achieves important First Amendment interests.\(^{104}\) This brief discussion demonstrates the value of physician speech under widely accepted views of the First Amendment’s goals, and the absurdity that would result if physicians received no First Amendment rights while other categories of speech, most notably commercial speech, receive ample protection under the current doctrine.


\(^{102}\) See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) (discussing the “truth-seeking function of the marketplace of ideas”); Grosjean v. Am. Press Co., 297 U.S. 233, 247, 250 (1936) (discussing how the First Amendment was inspired by the English government’s efforts “to prevent, or curtail the opportunity for, the acquisition of knowledge,” and noting that “informed public opinion is the most potent of all restraints upon misgovernment”); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“[f]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .”); see also 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (Worthington Chauncey Ford ed., Government Printing Office, Washington 1904) (1774), available at http://memory.loc.gov/ammem/amlaw/lwjclink.html (discussing the importance of freedom of the press in “the advancement of truth, science, morality, and arts”).


\(^{104}\) See Jack M. Balkin, The Future of Free Expression in a Digital Age, 36 PEPP. L. REV. 427, 427 (2009) (recognizing that one of the key values underlying the First Amendment is “the promotion and dissemination of knowledge and opinion”); Robert Post, Discipline and Freedom in the Academy, 65 ARK. L. REV. 203, 214 (2012) (discussing the “independent constitutional value to the production and distribution of knowledge”).
The democratic self-governance theory of the First Amendment, however, is not the only relevant theory worth considering. The “liberty” theory of the First Amendment also imposes a clear limit on state laws affecting physician speech: under the “liberty” theory, the state cannot compel citizens, even physicians engaging in the practice of medicine, to espouse the state’s ideological beliefs.

Under the “liberty” theory of the First Amendment, free speech also has constitutional value because of its important role in protecting an individual’s autonomy and right of self-definition.\(^{105}\) Freedom of speech ensures an individual’s liberty to form her own beliefs and opinions by ensuring that few restrictions are placed on the dissemination of different viewpoints in the public sphere. This interest in individual liberty and autonomy, in fact, is one of the primary justifications for restricting the state’s ability to compel citizens to engage in the state’s ideological speech. While physicians may have more limited autonomy interests when engaging in the practice of medicine, this does not mean that they surrender all of their ordinary First Amendment rights against compelled ideological speech. Physicians retain the core First Amendment right of ordinary citizens to refuse to be the mouthpiece for the state’s ideological advocacy.

As Professor C. Edwin Baker described over thirty years ago:

> The liberty model [of the First Amendment] holds that the free speech clause protects not a marketplace but rather an arena of individual liberty from certain types of governmental restrictions. Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual. The liberty theory justifies protection because of the way the protected conduct fosters individual self-realization and self-determination . . . .\(^{106}\)

The Court invoked the liberty, or autonomy, theory of the First Amendment when articulating the principles of the compelled speech doctrine, recognizing the ways in which forcing speakers to adopt ideological beliefs with which they disagree interferes with the broader concept of “individual freedom of mind.”\(^{107}\) Such laws, by compelling an individual “to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable,”\(^{108}\) interfere with individual autonomy interests. These laws “invade[] the sphere of

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intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control.”

It is certainly true that physicians have much more limited constitutionally protected autonomy interests than the street-corner speaker. As Dean Post recognizes, if physicians were to retain a constitutionally protected autonomy interest in defining the content of all of their speech, “[a]ny physician who has been held liable for failure to obtain the informed consent of his patient could argue that the law impairs his autonomy because it requires him to speak in ways that he would prefer not to.” Since the informed-consent doctrine is compatible with the First Amendment values served by physician speech, given that informed consent promotes patients’ reasoned decision-making and access to expert knowledge, such a broad conception of physicians’ autonomy interests would be incompatible with the doctrine. However, this conclusion does not mean that physicians are without any autonomy interests when they are engaging in speech as part of their practice of medicine. Certain forms of state-mandated speech surely do interfere with the physician’s right to “individual freedom of mind.” Just as the state cannot compel a street-corner speaker to tell those passing by to “vote for Obama,” the state cannot compel physicians to tell their patients how to vote, what religion to practice, or whether to support the country’s involvement in a given war. These are matters of opinion and debate that depend on morals and values—physicians do not lose the right to object to such compelled ideological speech, even if it is within the practice of their profession. There is absolutely no reason why the state’s power to regulate the medical profession should extend to permitting the state to force doctors to puppet the state’s value judgments about non-medical matters. Compelled speech that forces physicians to express the state’s ideological position on whether a woman should have an abortion is even more problematic from a First Amendment perspective given the important role that physician speech plays in spreading expert medical knowledge to patients. Because of the fiduciary relationship between physicians and their patients, patients are likely to place significant value on their physicians’ speech about a medical procedure. A patient trusts that her physician’s words to her convey expert knowledge tailored to serve the patients’ best interests, and that these words are not the product of the state’s moral agenda.

109 Id. (second alteration in original) (quoting Barnette, 319 U.S. at 642) (internal quotation marks omitted).
110 Post, supra note 3, at 973.
111 Barnette, 319 U.S. at 637.
112 See discussion supra pp. 2367–68.
An analogy to the commercial speech doctrine is again instructive in explaining the First Amendment’s protections against compelling physicians to engage in ideological speech. As discussed earlier, the extension of the First Amendment’s protections to commercial speech is justified based on the value of this speech to consumer’s informational interests.\textsuperscript{113} Even though lesser scrutiny applies to state laws affecting commercial speech,\textsuperscript{114} the Court’s holding in \textit{United States v. United Foods}\textsuperscript{115} suggests that commercial speakers retain a constitutionally protected autonomy interest in not being forced to support a message with which they disagree.

In \textit{United Foods}, the Court evaluated a First Amendment challenge brought by a mushroom producer who was being forced to subsidize speech promoting the message that all mushrooms are worthy of consuming, despite his desire to spread his own message that his brand of mushrooms were of a superior quality. While recognizing that this disagreement could be characterized as “minor,” the Court nonetheless struck down the statute, finding that “First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.”\textsuperscript{116} \textit{United Foods} supports the proposition that even commercial speakers retain constitutionally protected interests, independent from the informational interests of consumers, in not being forced to spread the government’s messages and opinions, even on uncontroversial topics. While the quality of different brands of mushrooms may not be a matter of serious public debate, \textit{United Foods} suggests that even this type of compelled speech treads on commercial speakers’ constitutionally protected autonomy interests. The logical extension of \textit{United Foods} is illustrated by the recent litigation over compelled labeling of tobacco products and advertisements with graphic labels that arguably spread the government’s ideological message about whether individuals should ever smoke. While the negative health consequences of regular tobacco use are an incontestable fact, these graphic labels arguably go further than merely informing consumers of the relevant health risks and, instead, spread the government’s message

\textsuperscript{113} Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) (“[The] consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”).


\textsuperscript{115} 533 U.S. 405 (2001).

\textsuperscript{116} Id. at 411.
that individuals should never smoke.\textsuperscript{117} As the D.C. Circuit concluded in upholding the district court’s permanent injunction of the graphic tobacco labels, commercial speakers retain the First Amendment right to refuse to engage in government advocacy.\textsuperscript{118}

Just as commercial speakers retain the autonomy interest in not being forced to convey the government’s message about whether tobacco products should be used, physicians must retain a constitutionally protected autonomy interest in refusing to spread the government’s opinions and beliefs on matters of religion, politics, and values. In fact, we would expect physician speech to receive greater protection than commercial speech, given the important First Amendment values served by physician speech, and the Court’s recognition that professional speech may be entitled to “the strongest protections our Constitution has to offer.”\textsuperscript{119} Imagine, for example, if a state were to compel physicians to inform any parents who wanted their minor daughter to receive the HPV vaccine that the parents were encouraging promiscuous, risky, and inappropriate sexual behavior. Forcing physicians to spread this type of government message is not an appropriate regulation of the medical profession—the state cannot use its regulatory power to force physicians to “affirm ideological truths to which they might well object.”\textsuperscript{120} If speakers engaged in commercial speech retain the right to object to compelled government advocacy, physicians also have the right to refuse to spread the government’s beliefs, particularly given that such compelled advocacy corrupts the physician-patient relationship of trust and interferes with the transfer of expert knowledge from physician to patient.

As discussed in the preceding Section, this conception of physicians’ First Amendment rights is entirely consistent with the Court’s decision in \textit{Casey}, which permits the state to express its own pro-life views in a state pamphlet, but says nothing about whether the state can force physicians themselves to express the state’s ideological views. The arguably ideological information required by the Pennsylvania statute at issue in \textit{Casey} was located in the state pamphlet that physicians had to offer to patients—the physicians were not required to

\textsuperscript{117} For a more extensive discussion, see Keighley, \textit{supra} note 72.
\textsuperscript{118} See R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 696 F.3d 1205, 1217 (D.C. Cir. 2012) (characterizing the graphic tobacco labels as “unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting”); see also \textit{R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.}, 845 F. Supp. 2d 266, 273–74 (D.D.C. 2012) (“[W]hile the line between the constitutionally permissible dissemination of factual information and the impermissible expropriation of a company’s advertising space for Government advocacy can be frustratingly blurry, here the line seems quite clear.”), aff’d, 696 F.3d 1205.
\textsuperscript{120} Post, \textit{supra} note 3, at 959.
produce their own written materials with the state’s ideological message, nor were they required to endorse the state’s written materials. Importantly, the statute did not force physicians to engage in speech expressing the state’s ideological views as though these were their personal views.

