Maryland Law Review

Volume 73 | Issue 2 Article 3

Compelling Images: The Constitutionality of Emotionally Persuasive Health Campaigns

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COMPELLING IMAGES: THE CONSTITUTIONALITY OF EMOTIONALLY PERSUASIVE HEALTH CAMPAIGNS

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ABSTRACT

Legislation requiring the display of emotionally compelling graphic imagery in medical and public health contexts is on the rise—two examples include the Food and Drug Administration's recently abandoned tobacco labeling regulations, which would have imposed images of diseased lungs and cancerous lesions on cigarette packaging, and state laws requiring physicians to display and describe ultrasound images to women seeking abortions. This Article highlights the disconnect between the constitutional challenges to these laws, which focus on the perils of compelling speakers to communicate messages with which they may disagree, and the public's primary objections, which are grounded in ethical concerns about the state's reliance on emotion to persuade. This Article argues that, despite inconsistent judicial precedent in the tobacco and ultrasound contexts, concerns about the emotional impact of government-mandated images on viewers can and should be incorporated in First and Fourteenth Amendment analyses. In making this argument, the Article relies on the body of First Amendment jurisprudence in which the Supreme Court suggests that images are uniquely dangerous because they are less rational, less controllable, and more emotionally powerful than textual communications.

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The research for this Article was conducted during a semester's research leave generously provided by Loyola University Chicago School of Law; supported by the American Bar Foundation's Visiting Scholar program; and facilitated by the valuable research assistance of Loyola Law student Matthew Newman.

INTRODUCTION

In order to achieve its policy objectives, the government must speak.[1] Because the success of its policies depends on how persuasively the state communicates, policymakers and politicians have long sought ideas from the worlds of advertising and communications to improve the salience of government messages. As a result, governments frequently use graphic images with emotional appeal—from highway posters featuring Smokey Bear[2] to video game-style recruiting campaigns for the United States Armed Forces[3]—to persuade citizens to act in support of public goals.

This phenomenon is particularly striking in the realms of medicine and public health. American public health campaigns have long relied on the use of emotionally stirring graphic imagery to persuade the public. Early examples include a 1919 poster from the American Red Cross featuring the ghost of tuberculosis being pushed out of a home,[4] and a 1944 United States War Department venereal disease warning depicting an attractive woman as "A Bag of Trouble."[5] Indeed, one could trace the history of American public health using posters from the United States Public Health Service alone.[6] While this approach has traditionally been uncontroversial, two

1. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009) ("[I]t is not easy to imagine how government could function if it lacked [the freedom to express its views]."); MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 6 (1983) (describing the "transfer of information" as a "policy tool"); Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 749–51 (2011) (discussing government speech as a means to inform, persuade, and foster debate); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 681 (1992) ("The citizenry has an interest in knowing the government's point of view, and the government has an interest in using speech to advance the programs and policies it enacts.").

2. Smokey Bear, the mascot of the United States Forest Service, has been used since 1944 to educate the public about the dangers of forest fires. *Smokey Bear Campaign History*, AD COUNCIL, http://www.smokeybear.com/vault/history_main.asp (last visited Dec. 3, 2013).

3. The U.S. Army has developed a series of video games for potential recruits to experience "what the Army has to offer without leaving your home—and have fun while doing it." *Downloads: Games*, U.S. ARMY, http://www.goarmy.com/downloads/games.html (last visited Sept. 5, 2013). The U.S. Army also created a television commercial targeted at video game players. *U.S. Army Commercial Targeting Video Gamers*, YOUTUBE, http://www.youtube.com/watch?v=XkKF4ZcqW14 (last updated June 8, 2007).

4. *Visual Culture and Public Health Posters: The Next to Go: Fight Tuberculosis*, NAT'L LIBRARY OF MED., http://www.nlm.nih.gov/exhibition/visualculture/infectious04.html (last updated Sept. 8, 2011).

5. *Visual Culture and Public Health Posters: She May Be a Bag of Trouble*, NAT'L LIBRARY OF MED., http://www.nlm.nih.gov/exhibition/visualculture/infectious18.html (last updated Sept. 8, 2011).

6. *See Visual Culture and Public Health Posters: Exhibition Introduction*, NAT'L LIBRARY OF MED., http://www.nlm.nih.gov/exhibition/visualculture/introduction.html (last updated Sept. 8,

recent developments have brought the government's use of graphic imagery in medical and public health contexts to the forefront of public debate.

In 2011, the United States Food and Drug Administration ("FDA") adopted tobacco labeling regulations, which required manufacturers to cover fifty percent or more of cigarette packaging with graphic images depicting the negative health consequences of smoking; selected images included photographs of diseased lungs, cancerous oral lesions, and cadavers.[7] Notably, the FDA selected these images precisely because of their emotional impact, citing evidence that "messages that arouse emotional reactions" or "generate an immediate emotional response" are more likely to trigger behavioral changes.[8] Tobacco manufacturers, suing to enjoin enforcement of these laws, publicly objected that the mandated warnings were inappropriate because they were "intended to elicit loathing, disgust, and repulsion."[9]

A second recent example of this phenomenon is the adoption of state laws requiring that a woman seeking an abortion view an ultrasound of her fetus and listen to her doctor's description of the image before consenting to the procedure.[10] Policymakers have suggested that viewing the fetal ultrasound will trigger maternal bonding instincts and feelings of love, in turn inspiring women who might otherwise choose abortions to carry their pregnancies to term.[11] Critics, however, have challenged these laws as taking advantage of women's emotions to influence their private medical decisions.[12]

2011) (revealing how public health posters can "provide an effective medium for communicating information about disease, identifying risk factors, and promoting behavioral change").

7. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,674 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

8. *Id.* at 36,635.

9. Duff Wilson, *U.S. Releases Graphic Images to Deter Smokers*, N.Y. TIMES, June 21, 2011, http://www.nytimes.com/2011/06/22/health/policy/22smoke.html?_r=1& (internal quotation marks omitted).

10. *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.35.2(D)(2)(b) (2008) (amended 2013) (requiring physicians performing abortions to display real-time sonograms and provide "a simultaneous and objectively accurate oral explanation of what the ultrasound is depicting" at least twenty-four hours before performing abortion); N.C. GEN. STAT. § 90-21.85(a) (2011) (amended 2013) (requiring same); OKLA. STAT. tit. 63, § 1-738.3d(B) (2010) (requiring same); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2011) (requiring same).

11. Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2393–94 (2013) (quoting Texas Governor Rick Perry representing the Texas statute as a "critical step in our efforts to protect life" (internal quotation marks omitted)).

12. *See infra* Part II.B.

Both the tobacco and ultrasound laws have been challenged on First Amendment grounds as unconstitutionally compelling speech.[13] The ultrasound laws, which continue to face judicial scrutiny, also face Fourteenth Amendment challenges based on the right to reproductive privacy.[14] In both arenas, circuit splits have called attention to the uncertainty surrounding the resolution of these important constitutional issues.[15] While the FDA recently declined to petition the Supreme Court for review in the tobacco cases, suggesting that future rulemaking would render the legal issues moot,[16] the conflicting precedent in the ultrasound context potentially puts this conflict in a position to reach the Supreme Court.[17]

This Article makes a much needed interdisciplinary contribution to the existing literature on this topic by demonstrating that the constitutional challenges to these laws can be effectively bolstered by relying on well-established ethical arguments about the dangers of emotional and arational persuasion,[18] as well as scientific research suggesting that visual images

13. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1211 (D.C. Cir. 2012) (tobacco); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 521 (6th Cir. 2012) (tobacco); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 574 (5th Cir. 2012) (abortion); Stuart v. Huff, 834 F. Supp. 2d 424, 428 (M.D.N.C. 2011) (abortion), *aff'd*, 706 F. 3d 345 (4th Cir. 2013).

14. *See Stuart*, 824 F. Supp. 2d at 436; Nova Health Sys. v. Pruitt, 292 P.3d 28 (Okla. 2012) (per curium) (holding that the Oklahoma Ultrasound Act is facially unconstitutional under *Planned Parenthood of Se. Pa. v. Casey*).

15. In the tobacco context, *compare R.J. Reynolds Tobacco Co.*, 696 F.3d at 1222 (vacating the graphic warning requirements as unconstitutional and remanding to the FDA), *with Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 531 (upholding constitutionality of graphic tobacco warnings). In the ultrasound context, *compare Lakey*, 667 F.3d at 584 (vacating preliminary injunction of the Texas ultrasound law), *with Stuart*, 834 F. Supp. 2d at 433 (granting preliminary injunction of North Carolina law).

16. On October 26, 2012, tobacco companies petitioned the Supreme Court for a writ of certiorari to resolve the circuit split. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3249 (U.S. Oct. 26, 2012) (No. 12-521). After consultation with HHS and FDA, however, the Solicitor General decided not to seek Supreme Court review of the First Amendment issues raised by the Plaintiff cigarette manufacturers. Letter from Eric H. Holder, Jr., Attorney Gen., to John Boehner, Speaker of the House of Representatives (Mar. 15, 2013), *available at* http://www.mainjustice.com/files/2013/03/Ltr-to-Speaker-re-Reynolds-v-FDA.pdf. On April 22, 2013, the Supreme Court denied the petition for certiorari. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012), *cert. denied sub nom.* Am. Snuff Co. v. United States, 133 S. Ct. 1996 (2013).

17. On November 12, 2013, the Supreme Court declined to review the Oklahoma Supreme Court's decision in *Nova Health Systems v. Pruitt*. *See supra* note 14. The contrasting decisions of the Fifth Circuit in *Lakey* and the Middle District of North Carolina in *Stuart*, which was affirmed by the Fourth Circuit, however, remain in conflict.

18. For a more thorough discussion of what constitute arational methods of persuasion, see Nadia N. Sawicki, *Ethical Limitations on the State's Use of Arational Persuasion* 6 (Loyola Univ.

play an important role in triggering emotional responses.[19] The Article first highlights the substantial concerns that scholars of medical and public health ethics have raised about the government's use of emotionally persuasive imagery to achieve its policy goals[20]—a normative objection which has, to date, received little attention in legal literature.[21] Second, the Article looks to social science research demonstrating that vivid images are more likely to trigger emotional responses than are verbal communications, and argues that this empirical work about the connection between images, emotions, and decisionmaking ultimately reinforces ethicists' concerns about emotional persuasion in image-based health campaigns.[22]

Taken together, these two lines of scholarship provide valuable support to opponents of the tobacco and ultrasound campaigns. By drawing on Supreme Court precedent about the power of images in First Amendment law, as well as judicial commentary in the tobacco and ultrasound cases, this Article argues that there are powerful reasons for considering the emotional impact of the tobacco and ultrasound images as relevant to their constitutionality.[23] Further, it develops concrete arguments that litigants can use to build concerns about emotion persuasion into existing constitutional standards—including the tests for compelled commercial speech in *Central Hudson Gas & Electric Corp. v. Public*

Chicago School of Law, Research Paper No. 2013-004), *available at* http://ssrn.com/abstract=2286396.

19. *See infra* Part V.B.1.

20. *See generally* J. S. Blumenthal-Barby & Hadley Burroughs, *Seeking Better Health Care Outcomes: The Ethics of Using the "Nudge,"* 12 AM. J. BIOETHICS 1, 1 (2012) (examining the ethical considerations when behavioral economics and psychology are used to "nudge" people toward making particular health decisions); Catherine Mills, *Images and Emotion in Abortion Debates*, 8 AM. J. BIOETHICS 61, 61 (2008) [hereinafter Mills, *Images and Emotion*] (suggesting that greater attention be made to the "emotive or affective impact of images on ethical intuitions"); John Rossi & Michael Yudell, *The Use of Persuasion in Public Health Communication: An Ethical Critique*, 5 PUB. HEALTH ETHICS 192, 193 (2012) (arguing that the use of persuasive health communication "infringes upon autonomy, . . . leads to inadvertent harm, and . . . is objectionable on principle"). For arguments raised in the abortion context in particular, see CATHERINE MILLS, FUTURES OF REPRODUCTION: BIOETHICS AND BIOPOLITICS 102–03 (2011) [hereinafter FUTURES OF REPRODUCTION] (exploring the effect of ultrasound on the experience of pregnancy, and discussing the ethical implications of fetal imaging); Nick Hopkins et al., *Visualising Abortion: Emotion Discourse and Fetal Imagery in a Contemporary Abortion Debate*, 61 SOC. SCI. & MED. 393, 402 (2005) (arguing that it is "erroneous to depict the appearance of emotion discourse in social movement rhetoric as evidencing an attempt to circumvent rational deliberation"); Rosalind Pollack Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 FEMINIST STUD. 263, 265 (1987) (exploring the impact of ultrasound imaging on consciousness of pregnant women and considering the implications of fetal images on feminist theory and practice).

21. *See infra* Part V.A.

22. *See infra* Part V.B.1.

23. *See infra* Part V.

Service Commission of New York[24] and *Zauderer v. Office of Disciplinary Counsel*;[25] strict scrutiny of compelled personal speech;[26] tests for protecting captive audiences from unwanted speech;[27] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*'s[28] undue burden test for protecting reproductive privacy.[29] While recognizing that ethical claims about the emotional impact of images may not ultimately trump utilitarian concerns about the effectiveness of policy messages and the merits of these policy goals, this Article concludes that when the government relies on image-based emotional messaging to achieve its policy goals without carefully considering its impact on viewers, important ethical considerations are lost.[30]

Part II of the Article describes the two public health campaigns at issue. It demonstrates that both the FDA's tobacco labeling laws and state abortion ultrasound requirements were passed to persuade behavior change at least in part through emotional persuasion, and emphasizes that much of the public criticism of these laws revolves around concerns about their emotional impact.

Part III provides a fuller explanation of the objection to emotional persuasion, defining it as the claim that, generally, those seeking to persuade others—particularly those persuaders in positions of superior power—ought to do so primarily on the basis of reasoned argument rather

24. 447 U.S. 557, 566 (1980) (establishing that a state may regulate commercial speech where the "governmental interest is substantial," the regulation at issue "directly advances the governmental interest asserted," and where the regulation "is not more extensive than is necessary to serve that interest").

25. 471 U.S. 626, 651 (1985) (holding that the rights of commercial speakers "are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers").

26. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 713**,** 716 (1977) (holding that a state's interests must be "compelling" to "require an individual to participate in the dissemination of an ideological message by displaying it on his private property," especially when the end could be more narrowly achieved).

27. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech.").

28. 505 U.S. 833 (1992).

29. *Id.* at 877 (finding that pre-viability regulations of abortion do not violate a woman's Fourteenth Amendment right to reproductive privacy so long as they do not place substantial obstacles in the path of the woman seeking abortion).

30. *See also* Sawicki, *supra* note 18, at 13. It is for this reason, also, that this Article does not address the merits of the substantive policies the government is seeking to pursue. While audiences may disagree as to whether reducing smoking rates and abortion rates are, as a general matter, worthwhile goals for the state to pursue, the purpose of this Article is to bring to light ethical concerns that are relevant regardless of one's agreement or disagreement with the substance of the message the state conveys.

than by appealing to our basic instincts, stereotypes, or emotions. Reason and emotion, of course, are not firm categories, but rather ends on the spectrum of human decisionmaking. That said, the case for the primacy of rational argument has a long-standing basis within the theories of deliberative democracy, social psychology, communications ethics, and medical ethics, and has been voiced by thinkers such as Aristotle, Immanuel Kant, and Jürgen Habermas.

Part IV introduces the principles of First and Fourteenth Amendment jurisprudence that federal courts have applied in the tobacco and ultrasound contexts thus far—*R.J. Reynolds Tobacco Co. v. FDA*[31] and *Discount Tobacco City & Lottery, Inc. v. United States*[32] (tobacco); and *Stuart v. Huff*[33] and *Texas Medical Providers Performing Abortion Services v. Lakey*[34] (ultrasound). It parses the precedential decisions on these topics and highlights the few situations in which judicial decisionmakers have responded to litigants' concerns about emotional persuasion. There is, unfortunately, no consistent precedent on this issue—only one court has incorporated an objecting party's concerns about the emotional impact of compelled speech explicitly in its analysis,[35] as have two judges in dissenting or nonprecedential opinions.[36]

Finally, Part V uses the themes identified in the previous sections to outline four methods by which concerns about emotionally persuasive imagery might be brought into the constitutional analysis, and offers a broader theoretical grounding for such a move by highlighting the unique nature of images in constitutional doctrine.[37] Relying on Amy Adler's work

31. 696 F.3d 1205 (D.C. Cir. 2012).