As the Court had observed in *Rust v. Sullivan*, which was decided just a few years before *Casey*, laws affecting physician speech that do not require a physician “to represent as his own any opinion that he does not in fact hold” do not “significantly impinge upon the doctor-patient relationship.”121 While the Court in *Rust* stopped short of holding that this relationship was protected under the First Amendment, its discussion helps to explain why the Court had such an easy time disposing the First Amendment claim in *Casey*. As Dean Post explains:

> If the state requires the state’s own views on abortion to be delivered to patients, as happened in *Casey*, the integrity of physician-patient communication is not necessarily compromised. So long as the physician is not forced to express views that contradict and undermine the authority of medical knowledge, so long as the physician retains the liberty to disagree with or to undermine messages that the state may wish to communicate, the independent medical expertise of the physician is not debased.122

An understanding of the First Amendment values served by physician speech helps to explain why requiring physicians to merely offer state materials as part of their practice of medicine does not violate the physician’s First Amendment rights, even if these materials contain the state’s ideological viewpoints.123 A law that requires a physician to offer a state pamphlet to her patients does not infringe the physician’s constitutionally-protected autonomy interests because the physician herself is not required to adopt the state’s ideological views, nor to represent these views as her own.

122 Post, *supra* note 3, at 989–90; cf. Berg, *supra* note 73, at 259 (arguing that the focus of the First Amendment inquiry in physician speech cases should be on patients’ interests, and that *Casey’s* requirement that doctors distribute the state pamphlets undermines patients’ ability to give informed consent by “turning physicians into instruments of state propaganda”).
123 Of course, if the state were to require the physician to *force* her patients to read overtly ideological information published by the state, or if the state were to restrict the physician’s ability to express his disagreement with the state materials, such laws may very well violate physicians’ First Amendment rights. Moreover, such laws also raise First Amendment issues on behalf of the patient, who may have her own First Amendment claim against being forced to read the state’s materials. *See generally* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939 (2009).
D. Laws Compelling Physicians to Spread the State’s Ideological Speech Should Be Subject to Strict Scrutiny

As the Court held almost seventy years ago when first articulating the principles of the compelled speech doctrine, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Justice O’Connor, in fact, noted the First Amendment concerns that would be raised by a statute that required physicians to engage in ideological speech in her dissent in Akron v. Akron Center for Reproductive Health. This fundamental principle of the First Amendment, that the state cannot compel individuals to adopt the state’s opinions on matters that should be left to public debate, applies equally to physicians as it does to the street-corner speaker.

Compelled speech laws that require physicians to engage in speech that expresses the state’s ideological message should be subject to strict scrutiny. Thus, while such laws do not automatically violate the First Amendment, the state would likely have a difficult time demonstrating that such laws serve a compelling government interest, and that the law was narrowly tailored to serve that interest. Even assuming that a state were able to show that it had a compelling interest in spreading its ideological message, the state would still need to show that requiring physicians to personally spread this message was the most narrowly tailored way of meeting this interest. The difficulty a state would have in meeting this standard becomes readily apparent after considering the Court’s language in Wooley v. Maynard: “[W]here the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”

Before moving to the mandatory ultrasound law, it is worth giving a recent example of how this limit on state regulatory power plays out in practice. South Dakota’s “informed consent” law, discussed briefly above, requires physicians to provide women with a written statement indicating “[t]hat the abortion will terminate the life of a whole,

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125 462 U.S. 416, 472 n.16 (1983) (O’Connor, J., dissenting) (“This is not to say that the informed-consent provisions may not violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology.”).
separate, unique, living human being.” 128 Importantly, while the compelled statement is written, the physician herself has to create the materials containing the mandatory written statement—it is not located in a state-authored and state-produced pamphlet. The text of the statute plainly demonstrates that the South Dakota law requires physicians to spread the state’s belief that life begins at conception. As the Supreme Court observed in Roe v. Wade, however, there is a “wide divergence of thinking on this most sensitive and difficult question” 129 of when life begins, and “those trained in the respective disciplines of medicine, philosophy, and theology [have been] unable to arrive at any consensus.” 130 Thus, by requiring physicians to endorse one theory of when life begins, South Dakota requires physicians to spread the state’s ideological beliefs. 131

While the district court agreed that the law compelled ideological speech, 132 the Eighth Circuit, sitting en banc, concluded that since the statute defined “human being” as “an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation,” 133 the law did not compel untruthful or misleading speech, and therefore did not violate the physicians’ First Amendment rights. 134 As discussed above, 135 the en banc court essentially collapsed the First Amendment and undue burden inquiries, concluding that a law that met Casey’s undue burden standard could not violate a physician’s First Amendment rights. 136

The en banc court was willing to allow the statute’s definition of the term, which was not required as part of the written materials and which goes against the common understanding of the term “human being,” 137 to undermine the physicians’ First Amendment claim. It is

130 Id. at 159.
131 Dean Post has written extensively on the ideological nature of the “information” required by the South Dakota law. He argues that since “[t]he construction of ‘the Fetus as a Human Person’ is in fact a recognized and studied goal of the ‘social movement rhetoric’ of those who oppose abortion,” South Dakota’s law “deliberately and provocatively incorporates the language of ideological controversy and forces physicians to affirm the side of those who oppose abortion.” Post, supra note 3, at 956.
132 Planned Parenthood Minn., N.D., S.D. v. Rounds, 375 F. Supp. 2d 881, 887 (D.S.D. 2005) vacated on reh’g en banc, 530 F.3d 724 (8th Cir. 2008) (concluding that the statute required physicians to “espouse the State’s ideology. . . . [by requiring] abortion doctors to enunciate the State’s viewpoint on an unsettled medical, philosophical, theological, and scientific issue, that is, whether a fetus is a human being”.
134 Rounds, 530 F.3d at 736–37.
135 See supra Part I.
136 See Rounds, 530 F.3d at 735.
137 See Post, supra note 3, at 954 (discussing how the statute’s definition of “human being”
worth considering how the en banc majority’s analysis would have differed if the court had engaged in a separate First Amendment inquiry, as opposed to applying Casey’s undue burden framework. The discussion above of the First Amendment values implicated by physician speech demonstrates both that physicians retain the First Amendment right of ordinary citizens to object to compelled government orthodoxy on matters of opinion and belief, as well as the important First Amendment values served by giving patients access to expert medical knowledge and advice. From a First Amendment perspective, the fact that an individual can expand upon or respond to a compelled statement is of no consequence, because that would mean that “the government could require speakers to affirm in one breath that which they deny in the next.” Accordingly, the fact that physicians could follow up on the compelled statement that the woman is terminating the “life of a whole, separate, unique, living human being” with the clarification that the term human being is meant to refer to “an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation” is of no consequence—the compelled statement still requires physicians to make an ideological statement giving the fetus the status of a living child, even if the physician has the liberty to qualify this statement with the statutory definition.

In addition, from a First Amendment perspective, the patient’s understanding of the meaning of the compelled statement should matter, given that one of the core First Amendment values served by physician speech is this speech’s ability to give patients’ access to medical expertise, including expertise that will inform patients’ worldview. Thus, if the en banc court had evaluated the First Amendment implications of the statute, instead of just focusing on whether the undue burden standard was violated, the court would not have been able to rest its decision on the statutory definition of “human being.” Moreover, if the en banc court had then applied strict scrutiny to this
compelled ideological statement, it is doubtful that the state would have been able to demonstrate that requiring physicians to give women this statement was the most narrowly tailored way of achieving the state’s interest in protecting fetal life. While the South Dakota law will not be a focus of this Article, the law provides one clear example of the inability of the Casey undue burden standard to fully capture the pertinent First Amendment interests at stake in regulating physician speech.

III. SHOULD THE TEXAS MANDATORY ULTRASOUND LAWS BE SUBJECT TO STRICT SCRUTINY UNDER THE FIRST AMENDMENT?

In recent years, physicians have brought First Amendment challenges against state laws requiring physicians to perform ultrasound exams on women seeking abortions, and to then display and describe the ultrasound image to these women before getting their “informed consent” to the abortion procedure. This Part will analyze whether mandatory ultrasound laws require physicians to spread the state’s ideological message. I conclude that strict scrutiny should apply to the mandatory ultrasound laws because these laws commandeer physicians into spreading the state’s ideological belief that pregnancies should be carried to term.

A. Overview of the Texas Mandatory Ultrasound Law

Although twenty-one states currently impose varying requirements for ultrasound provision by abortion providers, this Section will analyze the First Amendment issues raised by the Texas ultrasound law, which is currently being challenged in federal court. Before delving into the First Amendment analysis, I will briefly describe the Texas statute.

The Texas statute, which is part of the state’s “informed consent” requirements for abortion, mandates that, at least twenty-four hours in advance of the abortion procedure the physician must perform an

142 This is assuming, of course, that the state was able to demonstrate that it had a compelling interest in protecting fetal life.
143 Part I of this Article briefly mentioned ongoing litigation in Texas over the First Amendment issues raised by mandatory ultrasound requirements.
144 See GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (2012), available at: http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf. Some states require that physicians offer the woman the chance to view the ultrasound, without mandating that the ultrasound image be displayed or described. Id. at 2.
146 The twenty-four-hour requirement is waived if the woman lives over 100 miles from the
ultrasound on the pregnant woman and display the ultrasound images “in a quality consistent with current medical practice in a manner that the pregnant woman may view them.” The physician must then provide, “in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs.” In addition, the physician must make the heart auscultation audible for the pregnant woman to hear, and provide a verbal explanation of the heart auscultation. The physician is required to give the explanation of the ultrasound images unless the pregnant woman certifies that 1) she is pregnant as the result of “sexual assault, incest, or another violation of the Texas Penal Code that has been reported to the authorities, or that has not been reported” because of a reasonable belief that doing so would result in a risk of serious bodily injury; 2) she is a minor obtaining the abortion through a judicial bypass procedures; or 3) the fetus has an “irreversible medical condition or abnormality” that has been documented in the medical file. While the law provides that a pregnant woman may decline both to view the ultrasound image and to hear the fetal heart auscultation without being subject to penalties, the physician is still required to display the image and make the heartbeat audible in these circumstances. In addition, if the woman does not meet one of the three exceptions mentioned above, the physician must provide a verbal explanation of the ultrasound images, even if the woman does not wish to hear the explanation. The law


147 Id. § 171.012(4)(A)–(B). An agent of the physician who is also a registered sonographer can perform the actual ultrasound. Although the Texas law uses the term “sonogram” instead of “ultrasound,” these are merely different words for the same procedure, and I will use the term “ultrasound” throughout this Article.

148 Id. § 171.012(4)(C). Although an agent of the physician can perform the ultrasound exam, the physician herself must display and describe the ultrasound image.

149 Id. § 171.012(4)(D). Again, a registered sonographer who is an agent of the physician may make the heart auscultation audible. Id.

150 Id. § 171.012(5).

151 See id. § 171.0122(b) (providing that “[a] pregnant woman may choose not to view the sonogram images required to be provided to and reviewed with the pregnant woman under Section 171.012(a)(4),” but giving no exception to the requirement that the physician display the image); id. § 171.0122(c) (providing that “[a] pregnant woman may choose not to hear the heart auscultation required to be provided to and reviewed with the pregnant woman under Section 171.012(a)(4),” but giving no exception to the requirement that the physician make the heartbeat audible).

152 Id. § 171.0122(d). Although North Carolina’s law will not be a focus of this Article, it is worth mentioning since the requirements of the North Carolina statute mirror those of the Texas law. See N.C. Gen. Stat. § 90-21.85 (2013). North Carolina’s statute is also the subject of ongoing federal litigation, and the holdings of the North Carolina district court will be referenced throughout Part III. In North Carolina, the physician must, at least four hours before the abortion procedure, perform an ultrasound on the pregnant woman, id. § 90-
provides a blanket exception from compliance with the law in the case of a medical emergency, which is defined as a life-threatening physical condition that puts the woman at risk of death or significant impairment of a critical bodily function unless the abortion is performed.

B. Is Displaying and Describing an Ultrasound a Form of Speech?

The first step in the analysis is whether Texas’s mandatory ultrasound law actually compels a speech act protected by the First Amendment. One could argue that displaying and describing the results of a medical exam is not a form of speech protected by the First Amendment. However, this argument is quickly dispelled after considering the Court’s case law extending the First Amendment’s protections to a wide variety of expressive conduct.

To decide whether a given action is protected by the First Amendment, the Court asks whether the “activity was sufficiently imbued with the elements of communication” to fall within the First Amendment’s scope. Under this test, the Court has concluded that displaying a United States flag overlaid with a peace symbol, and wearing black armbands to school to express opposition to the Vietnam War are forms of expression that are fully protected by the First Amendment. Mandatory ultrasound laws, by requiring physicians to both display and describe the ultrasound image, compel physicians to communicate a message to their patients. Even if the laws only required the physicians to display the ultrasound image, these laws would still compel a speech act because this conduct is imbued with the elements of

21.85(a)(1); provide “a simultaneous explanation of what the display is depicting, which shall include the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted,” id. § 90-21.85(2); “[d]isplay the images so that the pregnant woman may view them,” id. § 90-21.85(3); and “[p]rovide a medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable,” id. § 90-21.85(4). In addition, the physician must offer the woman the opportunity to hear the fetal heart tone. Id. § 90-21.85(2). Again while the woman is permitted to “avert[] her eyes from the displayed images,” and to “refus[e] to hear the simultaneous explanation and medical description,” id. § 90-21.85(b), the physician must display and describe the images for every abortion procedure.

154 Id. § 171.002(3).
156 Id. at 414–15.
157 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (concluding that the wearing of the armbands “involves direct, primary First Amendment rights akin to ‘pure speech,’” and that “[t]he school officials banned and sought to punish petitioners for a silent, passive expression of opinion”).
communication that warrant First Amendment protection—one of the explicit goals of the ultrasound law is to communicate “information” to the patient.\(^{158}\) Looking to the lower federal courts, both the North Carolina and Texas district courts that have evaluated challenges to mandatory ultrasound laws have concluded that these laws compel speech and expression that triggers the First Amendment’s protections.\(^{159}\) Thus, while the actual performance of the ultrasound may not be an activity protected by the First Amendment, the display of the ultrasound image, as well as the explanation of its contents, are communicative acts that implicate the First Amendment.

C. Does the Mandatory Ultrasound Law Force Physicians to Spread an Ideological Message?

While *Casey* holds that laws that express the state’s preference for childbirth over abortion do not impose an undue burden on the woman’s abortion right, the Court did not analyze whether forcing physicians themselves to spread a message advocating the state’s preferences raised any First Amendment concerns. As noted previously, the Pennsylvania law did not require the physician to give an oral speech advocating childbirth—the state’s ideological message was instead located in the state pamphlet that physicians had to offer to their patients. In the preceding Section, I demonstrated how state laws that require physicians to engage in speech advocating the state’s ideological beliefs interfere with the physician’s constitutionally protected autonomy interests, and that these concerns are particularly heightened given the First Amendment values served by physician speech. While compelled ideological speech is certainly not the only type of compelled physician speech raising constitutional concerns, it will be the focus of my inquiry. Looking to the mandatory ultrasound laws, the dispositive question for the purposes of this Article is whether the display and


\(^{159}\) Stuart v. Huff, 834 F. Supp. 2d 424, 429 (M.D.N.C. 2011) (“It is undisputed that the Act compels content-based speech by providers; it requires providers to orally and visually convey specified material about the fetus to their patients.” (footnote omitted)); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 975 (W.D. Tex. 2011), *vacated in part*, 667 F.3d 570 (5th Cir. 2012) (concluding that the Texas law, even its portions requiring the physician to display the image and to make the fetal heartbeat audible, compel expression protected by the First Amendment). While the Texas decision was reversed by the Fifth Circuit, the Fifth Circuit did not go so far as to hold that the mandatory ultrasound did not compel speech and expressive conduct protected by the First Amendment. See *Lakey*, 667 F.3d 570.
describe requirements force physicians to engage in ideological speech.\textsuperscript{160} Because of the complexity of this question, I will evaluate the potential ideological nature of the mandatory ultrasound law in some detail.

Some statutes may demonstrate their ideological nature on their face. For example, South Dakota’s requirement that physicians inform women “[t]hat the abortion will terminate the life of a whole, separate, unique, living human being” is, by its very language, an ideological statement about the status of the fetus as a human being.\textsuperscript{161} Imagine, as another example, if a state were to compel physicians to inform every woman seeking an abortion that the abortion may deprive a loving family who wants to adopt a baby from fulfilling their dreams. Again, this statement is undoubtedly an ideological message that encourages the woman to carry the pregnancy to term. Accordingly, when the ideological content is clear on the compelled statement’s face, the inquiry will be rather simple: if the state has required physicians to give their patients a statement with obvious ideological content, strict scrutiny applies.