32. 674 F.3d 509 (6th Cir. 2012).

33. 834 F. Supp. 2d 424 (M.D.N.C. 2011), *aff'd*, 706 F. 3d 345 (4th Cir. 2013).

34. 667 F.3d 570 (5th Cir. 2012).

35. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1216–17 (explaining that graphic tobacco warnings "do not constitute . . . 'purely factual and uncontroversial' information" but are rather "unabashed attempts to evoke emotion").

36. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012) (Clay, J., dissenting); Tex. Med. Providers Performing Abortion Servs. v. Lakey, No. A-11-CA-486-SS, 2012 WL 373132 (W.D. Tex. 2012) (Sparks, J.).

37. *See infra* Part V.B.1–4 (arguing that (1) image-based messages communicated by the state run the risk of violating First and Fourteenth Amendment constitutional tests requiring that compelled communication be factual, truthful, non-misleading, and uncontroversial; (2) campaigns that communicate factual messages more directly may be a more tailored means of achieving government goals than relying on campaigns with image-based messaging; (3) ultrasound image requirements that make it more difficult for a woman to exercise free choice may run afoul of the Fourteenth Amendment's protections of reproductive privacy; and (4) image-based emotional campaigns might violate the captive audience doctrine).

on the First Amendment's treatment of images,[38] Part V argues that Supreme Court precedent in a variety of contexts has often understood image-based communications to be less rational, less controllable, more emotionally powerful, and therefore potentially more dangerous than words.

Litigants and public commentators in the tobacco and ultrasound challenges have drawn attention to the emotional impact of the images that are being communicated, via unwilling third parties, by the state. Currently, however, there is an imperfect fit between these concerns and the way in which courts have analyzed the constitutional issues. This Article provides an interdisciplinary framework for drawing a tighter fit between law, ethics, and social science—one that will hopefully guide litigants in the cases currently winding their way toward the Supreme Court, as well as policymakers considering such laws in the future.

II. THE EMOTIONAL RESONANCE OF IMAGE-BASED HEALTH CAMPAIGNS

Recently, the National Institutes of Health and the United States National Library of Medicine collaborated in order to present a web-based exhibition of public health campaigns throughout American history, titled "Visual Culture and Public Health Posters."[39] The introduction to the exhibit features a quote from William H. Helfland, consultant to the National Library of Medicine and collector of medical ephemera: "Posters have been a powerful force in shaping public opinion because propagandists have long known that visual impressions are extremely strong. People may forget a newspaper article but most remember a picture."[40]

The use of graphic and emotionally stirring imagery to encourage citizens to make choices that the state believes are in the interest of public health is by no means a historical phenomenon, however. Two recent developments, described herein, have heightened public consciousness of the state's use of vivid imagery to persuade. Unlike their historical counterparts, which were relatively uncontroversial, image-based

38. Amy Adler, *The First Amendment and the Second Commandment*, 57 N.Y.L. SCH. L. REV. 41 (2012).

39. *Visual Culture and Public Health Posters*, NAT'L LIBRARY OF MED., http://www.nlm.nih.gov/exhibition/visualculture/index.html (last updated July 10, 2012); *see also* WORLD HEALTH ORG., PUBLIC HEALTH CAMPAIGNS: GETTING THE MESSAGE ACROSS (2009) [hereinafter PUBLIC HEALTH CAMPAIGNS] (collecting post-WWI international public health posters).

40. NAT'L LIBRARY OF MED., TO YOUR HEALTH: AN EXHIBITION OF POSTERS FOR CONTEMPORARY PUBLIC HEALTH ISSUES 14 (1990), *available at* https://archive.org/stream/9400022.nlm.nih.gov/9400022#page/n1/mode/2up.

campaigns in tobacco labeling and abortion informed consent have encountered fierce opposition.

A. Graphic Tobacco Labeling

The Family Smoking Prevention and Tobacco Control Act, passed in 2009, requires that the Secretary of the Department of Health and Human Services "issue regulations that require color graphics depicting the negative health consequences of smoking" on tobacco packaging.[41] In 2011, the FDA published a Final Rule,[42] selecting nine graphic images for inclusion on cigarette labeling, including images of:

> a man exhaling cigarette smoke through a tracheotomy hole in his throat; a plume of cigarette smoke enveloping an infant receiving a kiss from his or her mother; a pair of diseased lungs next to a pair of healthy lungs; a diseased mouth afflicted with what appears to be cancerous lesions; a man breathing into an oxygen mask; a bare-chested male cadaver lying on a table, and featuring what appears to be post-autopsy chest staples down the middle of his torso; a woman weeping uncontrollably; [] a man wearing a t-shirt that features a 'no smoking' symbol and the words 'I QUIT'; . . . [and] a stylized cartoon . . . of a premature baby in an incubator.[43]

These images were required to be placed on "at least 50 percent of the area of the front and rear panels" of cigarette packaging as of September 22, 2012.[44]

The FDA selected these images and associated textual warnings precisely because of their emotional impact. Citing evidence that messages "generat[ing] an immediate emotional response" are more likely to trigger behavioral changes,[45] the FDA noted that the selected images "elicited

41. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201(a), 123 Stat. 1776, 1845 (2009) (codified as amended in 15 U.S.C. 1333 (2010)).

42. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,628 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

43. R.J. Reynolds Tobacco Co. v. FDA, 823 F. Supp. 2d 36, 41–42 (D.D.C. 2011), *vacated*, 696 F.3d 1205 (D.C. Cir. 2012).

44. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,674. The FDA regulations comply with Article 11 of the WHO Framework on Tobacco Control, which requires that tobacco packaging in signatory states carry health warnings that are "50% or more, but no less than 30%, of the principal display areas." Conference of the Parties, *Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control*, at 3, WHO FCTC/COP3(10) (2008). The United States signed the WHO Framework; however, it was not sent to the Senate for ratification. Kevin Outterson, *Smoking and the First Amendment*, 365 NEW ENG. J. MED. 2351, 2353 (2011).

45. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,635.

significant impacts on the [emotional and cognitive] salience measures" and thus were more likely to cause consumers to change their behavior.[46]

Whether the FDA's claims that graphic tobacco warnings help reduce smoking rates are correct is, however, a matter of dispute. In its rulemaking, the FDA cited numerous studies about the effects of graphic health warnings in Canada, concluding that such warnings are "effective in conveying the health risks of smoking, influencing consumer awareness of these risks, and affecting smoking intentions."[47] In contrast, the United States Court of Appeals for the District of Columbia Circuit in *R.J. Reynolds* held that the evidence presented by the FDA did not support this conclusion.[48] Scholarly reviews of the evidence regarding the effectiveness of antitobacco campaigns have likewise reached mixed or uncertain results.[49]

Much of the public opposition to the new FDA regulations emphasizes the emotional impact of the mandated graphic images. An article in Albany Law Review about the new tobacco labels begins with the following dramatic statement:

> Picture this: the upper body of an anonymous man, cigarette in hand, mouth parted in shame, as he exhales the ominous white smoke of his relentless habit through the black tracheotomy in the small of his neck. . . . Try to envision: lips pulled back to reveal a crooked, rotting set of stained teeth, or what is left of them, with a crimson, flesh-eating wound, relentlessly devouring the raw skin surrounding it.[50]

46. *Id.* at 36,639.

47. *Id.* at 36,633.

48. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1222 (D.C. Cir. 2012) ("FDA failed to present any data—much less the substantial evidence required under the APA—showing that enacting their proposed graphic warnings will accomplish the agency's stated objective of reducing smoking rates.").

49. *Compare* Jeremy Kees et al., *Understanding How Graphic Pictorial Warnings Work on Cigarette Packaging*, 29 J. PUB. POL'Y & MKTG. 265, 270 (2010) (citing U.S. studies showing favorable effects), *with* Matthew C. Farrelly et al., *Youth Tobacco Prevention Mass Media Campaigns: Past, Present, and Future Directions*, 12 TOBACCO CONTROL i35, i40 (2003) (demonstrating mixed effectiveness of state and national campaigns, and noting the difficulty of separating out the impact of marketing campaigns from other anti-smoking measures).

50. Danielle Weatherby & Terri R. Day, *The Butt Stops Here: The Tobacco Control Act's Anti-Smoking Regulations Run Afoul of the First Amendment*, 76 ALB. L. REV. 121, 121–22 (2012); *see also* Stephanie J. Bennett, *Paternalistic Manipulation Through Pictorial Warnings: The First Amendment, Commercial Speech, and the Family Smoking Prevention and Tobacco Control Act*, 81 MISS. L.J. 1909, 1910 (2012) ("Imagine visiting your neighborhood grocery store to buy snacks and beer for a special occasion. On the snack aisle, you select a box of Oreos from the middle shelf. On the cookie package, you see an image of a pallid male cadaver, his autopsy incision bound together by thick staples and black thread.").

Scholars are not the only ones struck by the emotional impact of the FDA's graphic warning labels; countless media articles refer to the images selected by the FDA as "disgusting,"[51] "gross,"[52] and "shocking."[53] Representatives of the tobacco industry have similarly called them "ghoulish," "grisly," and "ghastly."[54] A recent qualitative study of public reactions to the FDA images reported one participant's response to the image of a man smoking through a tracheotomy hole: "Oh my God! . . . I can't even look at that again."[55]

Unsurprisingly, the new labeling requirements faced substantial legal challenges before their effective date—numerous tobacco manufacturers and marketers raised First Amendment claims, arguing that the mandatory inclusion of graphic warnings on cigarette packaging constitutes unconstitutional compelled commercial speech. The two federal appeals courts that analyzed the FDA labeling requirements, however, reached opposing conclusions. In March 2012, the Sixth Circuit affirmed the Western District of Kentucky's decision to uphold the graphic warning requirements.[56] Just one month later, however, the D.C. Circuit affirmed the District of D.C.'s grant of summary judgment to R.J. Reynolds.[57]

On October 26, 2012, a group of tobacco companies petitioned the Supreme Court for a writ of certiorari to resolve the circuit conflict;[58] the petition for certiorari was denied on April 22, 2013.[59] The Department of Justice announced in March 2013 that it would not seek Supreme Court

51. Casey Chan, *Judge Says Putting Disgusting Warning Pictures on Cigarette Boxes Is a Violation of Free Speech*, GIZMODO (Nov. 8, 2011, 1:20 PM), http://gizmodo.com/5857530/judge-says-putting-disgusting-warning-pictures-on-cigarette-boxes-is-a-violation-of-free-speech; Laura Stampler, *Here Are the Disgusting Images a Court Just Mandated for All Cigarette Packs*, BUSINESS INSIDER (Mar. 20, 2012, 1:43 PM), http://www.businessinsider.com/here-are-the-disgusting-images-a-court-just-mandated-for-all-cigarette-packs-2012-3?op=1#ixzz29TkkTu6W.

52. Thomas J. Glynn, *Ewwww, That's Gross! A New Era in U.S. Cigarette Labeling*, AMERICAN CANCER SOCIETY (June 22, 2011), http://www.cancer.org/cancer/news/expertvoices/post/2011/06/22/ewwww-thats-gross!-a-new-era-in-us-cigarette-labeling.aspx.

53. Paul Waldman, *The Ick Factor*, AMERICAN PROSPECT (June 23, 2011), http://prospect.org/article/ick-factor.

54. *See* Glynn, *supra* note 52.

55. Paul L. Reiter et al., *Appalachian Residents' Perspectives on New U.S. Cigarette Warning Labels*, 37 J. CMTY. HEALTH 1269, 1274 (2012) (internal quotation marks omitted).

56. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 518, 568–69 (6th Cir. 2012).

57. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1222 (D.C. Cir. 2012).

58. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3249 (U.S. Oct. 26, 2012) (No. 12-521).

59. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012), *cert. denied sub nom.* Am. Snuff Co. v. United States, 133 S. Ct. 1996 (2013).

review of the First Amendment challenges.[60] Moreover, the Attorney General of the United States noted that the FDA "remains free to conduct new rulemaking proceedings under the Act, and [the FDA] can address issues identified by the court of appeals."[61] He further stated that the Department of Health and Human Services plans to "undertake research to support a new rulemaking consistent with the Tobacco Control Act."[62]

B. Ultrasound Display Prior to Abortion

The pro-life movement[63] has long relied on the use of graphic imagery to advocate against abortion. From the influential 1984 documentary *The Silent Scream* to images of aborted fetuses displayed by protesters outside Planned Parenthood, many abortion opponents use images meant to invoke fear and shame in order to persuade women to "choose life."[64] In recent years, however, the anti-abortion movement moved away from such negative appeals.[65] Rather than seeking to shame or horrify women into continuing their pregnancies, pro-life advocates and their legislative supporters recognized and harnessed the power of positive emotions that fetal imagery can trigger.[66]

Piggybacking on this shifting trend, some states require that, as part of the informed consent process, women seeking abortions review an

60. Letter from Eric H. Holder, Jr., *supra* note 16.

61. *Id.*

62. *Id.*

63. There is a vigorous debate within the reproductive rights community with respect to terminology: whether to use "pro-life" (the term most commonly used by opponents of the women's right to choose abortion) or "anti-choice" (the preference of many supporters of women's reproductive choice). I use the term "pro-life" throughout this Article, not as an endorsement of any political position, but merely because this term has a longer history and tends to be more widely recognized among commentators on issues relating to reproductive rights.

64. *See* Drew Halfmann & Michael P. Young, *War Pictures: The Grotesque as a Mobilizing Tactic*, 15 MOBILIZATION: AN INT'L QUARTERLY 1, 13–19 (2010) (noting that "'photographic evidence . . . transcends language and logic'" to "unveil the violence of abortion"); Hopkins et al., *supra* note 20, at 396 ("A key feature of contemporary anti-abortion campaigns is their use of fetal imagery . . . ."); Keighley, *supra* note 11, at 2396–97 (explaining that, using ultrasound technology, *The Silent Scream* depicts what appears to be a real abortion of a twelve-week old fetus, thus presenting both graphic and unsettling propaganda against abortion).

65. This move may also be driven by popular opposition to public images of disgust. *See* PUBLIC HEALTH CAMPAIGNS, *supra* note 39, at iv, 1 (noting that negative moralizing messages have gradually evolved toward more positive methods, including humor); Hopkins et al., *supra* note 20, at 396 (describing the rejection of a U.K. television ad featuring aborted fetuses on the grounds that it "offend[ed] standards of taste and decency").

66. Paul Lauritzen, *Visual Bioethics*, 8 AM. J. BIOETHICS 50, 51 (2008) ("Rather than seeking to induce guilt and fear by showing pregnant women grisly images of aborted fetuses, many 'pregnancy crisis centers' strive to foster hope and a sense of caring by displaying images or models of intact fetuses.").

informational pamphlet provided by the state;[67] the pamphlet typically includes color images of fetuses at various stages of development.[68] In recent years, a more controversial requirement adopted by state legislators requires that a physician performing an abortion first either perform an ultrasound, or offer the woman the opportunity to have an ultrasound.[69] Louisiana, Oklahoma, North Carolina, Texas, and Wisconsin, however, have gone even further—these states require that the medical provider conduct an ultrasound display and describe the image to the patient, even if the patient wishes not to see the image or hear the description.[70] The medical provider may also be required to make the fetal heartbeat audible to

67. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(2)(D) (West 2010) (requiring a physician to provide a pregnant woman seeking an abortion with printed materials provided by the Texas Department of Health).

68. *See generally* A WOMAN'S RIGHT TO KNOW (Tex. Dep't of Health ed., 2003), *available at* http://www.dshs.state.tx.us/wrtk/pdf/booklet.pdf (describing the information to be included in the pamphlet that Texas physicians are required by law to make available to women seeking abortions); *see also* Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 CORNELL J.L. & PUB. POL'Y 1, 23 (2011) (discussing the Texas Department of Health brochure and noting its apparent partiality to the state's preferences).