Not all compelled statements, however, will be overtly ideological. Consider, for example, if a state required physicians to inform all patients that seventy percent of the grains and cereals grown in the United States are fed to farmed animals.\textsuperscript{162} It is difficult to tell whether this statement has ideological content—the statement is factual, but it also appears to be advocating for less consumption of meat and animal products. But consider if this compelled statement was adopted in the context of a larger legislative campaign supporting veganism, on the grounds that consuming meat and animal products is morally wrong. Should the state be permitted to force physicians to participate in the state’s moral campaign against eating meat by using a compelled

\textsuperscript{160} The mandatory ultrasound laws may violate other First Amendment principles, but this Article focuses solely upon the question of whether mandatory ultrasound laws require physicians to engage in the state’s ideological advocacy. Laws that corrupt the communicative relationship between the physician and patient by destroying the patient’s trust in her physician also implicate First Amendment interests by undermining the physician’s ability to transfer expert knowledge to her patient. See \textit{supra} pp. 2362–63. Mandatory ultrasound laws, by requiring physicians to display and describe the ultrasound even when 1) the patient has expressly stated that she does not wish to see the image or hear the description, and 2) the physician believes that compliance may cause the patient physical or mental harm, certainly threaten to corrupt this communicative relationship and to undermine patient trust. Such types of further First Amendment limitations on the state’s ability to compel physician speech should be explored in future scholarship. One clear First Amendment limit that has already been the subject of academic writing is a limit on the state’s ability to compel false or misleading physician speech. See, e.g., Post, \textit{supra} note 3, at 975–90.

\textsuperscript{161} S.D. \textsc{Codified Laws} § 34-23A-10.1(1)(b) (2011); see also \textit{supra} p. 2368.

statement whose ideological content is ambiguous on the face of the statute, but clear once one considers the statute’s larger context?

This concern about ambiguous ideological messages is particularly heightened when the state compels speech that contains visual images—it can be very difficult to determine whether a visual image is purely factual, or whether it instead contains an ideological message. As theorist and philosopher Roland Barthes argued over fifty years ago, the “photographic message” is not an “objective” representation of reality—the photograph often includes a “connoted” or “coded” message, one that is “not necessarily immediately graspable at the level of the message itself,” and one that is shaped by the image’s cultural and historical context. It is nearly impossible to decide, based solely on the face of an image, whether the image expresses a “coded” ideological message. Professor Rebecca Tushnet recently delved into this topic in her Harvard Law Review article, observing that “the power of images comes not just from the emotions they evoke but also from the linked feature that they are hard to see as arguments: they persuade without overt appeals to rhetoric.” Images often appeal to the audience’s emotions; images may express a compelling message that triggers a strong emotional reaction from viewers without needing to explicitly adopt any ideological language. It can, therefore, be very difficult to evaluate whether compelled speech acts that include visual images require the speaker to convey the state’s ideological message.

Consider, as one recent example of compelled visual images challenged on First Amendment grounds, the federal requirements that tobacco packages and advertisements contain graphic warning labels featuring a picture of tobacco smoke being exhaled through a

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164 Id. at 200–204, 206. Barthes argues that a photograph’s “code of connotation [is] in all likelihood neither ‘natural’ nor ‘artificial’ but historical, or, if it be preferred, ‘cultural.’ Its signs are gestures, attitudes, expressions, colors, or effects, endowed with certain meanings by virtue of the practice of a certain society . . . signification is always developed by a given society and history.” Id. at 206.
166 Id. at 696 (“Images, by not making their appeal to emotion explicit, provide a way to bring emotion to law despite law’s expressed discomfort with emotions.”); see also Costas Douzinas & Lynda Nead, Introduction to Law and the Image: The Authority of Art and the Aesthetics of Law 1, 7 (Costas Douzinas & Lynda Nead eds., 1999) (“Images are sensual and fleshy; they address the labile elements of the self, they speak to the emotions . . . . They have the power to short-circuit reason and enter the soul . . . .”); Christina O. Spiesel et al., Law in the Age of Images: The Challenge of Visual Literacy, in CONTEMPORARY ISSUES OF THE SEMIOTICS OF LAW 231, 237 (Anne Wagner et al. eds., 2005) (arguing that visual stories are “rich in emotional appeal, which is deeply tied to the communicative power of imagery. This power stems in part from the impression that visual images are unmediated. They seem to be caused by the reality they depict.”).
tracheotomy hole alongside the text “Warning: Cigarettes are addictive,” or a picture of a woman crying alongside the text “Warning: Tobacco smoke causes fatal lung disease in nonsmokers.”

Do these mandatory graphic labels provide consumers with factual information about tobacco’s health risks, or is the government instead compelling tobacco manufacturers to spread the government’s message “do not smoke”? The U.S. District Court for the District of Columbia concluded that the graphic labels did not convey factual and uncontroversial information, and instead crossed the line into “[g]overnment advocacy.”

Importantly, the court reached this conclusion after considering the evidence of the government’s purpose in mandating the graphic labels: “[T]he graphic images here were neither designed to protect the consumer from confusion or deception, nor to increase consumer awareness of smoking risks; rather, they were crafted to evoke a strong emotional response calculated to provoke the viewer to quit or never start smoking.”

The D.C. Circuit’s opinion upholding the district court’s injunction again looks to the government’s purpose in deciding whether the images convey merely factual information or instead spread a government message—according to the D.C. Circuit, “the graphic warnings are not ‘purely’ factual because—as FDA tacitly admits—they are primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning.”

Such an attempt to spread the government’s anti-smoking message meant that the graphic tobacco labels were not merely conveying factual information about health risks. While the tobacco labels fall under the Court’s commercial speech doctrine, the analysis of whether these visual labels convey factual or ideological information applies with equal force to the analysis of the supposed “factual” and nonideological nature of the speech compelled by the mandatory ultrasound laws.

When there are close cases where the ideological content of the compelled speech is unclear on the statute’s face, the courts will need to

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169 Id. at 272.

170 R.J. Reynolds Tobacco, 696 F.3d at 1216.

171 Under the commercial speech doctrine, the dispositive question is whether the tobacco labels fall within Zauderer, which holds that rational basis review applies to disclosure laws that compel factual and uncontroversial information. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).
evaluate the state’s actual purpose in compelling this speech in order to
discern whether the statute forces the physician to engage in ideological
speech. As I argued in my recent article on compelled commercial
speech in the context of the tobacco graphic labeling requirements, a
purpose inquiry is particularly helpful when the government has
compelled speech containing visual imagery.172 I noted that courts have
plenty of experience evaluating government purpose, particularly within
the First Amendment doctrine,173 and that a purpose inquiry is the best
way of ensuring that the state does not use compelled speech containing
visual images to spread the government’s ideological message under the
guise of compelling purely “factual” speech. Importantly, courts must
evaluate the “actual” purpose behind the law, not just the legislature’s
stated motivations for its passage.174 Once the court has determined the
legislature’s actual purpose in mandating the speech, the court will be
able to reach a conclusion as to whether the state has required the
physician to make a statement with ideological content.

This inquiry is not an attempt to discern the psychological
motivations behind each individual member of the legislature, but is
rather an attempt to uncover the social meaning of the statute given its
content, context, and history.175 As Professor Jed Rubenfeld argues,
“[o]ne way to think of the judicial inquiry is to ask what a reasonable
citizen under the actual circumstances would have understood the law’s
purpose to be.”176 Courts have ample experience engaging in this
inquiry by looking to evidence such as the statute’s text, its effects, its
social context, and common knowledge.177 Even if the examined
evidence only raises a strong suspicion of an impermissible ideological

172 Keighley, supra note 72, at 574.
173 Id.; see also Elena Kagan, Private Speech, Public Purpose: The Role of Governmental
Motive in First Amendment Doctrine, 63 U. CHI. L. REV. 413 (1996); Jed Rubenfeld, The First
174 See, e.g., Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987) (“While the Court is
normally deferential to a State’s articulation of [its] purpose, it is required that the statement of
such purpose be sincere and not a sham.”).
175 See, e.g., Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 11 (1st Cir.
2010) (“[I]n a wide variety of contexts, the law rejects tests relying on subjectivity and utilizes
the analytic device of asking how a reasonable and objective observer would view the matter in
question.”).
176 Rubenfeld, supra note 173, at 796.
177 Id. at 794–95. As just one example, courts routinely inquire into legislative purpose when
applying the first step of the Lemon test for Establishment Clause violations, which requires the
court to determine whether the law was motivated by a secular purpose. See Lemon v.
Kurtzman, 403 U.S. 602, 612–13 (1971); see also Berg, supra note 73, at 261–62 (“To ascertain
whether a regulation’s purpose is medical or ideological, and whether it is intended to advance
the government’s viewpoint about a particular treatment, courts must examine the statute’s
language, overall content, and, if necessary, its legislative history. . . . [I]f the government
enacted a law that compels physicians to express a clear preference for a particular medical
treatment or an opinion about what course of action a patient should follow, the law would be
unconstitutional because it promoted an ideological viewpoint.” (footnote omitted)).
purpose, such a law should still be subject to strict scrutiny—heightened review of the law is the best way to ensure that the law is not a disguised attempt at government advocacy.\footnote{See Rubenfeld, supra note 173, at 794–95.} In the context of the mandatory ultrasound laws, if the government’s actual purpose in requiring physicians to display and describe the ultrasound image is to force physicians to convey an ideological message in support of carrying the pregnancy to term, such a law should be subject to strict scrutiny.

When the government seeks to commandeer physicians into spreading the message that the fetus is a “child” that should be carried to term, the government is no longer seeking to compel doctors to engage in speech that ensures informed medical decision-making, and is instead compelling doctors to speak the state’s ideological anti-abortion message. Given that there is no consensus in the medical community that a fetus is a “child” or “human being,”\footnote{See Acuna v. Turkish, 930 A.2d 416, 425–26 (N.J. 2007) (“Clearly, there is no consensus in the medical community or society supporting plaintiff’s position that a six- to eight-week-old embryo is, as a matter of biological fact—as opposed to a moral, theological, or philosophical judgment,—a complete, separate, unique and irreplaceable human being’ or that terminating an early pregnancy involves ‘actually killing an existing human being.’”).} and that “[t]he construction of ‘the Fetus as a Human Person’ is in fact a recognized and studied goal of the ‘social movement rhetoric’ of those who oppose abortion,”\footnote{Post, supra note 3, at 956.} the government’s purpose in enacting the mandatory ultrasound law cannot be to spread a value-laden message about the moral worth of the fetus through the mouths of physicians. While the government can, under \textit{Casey}, have a purpose of encouraging childbirth in its own state pamphlet, the joint opinion does not analyze whether the state can have this purpose when the state compels the physician to personally deliver the state’s speech.

1. Evaluating the Actual Purpose Behind the Texas Mandatory Ultrasound Law

This Section will analyze the actual legislative purpose behind the mandatory ultrasound law in Texas in an attempt to discern whether the Texas statute requires physicians to spread the state’s ideological message. I conclude that the state’s actual purpose in enacting the ultrasound law was to encourage women to carry their pregnancies to term, and that this compelled ideological message should consequently be subject to strict scrutiny.

\footnote{178 See Rubenfeld, supra note 173, at 794–95.} \footnote{179 See Acuna v. Turkish, 930 A.2d 416, 425–26 (N.J. 2007) (“Clearly, there is no consensus in the medical community or society supporting plaintiff’s position that a six- to eight-week-old embryo is, as a matter of biological fact—as opposed to a moral, theological, or philosophical judgment,—a complete, separate, unique and irreplaceable human being’ or that terminating an early pregnancy involves ‘actually killing an existing human being.’”).} \footnote{180 Post, supra note 3, at 956.}
The analysis of the purpose behind the Texas law begins by looking to its text. The enrolled and final version of the bill explicitly recognizes that one of its purposes is to “provide[e] pregnant women access to information that [will] allow her to consider the impact an abortion would have on her unborn child.” Thus, the text itself suggests that the legislature sought to construct the fetus as a “child” worthy of protection.

The mandatory nature of the ultrasound law also suggests that the legislature’s purpose was not just to provide more information to women seeking abortion—if informing women was the state’s actual goal, there would be no reason to require physicians to display and describe the ultrasound image even when the woman has told the physician that she does not wish to see the image, or to hear the physician’s description of it. The statute’s mandatory nature, therefore, again suggests that the state is motivated by more than just informational goals.

It is the law’s exceptions, however, that provide the strongest evidence in the statutory language of the ideological motivations behind the Texas law. The law provides exceptions for compliance in certain circumstances where the abortion is arguably more socially acceptable, providing further proof that the actual purpose behind the law is not to provide women with medically necessary information. If the state were seeking to provide women with the information that is necessary to make an informed decision whether to have an abortion, there would be no reason to provide exceptions for women who are getting abortions for certain more "socially acceptable" reasons.

First, while the physician is required to perform the ultrasound and display its results, regardless of whether the woman is interested in viewing the ultrasound image, the statute allows women to opt out of hearing the verbal description of the ultrasound image in three specific circumstances: 1) if the pregnancy is the result of “sexual assault, incest, or other violation of the Texas Penal Code”; 2) if the pregnant woman is a minor who is obtaining the abortion through a judicial bypass procedure; or 3) if the fetus has an “irreversible medical condition or abnormality.” There is no reason why women who fall into any of these three exceptions have any less of a need to give their “informed

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181 See United States v. Am. Trucking Ass’ns, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").
consent” to the abortion procedure—if the information conveyed by the ultrasound description is relevant and necessary to “informed consent,” than the statute’s logic should mean that physicians must provide this information to all women seeking abortions. Instead, these three exceptions suggest that the legislature was aware that the ultrasound display and description provides more than just factual information, and that certain women, those who are getting abortions for more socially acceptable reasons, should not be compelled to hear the state’s anti-abortion message.184

Second, physicians do not have to comply with any of Texas’s “informed consent” requirements, which include the mandatory ultrasound provisions, if the abortion is the result of a “medical emergency.”185 However, “medical emergency” is defined as those situations where the woman is in “danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.”186 Thus, while a medical emergency exemption that excused compliance only if the woman was in immediate risk of physical injury or death might be consistent with a law that sought merely to provide women with more information about the abortion procedure, the breadth of this exception suggests that something else motivates the statute’s requirements. Physicians need not comply with the “informed consent” requirements if the abortion is necessary to save the woman’s life or to guard against a substantial risk of injury—but if there is no immediate danger requiring the abortion to be performed without any delay, exempting the physician from “informed consent” requirements that merely provide information about the abortion procedure makes little sense. Instead, this exemption again suggests that the state has determined that in certain circumstances—those where the woman’s life or health are at risk—the woman does not have to hear the state’s anti-abortion message.

Moreover, it is important to note that the Texas ultrasound statute does not exist in isolation—the surrounding sections of the Texas Health and Safety Code already require physicians to offer women a state pamphlet containing detailed visual information about the development and size of the fetus at two-week gestational increments.187 This suggests that the actual purpose behind the ultrasound statute is to

184 One could also argue that these exceptions are the result of the state’s conclusion that providing the verbal description in these circumstances would result in significant physical or mental harm. However, if the state were truly concerned with the potential harm that the mandatory ultrasound law might cause, the state could have provided a blanket exception permitting the physician to decline to comply if she determined that the statute’s requirements would result in physical or mental harm to the pregnant woman.
185 TEX. HEALTH & SAFETY CODE ANN. § 171.0124.
186 Id. § 171.002(3).
187 Id. § 171.016.
provide women with something different from mere factual information about the size and anatomical characteristics of the fetus she is carrying. Given that Texas law already requires that 1) the physician inform women of the probable gestational age of the fetus at the time the abortion will be performed,\(^{188}\) and 2) the physician offer the woman the opportunity to view a state pamphlet containing color pictures of the fetus at two-week gestational increments,\(^{189}\) the state has already ensured that a pregnant woman will have access to information about the size and developmental stage of her fetus. Thus, the larger statutory context also supports the theory that the actual purpose behind the ultrasound law is to give women the state’s message that they should carry their pregnancies to term.

In sum, the statutory text strongly suggests that the state’s purpose in enacting the mandatory ultrasound law was to use physicians to spread the state’s message supporting childbirth over abortion. The following Sections provide even more background evidence of the impermissible ideological purpose behind the law.

b. Legislative History of the Texas Law

The legislative history supports the theory that the Texas law was motivated by the legislature’s desire to use physicians to spread the state’s ideological message about abortion.\(^{190}\) First, the engrossed version of the bill makes clear that the legislature believed that the law was constitutional under *Casey’s* allowance for laws that express the state’s preference for childbirth over abortion.\(^{191}\) This statement demonstrates that the legislature was well aware that the ultrasound law expressed the state’s opposition to abortion, and that the legislature believed that requiring the physician to deliver the state’s ideological message in her own voice, as opposed to locating this message in a state pamphlet, was of no constitutional significance.

The statements made on the floor by the House and Senate sponsors of the bill provide additional evidence of the ideological beliefs

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188 Id. § 171.012(a)(1)(C).
189 Id. § 171.016(b) ("The materials must include color pictures representing the development of the child at two-week gestational increments. The pictures must contain the dimensions of the unborn child and must be realistic.").
191 H.B. 15, 82d Leg., Reg. Sess. § 10(c) (Tex. 2011). As discussed earlier in this Article, however, the Pennsylvania law at issue in *Casey* did not require physicians to deliver the state’s message supporting childbirth over abortion in the physicians’ own voice.
motivating the Texas law. First, when the House sponsor of the bill, Representative Sid Miller, was asked whether the purpose of the bill was not to inform women, but to dissuade them from getting an abortion, Representative Miller responded that it would be “fine with me” if the bill stopped women from having abortions. Representative Miller’s response shows his willingness to admit to the pro-life motivations behind the bill. The Senate sponsor’s statements regarding the exceptions in the bill, permitting certain women to opt out of hearing the physician’s description of the fetus, also suggest that the legislature’s value judgments about abortion motivated the statute. The Senate sponsor, Senator Dan Patrick, attempted to deflect his opponents’ attacks that the exceptions demonstrated that the bill was not really about informed consent, by explaining that the exceptions were the result of other State Senators expressing how the law imposed “threats to some women.” In response to these concerns about the threatening nature of the law, Senator Patrick decided “to give those women the option.” How a law that is allegedly solely “informational” could possibly pose a “threat” to certain women was left unexplained, and Senator Patrick refused to answer continued questioning about how the law could serve the purposes of informed consent if certain women were carved out from the statute’s requirements. While Senator Patrick refused to provide a clear explanation of the rationale behind the exceptions, this discussion suggests that the legislature was aware that these exceptions indicated that more than “informed consent” was really at issue.