69. *See State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INSTITUTE (Aug. 1, 2012), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf. Five states (Louisiana, North Carolina, Oklahoma, Texas, and Wisconsin) require an abortion provider to perform an ultrasound, and to show and describe the image to the woman seeking an abortion, prior to the procedure. *Id.* In North Carolina and Oklahoma, however, these controversial ultrasound requirements have been held unenforceable and enjoined, respectively, per court decision. *Id.* Seven states (Alabama, Arizona, Florida, Indiana, Kansas, Mississippi, and Virginia) require the doctor to perform an ultrasound, but only *offer* the woman seeking an abortion the opportunity to view the image. *Id.*

70. *See* LA. REV. STAT. ANN. § 40:1299.35.2(D)(2)(c) (2008) (amended 2012) (requiring that the physician "display the screen which depicts the active ultrasound images so that the pregnant woman may view them" and "provide a simultaneous and objectively accurate oral explanation of what the ultrasound is depicting"); N.C. GEN. STAT. § 90-21.85(a) (2011) (amended 2013) (requiring that the physician "perform an obstetric real-time view of the unborn child on the pregnant woman," "provide a simultaneous explanation of what the display is depicting," and "display the images so that the pregnant woman may view them"), *preliminary injunction granted by* Stuart v. Huff, 834 F. Supp. 2d 424 (M.D.N.C. 2011); OKLA. STAT. ANN. tit. 63, § 1-738.3d(B) (West 2004) (requiring that the physician "perform an obstetric ultrasound on the pregnant woman," "provide a simultaneous explanation of what the ultrasound is depicting," and "display the ultrasound images so that the pregnant woman may view them"), *overruled by* Nova Health Sys. v. Pruitt, 292 P.3d 28 (2012); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2011) (requiring that the physician "displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them," and "provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images"), *upheld by* Tex. Med. Providers v. Lakey, 667 F.3d 570 (5th Cir. 2012); WIS. STAT. ANN. § 253.10 (West 2013) (requiring that the physician "provide [an] . . . oral explanation to the pregnant woman during the ultrasound of what the ultrasound is depicting," and "display the ultrasound images so that the pregnant woman may view them").

the patient.[71] In the case of a patient unwilling to view the mandated images or listen to the mandated disclosure, the statutes explicitly permit the patient to avert her eyes or avoid listening without being subjected to (or subjecting the physician to) any penalty.[72] The statutes do not detail how, precisely, a patient would be able to avoid listening to the physician's description of the fetal characteristics other than by shutting her eyes and closing off her ears.

Laws requiring women seeking abortions to view fetal imagery are heralded by pro-life advocates as a valuable supplement to the traditional informed consent process,[73] which typically requires that physicians disclose the risks, benefits, and alternatives to any medical procedure a patient is about to undergo.[74] Many proponents, however, are more explicit about the fact that the true purpose of these laws is to dissuade women from choosing abortion.[75] Texas Governor Rick Perry, for example, described Texas's abortion ultrasound law as a "critical step in our efforts to protect life."[76] Focus on the Family, a Christian ministry dedicated to promoting traditional family values, contends that "'when a woman considering abortion can see her baby and hear the tiny heartbeat, she's much more likely to choose life.'"[77] Even some supporters of abortion rights, including Dr. Philip Stubblefield, former Board President of the National Abortion Federation, concede that a "'small percentage'" of women seeking abortions might choose not to abort after viewing a consent form "'describing the embryo in terms of size and mass at certain times, and

71. *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.35.2(D) (2008) (amended 2012) (mandatory); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4)(D) (West 2011) (mandatory); MO. ANN. STAT. § 188.027.1(4) (2011) (optional); N.C. GEN. STAT. § 90-21.85(a)(2) (2011) (amended 2013) (optional).

72. LA. REV. STAT. ANN. § 40:1299.35.2(D)(3)(b) (2008) (amended 2013) ("A pregnant woman may choose not to view the ultrasound images required to be provided to and reviewed with the pregnant woman as provided for under this Section."); N.C. GEN. STAT. § 90-21.85(b) (2011) (amended 2013) ("Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the displayed images or from refusing to hear the simultaneous explanation and medical description.").

73. Critics of these laws, however, question proponents' arguments that the laws are merely an extension of traditional informed consent doctrine. *See* Sawicki, *supra* note 68, at 10–18 (describing informed consent-based objections to abortion disclosure laws).

74. Sawicki, *supra* note 68, at 6–10.

75. *See* Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading* Casey, 83 WASH. L. REV. 1, 22 (2008) ("There is little question that the goal of many of these informed consent laws *is* dissuading women from pursuing abortions, and they are likely somewhat successful."); Keighley, *supra* note 11, at 2392–95 (discussing statutory language and legislative history supporting this point).

76. Keighley, *supra* note 11, at 2393–94.

77. *Id.* at 2400 (quoting *Option Ultrasound: Revealing Life to Save Life*, FOCUS ON THE FAMILY (May 31, 2012), http://www.heartlink.org/pdf/DonorOUPUpdate.pdf).

relating times at which heartbeat, movement and full development is reached.'"[78]

Pro-life advocates support these claims by arguing that viewing a representation of a fetus will trigger maternal instincts and mother-child bonding, thereby reducing the likelihood that a woman will ultimately choose abortion.[79] This hypothesis was first proposed in a 1983 commentary in the New England Journal of Medicine.[80] While there is some evidence to support the theory of early initiation of fetal bonding in the context of planned pregnancies,[81] there is no scientific support for this proposition in the context of unplanned pregnancies. The only study directly targeting this question found that of the women who viewed ultrasounds in anticipation of abortion, *none* changed their minds and many viewed the ultrasound as a generally positive experience.[82] Another study

78. Daniel Avila, *The Right to Choose, Neutrality, and Abortion Consent in Massachusetts*, 38 SUFFOLK U. L. REV. 511, 513–14 (2005) (quoting Planned Parenthood League of Mass. v. Bellotti, 499 F. Supp. 215, 218–19 (D. Mass. 1980), *aff'd in part and vacated in part*, 641 F.2d 1006 (1st Cir. 1981)).

79. For further detail on the argument that fetal images are aimed at fostering maternal emotions, see JANELLE S. TAYLOR, THE PUBLIC LIFE OF THE FETAL SONOGRAM: TECHNOLOGY, CONSUMPTION, AND THE POLITICS OF REPRODUCTION 80 (2008) (noting that "[c]laims regarding ultrasound's capacity to promote maternal bonding . . . make regular public appearances in the arguments put forth by people working to try to shape the ways ultrasound is used," and that "[s]ome of these people also seek to enlist ultrasound in their struggles to end abortion"); Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 396–97 (2008) (arguing that ultrasound laws are grounded in the idea that "the fetal image will overwhelm the decision to abort by triggering something like a primitive maternal instinct"); Lauritzen, *supra* note 66, at 54 (describing *The Silent Scream* as "facilitating an emotional identification between the viewer and the fetus"); Mills, *Images and Emotion*, *supra* note 20, at 62 ("[T]here is thought to be something in the process or act of seeing the fetus that impacts on a woman's response to an emotional and ethical relationship with the fetus.").

80. John C. Fletcher & Mark I. Evans, *Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 NEW ENG. J. MED. 392, 392 (1983) (theorizing that viewing the fetus "may also influence the resolution of any ambivalence toward the pregnancy itself" and "may thus result in fewer abortions").

81. Researchers have concluded that having an ultrasound is generally a positive experience for women with planned pregnancies. *See id.* at 392 (offering anecdotal evidence that the ultrasound experience is "likely to increase the value of the early fetus" in a planned pregnancy); M. A. Rustico et al., *Two-Dimensional vs. Two-Plus Four-Dimensional Ultrasound in Pregnancy and the Effect on Maternal Emotional Status: A Randomized Study*, 25 ULTRASOUND IN OBSTETRICS & GYNECOLOGY 468, 470 (2005) ("The physical and kinesthetic awareness of the fetus gives rise to an experience that in nature has been referred to as maternal–fetal attachment."). Indeed, a whole industry has arisen around 3D and 4D ultrasound technology to create keepsake photos, further supporting the theory that the ultrasound experience is a positive one for women with planned pregnancies. Keighley, *supra* note 11, at 2401–02.

82. Ellen R. Wiebe & Lisa Adams, *Women's Perceptions About Seeing the Ultrasound Picture Before an Abortion*, 14 EUR. J. CONTRACEPTION AND REPROD. HEALTH CARE 97, 99–101 (2009); *see also* A.A. Bamigboye et al., *Should Women View the Ultrasound Image Before First-Trimester Termination of Pregnancy?*, 92 S. AFR. MED. J. 430, 431–32 (2002) (noting that in a

found that, of the eighty-seven percent of women seeking abortions who did not have ultrasounds (or had an ultrasound but chose not to view it), some believed that viewing the fetal image might have caused them to feel guilty and change their minds about having an abortion.[83]

Regardless of whether abortion opponents' optimism about ultrasound laws is warranted, the argument that mandatory ultrasounds will reduce abortion rates is a compelling tool in the pro-life arsenal.[84] The development of prenatal ultrasound technology stands as a remarkable example of the cultural impact of medical discovery. The prenatal ultrasound, which allows a viewer to observe a living fetus in the womb, has without a doubt facilitated public conversations about fetal personhood and thereby affected the debate about abortion as public policy.[85] Richard Posner notes that before prenatal ultrasounds became available, pro-choice advocates "could tell vivid stories and . . . show photographs of women killed by botched illegal abortions, whereas the abortion 'victim,' the fetus, was hidden from view."[86] When the fetal image became visible through ultrasound technology, however, "the rhetorical advantage that proponents of abortion rights had enjoyed by virtue of the heuristic" disappeared.[87] The now clearly visible fetus—complete with heartbeat, fingers, toes, and facial expressions—made pro-life advocates' arguments about fetal personhood more concrete and more tactile.[88]

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controlled trial where ultrasound screens for the control group faced the patient, and ultrasound screens for the experimental group were turned away from the patient, there was no difference in how many women ultimately chose to undergo pregnancy termination). The Bamigboye study also found that, when asked after the fact, sixty-four percent of women planning to terminate their pregnancies said they would prefer to see the ultrasound image. *Id.* at 431.

83. O. Graham et al., *Viewing Ultrasound Scan Images Prior to Termination of Pregnancy: Choice for Women or Conflict for Ultrasonographers?*, 30 J. OBSTETRICS & GYNAECOLOGY 484, 486 (2010); *see also* Bamigboye et al., *supra* note 82, at 432 (reporting commentary from women who preferred not to view the ultrasounds as "ha[ving] to do with guilt and avoidance").

84. *See* TAYLOR, *supra* note 79, at 23 ("[C]onsidered as science, the theory of ultrasound bonding is highly dubious, but considered as a social and cultural phenomenon it is very real indeed.").

85. *See, e.g.*, Mills, *Images and Emotion*, supra note 20, at 61–62 (discussing views linking fetal images and abortion debates); Petchesky, *supra* note 20, at 263–64 (explaining how fetal images are used by antichoice proponents to project fetal personhood and influence reproductive rights policy); Sanger, *supra* note 79, at 356–57 (discussing how fetal imagery "has been incorporated into the regulation of abortion in the United States").

86. Richard A. Posner, *Emotion Versus Emotionalism in Law*, *in* THE PASSIONS OF LAW 309, 323 (Susan A. Bandes ed., 1999).

87. *Id.*

88. *See* Rita Beck Black, *Seeing the Baby: The Impact of Ultrasound Technology*, 1 J. GENETIC COUNSELING 45, 46 (1992) ("Seeing the baby move seems to further confirm its life and identity . . . ."); Joanne Boucher, *The Politics of Abortion and the Commodification of the Fetus*, 73 STUD. IN POL. ECON. 69, 76 (2004) ("[T]he public fetal image visually summarizes in an appealing way the argument that 'life begins at conception.'"); Mills, *Images and Emotion*, *supra*

It is this reified, culturally laden, and emotional visualization of the fetal body to which critics of the abortion ultrasound laws object most strenuously. Numerous scholars of law, medical humanities, and feminist theory have challenged the state's use of ultrasound imagery in this context on these grounds.[89] The ultrasound image, according to many, represents a single vantage point from which to understand the relationship between mother and fetus,[90] and improperly instructs women as to how they should make the abortion decision,[91] "including to what extent they should include emotion in their deliberations."[92]

As might be expected, the new state laws regarding abortion ultrasounds have faced legal challenges.[93] Lawsuits have met with mixed success. The Fifth Circuit recently vacated a preliminary injunction against such a law, noting that the display of ultrasound images did not violate the First Amendment rights of physicians or the Fourteenth Amendment rights of patients because it satisfied *Casey*'s requirement that information

note 20, at 62 (describing the impact of ultrasound technology on fetal embodiment); Rustico et al., *supra* note 81, at 472 (commenting on "the growing importance of the power of the visual in Western culture" and noting that "the visual technology of ultrasound enables the fetus to be seen as a person"); Sanger, *supra* note 79, at 378 (arguing that ultrasound statutes are "meant to transform the embryo or fetus from an abstraction to a baby in the eyes of the potentially aborting mother").

89. *See* LISA M. MITCHELL, BABY'S FIRST PICTURE: ULTRASOUND AND THE POLITICS OF FETAL SUBJECTS 3–5 (2001) (critically discussing the normalization of ultrasound in various countries); Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 320 (2010) (criticizing ultrasound requirements for their reliance on the impact fetal images will have on women's decisions to abort); James Rocha, *Autonomous Abortions: The Inhibiting of Women's Autonomy Through Legal Ultrasound Requirements*, 22 KENNEDY INST. ETHICS J. 35, 38 (2012) (objecting to mandatory ultrasound laws on the basis that they hinder the autonomous, individualized choices of women).

90. *See* REBECCA KUKLA, MASS HYSTERIA: MEDICINE, CULTURE, AND MOTHERS' BODIES 113–14 (2005) (describing the ultrasound image as socially constructed to represent a particular perspective of maternal-fetal bonding); Petchesky, *supra* note 20, at 270 (concluding that "[t]he fetus as we know it is a fetish"); Sanger, *supra* note 79, at 383 (describing that mandatory ultrasound laws intended "to solidify the idea of a child so that the norms of maternal solicitude and protection begin to take hold").

91. *See* Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1599, 1611 (2008) (describing ultrasound requirements as state responses to *Casey*'s observation that most women considering abortion would consider its impact on the fetus relevant to their decision).

92. Rocha, *supra* note 89, at 38.

93. In addition to the two cases discussed in this Article, an early lawsuit challenging a now-defunct Louisiana abortion ultrasound law found the law unconstitutional on the grounds that the ultrasound procedure impedes women's access to abortions by increasing costs and lessening the availability of abortion. Margaret S. v. Treen, 597 F. Supp. 636, 660 (E.D. La. 1984). A more recent decision by the Oklahoma Supreme Court likewise found a pre-abortion ultrasound law unconstitutional under *Casey*, but did not provide a substantive discussion of its decision. Nova Health Sys. v. Pruitt, 292 P.3d 28 (Okla. 2012).

provided as part of the abortion informed consent process be truthful and not misleading.[94] The Middle District of North Carolina in *Stuart*, in contrast, applied strict scrutiny to the First Amendment claim and granted a preliminary injunction against enforcement of an ultrasound law; it concluded that the state's interests in protecting women from emotional distress, preventing coercion, and promoting life were not compelling enough to justify requiring physicians to communicate messages with which they disagree.[95]

III. OBJECTIONS TO EMOTIONAL PERSUASION

The bulk of the constitutional arguments against the health campaigns described above focus on the wrongs suffered by speakers who are compelled to communicate messages with which they disagree. The primary objections, however, voiced by the general public, by media, and by scholars of law and ethics rarely track the First Amendment arguments against compelled speech. Rather, as highlighted in Part II, the core of the public opposition to tobacco labeling and abortion ultrasound laws focuses on the impropriety of the state's use of emotional imagery for persuasive purposes—that is, the format of the government's message and the emotions evoked in its audience, rather than its compulsion of third parties to convey its message. This Part more fully describes the argument against emotional persuasion, and highlights its roots in economic theory, social psychology, political philosophy, applied ethics, and even some areas of law.