Texas Governor Rick Perry’s statements during the signing of the bill, however, provide even more evidence of the ideological

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192 Statements by the sponsors of legislation are some of the most persuasive legislative materials for determining statutory meaning. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKER & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1000 (4th ed. 2007) (“The statements by sponsors are given such deference in part because the sponsors are the most knowledgeable legislators about the proposed bill and in part because their representations about the purposes and effects of the proposal are relied upon by other legislators.”).


195 Id.

196 Despite criticisms of relying on executive branch statements when signing a bill for determining statutory meaning, see Marc Garber & Kurt A. Wimmer, Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power, 24 HARV. J. LEGIS. 363 (1987), views expressed in signing legislation can “provide useful policy or even linguistic context for understanding the statute,” ESKRIDGE ET AL., supra note 192, at 1045, and can help to confirm other evidence of statutory intent, see, e.g., United States v. Perlaza, 439 F.3d 1149, 1163 (9th Cir. 2006).
motivations behind the Texas law. Governor Perry described the bill as representing a “critical step in our efforts to protect life.” The following statement by Governor Perry about the importance of the bill highlights the motivating belief that the ultrasound display and describe requirements will demonstrate to women that the fetus is a human being worth of protection:

[T]his is an important bill that ensure that women, in addition to having all the facts about the life she’s carrying, also understands the devastating impact that this life-ending decision can have. The concept of choice can really be a fallacy, because you can’t make the right choice without knowing the true impact of what you’re deciding. Only when someone has access to all the facts, has a deep understanding of what’s at stake, can you make the right decision. And like many in this room today, I believe the right choice is life.

The Governor’s statement suggest that the ultrasound law was not just designed to provide women with facts—it was designed to provide women with the state’s beliefs about the “devastating impact” her decision will have on “the life she’s carrying,” and to lead her towards what the state believes to be the only “right decision.”

c. The Larger Context of the Texas Bill

The surrounding evidence of the legislature’s motivation in signing the bill, while outside the official legislative history, provides additional support for the theory that the state’s purpose in enacting the law was to spread an ideological message through the voice of the physician. Turning again to Governor Perry, when the Governor designated the bill as “emergency legislation” deserving the legislature’s highest priority, he did so at a pro-life rally: the 2011 Texas Rally for Life. Speaking to the crowd gathered at the rally, Perry again expressed that the “right,” and “only” choice is “life,” and described abortion as “the biggest mistake” in a woman’s life. He then urged his audience that

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“[w]e can’t afford to give up the good fight until the day that Roe v. Wade is nothing more than a shameful . . . footnote in our nation’s history.”\textsuperscript{201}

In addition, the statements by the House and Senate members who sponsored the bill at the signing ceremony illustrate their pro-life motivations. The Senate sponsor, Senator Patrick, stated that pro-life crisis pregnancy centers\textsuperscript{202} use of ultrasounds to counsel women against abortion was the motivation behind his support for the mandatory ultrasound requirements: “It was the crisis pregnancy centers that I discovered probably a decade ago that originally gave me the idea for this. If it works for our non-profit crisis pregnancy centers, why shouldn’t it work for everyone else?”\textsuperscript{203} By seeking to require physicians to engage in the same behavior that pro-life advocates use to convince, and arguably to coerce, women into carrying their pregnancies to term, Senator Patrick demonstrated his underlying ideological motivations. The House sponsor of the bill, Representative Miller, made explicit his belief that the bill would “protect human life: the lives of the unborn victims of abortion.”\textsuperscript{204} While merely believing that the consequence of the ultrasound law will be fewer abortions is not conclusive evidence of the legislature’s desire to use physicians to spread a message discouraging abortion, the overall context of the Texas bill is one of strong pro-life opposition to abortion, rather than a desire to facilitate women’s ability to make informed medical decisions.

d. The Broader Social and Historical Context of Ultrasounds

The broader social and historical context of fetal imagery and ultrasounds are also important pieces of evidence in determining the actual purpose behind the mandatory ultrasound law, and are particularly probative pieces of evidence in demonstrating the law’s social meaning.\textsuperscript{205} As noted above, images themselves “lack ‘objective’

\textsuperscript{201} Id.

\textsuperscript{202} These centers, which provide pregnancy "resources" to women facing an unplanned pregnancy, are commonly referred to as "crisis pregnancy centers." Although many of the centers formerly referred to themselves as "crisis pregnancy centers," they now avoid using the term. \textit{Waxman Report}, supra note 9, at 1. I will use the term “crisis pregnancy centers,” the term that Senator Patrick himself used, to refer to these centers throughout this Article.

\textsuperscript{203} \textit{Gov. Perry: Sonogram Legislation Helps Prevent the Tragedy of Abortion}, \textsc{YouTube}, supra note 198 (statement by Sen. Dan Patrick beginning at 10:05).


\textsuperscript{205} See, e.g., Edwards v. Aguillard, 482 U.S. 578, 591 (1987) (looking to the social and historical context of the dispute over evolution in determining that “[t]he preeminent purpose of the Louisiana Legislature” in enacting a law limiting the teaching of evolution in public
meanings; meanings come from the interlocking fields of context, communication, application, and reception.” 206 Thus, the social context of ultrasound images, and fetal imagery more generally, is particularly important when attempting to determine what the reasonable observer would understand the legislature’s purpose to be. While this type of evidence might not be enough, standing alone, to establish the legislature’s actual purpose, this evidence is particularly probative in this context given that it confirms the explicit evidence, discussed in the preceding pages, of the pro-life motivations behind the Texas law.

Fetal imagery has long been a potent weapon used by the anti-abortion movement in support of its view that abortion terminates the life of an unborn child worthy of being carried to term. As Rosalind Petchesky has observed, in the mid-1980s, “the political attack on abortion rights moved further into the terrain of mass culture and imagery . . . . [The movement’s] defeats [in the political arenas] have hardened its commitment to a more long-term ideological struggle over the symbolic meanings of fetuses, dead or alive.” 207 This strategy is best exemplified by the 1984 film The Silent Scream, which purports to show the abortion of a twelve-week old fetus using ultrasound technology. 208 Described by Time magazine as a “shock-the-viewer indictment of abortion,” 209 the film received ample criticism for both misrepresenting the size of the twelve-week old fetus as though it was the size of a full-term baby, 210 as well as deliberately manipulating the speed of the ultrasound images in order to create “the illusion that the fetus is thrashing about in alarm” 211 in anticipation of the abortion procedure. Despite these criticisms, the film was hailed by the pro-life movement as an effective propaganda tool that would help to end the “tragedy of abortion.” 212

The anti-abortion movement’s use of fetal imagery is not confined to The Silent Scream. The movement has employed many other

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207 Id. at 263.
208 See Petchesky, supra note 206, at 265–68 (describing the film).
210 Id.
212 Wallis & Banta, supra note 209, at 62 (quoting President Ronald Reagan as saying that the film, if distributed to every member of Congress, would lead Congress to “end the tragedy of abortion”).
propaganda tools, such as the film *Ultrasound: A Window to the Womb*, that use fetal imagery to spread a message about the value of fetal life. In this 1990 film, ultrasound images are used to “prove” to the viewer that life begins at conception.\(^{213}\) The same company that produced this film has now created updated DVD’s using more technologically advanced ultrasound technology to further illustrate the humanity of the unborn and to spread the message that “abortion hurts all.”\(^{214}\) These DVDs are marketed to crisis pregnancy centers as a tool for discouraging abortion.\(^{215}\) Using a similar tactic, the company Heritage House markets its various fetal imagery products to pro-life organizations and crisis pregnancy centers by claiming that these products are effective tools to spread the “message of life.”\(^{216}\) Heritage House sells fetal models at various stages of development and describes these models as “most effective tool ever created to show the humanity of the developing child.”\(^{217}\)

The social and historical context of fetal imagery, therefore, is one in which fetal images play a core role in the anti-abortion movement’s attempt to demonstrate the horrors of abortion. As Jeanne Boucher argues, “the public fetal image visually summarizes in an appealing way the argument that ‘life begins at conception,’ the cornerstone of the anti-abortion case.”\(^{218}\) Today, pro-life crisis pregnancy centers still routinely use fetal imagery, including *The Silent Scream*, to convince women to carry their pregnancies to term.\(^{219}\) The message conveyed by an ultrasound image is deeply affected by this social context:


\(^{218}\) Boucher, supra note 213, at 76.

\(^{219}\) Alex Cooperman, *Abortion Battle: Prenatal Care or Pressure Tactics?: Crisis Pregnancy Centers’ Expand and Draw Criticism*, WASH. POST, Feb. 21, 2002, at A1. In this article, a crisis pregnancy center staff member describes how, in order get women to think about the baby instead of themselves, “she begins by showing black and white pictures of the rapidly
Women's ways of seeing ultrasound images of fetuses, even their own, may be affected by the cumulative array of "public" representations . . . . When young women seeking abortions are coerced or manipulated into seeing pictures of fetuses, their own or others, it is the "public fetus" as moral abstraction they are being made to view.220

Petchesky argues that an ultrasound, by treating the "fetus as if it were outside a woman's body, because it can be viewed, is a political act."221 The charged political nature of fetal imagery, therefore, suggests that the social context of ultrasound images is one in which ultrasounds carry deep social meaning beyond their mere factual content.