Critics of the tobacco labeling and abortion ultrasound campaigns recognize that the government must communicate with citizens in order to achieve its policy goals. They believe, however, that while the government has a right to express its perspective in public debate, it ought not communicate this perspective in a manner that calls more upon citizens' emotional instincts than their analytical skills. One legal scholar has referred to "forcing unwanted imagery" on citizens as "a kind of violence

94. Tex. Med. Providers Performing Abortion Svcs. v. Lakey, 667 F.3d 570, 580–84 (5th Cir. 2012) (holding that a mandatory ultrasound law's provisions were "within the State's power to regulate" and that "[n]o extreme burden is placed on the physician, nor is the woman harmed if she receives the printed matter").

95. Stuart v. Huff, 834 F. Supp. 2d 424, 432 (M.D.N.C. 2011) (holding that the mandatory ultrasound law's provisions were "likely to harm the psychological health of the very group the state purports to protect"; that defendants failed to articulate how the provisions would reduce the likelihood of coerced abortions; and that precedent has not suggested that the state interest in potential life is "compelling" during the entire term of a woman's pregnancy), *aff'd*, 706 F. 3d 345 (4th Cir. 2013).

[that results in] emotional trauma."[96] Others have compared abortion ultrasound laws to requiring that parties to a divorce first "participate in individualized sessions where their own children could express face to face how much they want Mommy and Daddy to stay married";[97] or asking potential organ donors "to look at photographs of the next three people on the donor list."[98]

While the man on the street may articulate his opinion[99] about graphic tobacco and ultrasound images in terms as simple as "intrusive . . . and . . . cruel,"[100] "disgusting,"[101] "gross,"[102] and "shocking,"[103] the ethical argument against the state's use of emotional persuasion has deep roots in a variety of disciplines.

The fundamental principle grounding the objection to emotional persuasion is the belief that persuasion is and ought to be a rational process.[104] The goal of persuasion is not simply to change a listener's opinion, but rather to change the listener's opinion by appealing to analytic skills, with the recognition that the listener may not ultimately choose to adopt the persuader's stance. Some scholars have described this distinction as one between manipulation and persuasion.[105] Others categorize these

96. Sherry F. Colb, *Some Reflections on the Texas Pre-Abortion Ultrasound Law, a Year After Its Passage*, JUSTIA.COM (June 6, 2012), http://verdict.justia.com/2012/06/06/some-reflections-on-the-texas-pre-abortion-ultrasound-law-a-year-after-its-passage-2.

97. Sanger, *supra* note 79, at 390.

98. *Id.* at 393; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 937 n.7 (1992) (Blackmun, J., concurring) (noting that appendicitis patients are not required to look at their appendix before consenting to its removal); Waldman, *supra* note 53 ("Imagine that you wanted to lose weight, but you love ice cream. What if every time you reached for that carton of Ben & Jerry's, you had to look at a photo of a morbidly obese man dying from a heart attack? Would that make you less likely to indulge?").

99. Few people, scholars included, are able to clearly articulate their objections to emotional persuasion. *See* Franklyn S. Haiman, *Democratic Ethics and the Hidden Persuaders*, 44 Q. J. SPEECH 385, 386 (1958) ("The average American appears to feel considerable ambivalence in regard to hidden persuasion. He vaguely senses there may be something wrong about it, but when asked to say why, is usually unable to present cogent arguments."); Rossi & Yudell, *supra* note 20, at 192 (noting that public health communications designed to influence have been viewed as problematic, but "the reasons for this are often incompletely explained or explored").

100. Kevin Sack, *In Ultrasound, Abortion Fight Has New Front*, N.Y. TIMES, May 28, 2010, at A1 (internal quotation marks omitted).

101. Chan, *supra* note 51.

102. Glynn, *supra* note 52.

103. Waldman, *supra* note 53.

104. *See* Arthur N. Kruger, *The Ethics of Persuasion: A Re-Examination*, 16 THE SPEECH TEACHER 295, 296 (1967) (arguing that the "emotional" mode of proof "belittles rational processes [and] shows little faith in man's ability to govern himself" (internal quotation marks omitted)).

105. *See, e.g.*, BRYAN GARSTEN, SAVING PERSUASION: A DEFENSE OF RHETORIC AND JUDGMENT 7 (2006) (distinguishing persuasion from manipulation, coercion, and brainwashing);

two approaches as "strategic persuasion" and "deliberative persuasion."[106] For example, Nathaniel Klemp defines deliberative persuasion as the sincere use of rhetoric and merit-based arguments "to induce agreement with an orientation toward mutual understanding," and strategic persuasion as the inducement of agreement where the "intent to win trumps the intent to achieve mutual understanding."[107] Whether described as manipulation or persuasion, attempts to change a listener's opinion by appealing to something other than the listener's capacity for reasoned analysis have long been viewed as normatively inferior to rational persuasion.[108]

It should be emphasized that it is both impossible and undesirable to categorize persuasive appeals as "strictly rational" or "strictly emotional."[109] The exercise of reason falls on a spectrum.[110] At one end of the spectrum, an appeal can be made on primarily rational grounds—presenting truthful facts on both sides of the argument, with no inaccuracies, omissions, or biases. At the other end of the spectrum, we see appeals that influence choices on grounds unrelated to reasoned argument, such as those that aspire to change a listener's emotional state and decisions. Most persuasive appeals fall somewhere in between. That said, the ethical arguments against arational or emotional persuasion do not depend on there being a clear way to empirically assess whether any given persuasive appeal is "more rational" or "more emotional."[111]

Sarah Buss, *Valuing Autonomy and Respecting Persons: Manipulation, Seduction, and the Basis of Moral Constraints*, 115 ETHICS 195, 210 (2005) (explaining the view that manipulation is morally distinct from rational persuasion); Thomas E. Hill, Jr., *Autonomy and Benevolent Lies*, 18 J. VALUE INQUIRY 251, 258 (1984) (explaining how beliefs about autonomy compete with beliefs about benevolent lies); Blumenthal-Barby & Burroughs, *supra* note 20, at 5 (asserting that "[m]anipulation falls somewhere in between coercion . . . [and] rational persuasion").

106. *See* Nathaniel Klemp, *When Rhetoric Turns Manipulative: Disentangling Persuasion and Manipulation*, *in* MANIPULATING DEMOCRACY: DEMOCRATIC THEORY, POLITICAL PSYCHOLOGY, AND MASS MEDIA 59, 70 (Wayne Le Cheminant & John M. Parrish, eds., 2011) [hereinafter MANIPULATING DEMOCRACY] (providing contrasting definitions of strategic and deliberative persuasion).

107. *Id.* at 70-71; *see also* James Fishkin, *Manipulation and Democratic Theory*, *in* MANIPULATING DEMOCRACY, *supra* note 106, at 31, 34 (arguing that persuasion or deliberation, unlike manipulation, contemplates "a dialogue or debate in which accurate information is available and in which it is expected that the other side will have its say").

108. *See* Buss, *supra* note 105, at 208–10 (describing views on the morally problematic nature of manipulation).

109. *See* Klemp, *supra* note 106, at 67–68 (problematizing the "simple dichotomy between emotion and reason").

110. *See* Fishkin, *supra* note 107, at 34 (describing a continuum running from rational deliberation to manipulation).

111. *See* Buss, *supra* note 105, at 208–10 (discussing arguments against emotional persuasion that rest on ethical objections).

Examples of the perceived primacy of rational over emotional decisionmaking are abundant. Traditional economic theory, for example, assumes rational behavior on the part of actors in the marketplace (though economists' definitions of rationality may differ from the layperson's definitions).[112] This fundamental premise, however, has been widely criticized in recent years, most notably by behavioral economists who offer evidence that human decisionmaking rarely follows purely rational pathways and that, as a result, we often make economically inefficient choices.[113] That said, the practical application of the insights gleaned from behavioral economics seems to be aimed primarily at circumventing the nonrational aspects of human decisionmaking, such as inherent biases, the use of heuristics, and other psychological faults in an effort to optimize behavior.[114] Thus, even economic theories that recognize the failings of human rationality strive to highlight these failings in an effort to encourage decisionmakers to reach the outcomes that a rational actor, unhindered by cognitive biases, would reach.[115]

The ideal of the rational actor as mediator of decisions is further supported by empirical research in social psychology. Daniel Kahneman, for example, describes human decisionmaking as a combination of two systems.[116] Our primary (or peripheral) system makes choices quickly and easily, often relying on heuristics and past experience, to facilitate our day-

112. *See* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 153 (1976) (defining rational behavior as "consistent maximization of a well-ordered function, such as a utility or profit function").

113. *See, e.g.*, DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 1– 21 (HarperCollins rev. ed. 2009) (explaining how ordinary decisions are more relative than objectively rational); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 17–39 (2009) (describing common cognitive errors that lead to irrational choices).

114. *See* THALER & SUNSTEIN, *supra* note 113, at 74 (pointing to how information about when we are least likely to make good decisions can be used to improve our decisionmaking capacities).

115. Interestingly, however, advocates of the "nudge" model of behavioral economics frequently rely on the very same heuristics and cognitive biases they criticize in order to change peoples' behavior. In the example introduced by Thaler and Sunstein in NUDGE, they consider a cafeteria manager who, in an effort to encourage healthy eating, changes the design of the cafeteria buffet to place healthier options at the head of the line (taking advantage of a common cognitive bias). *Id.* at 1–2.

116. *See* DANIEL KAHNEMAN, THINKING FAST AND SLOW 20–21 (2011) ("*System 1* operates automatically and quickly, with little or no effort and sense of voluntary control. . . . *System 2* allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration.").

to-day decisionmaking.[117] Our secondary (or central) system, instead, relies more on reasoned analysis and expends far greater energy and effort in making choices.[118] While some scholars in other disciplines have described emotional or primary decisionmaking as "short-circuiting" reason and leading to poor choices,[119] Kahneman and his colleagues are explicit in saying that neither process is privileged or better.[120] Primary decisions, for example, are an extremely efficient and highly accurate means of operating in the day-to-day world—for example, we do not need to conduct a secondary central analysis of which sock to put on first when we get dressed in the morning. Even Kahneman, however, cautions that peripheral reasoning may occasionally lead us astray, and that central reasoning should be used as a check on peripheral reasoning if people want to make optimal decisions.[121]

Concerns about the use of emotional persuasion are even stronger beyond the realm of the empirical disciplines. In philosophy, rhetoric, and political theory, many commentators advise caution in the use of emotion to persuade, especially by government actors.

In philosophy, nonconsequentialist moral theories emphasize the importance of autonomy in personal decisionmaking. Autonomy has been defined by one author as "a capacity and disposition to make choices in a rational manner," that is, without being subject to obstacles that interfere with rational choice.[122] This conception of autonomy has its roots in

117. Psychology research about the impact of images on decisionmaking suggests that images and emotional prompts trigger the primary system, bypassing the reasoned analysis of the secondary system. *See, e.g.*, Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 691–93 (2012) (noting that messages conveyed in visual terms will trigger emotional responses more quickly than textual or verbal messages).

118. KAHNEMAN, *supra* note 116, at 21.

119. *See* Kruger, *supra* note 104, at 300 ("[W]hen man experiences strong feelings, he tends to short-circuit his thinking process, to jump to conclusions, to act hastily, to yield to atavistic impulses."); Posner, *supra* note 86, at 310–11 ("[E]motion short-circuits reason conceived of as a conscious, articulate process of deliberation, calculation, analysis, or reflection.").

120. KAHNEMAN, *supra* note 116, at 408–18; *see also* Posner, *supra* note 86, at 310–11 ("Emotion is an efficient method of cognition in some cases but an inefficient one in others. . . . [E]motion focuses attention, crystallizes evaluation, and prompts action in circumstances in which reflection would be interminable, unfocused, and indecisive. But in situations in which making an intelligent decision requires careful, sequential analysis or reflection, emotion may, by supplanting that process, generate an inferior decision.").

121. KAHNEMAN, *supra* note 116, at 408–18.

122. Hill, *supra* note 105, at 256; *see also* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 58–59 (6th ed. 2009) (defining autonomy as "at a minimum, self-rule that is free from both controlling interference by others and from limitations such as an inadequate understanding that prevents meaningful choice").

Immanuel Kant's writings in *The Metaphysics of Morals*.[123] Kant identifies the principle of autonomy, or self-governance, as "the sole principle of ethics."[124] According to Kant, only rational beings have autonomy of will, and it is by virtue of our rationality and autonomy that we can access and act upon moral truths.[125] The exercise of what Kant calls practical reason must be done without reference to externalities or "alien influences" that cloud one's judgment.[126] Such alien influences, according to Kant, include "incitements from desires and impulses (and therefore from the whole sensible worlds of nature),"[127] as well as influences from third parties.[128] In his writing, he refers to passion,[129] envy,[130] pain,[131] and concerns about reputation,[132] among others, as influences that weaken autonomy and moral resolve.[133] Kant's ideas are widely reflected in contemporary literature on applied ethics[134]—particularly medical ethics[135] and communication

123. *See generally* IMMANUEL KANT, THE MORAL LAW: KANT'S GROUNDWORK OF THE METAPHYSIC OF MORALS (H.J. Paton trans., Hutchinson Univ. Library 1966) (1948) [hereinafter KANT, MORAL LAW].

124. *Id.* at 102.

125. *Id.* at 101.

126. *Id.* at 109.

127. *Id.* at 118.

128. In his essay, *What Is Enlightenment?*, Kant described enlightenment as "the human being's emergence from his self-incurred minority" and called on his readers to have the courage to use their own understanding "without direction from another." *See* JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 40 (2010) ("A person whose desires and impulses are his own—are the expression of his own nature, as it has been developed and modified by his own culture—is said to have a character. One whose desires and impulses are not his own, has no character, no more than a steam-engine has a character.").

129. IMMANUEL KANT, 2 ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS 16 (Hoffman 1798) [hereinafter KANT, ESSAYS AND TREATISES].

130. IMMANUEL KANT, 2 THE METAPHYSICS OF MORALS, DIVIDED INTO METAPHYSICAL ELEMENTS OF LAW AND OF ETHICS 47 (Hoffman 1799).

131. *Id.*

132. KANT, MORAL LAW, *supra* note 123, at 89.

133. KANT, ESSAYS AND TREATISES, *supra* note 129, at 124.

134. *See, e.g.*, Eric M. Cave, *What's Wrong with Motive Manipulation?*, 10 ETHICAL THEORY & MORAL PRACTICE 129, 136 (2007) ("[Mo]tive manipulation might be wrong because it violates the injunction to act autonomously. This injunction is associated most closely with Kant's moral philosophy. On Kant's view, to act autonomously is to act rationally, to act from an awareness of the requirements of reason alone.").

135. *See, e.g.*, BEAUCHAMP & CHILDRESS, *supra* note 122, at 100 (focusing on the importance of autonomy in the context of healthcare decisions); Blumenthal-Barby & Burroughs, *supra* note 20, at 4 (noting that "manipulation always involves some infringement on a person's autonomy"); Rossi & Yudell, *supra* note 20, at 193 (arguing that "persuasion infringes upon autonomy, [] it leads to inadvertent harm, and [] it is objectionable on principle because persuasive messages are rationally indefensible").

ethics.[136] While it is clear that not all third-party appeals to emotion are violations of autonomy, the line between autonomy-defeating emotional appeals and permissible emotional appeals is, as many scholars recognize, an extremely difficult one to draw.[137]

The discipline of rhetoric, or the art of effective communication, likewise shares concerns about the use of emotion to persuade. Traditional theories of rhetoric describe the concept as composed of three primary elements: *logos* (logic, or the truth of the ideas presented), *pathos* (appeals to emotion, passion, or prejudice), and *ethos* (the listeners' impression of the credibility or character of the advocate).[138] Aristotle described the value of *pathos* as follows: Persuasion is effected "through the medium of the hearers, when they shall have been brought to a state of excitement under the influence of the speech; for we do not, when influenced by pain or joy, or partiality or dislike, award our decisions in the same way."[139] This principle—that influencing a listener's emotions is necessary to affect her judgment—is still widely recognized today.[140] Most rhetoricians view this technique as a positive one,[141] noting that emotional appeals are uniquely

136. *See, e.g.*, David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991) ("Violating the persuasion principle is wrong for some of the reasons that lies [that are told for the purpose of influencing behavior] are wrong: both involve a denial of autonomy in the sense that they interfere with a person's control over her own reasoning processes. This justification of the persuasion principle can be characterized as Kantian.").

137. *See, e.g.*, Rossi & Yudell, *supra* note 20, at 193 (noting that while "[a] number of ethical critiques of health communication have asserted that attempts to influence message recipients by definition infringe upon their autonomy[,] . . . these claims are often general, and when they are evaluated in more detail against specific criteria for autonomous choice, doubt emerges that persuasion intrinsically infringes upon autonomy").

138. BRIAN VICKERS, IN DEFENCE OF RHETORIC 19–21 (1988) (describing "the three kinds or modes of persuasion").

139. ARISTOTLE, TREATISE ON RHETORIC 12 (Theodore Buckley trans., Prometheus 1995) (1851).

140. *See* Hugh Blair, *Lectures of Rhetoric and Belles Lettres, Lecture XXXII*, *in* THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT 824–25 (Patricia Bizzell & Bruce Herzberg eds., 1990) (describing the persuasive power of *pathos* and *ethos*); George Campbell, *The Philosophy of Rhetoric*, *in* THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT 903–04 (Patricia Bizzell & Bruce Herzberg eds., 1990) ("[T]he most complex of all, which is calculated to influence the will, and persuade to a certain conduct, is in reality an artful mixture of that which proposes to convince the judgment, and that which interests the passions, its distinguishing excellency results from these two, the argumentative and the pathetic incorporated together."); RICHARD WEAVER, THE ETHICS OF RHETORIC 9 (1953) ("Rhetorical language on the other hand, for whatever purpose used, excites interest and with it either pleasure or alarm.").

141. *See, e.g.*, EDWARD P.J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 86 (3d ed. 1990) ("There is nothing necessarily reprehensible about being moved to action through our emotions; in fact, it is perfectly normal . . . [because] many of our actions are prompted by the stimulus of our emotions."); MARCUS FABIUS QUINTILIANUS, *Book XII*, *in* 2 QUINTILIAN'S INSTITUTES OF ELOQUENCE: OR, THE ART OF SPEAKING IN PUBLIC, IN EVERY CHARACTER AND

capable of "excit[ing] public opinion" and drawing people into debate in ways that neutral and factual appeals cannot.[142] In particular, many rhetoricians focus on the use of vivid images as emotionally triggering.[143] Even the most prominent supporters of the use of *pathos*, however, warn that this technique can be problematic. As one scholar notes, Aristotle emphasized the importance of nonrational methods of persuasion, but cautioned that "perhaps the greatest and most dangerous disadvantage of democracy is that such citizens are alternately agitated, pandered to, flattered, and fooled by demagogues who play to their hopes, their prejudices, and—most especially—their fears."[144] Many commentators note that emotional appeals may be used in either appropriate or inappropriate ways;[145] however, the distinction between the two is often unclear.

Finally, and perhaps most importantly, political theory also raises concerns about emotional persuasion by government agents. Even if persuading people through emotionally laden imagery is permissible, as some might argue, the use of such techniques by those in positions of power raises independent ethical concerns. Theories of deliberative democracy in political science literature, for example, reinforce the emphasis on reasoned persuasion in the context of government communication. Jürgen Habermas, for example, believes that law's legitimacy depends on the quality of public deliberation and argues that state manipulation violates the principles of

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CAPACITY 440 (W. Guthrie ed., 1805) [hereinafter QUINTILIAN] ("[A]s [the orator's] profession leads him to give delight and emotion, and to mould the mind of the hearer into various affections, he is justified in taking advantage of those assistancies, which even nature bids him employ.").

142. *See Book III*, *in* 1 QUINTILIAN, *supra* note 141, at 167–68 (to persuade the people, "it is generally necessary to give a circumstantial detail of the affair, so as to move their passions, which is the great point . . . In order to do this, we are frequently to rouse, and to calm, their resentments; we are to work upon their fears, their wishes, their hatred, and to touch every spring of their passions."); *see also* WEAVER, *supra* note 140, at 9 ("People listen instinctively to the man whose speech betrays inclination. It does not matter what the inclination is toward, but we may say that the greater the degree of inclination, the greater the curiosity or response.").

143. *See* JOHN H. MACKIN, CLASSICAL RHETORIC FOR MODERN DISCOURSE 195 (1969) (citing "the use of living pictures of events" as a way to make emotional appeals more effective); John Bender & David E. Wellbery, *Rhetoricality: On the Modernist Return of Rhetoric*, *in* THE ENDS OF RHETORIC: HISTORY, THEORY, PRACTICE 3, 32 (John Bender & David E. Wellbery eds., 1990) (noting that "[i]mages and slogans [have] replace[d] the ideas and expository discourse by which exchange in the public sphere [is] defined"); VICKERS, *supra* note 138, at 79 (citing Shakespeare to illustrate the impact of emotional appeal in speech).

144. Terence Ball, *Manipulation: As Old as Democracy Itself (and Sometimes Dangerous)*, *in* MANIPULATING DEMOCRACY, *supra* note 106, at 41, 54.

145. *See, e.g.*, CORBETT, *supra* note 141, at 87 (noting that "some people play on other people's emotions for unscrupulous purposes," and that this "may constitute a caution about the use of emotional appeal").

democratic discourse.[146] Likewise, Kant refers to such tactics as "erod[ing] the democratic ideal of popular sovereignty."[147] Some contemporary commentators have focused specifically on the violation of norms of public discourse that occur when "grotesque imagery" is introduced into deliberations.[148] Much of the opposition to government emotional persuasion arises from the idea that an actor in a position of power, when using emotion to persuade, is engaging in unfair terms of social exchange.[149] There is, according to some, an important distinction "between manipulative practices of persuasion, which we tolerate for selling consumer products, and the sort of collective public will formation that makes democracy meaningful."[150] Those in positions of power, it is argued, ought not encourage arational decisionmaking.[151]

The arguments against emotional persuasion that arise from ethics, rhetoric, and political philosophy are not, however, merely lip service to an impractical ideal. Indeed, in at least one area of law, the argument against the government's use of emotional persuasion takes a very concrete form. Prosecutors in criminal trials frequently introduce graphic and emotionally stirring evidence to plead their case before a jury.[152] Evidence law, however, which prohibits the use of prejudicial evidence, poses limits on

146. Ball, *supra* note 144, at 41.

147. *See* Klemp, *supra* note 106, at 76–77 (noting that political manipulation "erodes the epistemic quality of political debate" and "threatens the ideal of democracy as rule of the people").

148. Halfmann & Young, *supra* note 64.

149. *See, e.g.*, Patricia Greenspan, *The Problem with Manipulation*, 40 AM. PHIL. Q. 155, 160 (2003) ("Manipulation is unfair to the extent that it involves taking more than one's fair share of power over the other party's choice situation—whether by deception or some other means."); Klemp, *supra* note 106, at 81 ("As power relationships grow more asymmetrical, however, the immorality of manipulation increases," as in politics.).

150. Fishkin, *supra* note 107, at 39.

151. *See* Kruger, *supra* note 104, at 300 ("A truly ethical speaker respects the intelligence of his listeners and tries to get them to think about what he is saying, however difficult thinking might be for some. Only in this way does he show any respect for democratic values, which presume that people can think for themselves and govern themselves intelligently."). Critics may caution that governments are not the only entities with sufficient power to make emotional persuasion unethical. Some tobacco companies, for example, have a net worth in excess of that of some countries, and thus can assert significant power over consumer preferences. If this is the case, critics might argue, perhaps the argument from deliberative democracy ought to be extended to protect against emotional persuasion by powerful non-governmental entities. I recognize this as a possibility, and offer the argument from a deliberative democracy perspective merely in the context of state speech, without comment as to other forms of speech. I take no stance on whether and to what extent the ethics of public communications differ from the ethics of private communications—indeed, this would require a much more thorough interrogation of the values implicated in corporate communication.

152. *See* Susan A. Bandes, *Introduction* to THE PASSIONS OF LAW, *supra* note 86, AT 1, 1–2 (outlining ways emotion enters the courtroom).

the use of emotionally gripping evidence such as gruesome photographs and videos: Federal Rule of Evidence ("FRE") 403 permits a court to exclude even unquestionably relevant evidence where the danger of "unfair prejudice" substantially outweighs the evidence's probative value.[153] The Advisory Committee Notes to FRE 403 define unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[154] Many commentators, rightly or wrongly, equate FRE 403, which focuses on prejudice, with emotion.[155] In short, the basis of this rule is the exact sort of argument highlighted in the ethical discussion above—that it is wrong to take advantage of emotion to persuade.[156] In addition to these ethical concerns, pragmatic concerns ground FRE 403—namely, the idea that "jurors might incorrectly decide a case if they vote with their hearts rather than their heads."[157] Both practicing attorneys and laypeople tend to think of jurors' tendency toward feelings such as compassion, mercy, anger, and vengeance as

153. FED. R. EVID. 403.

154. FED. R. EVID. 403 advisory committee's notes.

155. *See* Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 238 (1976) ("To be prejudicial, evidence must appeal to irrationality or emotion."); Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 503 (1982) ("Current case law considers 'emotion' the hallmark of unfair prejudice."); Thomas F. Green, Jr., *Relevancy and Its Limits*, 1969 L. & SOC. ORD. 533, 543–44 (1969) (describing emotional arousal as the primary evil to be prevented by the prejudice rule).

156. *See* Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 L. & HUM. BEHAV. 119, 120 (2006) ("A core presumption underlying modern legality is that reason and emotion are different beasts entirely: they belong to separate spheres of human existence; the sphere of law admits only of reason; and vigilant policing is required to keep emotion from creeping in where it does not belong."); Richard L. Wiener et al., *Emotion and the Law: A Framework for Inquiry*, 30 L. & HUM. BEHAV. 231, 232 (2006) ("[M]ost studies of legal decision making treat emotion (and motivation) as unwanted intruders in the objective world of weighing inputs and throughputs to reach one of a very few permissible outputs."); *see also* Bandes, *supra* note 152, at 2 ("In the conventional story, emotion has a certain, narrowly defined place in law. . . . [I]t is portrayed as crucially important to narrowly delineate [emotion's] . . . proper roles, so that emotion doesn't encroach on the true preserve of law: which is reason."); *id.* at 7 ("[E]motion, by its very nature, threatens much of what law hopes to be. To the extent legal systems thrive on categorical rules, emotion in all its messy individuality makes such categories harder to maintain."). *But see* Posner, *supra* note 86, at 310 (describing the "dichotomizing [of] reason and emotion" as "misleading").

157. J. Alexander Tanford, *A Political-Choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 841 (1989); *see also* Bandes, *supra* note 152, at 7 ("[E]motions cause prejudice because they mislead jurors into making hasty decisions based on passion instead of slowly evaluating all the evidence.").

"illegitimate"[158] or "untrustworth[y],"[159] potentially leading to inferential error,[160] errors in logic,[161] and inaccuracy.[162]

There are, of course, a number of powerful counterarguments to the argument against emotional persuasion. First, the argument, most closely associated with David Hume, that the preference for rational reasoning is invalid because it does not accurately represent how people actually make decisions—namely, that our decisions are ultimately driven by passion rather than reason.[163] Indeed, this argument echoes the findings of some researchers in social psychology, like Kahneman.[164]

Second, utilitarians may argue that triggering arational instincts like emotion is necessary to get people to engage in public debate. Some scholars of political philosophy, for example, believe that the government would be remiss if it did not rely on all the tools at its disposal, even emotional cues, to persuade the public of the merits of greater policy goals.[165] Aristotle argued that, in order to succeed in politics, one must "magnify or minimize the leading facts, excite the required state of emotion in your hearers, and refresh their memories[;]"[166] these principles are often reflected in the theory of rhetoric.[167] This utilitarian claim, however, while compelling to a consequentialist, does not adequately address the

158. Bandes, *supra* note 152, at 2.

159. Tushnet, *supra* note 117, at 697.

160. *See* Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 72 (1984) ("[F]ew other rules [than Rule 403] are directly concerned with evidence that, while accurately reflecting a fact or event, may still lead the jury away from the truth because the evidence induces the jury to draw illogical or otherwise improper inferences from that fact or event."); *see also* Gold, *supra* note 155, at 498–99 ("[E]vidence may be considered unfairly prejudicial when it has a tendency to cause the trier of fact to commit an inferential error.").

161. *See* Gold, *supra* note 160, at 76 ("Evidence presents a Rule 403 problem precisely because of the danger the jury will not use the evidence in a perfectly logical way.").

162. *See id.* at 65–66 ("Emotion is therefore dangerous since it may lead to inaccuracy.").

163. *See* David Hume, *Book II, Part III. Of the Will and Direct Passions*, *in* 2 THE PHILOSOPHICAL WORKS OF DAVID HUME 167 (1826) ("I shall endeavour to prove *first*, that reason alone can never be a motive to any action of the will; and *secondly*, that it can never oppose passion in the direction of the will.").

164. *See supra* text accompanying notes 116–121.

165. For an example of this type of reasoning, consider the FDA's comment in *R.J. Reynolds* that "their previous efforts to combat the tobacco companies' advertising campaigns have been like bringing a butter knife to a gun fight." R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1221 (D.C. Cir. 2012).

166. Klemp, *supra* note 106, at 59.

167. *See generally* Ball, *supra* note 144, at 43, 45, 50–52 (noting that "democracy and manipulation have been bedfellows since the origin of democracy" and providing examples thereof, such as Ancient Athenian theater, which incorporated criticisms of democracy, and Lincoln's Gettysburg Address, which transposed values espoused in the Declaration of Independence into the Constitution).

deontologists' concerns about arational persuasion detracting from autonomous decisionmaking.

These objections are certainly worth exploring further. It would indeed be naïve to think the government could succeed in achieving its policy goals by relying on facts and figures alone, which are unlikely to draw people into deliberative debate.[168] For example, it may well be the case that utilitarian arguments in favor of emotional persuasion are strong enough to outweigh the ethical challenges, at least in some contexts (though identifying those contexts may be challenging). Indeed, "[i]n practice, states take into account a variety of consequentialist concerns when making policy decisions, and often prioritize these concerns over considerations raised by theorists of deontology and virtue ethics."[169]

This Article does not propose that states abandon concerns about the practical outcomes of their policy decisions—outcomes do matter, especially on issues of national importance. Rather, it emphasizes, as I argue in another article on this topic, that "when states rely on persuasive messaging to achieve favorable policy goals without considering the methods by which they seek to persuade, important ethical considerations are lost."[170]

Moreover, as a general matter, these legitimate consequentialist defenses of emotional persuasion by the state do not detract from the fact that objections to emotional persuasion have a long and storied history within a wide variety of disparate disciplines, and therefore may reasonably be presumed to have some legitimate grounding. The fact that these objections are being raised still, even by members of the public with no training in political philosophy or applied ethics, further supports the importance of research into whether doctrines of American constitutional law reflect any recognition of these concerns.

IV. EXISTING CONSTITUTIONAL ANALYSES NEGLECT CONCERNS ABOUT THE EMOTIONAL IMPACT OF IMAGERY

The constitutional challenges to the tobacco and ultrasound laws take a variety of approaches. First Amendment challenges argue that the laws compel speakers to communicate government messages with which they

168. *See* GARSTEN, *supra* note 105, at 36 ("Rhetorical appeals to people's partial and passionate points of view can often be a good means of drawing out their capacity for judgment and so drawing them into deliberation"); Haiman, *supra* note 99, at 388 (noting that emotional persuasion may "stimulate [a person's] thinking by bringing him into vivid contact with a problem he has not thought about before").

169. Sawicki, *supra* note 18, at 47.

170. *Id.*

may not agree; tobacco manufacturers rely on the doctrine of compelled commercial speech to make this claim. Medical providers, moreover, have raised additional arguments about the rights of professionals to be free from state intrusion into professional speech, a category of speech that the Supreme Court has not yet addressed with any clarity. Additional arguments include tobacco manufacturers' claims under the Fifth Amendment that the mandated tobacco warnings constitute an unlawful taking;[171] and arguments that pre-abortion ultrasounds violate women's Fourteenth Amendment rights to reproductive privacy.