Moreover, fetal imagery has not just been used as a political weapon to show the humanity of the unborn—ultrasounds themselves have also been used by the pro-life movement in an explicit attempt to encourage maternal bonding with the fetus, and to thereby discourage abortion. Janelle S. Taylor, a medical anthropologist who has studied the social role of fetal ultrasounds, observes that "[c]laims regarding ultrasound's capacity to promote maternal bonding, and transform women's emotional disposition toward their pregnancies, make regular public appearances in the arguments put forth by people working to try to shape the ways ultrasound is used, inside and outside of the clinical setting."222 While there is little actual evidence to support the theory that a pregnant woman who sees her ultrasound will decide to carry the pregnancy to term, this belief is widely held throughout the pro-life movement. Taylor argues that while "considered as a science, the theory of ultrasound bonding is highly dubious, . . . considered as a social and cultural phenomenon it is very real indeed."223 Her research demonstrates that the "ultrasound bonding theory" is deeply connected to abortion politics: "If in the era of legalized abortion modern women could no longer be trusted to naturally feel love toward their fetuses and carry them to term, then ultrasound [stands] ready to help make them."224

The first piece of "evidence" that is often cited in support of the ultrasound bonding theory is a letter to the editor published in 1983 in developing fingers of a fetus at five, six, seven and eight weeks. Next she pulls out a big, color photo of a five-week fetus with closed eyes and a smile. Then she flips to another full page, color picture: bloody fetuses in a trash bin." Id. She finishes by showing the pregnant woman either a movie documenting second and third-trimester abortions, or The Silent Scream, on a big-screen television. Id.

Petchesky, supra note 206, at 281.

Id. at 272.


Id. at 23.

Id. at 93.
the New England Journal of Medicine. This letter, entitled *Maternal Bonding in Early Fetal Ultrasound Examinations*,225 was based on two anecdotal accounts of women who expressed that they could not have an abortion after seeing their ultrasound images. The authors posited that “viewing the fetal form in the late first or early mid-trimester of pregnancy, before movement is felt by the mother, may... influence the resolution of any ambivalence toward the pregnancy itself in favor of the fetus. Ultrasound examination may thus result in fewer abortions and more desired pregnancies.”226 However, the article posed the potential “bonding” effect as a question worthy of further analysis,227 not as a conclusion about the actual effect of fetal ultrasounds on women considering abortion.228 Nevertheless, this letter mobilized the pro-life movement in favor of using fetal ultrasounds to further its crusade against abortion, inspiring *The Silent Scream*229 as well the efforts of crisis pregnancy centers to use ultrasounds to counsel women against abortion.230

Crisis pregnancy centers regularly use fetal ultrasounds as part of their anti-abortion counseling.231 The views of Timothy Gleisner, the President of the National Institute of Family and Life Advocates, an organization that provides crisis pregnancy centers with legal counsel,

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225 John C. Fletcher & Mark I. Evans, Sounding Board, *Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 NEW ENG. J. MED. 392 (1983); see also Thomas A. Glessner, *Securing an Abortion-Free America by Opening a Window to the Womb* (Dec. 11, 2008), http://www.nifla.org/commentaries06.asp (referring to the 1983 letter as a “study” that demonstrates the “remarkable” effect of showing an ultrasound to a pregnant woman considering abortion).

226 Fletcher & Evans, supra note 225, at 392 (emphasis added).

227 Taylor, supra note 222, at 89.

228 *Id.* (noting that Letters to the Editor “inhabit the realm of opinion and debate, rather than that of scientific knowledge accepted as true.”).

229 Petchesky, supra note 206, at 265.

230 Another article from the early 1980s is also pointed to as demonstrating the bonding effect of fetal ultrasounds. See Stuart Campbell et al., *Ultrasound Scanning in Pregnancy: The Short-Term Psychological Effects of Early Real-Time Scans*, 1 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 57 (1982). In this Article, the authors assigned women receiving ultrasounds to high-feedback and low-feedback groups. The women in the high-feedback group were shown the ultrasound and provided with visual and verbal feedback about fetal size, shape, and movement. The women in the low-feedback group were given only the global evaluation that “all is well,” and were not provided with any visual or verbal feedback. *Id.* Women were asked to rate their feelings about being pregnant and toward the fetus before and after the ultrasound procedure. Women in the high-feedback group showed more positive attitudes towards the fetus. *Id.* at 59. Although the study’s author himself has claimed that the results show that ultrasound scans promote bonding before birth, STUART CAMPBELL, *WATCH ME . . . GROW! A UNIQUE, 3-DIMENSIONAL, WEEK-BY-WEEK LOOK AT BABY’S BEHAVIOR AND DEVELOPMENT IN THE WOMB* 5 (2004), the study doesn’t actually analyze bonding. Instead, “[w]hat this study really documents... is simply that when the person conducting an ultrasound examination provides more information and feedback, pregnant women experience it as a more positive event. In other words, women appreciate it when the people who provide medical care to them also talk to them about it, and explain what is happening.” Taylor, supra note 222, at 89.

231 Taylor, supra note 222, at 161.
education, and training, provide a typical example of the pro-life movement’s belief that ultrasounds will reduce abortion rates. Gleisner argues that showing a woman contemplating an abortion her ultrasound image means that “[t]iny hands, fingers, toes and a beating heart are all made visible to this mother who has been told by others that what is inside her is just a glob of pregnancy tissue.”

Gleisner claims that crisis pregnancy centers that do not offer ultrasounds report that “20–25% of their abortion-minded clients choose life after receiving the services offered at the center. However, when [crisis pregnancy centers] convert to medical clinic status and provide ultrasound confirmation of pregnancy they report that 90% of these clients change their minds and choose life.” This widespread, but unsubstantiated, belief in the power of fetal ultrasounds has lead to a deliberate focus on expanding the number of crisis pregnancy centers that can provide their clients with fetal ultrasounds.

As of 2010, Focus on the Family had spent an estimated ten million dollars outfitting crisis pregnancy centers with ultrasound equipment as part of their “Option Ultrasound” initiative. According to Focus on the Family, "when a woman considering abortion can see her baby and hear the tiny heartbeat, she’s much more likely to choose life.” The Option Ultrasound initiative provides crisis pregnancy centers “in high abortion communities across the nation” with grants for ultrasound machines or professional training for ultrasound technicians, and Focus on the Family claims that the program has saved the lives of 146,000 babies. According to the program, ultrasound images provide pregnant woman with “more than a picture”—they give a woman “an opportunity to make a decision she will never regret,” provide her with a “priceless bonding experience with her baby,” and “open[] her eyes and heart to the miracle of life.” Project Ultrasound is yet another non-profit organization with a similar mission of discouraging abortion through the use of ultrasound technology in crisis pregnancy centers. Option Ultrasound and Project Ultrasound’s efforts have successfully expanded upon the use of ultrasounds by crisis pregnancy centers:
Heartbeat International, an umbrella organization of 1100 crisis pregnancy centers across the country, reports that at least 460 of their affiliated centers have ultrasound capabilities.\textsuperscript{239} Looking to a specific example, Expectant Mother Care, an organization of crisis pregnancy centers in the New York City area, reports that all five of their facilities have ultrasound machines, and that their Bronx facility features a $120,000 3-D ultrasound machine which is “a wonderful way to show a woman the full humanity of her unborn child.”\textsuperscript{240} In sum, the anti-abortion movement’s embrace of ultrasounds as a method of discouraging abortion demonstrates the charged social context of ultrasound technology. This evidence is particularly probative given that State Senator Patrick, one of the sponsors of the Texas legislation, pointed to crisis pregnancy centers’ use of fetal ultrasounds as the inspiration behind the Texas law.\textsuperscript{241}

Even outside of the abortion debate, the social context of ultrasounds demonstrates a strong belief in the ‘bonding’ potential of fetal ultrasounds. The rise of so-called “keepsake ultrasound businesses,” which provide ultrasound viewing opportunities to women in a non-medical setting, provides additional evidence of the non-medical, “bonding” purposes served by ultrasound imagery. These businesses offer “women the opportunity to view and acquire fetal ultrasound images on their own initiative and at their own expense, outside the purview of medical authority.”\textsuperscript{242} They offer a range of products featuring the woman’s ultrasound images, including viewing parties for family and friends in the businesses’ “baby theatre,”\textsuperscript{243} take-home DVD recordings, photos in varying sizes, and in some cases a teddy bear that emits a recording of the baby’s heartbeat when squeezed.\textsuperscript{244} Some argue that “keepsake” ultrasounds are a “tool that helps soon-to-be parents develop a connection with their unborn child,”\textsuperscript{245} and the centers themselves advertise that their ultrasound

\begin{footnotes}
\item[240] Cooperman, supra note 219.
\item[242] Taylor, supra note 222, at 144.
\item[243] One center advertises that its so-called “baby theatre” can accommodate up to six guests, and that you can watch your baby on a “huge 85 inch screen.” Frequently Asked Questions, Clear Image Ultrasound, http://www.ciu4d.com/faq.htm (last visited Mar. 23, 2013). This center, which is located in Brooklyn, New York, describes itself as an ultrasound “studio” and urges women “to bring your family and friends for your baby’s debut.” Id.
\end{footnotes}
service “will bring love, affection, [and] respect for the miracle of a new life.”246 The centers justify the use of ultrasounds for non-medical purposes “on the grounds that it enhances maternal bonding.”247 However, the employees and operators of these businesses often have little, if any, medical training,248 and a variety of professional medical associations have issued statements in opposition to these businesses’ use of ultrasounds for non-diagnostic purposes.249 Regardless of the truth of the assertion that keepsake ultrasounds enhance maternal bonding, the very existence of these types of businesses provides yet another piece of evidence of the social context of ultrasounds. Ultrasounds often serve non-medical purposes—these images can be used in an effort to transform pregnant women into mothers by enhancing their sense of maternal connection to the fetus.250