While these constitutional arguments reflect a variety of ethical principles—including the freedom to speak one's own mind freely; the freedom to remain silent when asked to communicate state-sponsored messages; the autonomy of medical providers to define their scope of practice and make patient-specific determinations about medical care; professionals' fiduciary obligations toward their patients; and the ethical principles of informed consent—one is conspicuously absent. The constitutional doctrines available to challengers of the tobacco and ultrasound laws, at least as they have been interpreted to date, do not obviously reflect the concerns described in Part III about the means by which the government communicates its policy messages.

This Part focuses on the First and Fourteenth Amendment challenges that form the core of the pending lawsuits. It explains how the few federal courts that have reached substantive decisions on the tobacco and ultrasound challenges have analyzed the issues, including the extent to which they have considered litigants' arguments about emotional persuasion. Only one precedential decision has explicitly recognized concerns about the emotional impact of the state-mandated imagery, though the issue has been highlighted by two dissenting judges. The remaining courts that have resolved the tobacco and ultrasound challenges have either dismissed or failed to address litigants' arguments about emotional persuasion. Thus, existing precedent in these contexts provides limited

171. *See, e.g.*, Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 540 (W.D. Ky. 2010) (finding lack of jurisdiction on the takings claim), *aff'd in part, rev'd in part by* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F. 3d 509 (6th Cir. 2012). Takings arguments have also been particularly prominent in international litigation relating to tobacco labeling laws, in part because other nations do not offer speech protections as strong as those in the United States. *See, e.g.*, *JT Int'l SA v Commonwealth* (2012) 291 ALR 669, 673 (Austl.) (addressing plaintiffs' arguments that tobacco labeling laws constitute unlawful acquisition of property within the meaning of the Australian Constitution); Abal Hermanos, S.A. v. Uruguay, (2010) Sentencia No. 1713 (Suprema Corte de Justicia) [Supreme Court of Uruguay], *available at* http://www.tobaccocontrollaws.org/litigation/decisions/uy-20101117-abal-hermanos,-s.a.-v.-uruguay (addressing plaintiffs' arguments that tobacco labeling laws interfered with property rights by expropriating use of trademarks without fair compensation).

support for the argument, which this Article defends in Part V, that the emotional impact of persuasive compelled imagery is relevant to the constitutional analysis.

A. First Amendment Challenges

The primary constitutional challenge raised against the tobacco and ultrasound laws is a First Amendment compelled speech challenge. Petitioners in these cases argue that the government's mandate that tobacco manufacturers and physicians communicate messages with which they disagree violates the First Amendment's prohibition on compelled speech.

The First Amendment to the U.S. Constitution prohibits laws abridging the freedom of speech.[172] First Amendment doctrine, which is aimed at government interference with private speech, does not, however, impose direct restrictions on the government as a speaker.[173] Therefore, from a constitutional perspective, the government generally has wide latitude to disseminate information that it deems to be of public benefit.[174]

One limitation on government communication—highlighted in the tobacco and ultrasound lawsuits—is that the government faces significant restrictions when it seeks to compel a third party to communicate a message on its behalf.[175] Typically in such cases, strict scrutiny applies: in order for an intervention to satisfy constitutional muster, the government must demonstrate that its speech mandate is narrowly tailored to meet a compelling state interest.[176] The compelling state interest test, as one might imagine, cannot be satisfied where the mandated speech is ideological in

172. U.S. CONST. amend. I.

173. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562, 566–67 (2005) (concluding that the Free Speech Clause does not regulate government speech); Blocher, *supra* note 1, at 706–08 (noting that "government speech" is a defense to First Amendment claims by individuals). Indirect restrictions on government speech are typically derived from citizens' First Amendment rights, and include the Establishment Clause, the opening of public forums, and the captive audience doctrine; *see also* Pleasant Grove v. Summum, 555 U.S. 460, 467–70 (2009) (concluding that the Free Speech Clause does not regulate government speech, but noting that restrictions on government speech include the Establishment Clause, and electoral and political processes); YUDOF, *supra* note 1, at 214 (describing the Establishment Clause as "special: that clause is the only substantive constitutional restraint on what governments may say").

174. *See* Blocher, *supra* note 1, at 726 (referring to government speech as a "'glaring exception to the First Amendment norm that the government must be viewpoint neutral'" (citing *The Supreme Court—Leading Cases—G. Freedom of Speech and Expression*, 119 HARV. L. REV. 277, 283 (2005))).

175. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) (finding that the Framers of the Bill of Rights objected to coerced forms of communication, including forcing children to salute the flag in school).

176. Wooley v. Maynard, 430 U.S. 705, 713 (1977).

nature. As the Supreme Court noted in *Wooley v. Maynard*,[177] "where 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."[178]

Where petitioners are engaged in commercial speech, the government's burden is lowered. The Supreme Court defines commercial speech as "expression related solely to the economic interests of the speaker and its audience."[179] The line between commercial and non-commercial speech, however, is by no means easy to draw.[180] Where commercial and non-commercial speech are inextricably intertwined, courts typically regard the speech as non-commercial in nature, and therefore hold that regulations on the speech are subject to strict scrutiny.[181]

There appears to be some confusion among the lower courts as to how these standards should be applied in the compelled speech context. In *Riley v. National Federation of the Blind*,[182] the Supreme Court stated, "Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon."[183] Absent government regulation in compelled speech cases, most district and appellate courts base their standard of review primarily on whether the speaker's underlying speech is commercial in nature.[184] Other courts instead select a standard of review

177. *Id.*

178. *Id.* at 717.

179. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

180. *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 772–73 (1999) (explaining the lack of uniformity in defining these terms); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000) (noting that the boundaries between commercial and non-commercial speech are "quite blurred"); Keighley, *supra* note 11, at 2365 ("[I]t is assuredly difficult to develop a precise definition of commercial speech . . . .").

181. Stuart v. Huff, 834 F. Supp. 2d 424, 431 (M.D.N.C. 2011), *aff'd*, 706 F. 3d 345 (4th Cir. 2013).

182. 487 U.S. 781 (1988).

183. *Id.* at 796.

184. *See, e.g.*, Evergreen Ass'n v. City of N.Y., 801 F. Supp. 2d 197, 204–07 (S.D.N.Y. 2011) (finding that the plaintiff's speech was not commercial in nature), *aff'd in part, vacated in part*, No. 11-2735-CV, 2014 WL 184993 (2d Cir. Jan. 17, 2014); Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore, 683 F.3d 539, 555 (4th Cir. 2012) (concluding that the Pregnancy Center's speech was non-commercial and thus subject to strict scrutiny), *aff'd in part, vacated in part en banc*, 721 F.3d 264, 280 (4th Cir. 2013) (noting that the court below granted summary judgment without making an adequate determination of whether the speech was commercial or non-commercial).

based on the commercial or non-commercial nature of the speech that has been compelled by the state.[185]

A second point of contention is the extent to which the ideological nature of a speaker's underlying message transforms the speech from commercial to non-commercial. Some courts have determined, for example, that in counseling women against abortion, speech by crisis pregnancy centers constitutes non-commercial speech.[186] This is in part because the centers' counseling is "informed by a religious and political belief[,]" rendering it ideological in nature.[187] That said, the Supreme Court has "consistently held that advertising does not automatically lose its character as commercial speech simply because it may do much more than propose a transaction or disseminate purely factual information."[188]

Regulations of truthful and non-deceptive commercial speech[189] are generally subject to the intermediate standard of scrutiny first set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, a case that challenged a New York ban on promotional advertising.[190]

185. In *Stuart*, for example, the District Court for the Middle District of North Carolina found that because the ultrasound "speech-and-display" requirements compelled physicians to convey a non-medical (and therefore, non-commercial) message, the ultrasound law was therefore subject to strict scrutiny. 834 F. Supp. 2d at 431–33; *see also* Tepeyac v. Montgomery Cnty., 683 F.3d. 591, 594 (4th Cir. 2012) (reasoning that a regulation which requires crisis pregnancy centers to disclose whether they have licensed medical professionals on staff, and post a statement specifying that the local health department encourages women to consult with a licensed medical professional, compels non-commercial speech and should therefore be subject to strict scrutiny), *aff'd en banc*, 722 F. 3d 184 (4th Cir. 2013); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 970 (W.D. Tex. 2011) (finding that "[a]lthough physicians often have a commercial interest in a woman's decision to get an abortion, the Act compels speech that is, at best, unrelated to a physician's commercial motivations, and that is, in reality, likely to be adverse to those motivations"), *vacated in part*, 667 F.3d 570, 575–80 (5th Cir. 2012) (outlining a host of reasons why the Act has greater commercial motivations than the court below recognized).

186. *See, e.g.*, *Greater Baltimore Ctr. for Pregnancy Concerns, Inc.*, 683 F.3d at 554 (explaining that "[t]his kind of ideologically driven speech has routinely been afforded the highest levels of First Amendment protection, even when accompanied by offers of commercially valuable services"); *Evergreen Ass'n*, 801 F. Supp. 2d at 205 (noting that "plaintiff's missions—and by extension their charitable work—are grounded in their opposition to abortion and emergency contraception").

187. *Greater Baltimore. Ctr. for Pregnancy Concerns, Inc.*, 683 F.3d at 554.

188. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 491 n.6 (1997) (Souter, J., dissenting). Expanding on this point, the Court continued,

> [t]he concept of commercial speech would be reduced to a relic if the threshold for imposing strict scrutiny were reached simply because certain advertisements evoke vaguely nostalgic themes of indeterminate political import or because the hypersensitive may see the specter of sex in the film of a child eating a peach.

Id.

189. The state may freely regulate and restrict commercial speech that is false, deceptive, or concerns unlawful activity. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985).

190. 447 U.S. 557, 566 (1980).

Intermediate scrutiny under *Central Hudson* establishes that a state may regulate commercial speech where the following four factors are present: (1) "the expression is protected by the First Amendment"; (2) the state can identify a substantial interest; (3) "the regulation directly advances" this interest; and (4) the regulation is "no[] more extensive than []necessary to serve [this] interest."[191] In a later case, *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court considered whether the *Central Hudson* test would also apply to cases where speech is compelled, rather than prohibited, by the government.[192] In *Zauderer*, the petitioner challenged an Ohio disciplinary rule requiring that attorney advertisements that mention contingency fees also disclose how those fees are calculated. The Court described the case as dealing with "purely factual and uncontroversial information" about the nature of a commercial transaction.[193] The Supreme Court found that an advertiser's interest in not providing factual information is minimal, particularly where the state maintains an interest in preventing consumer confusion or deception.[194] While recognizing that "unjustified or unduly burdensome disclosure requirements" might be unconstitutional if they chill protected commercial speech, the Court concluded that mandated disclosure requirements are generally permissible where the disclosures "are reasonably related to the State's interest in preventing deception of consumers."[195] This test, which depends on a finding that the state's compelled message is "purely factual and uncontroversial," is seemingly consistent with *Wooley*'s prohibition on compelled ideological speech in non-commercial contexts.[196]

Scholarly and judicial interpretations of *Zauderer* vary widely. Commentators and courts disagree as to whether rational basis review under *Zauderer* applies only when the state has an interest in preventing consumer deception, or whether the state may also compel speech to further other

191. *Id.* While some refer to the last prong of the *Central Hudson* test as a "least restrictive alternative" test, I prefer to use precise language used by the Court, which requires that the regulation be "no more extensive than necessary[.]" *Id.* at 569–70.

192. 471 U.S. 626, 651 (1985).

193. *Id.*

194. *Id.*

195. *Id.* This test is closer to rational basis review than it is to intermediate review. *Id.* at 652 n.14.

196. 430 U.S. 705, 713 (1977). *See also* Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 849–50 (9th Cir. 2003) (holding that even in the commercial speech context, the state may not "require an individual to disseminate an ideological message," but finding that an EPA education campaign did not fall within this narrow category of ideological speech); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 114 (2d Cir. 2001) (noting that "[r]equired disclosure of accurate, factual commercial information presents little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions").

rational interests.[197] Some courts and scholars interpret *Zauderer* as leaving open the possibility of analyzing compelled speech requirements under *Central Hudson*'s intermediate scrutiny standard.[198] Another debated issue is whether *Central Hudson*'s intermediate scrutiny test applies only to speech restrictions, or whether it also applies to compelled speech.[199] The Supreme Court has never directly addressed these questions, thus the resolution of these standards remains unclear.

A final consideration in analyzing the First Amendment claims of compelled speech, unique to the pre-abortion ultrasound requirements, is the issue of professional speech. Many commentators have noted that speech by professionals, such as doctors and lawyers in the course of their professional practice, differs in substantial respect from traditional commercial speech, and therefore should be treated differently under the First Amendment.[200] Unfortunately, the Supreme Court has provided very

197. *Compare Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 115 (applying *Zauderer* where the purpose of compelled speech was "increasing consumer awareness of the presence of mercury in a variety of products[,]" rather than preventing deception), *with* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 491 (1997) (Souter, J., dissenting) (arguing that *Zauderer* is inapplicable where a speech mandate is unrelated to an interest in preventing consumer deception), *and* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1213–17 (D.C. Cir. 2012) (rejecting *Zauderer* scrutiny in part because there was no evidence of misleading or deceptive cigarette packaging). *See also* Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1081–82 (N.D. Ill. 2005) (finding no evidence of consumer confusion under *Zauderer*); Jennifer Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 558–59 (2012) (suggesting that, "[r]ather than listing the various ultimate goals besides curing consumer deception that should qualify for rational basis review, the test can in fact be reduced to a much simpler inquiry into the state's immediate purpose in compelling the speech").

198. *See R.J. Reynolds Tobacco Co.*, 696 F.3d at 1217–21 (noting that "because this case also involves a compelled commercial disclosure, we . . . apply the intermediate standard set forth in *Central Hudson*"); Keighley, *supra* note 197, at 586–89 (arguing that "compelled normative speech" is not purely factual and uncontroversial, and therefore should be analyzed under *Central Hudson* intermediate scrutiny).

199. *See* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 978–79 (2007) (concluding that the distinction between prohibition and compulsion is not of particular importance, and observing "[i]f First Amendment concerns arise whenever the state proscribes physician speech . . . , constitutional questions should also arise if the state corrupts physician speech by requiring doctors to transmit misleading information in the context of informed consent").

200. *See* Halberstam, *supra* note 180, at 772 (arguing that the professional "fulfills a more defined social role by offering specific knowledge and expertise to an audience that deliberately seeks access to such information and often to the professional's judgment about a particular issue"); Keighley, *supra* note 11, at 2351 (proposing an alternative model of review for physicians' speech under the First Amendment); Post, *supra* note 199, at 950 ("[I]n the context of medical practice we insist upon competence, not debate, and so we subject professional speech to an entirely different regulatory regime.").

little guidance on this issue.[201] *Planned Parenthood of Southeastern Pennsylvania v. Casey* is one of the few cases in which the Court has directly addressed the First Amendment protections available to speakers within the medical profession; however, the Court's guidance is somewhat limited and arguably inconsistent.[202] In *Casey*, the Supreme Court held that the physician's First Amendment right not to speak is implicated "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State."[203] The Court cited only two cases in support of this proposition: *Wooley*, which established a strict scrutiny standard for compelled non-commercial speech;[204] and *Whalen v. Roe*,[205] which described physicians' constitutional challenge to a statute requiring reporting of patient information relating to prescription drugs as "clearly frivolous."[206] Neither *Wooley* nor *Whalen* provides useful guidance with respect to the scope of professionals' First Amendment rights.

In outlining First Amendment standards of review, the purpose of this Article is not to suggest which standard is most applicable in the contexts of tobacco labeling and pre-abortion ultrasounds.[207] Rather, its purpose is merely to determine whether any of the available standards for evaluating the constitutionality of compelled speech might take into account considerations of whether the compelled speech is aimed at triggering an emotional response. The following analysis of existing precedent in the tobacco and ultrasound cases leads to the conclusion that these concerns are rarely considered in a consistent fashion.

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201. Halberstam, *supra* note 180, at 834 (stating that "the Supreme Court and lower courts have rarely addressed the First Amendment contours of a professional's freedom to speak to a client").

202. *Id.* at 874 (articulating an undue burden standard for regulations interfering with a woman's ability to obtain an abortion). For a general critique of *Casey's* approach to professional speech, see Halberstam, *supra* note 180, at 834; Keighley, *supra* note 11, at 2351; Post, *supra* note 199, at 979.

203. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).

204. 430 U.S. 705, 715–16 (1977).

205. 429 U.S. 589 (1977).

206. *Id.* at 604.

207. The decisions in the tobacco and ultrasound lawsuits offer concrete examples of how courts choose between these various standards of scrutiny. Compare the approaches taken by the D.C. Circuit Court of Appeals in *R.J. Reynolds* (rejecting *Zauderer* scrutiny in favor of *Central Hudson*) and the Sixth Circuit Court of Appeals in *Discount Tobacco* (applying *Zauderer* scrutiny), with those taken by the Middle District of North Carolina in *Stuart* (rejecting the *Casey* standard and applying strict scrutiny), and the Courts of Appeals for the Eighth and Fifth Circuits (applying *Casey*). *See also* Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 858 (2010) (arguing that while "it is not clear what level of scrutiny should apply" to the tobacco cases, the same standard of scrutiny should be applied in both the tobacco and abortion contexts).

1. Compelled Noncommercial Speech: Strict Scrutiny

Of the four lawsuits that have resulted in substantive decisions in the tobacco and ultrasound contexts, only one court has determined that strict scrutiny is the appropriate standard of review. In *Stuart v. Huff*, the Middle District of North Carolina determined that the state's "speech-and-display" ultrasound requirements compelled physicians to convey a nonmedical, and therefore noncommercial, message, and thus were subject to strict scrutiny.[208] According to the evidence before the court, there was "no medical purpose for requiring the speaking or showing of this material to an unwilling listener."[209] While recognizing that the informed consent process may involve some commercial or professional speech, the court held that such speech was "inextricably intertwined" with noncommercial speech, and therefore subject to the highest level of First Amendment scrutiny.[210]

Strict scrutiny requires a determination of whether the compelled speech at issue is narrowly tailored to further a compelling state interest.[211] In conducting this inquiry, the court presumably might consider the emotional impact of the mandated message.[212] If a state is seeking to persuade women to carry their pregnancies to term, compelling physician speech is but one of a variety of options from which the state may choose. If compelling speech is significantly more intrusive than other options available to the state, a court might find that the speech law does not satisfy strict scrutiny.[213] Moreover, even if the state does succeed in demonstrating a compelling need for a physician speech mandate, the nature of this mandate may vary. For example, the state may be required to choose

208. 834 F. Supp. 2d 424, 432 (M.D.N.C. 2011), *aff'd*, 706 F. 3d 345 (4th Cir. 2013); *see also* Tepeyac v. Montgomery Cnty., 683 F.3d. 591, 594 (4th Cir. 2012) (stating that strict scrutiny is the appropriate standard for analyzing the constitutionality of the medical center's abortion policies), *aff'd en banc*, 722 F.3d 184 (4th Cir. 2013); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 975 (W.D. Tex. 2011) (finding that, in advancing an ideological agenda, the Act did not meet the burden of satisfying strict scrutiny), *vacated in part*, 667 F.3d 570, 575 (5th Cir. 2012) (holding that the court below erred in choosing to apply strict scrutiny).

209. *Stuart*, 834 F. Supp. 2d at 432 n.7.

210. *Id.* at 431 (citation and internal quotation marks omitted).

211. *Id.* at 432.

212. In *Stuart*, for example, the state argued, albeit unsuccessfully, that the "state has an interest in protecting abortion patients from psychological and emotional distress and that this interest justifies the speech—and—display requirements." *Id.*

213. In *Stuart*, the court found that the Act went "well beyond requiring disclosure of those items traditionally a part of the informed consent process," and that, although the state may have a compelling interest, the Act did not survive strict scrutiny. *Id.* at 431–32.

between compelling messages that are emotionally triggering for the listener and arguably ideological, and those that are more fact-based.[214]

The District Court in *Stuart* did consider the emotional impact of the state's persuasive message, but not for the reasons described above. When passing its abortion ultrasound law, North Carolina identified its primary interest as "protecting abortion patients from psychological and emotional distress" related to abortion.[215] Because the state, in defining its interest, explicitly highlighted the emotional state of patients seeking abortions, the court was called upon to evaluate the validity of using a compelled ultrasound law to further this interest. In fact, the district court concluded that the evidence before it directly contradicted the state's assertion, specifically finding that ultrasound requirements were likely to harm, rather than improve, "the psychological health of the very group the state purports to protect."[216] Because the compelled ultrasound law was likely to lead to psychological harm, the court held that it was not narrowly tailored to further the state's compelling interest and therefore did not satisfy strict scrutiny.[217]

Notably, the district court's consideration of the emotional impact of the state's message in *Stuart* was necessary only because the state itself had highlighted emotional harm in its discussion of state interests.[218] Had the state not mentioned the psychological impact of abortion on women, focusing instead on a different interest such as reducing abortion rates overall, it is unlikely that the court would have looked to the emotional impact of ultrasound images in evaluating the law's constitutionality. Nevertheless, those with ethical objections to emotional persuasion may have missed their opportunity to argue, as part of a strict scrutiny analysis, that the use of emotionally compelling images might not be a narrowly tailored means of achieving the state's goals.[219]

2. Compelled Commercial Speech: Zauderer

The two appellate courts that have considered substantive challenges to the FDA's new tobacco labeling regulations have found that they fall

214. *See* Keighley, *supra* note 11, at 2386 (arguing that there is a heightened concern when the state uses "ambiguous ideological messages").

215. *Stuart*, 834 F. Supp. 2d at 432.

216. *Id.*

217. *Id.* at 432–33.

218. *See id.* at 432 (discussing "psychological and emotional distress" in particular).

219. *See infra* Part V.B.2.

squarely within the category of commercial speech.[220] Both courts began their analyses by considering whether the regulations satisfied the *Zauderer* test for compelled commercial speech, which requires the state to demonstrate that the compelled speech is purely factual, uncontroversial, and in furtherance of a substantial government interest.[221] The courts, however, diverged in their conclusions. The Sixth Circuit, in *Discount Tobacco City & Lottery, Inc. v. United States*, found that the tobacco disclosures were purely factual and uncontroversial, and therefore that *Zauderer* scrutiny applied.[222] In contrast, the Court of Appeals for the District of Columbia rejected *Zauderer* scrutiny on the grounds that the images selected by the FDA were not "purely factual, accurate, or uncontroversial."[223]

More importantly for the purposes of this Article, however, the courts also took differing approaches in considering the relevance of the emotional impact of the FDA's messages. Only the D.C. Court of Appeals found that the issue of emotion affected its resolution of the *Zauderer* test.[224] According to the court in *R.J. Reynolds*, the images selected by the FDA were not purely factual and uncontroversial statements, in part because the FDA itself conceded that the images were meant to be understood symbolically, rather than literally.[225] The court further emphasized that the FDA's primary purpose in conveying these images was to "evoke an emotional response"[226] and that such "inflammatory" and "unabashed attempts to evoke emotion (and perhaps embarrassment) . . . certainly do not impart purely factual, accurate, or uncontroversial information to consumers."[227]

In contrast, the Sixth Circuit in *Discount Tobacco* expressly rejected such an analysis when it concluded that the graphic tobacco labels do not run afoul of *Zauderer*'s requirement that disclosures be purely factual.[228] It

220. *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 550 (6th Cir. 2012) (stating that tobacco disclosures and advertisements "clearly fall with[in] the category of commercial speech"); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d. 1205, 1214–15 (D.C. Cir. 2012) (concluding that disclosure requirements, which are appropriate when regulating commercial speech, apply to both cigarette advertisements and cigarette packages).

221. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985).

222. *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 560–61.

223. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1217.

224. *Id.* at 1216–17 (holding that because many of the images at issue are simply attempts to convey emotional responses and embarrass consumers to quit smoking, these disclosures are not impartial and therefore fall outside the ambit of *Zauderer*).

225. *Id.* at 1216.

226. *Id.*

227. *Id.* at 1216–17.

228. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 552 (6th Cir. 2012).

cited the Supreme Court's rejection in *Zauderer* of the state's argument that illustrations could be used "to play on the emotions . . . and convey false impressions."[229] The Court in *Zauderer* recognized that images "serve[] important communicative functions," such as "attract[ing] the attention of the audience to the advertiser's message," and expressly foreclosed the argument that the compelled images might be prohibited on the basis of their emotional resonance.[230] Thus, the Sixth Circuit concluded that disclosures promoting a "visceral response" do not necessarily fall outside *Zauderer*'s purview.[231] The court wrote:

> Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions. As set forth above, whether a disclosure is scrutinized under *Zauderer* turns on whether the disclosure conveys factual information or an opinion, not on whether the disclosure emotionally affects its audience or incites controversy.[232]

A dissenting judge, however, disagreed and argued that attempts to frighten consumers or "flagrantly manipulate [their] emotions" do not (in contrast to drug labeling requirements, for example) present purely factual and objective information.[233]

The contrast between the two courts' approaches suggests that there is a legitimate dispute about whether *Zauderer*'s "purely factual and uncontroversial" requirement can be satisfied when compelled speech or imagery is aimed at provoking an emotional response in the viewer. As further developed in Part V.B.1, this Article argues that considerations of emotional influence are indeed relevant to the determination of whether compelled speech is factual and uncontroversial.

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229. *Id.* at 560 (citation and internal quotation marks omitted).

230. *Id.* (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647 (1985)).

231. *Id.* at 569. In other contexts, as well, courts have analyzed *Zauderer*'s "purely factual and uncontroversial" requirement by distinguishing between pure facts and subjective opinions, not between factual communications and emotional communications. *See, e.g.*, Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 965–67 (9th Cir. 2009) (holding that video game packaging that includes an "18" sticker does not convey factual information); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1081 (N.D. Ill. 2005) (same); *see also* Dex Media West, Inc. v. Seattle, 790 F. Supp. 2d 1276, 1287–88 (W.D. Wash. 2011) (rejecting petitioners' argument that a compelled message informing residents of availability of an opt-out program for yellow pages distribution sent a normative message about the value of recycling yellow pages); New York State Rest. Ass'n v. N.Y. City Bd. of Health, No. 08-Civ-1000, 2008 WL 1752455, at *9 (S.D.N.Y. 2008) (contrasting compelled disclosure of calorie counts on fast food menus with an impermissible hypothetical alternative—a "statement . . . regarding the relative nutritional importance of calories or whether a food purchaser ought to consider this information").

232. *Disc. Tobacco City & Lottery, Inc.*, 674 F. 3d at 569.

233. *Id.* at 527–29 (Clay, J., dissenting).

3. Commercial Speech Generally: Central Hudson

If compelled speech laws fail *Zauderer* scrutiny, courts typically go on to analyze the laws under *Central Hudson*, the general test applicable to government regulation of commercial speech.[234] The Sixth Circuit in *Discount Tobacco* understands the test as the following: *Central Hudson*'s intermediate level of scrutiny permits government regulation of commercial speech where the state can identify a substantial interest, the regulation directly advances this interest, and the regulation is no more extensive than necessary to serve this interest.[235] If courts were to engage in any consideration of the impact of emotional persuasion, it would likely be in the third prong of *Central Hudson*. One might argue, for example, that an emotionally compelling message is more extensive than necessary to serve government interests where less provocative messages could achieve the same result.

The two appellate courts that have considered *Central Hudson* scrutiny as applied to the FDA's graphic tobacco labels have not, however, taken this approach. In *R.J. Reynolds*, for example, the court's analysis of the second and third prongs of *Central Hudson* focused exclusively on whether there was sufficient evidence to support the FDA's contention that the inclusion of graphic images on cigarette packaging actually resulted in decreased smoking rates.[236] The D.C. Circuit Court of Appeals concluded that the available evidence, based primarily on Canadian studies, did not support this claim and therefore the FDA labeling regulations failed *Central Hudson* scrutiny.[237] In *Discount Tobacco*, the Sixth Circuit also focused on the actual effectiveness of the images when determining whether the laws directly advanced the government interest in the least extensive way possible.[238]

In dissent, however, Judge Clay argued that "the inclusion of color graphic warning labels" was not a reasonably tailored response to address the harms the government sought to prevent because the labels were aimed at "flagrantly manipulat[ing] the emotions of consumers."[239] Thus, while one might expect courts to give some credence to claims that the display of emotionally compelling images is not a tailored enough means of advancing

234. Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

235. *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 522–23 (majority opinion) (quoting *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566).

236. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217–21 (D.C. Cir. 2012).

237. *Id.* at 1221–22.

238. *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 530–31.

239. *Id.* at 528–29 (Clay, J., dissenting).

government interests, such claims have not met with success. In Part V, this Article will argue that courts applying *Central Hudson* scrutiny to emotionally triggering compelled speech ought to consider whether the speech's emotional impact causes it to run afoul of the third prong of *Central Hudson*.

B. Fourteenth Amendment Challenges

As noted above, the federal courts that have analyzed substantive First Amendment claims against pre-abortion ultrasound requirements have opted not to analyze them under the compelled commercial speech doctrine.[240] On one hand, in *Stuart*, the Middle District of North Carolina analyzed the "speech-and-display" requirements as compelled non-commercial speech, subject to strict scrutiny.[241] On the other hand, the Fifth Circuit in *Lakey* applied *Casey*'s undue burden test to resolve the First Amendment challenge.[242] Indeed, both courts, following *Casey*'s lead, conflated the First and Fourteenth Amendment analyses in such a way that it is now difficult to disentangle the courts' reasoning on the two issues.[243]

The Supreme Court in *Casey* held that pre-viability regulations of abortion do not violate a woman's Fourteenth Amendment right to

240. *See supra* Part IV.A.2.

241. *See* Stuart v. Huff, 834 F. Supp. 2d 424, 431–33 (M.D.N.C. 2011) (explaining that, while the speech contained some commercial elements, the non-commercial elements meant that it would be subject to strict scrutiny), *aff'd*, 706 F. 3d 345 (4th Cir. 2013).

242. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 577–80 (5th Cir. 2012).

243. As recognized both by the U.S. District Court for the Middle District of North Carolina in *Stuart* and by various legal commentators, the analysis of First Amendment claims by reference to Fourteenth Amendment principles is incorrect as a matter of law. *See Stuart*, 834 F. Supp. 2d at 430 ("The Court in *Casey* did not, however, combine the due process/liberty interest analysis with the First Amendment analysis . . . . It seems unlikely that the Supreme Court decided by implication that long-established First Amendment law was irrelevant when speech about abortion is at issue, and this Court declines to so find."); Scott W. Gaylord & Thomas J. Molony, Casey *and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 619 (2012) (arguing that the district courts in *Lakey* and *Stuart* erred in interpreting *Casey*'s undue burden standard as not altering "the Court's normally high standard of review for compelled speech"); Keighley, *supra* note 11, at 2379 (criticizing the Supreme Court's conflation of First Amendment and undue burden analyses in *Casey*); Post, *supra* note 199, at 978–79 (same). Indeed, it would be odd if a constitutional standard designed for Fourteenth Amendment violations overrode traditional First Amendment standards—particularly where the Fourteenth Amendment standard is the weaker one. Consider, for example, an analogy to the tobacco-labeling context. Could a court legitimately reject tobacco manufacturers' First Amendment claims to compelled speech on the ground that the disclosure requirements satisfy the rational basis test that is applied to state interference with non-fundamental rights, like the right to smoke? Such an outcome seems unlikely. *But see* Gaylord & Molony, *supra*, at 619 (suggesting that the lower Fourteenth Amendment standard is more appropriate than the higher First Amendment standard in the context of pre-abortion ultrasounds).

reproductive privacy so long as they do not place substantial obstacles in the path of a woman seeking abortion, also known as the "undue burden" test.[244] *Casey* held that a state may take measures to ensure that a woman's abortion decision is informed, even if those measures express the state's preference for childbirth over abortion.[245] As long as the information provided is relevant, truthful, and not misleading, it will not constitute an undue burden on a woman's due process right to reproductive choice.[246] The Court in *Casey* identified examples of permissible informational disclosures, including disclosures about "the nature of the abortion procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus," as well as the procedure's "impact on the fetus."[247]

The "truthful and not misleading" test established by *Casey* echoes the "purely factual and uncontroversial" test for First Amendment challenges under *Zauderer*. Unlike the D.C. Court of Appeals' discussion in *R.J. Reynolds*, which cited the tobacco images' emotional impact as evidence that they were neither factual nor uncontroversial,[248] courts considering pre-abortion disclosure requirements have done so without reference to the method of state communication or its emotional impact on the patients. In *Eubanks v. Schmidt*,[249] for example, the Western District of Kentucky explicitly held that abortion consent brochures including color-enhanced and enlarged photos are neither misleading nor untruthful.[250] In *Lakey*, the Fifth Circuit upheld pre-abortion ultrasound requirements as consistent with *Casey*, describing them as "medically accurate descriptions [that] are

244. 505 U.S. 833, 876–78 (1992) ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.").