Given the evidence of the political uses of fetal and ultrasound imagery by the anti-abortion movement, as well as the marshaling of ultrasound imagery both to encourage maternal bonding and to discourage abortions, the social context of ultrasounds demonstrates that these images are often used to convey charged messages about women’s proper response to an unwanted pregnancy. As Carol Sanger astutely argues in her 2008 UCLA Law Review article on the impact of mandatory ultrasound laws on women’s substantive due process rights, ultrasound images do not just convey information about the developing fetus. Instead, mandatory ultrasound requirements are “harassment masquerading as knowledge.”251 Sanger argues that the motivation behind mandatory ultrasound requirements is “[t]he hope . . . that the fetal image will overwhelm the decision to abort by triggering something like a primitive maternal instinct. . . . [The ultrasound] is less an appeal to reason than an attempt to overpower it.”252 Sanger concludes that “on the spectrum of forms of persuasion, an ultrasound image is less like a brochure than it is like a sidewalk abortion protestor.”253

247 TAYLOR, supra note 222, at 158; see also CAMPBELL, supra note 230, at 5.
248 TAYLOR, supra note 222, at 156–57.
249 See TAYLOR, supra note 222, at 146 (discussing the statements in opposition to nondiagnostic ultrasound issued by the Society of Diagnostic Medical Sonography, the American College of Radiology, the American Registry of Diagnostic Medical Sonography, and the American Institute of Ultrasound Medicine).
250 Charlotte H. Krolokke, On a Trip to the Womb: Biotourist Metaphors in Fetal Ultrasound Imaging, 33 WOMEN’S STUD. COMM. 138, 142 (2010).
251 Carol Sanger, Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice, 56 UCLA L. REV. 351, 360 (2008).
252 Id. at 396–97.
253 Id. at 400.
Given the social context of ultrasounds, particularly the anti-abortion movement’s use of ultrasounds in their propaganda and counseling activities, medical anthropologist Janelle Taylor concludes that the “medical uses of ultrasound simply cannot be separated definitively from the politics of abortion.” In fact, the Fourth Circuit, in a decision authored by Judge Niemeyer, recently made just this observation, recognizing that “an advertisement offering a pregnant woman the opportunity to ‘see a picture of your baby’ is both an offer to provide a service—a sonogram—and a political statement regarding the status of fetal life.” Ultrasound images are often used to marshal women’s maternal instincts in favor of continuing the pregnancy, or to motivate opposition to abortion in general. Accordingly, the foregoing analysis of the social context of fetal imagery and ultrasounds provides additional evidence that the Texas legislature’s actual motivation in enacting the mandatory ultrasound requirements was not to provide women with factual information, but rather to commandeer physicians into spreading the state’s preference for childbirth over abortion.

The statute’s text, legislative history, and the surrounding social context demonstrate that the actual purpose of the law was not to inform women, but rather to use the ultrasound image to spread the state’s message that a fetus is a child that deserves to live. While merely hoping that a statute’s requirements will have the end result of decreasing the number of abortions is not enough to demonstrate an ideological purpose, here the evidence shows much more. Here, the evidence demonstrates that the reasonable citizen observer would understand the state’s purpose to be to encourage women to carry their pregnancies to term. The statute does not merely facilitate women’s “informed consent” to the abortion procedure: 1) physicians must comply with the statute even if the woman does not want to see the ultrasound image or hear the physician’s description of it; 2) certain women who are getting abortions for more socially acceptable reasons are exempt from some of the statute’s requirements, with the Senate sponsor of the bill recognizing that the statute may pose a “threat” to these women; 3) Texas law already requires that women have access to a state pamphlet with visual information about the size and anatomical characteristics of their fetus at two-week gestational increments; 4) the law was designed to show women the “devastating impact” of her decision and what is truly at stake; 5) the legislative history and context

254 TAYLOR, supra note 222, at 167.
256 See supra Part III.C.1.
make abundantly clear that the bill was motivated by pro-life sentiments; 6) the law was inspired by pro-life crisis pregnancy centers’ use of ultrasounds as a pro-life advocacy tool; 7) fetal imagery and ultrasound images are routinely used by the pro-life movement as pieces of political propaganda; and 8) ultrasounds are believed to trigger maternal bonding, and are consequently used by both pro-life crisis pregnancy centers and “keepsake ultrasound” businesses for non-medical purposes. When considered together, this evidence demonstrates that the state’s actual purpose was not to inform women about the size and shape of their fetus, but rather to give women a value-laden anti-abortion message. Requiring physicians to spread this kind of ideological message, however, implicates their First Amendment rights. Physicians have a constitutionally protected autonomy interest in refusing to serve as a billboard for the state’s pro-life propaganda.

CONCLUSION

Recognizing the First Amendment rights of physicians does not mean that physicians can object to any form of state regulation that affects their speech. While there is no coherent “physician speech doctrine,” certain forms of state regulation do not raise First Amendment concerns because these laws facilitate the transfer of expert knowledge and advice from the physician to her patient. The state, however, cannot eviscerate the First Amendment rights of physicians by characterizing attempts to convey ideological information to patients through the mouths of physicians as mere “informed consent” laws.

Mandatory ultrasound laws are just the latest incarnation of what is allegedly necessary in order for women to give “informed consent” to an abortion. States will likely continue to pass legislation that seeks to express the state’s “profound respect for the life of the unborn,”258 and to persuade women to choose childbirth over abortion. Even if such laws are permissible under the undue burden framework, however, this does not mean that physicians can be forced to speak the state’s ideology. Consider the hypothetical proposed earlier—what if Texas, instead of enacting the mandatory ultrasound law, required physicians to tell every woman seeking an abortion that the abortion may deprive a loving family who wants to adopt a baby from fulfilling their dreams? This is a truthful, non-misleading, and relevant statement, but it undoubtedly expresses the state’s ideological beliefs. While the state is entitled to have its own beliefs about what a pregnant woman should or should not do, the state’s attempt to use physicians to spread these

beliefs implicates the physicians’ constitutionally protected interests. The state is free to engage in its own speech spreading its views, through state pamphlets, advocacy in the public sphere, and through public education campaigns. The state cannot, however, force physicians to be the mouthpiece for its views.

Patients place a great deal of trust and faith in their physicians, partially because they know that their physicians must adhere to professional norms. State laws that interfere with physicians’ relationships with their patients are a cause for serious concern. The First Amendment provides an important tool for ensuring that state laws compelling physician speech serve legitimate purposes. While this debate is perhaps most relevant for abortion regulations, these principles apply with equal force to any state regulation compelling physician speech that commandeers physicians into doing the state’s ideological advocacy. Physicians remain citizens, even when they are practicing medicine, and they consequently retain the core First Amendment right against state-compelled orthodoxy.

While this Article has pointed to some of the First Amendment values served by physician speech, I have not attempted to outline a comprehensive model for the First Amendment’s application to physician speech. As I have noted throughout the Article, however, compelling physicians to engage in ideological speech raises particularly strong constitutional concerns given that physician speech serves important First Amendment values. Thus, while this Article has focused on the ways in which such laws interfere with physicians’ constitutionally protected autonomy interests, other important First Amendment values are also at stake. Physician speech gives patients access to medical expertise and advice, thereby spreading truth and knowledge and affecting patients’ world-view. Physician speech, however, cannot contribute to patients’ enlightened decision-making if the state has the power to manipulate its content to serve the state’s own political agenda. Such co-opting of physician speech undermines patients’ trust in their physicians, and consequently interferes with physicians’ ability to transfer expert knowledge to their patients. Thus, there very well may be other forms of state regulation that do not conflict with physicians’ constitutionally protected autonomy interests, but that nevertheless pose First Amendment concerns solely because they interfere with physicians’ ability to transfer expert knowledge to their patients. There is a need for more scholarship evaluating the First Amendment’s application to physician speech that recognizes the state’s ability to regulate this speech in ways that serve the pertinent First Amendment values, while also setting forth appropriate limits on the state’s regulatory power when state laws undermine these values.