245. *Id.* at 872–73 (finding that, while states should provide a reasonable framework to help women decide whether to terminate a pregnancy, this same framework could also include regulations designed to emphasize philosophical and social arguments in favor of carrying the pregnancy to term).

246. *Id.* at 882.

247. *Id.*

248. R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 272–73 (D.C. Cir. 2012) (explaining that the negative emotional response evoked by images such as a body on an autopsy table suggested that their objective was not to help consumers make an informed choice, but rather to provoke the viewer to quit or never start smoking).

249. 126 F. Supp. 2d 451 (W.D. Ky. 2000).

250. *Id.* at 459 ("Regardless of their size, photographs do not become misleading so long as the statutorily required scale allows an average person to determine their actual size. . . . The pictures provide an accurate rendition of the fetus at various stages of development . . . .").

inherently truthful and non-misleading."[251] While the parties[252] and numerous commentators[253] had objected to the emotional aspects of the ultrasound, the Fifth Circuit in *Lakey* did not consider these arguments.[254] Even the Middle District of North Carolina in *Stuart*, which rejected the abortion ultrasound law as unconstitutional, failed to address the argument against emotional persuasion when discussing the distinction between "factual and informative" speech and "ideological or judgmental speech concerning philosophical, spiritual, or moral issues."[255]

Only one court, in a non-precedential opinion, has suggested that analyses of abortion disclosure requirements under *Casey* are lacking if they do not take into account the emotional impact of the disclosures.[256] When commenting on the Court of Appeals' 2012 decision to allow a challenge to the Texas ultrasound law to proceed, Judge Sam Sparks of the Western District of Texas suggested that the court missed an opportunity to consider whether other aspects of the informed consent process might pose an undue burden by virtue of their emotional impact. According to Judge Sparks' reading of the Fifth Circuit's opinion, even an "an extended presentation, consisting of graphic images of aborted fetuses, and heartfelt testimonials about the horrors of abortion," would be constitutionally permissible.[257]

251. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 577 (5th Cir. 2012).

252. *See, e.g.*, Brief of Appellee at 21–22, *Lakey*, 667 F.3d 570 (No. 1:11-cv-00486-SS) (alleging that the Act inflicts emotional distress on women by requiring physicians, even against the patient's wishes, to deliver a verbal description of the unborn child, display the ultrasound, and make the heartbeat audible); Complaint at 31, *Lakey*, 667 F.3d 570 (No. 1:11-cv-0046-SS) (noting "information that the patient has declined to accept . . . will unnecessarily stress, upset, and/or anger her as she prepares to undergo a medical procedure"); Amended Complaint at 35, *Lakey*, 667 F.3d 570 (No. 1:11-cv-0046-SS) (same); Second Amended Complaint at 32, *Lakey*, 667 F.3d 570 (No. 1:11-cv-0046-SS) (same).

253. *See* MITCHELL, *supra* note 89, at 4–5 (objecting to links between the politics of gender and ultrasound that make such images inseparable from notions of women and power); Borgmann, *supra* note 89, at 320–25 (explaining that ultrasound statutes force a woman to see her baby's image and undermine her feeling of control regarding the profoundly personal circumstance of unintended pregnancy); Rocha, *supra* note 89, at 38 (objecting to the ultrasound as an emotional appeal that attempts to dictate how women should deliberate over the abortion choice); Sanger, *supra* note 79, at 396–97 (commenting that forcing a woman to view her ultrasound in order to change her mind about having an abortion is not an appeal to reason but rather an attempt to overpower it).

254. *See Lakey*, 667 F.3d at 574–84 (considering instead, the appellees' argument that the ultrasound requirement violates the First Amendment by requiring a medically unnecessary procedure to convey an ideological message, or uses unconstitutionally vague statutory language).

255. 834 F. Supp. 2d 424, 429 n.4 (M.D.N.C. 2011), *aff'd*, 706 F. 3d 345 (4th Cir. 2013).

256. Tex. Med. Providers Performing Abortion Servs. v. Lakey, No. A-11-CA-486-SS, 2012 WL 373132, at *3 (W.D. Tex. 2012).

257. *Id.* at *3.

This Article argues that Judge Sparks' argument has merit, and discusses it further in Part V.B.3.

V. THE EMOTIONAL IMPACT OF IMAGERY CAN AND SHOULD BE CONSIDERED AS PART OF THE CONSTITUTIONAL ANALYSES

Part IV explored the various standards of scrutiny that federal courts have applied when adjudicating the constitutionality of tobacco labeling and abortion ultrasound laws. It also highlighted the few instances in which judges have taken arguments against emotional persuasion into account when applying these standards of scrutiny. This section argues that, despite a paucity of consistent judicial recognition, there is room within the constitutional analysis of the tobacco and ultrasound cases to incorporate arguments that the state's use of emotionally laden imagery in compelled speech contexts violates constitutional norms. Moreover, it demonstrates that such arguments are, in fact, consistent with First Amendment jurisprudence relating to the use of symbols and images in speech.

A. Supreme Court Precedent Recognizes the Distinctive Power of Images in Its Free Speech Jurisprudence

Language used by the Supreme Court in some of its most prominent First Amendment decisions reinforces the idea that certain types of image-based appeals, when compelled by the government, may pose a greater risk of First Amendment violations. Throughout its jurisprudence, the Court has recognized the unique power that images and symbols have over viewers.[258] While it has explicitly rejected the idea that words and images ought to receive different levels of First Amendment protection, a careful reading of its leading free speech opinions finds support for the notion that images are capable of more direct communication, and therefore more direct harms and benefits, than words.

Amy Adler's work on First Amendment law's treatment of images and artwork is instructive in this regard. Adler argues that First Amendment law "consistently and unthinkingly offers more protection to text than to image."[259] According to Adler, this preference, which is "often assumed but almost never acknowledged,"[260] is based on the perception that visual images are more powerful, less rational, less controllable, and therefore

258. *See* Adler, *supra* note 38, at 56 (recounting the Court's acknowledgement of the visual symbol of the U.S. flag as being " so powerful it may overpower the speaker").

259. *Id.* at 42.

260. *Id.*

more dangerous than verbal speech.[261] In support of this contention, she cites not only obscenity and child pornography laws' focus on pictorial pornography, but also the Supreme Court's treatment of symbols like the American flag.[262] Indeed, a careful look at the jurisprudence in these areas reinforces Adler's interpretation.

1. Images Are Less Rational, More Emotional

Obscenity law, for one, routinely permits the restriction of image-based obscene speech while leaving textual pornography unaltered.[263] In the Supreme Court's 1973 decision in *Kaplan v. California*,[264] for example, a case dealing with a bookstore's sale of non-illustrated books containing explicitly sexual material, the Court made such a distinction, albeit cautiously.[265] The Court noted that statutory prohibitions on obscene expressions may be permissible under the First Amendment regardless of the "medium of the expression"—that is, whether the expression is pictorial or text-based.[266] It also recognized, however, that restraints on the printed word are typically more difficult to justify; as Justice Burger wrote: "A book seems to have a different and preferred place in our hierarchy of values, and so it should be."[267] The Court did not explain precisely why it made this distinction, but Adler posits that the Court did so on the basis of

261. *Id.; see also* Amy Adler, *The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship*, 103 W. VA. L. REV. 205, 217 (2000) ("Visual images are frequently perceived as more powerful and less controllable than verbal speech. They do not fit comfortably within our current notion of a reasoned, rational marketplace of ideas.").

262. Adler, *supra* note 38, at 42.

263. *See id.* at 52 ("Child pornography law governs only 'visual depictions' of child sexual conduct. Words can never be child pornography, no matter how gruesome and sexually explicit they might be."); Clay Calvert & Robert D. Richards, *A War over Words: An Inside Analysis and Examination of the Prosecution of the Red Rose Stories & Obscenity Law*, 16 J. L. & POL'Y 177, 189–91 (2007) (discussing a 2006 Western District of Pennsylvania obscenity prosecution of the "'written word,' i.e. non-pictorial works" and noting that there have been no prosecutions of non-pictorial works since 1973); Robert A. Jacobs, *Dirty Words, Dirty Thoughts and Censorship: Obscenity Law and Non-Pictorial Works*, 21 SW. U. L. REV. 155, 176–177 (1992) (noting the infrequency of obscenity prosecution of non-pictorial works since *Miller v. California*, 413 U.S. 15 (1973)).

264. 413 U.S. 115 (1973).

265. *See id.* at 118–19 (explaining that although obscenity can manifest itself in the written and oral description of conduct, "a profound commitment to protecting communication of ideas" prevents restraint of textual expression).

266. *Id.* at 119.

267. *Id.*; *see also* Landau v. Fording, 54 Cal. Rptr. 177, 181 (Cal. Ct. App. 1966), *aff'd*, 388 U.S. 456 (1967) (stating that "[b]ecause of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word").

unspoken assumptions about the power of imagery.[268] Furthermore, as Adler writes, "[Justice] Burger seems to envision the category of pictures itself as flagrant and debased," which reflects longstanding anxieties and concerns that "images are lowly, sensual, and divorced from the realm of reason and ideas; they are so connected with our body and our senses that pictures become fused with what they represent."[269]

The Supreme Court has recognized the idea of symbols and images as bypassing rationality and short-circuiting reason in its compelled speech jurisprudence as well. In *West Virginia State Board of Education v. Barnette*,[270] for example, Justice Jackson expressed concern that requiring students to salute the American flag, rather than informing them of its meaning through more traditional textual communications, is merely a "short-cut" to bypass the "slow and easily neglected route to aroused [patriotic] loyalties."[271] The Court described symbols like emblems and flags as creating "a short cut from mind to mind" and held that compelling individuals to make gestures of respect toward these symbols violates their First Amendment rights just as surely as a compelled statement of belief.[272]

Even outside of constitutional law, scholars have recognized that the law's aspiration toward rational thought has effectively denigrated the value of images. For instance, as Neal Feigenson and Christina Spiesel illustrate, American law "has tended to identify [] rationality (and hence its virtue) with texts rather than pictures, with reading words rather than 'reading' pictures."[273] Rebecca Tushnet likewise cites the arational power of images to explain why "[j]udges and scholars are powerfully motivated to disavow 'judging'" artistic images in copyright and other contexts: "Images seem especially dangerous because their power is irrational."[274] This focus on the arational power of images ties neatly into the arguments described in Part III against the state's use of emotional persuasion.

268. *See, e.g.*, Adler, *supra* note 38, at 46 (explaining that "the Court's opinion was maddening in its failure to explain or justify its distinction between words and images" and that "deep but unspoken assumptions about both the meaning of the First Amendment and about the distinction between text and image underlie [Chief Justice] Burger's assertion").

269. *Id.* at 47; *see also* Adler, *supra* note 261, at 210 (citing Catherine MacKinnon's theory that pictorial pornography is more dangerous to women than textual pornography).

270. 319 U.S. 624 (1943).

271. *Id.* at 631.

272. *Id.* at 631–32.

273. Tushnet, *supra* note 117, at 689 (citing NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY 4 (2009)).

274. *Id.* at 693–94.

2. Images Are Less Controllable

In its compelled speech cases, the Court has also expressed concern that the use of imagery to communicate substantive messages is troubling because images are inherently subject to various interpretations. In both *Barnette* and *Texas v. Johnson*,[275] state laws compelled adherence to a particular symbol—the American flag—and emphasized a particular reading of this symbol.[276] The Supreme Court found both laws unconstitutional, and its reasons for so finding were very much tied to the unique power that images have over observers and the inappropriateness of the state's reliance on this power to communicate a message.

Echoing the findings of researchers who suggest that viewers may interpret images differently depending on their background and context,[277] Justice Jackson noted in *Barnette* that "[a] person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."[278] Because viewers' interpretations of a given image can and do vary, the Court held in both *Barnette* and *Johnson* that it is unconstitutional for a state to compel only one interpretation of an image-based message.[279] In *Johnson*, for example, the Supreme Court overturned the conviction of a man who burned the American flag in protest, thus violating a Texas law prohibiting desecration of the flag.[280] In finding that flag burning constituted expressive conduct just as surely as speech, the Court highlighted the nature of the flag as a visual symbol—a "'visible manifestation of two hundred years of nationhood'" and an object "[p]regnant with expressive content."[281] As the Court noted, it had "never

275. 491 U.S. 397 (1989).

276. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626–29 (1943) (noting that West Virginia law mandated that school children salute the flag and recite the pledge of allegiance, and allowed expulsion of children who violated that law); *Johnson*, 491 U.S. at 399–400 (noting that Texas law considered burning the American flag a sign of disrespect that was criminally punishable).

277. *See infra* Part V.B.

278. *See Barnette*, 319 U.S. at 632–33; *see also Johnson*, 491 U.S. at 410 (stating that "[t]he State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation").

279. *See Barnette*, 319 U.S. at 632–34 (explaining that the same symbols can be interpreted differently, and thus a symbol of nationalism will take on various interpretations for different individuals); *Johnson*, 491 U.S. at 416–17 (noting that to prohibit flag burning for political purposes, but not for ceremonial purposes, would allow one to "burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood").

280. *Johnson*, 491 U.S. at 399, 420.

281. *Id.* at 405.

before [] held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents."[282]

Indeed, public criticism of the Supreme Court's recent decision in *Scott v. Harris*[283] seems grounded in concerns about singular interpretations of images. In *Scott*, the Supreme Court relied on a video of a police chase as representing the truth of an encounter,[284] effectively finding that the video "could be interpreted in only one way."[285] Rebecca Tushnet has argued that the Court's failure to recognize alternate interpretations of the video "conflat[ed] the realistic with the real," and that this failure led to erroneous analysis in *Scott*.[286]

3. Images Are More Powerful

The compelled speech cases also reflect a sense among Supreme Court justices that visual images are inherently more emotionally powerful than words. In her reading of the American flag cases, Adler describes the Court's statements about the power of the flag as a type of "idolatry"—a belief that some symbols or images hold inordinate power beyond the power of words.[287] In *Johnson*, the Court described the flag as "[p]regnant with expressive content."[288] Even Justice Rehnquist, in dissent, described the "mystical reverence" to which people hold the flag.[289] Justice Stevens, also in dissent, likewise wrote that "[t]he value of the flag as a symbol cannot be measured."[290] The language used in these cases makes clear that the Supreme Court views the American flag as being a uniquely impactful representation of a system of beliefs fundamental to our nation's history and progress. The fact that a symbol can hold such power reinforces the idea that an image can do the same.[291]

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282. *Id.* at 417.

283. 550 U.S. 372 (2007).

284. *See id.* at 378–81 (describing the videotape as the "added wrinkle" in the case).

285. Tushnet, *supra* note 117, at 700–01.

286. *Id.* at 701 (citing Dan Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009)).

287. Adler, *supra* note 38, at 43–44.

288. 491 U.S. 397, 405 (1989).

289. *Id.* at 429 (Rehnquist, C.J., dissenting).

290. *Id.* at 437 (Stevens, J., dissenting).

291. Regardless, there seems to be a contradiction in how the Court treats cases of image-based speech. In the obscenity cases, the Supreme Court seems to view the images as "devoid of any real meaning." Calvert & Richards, *supra* note 263, at 221. Likewise, a dissent in one of the flag cases correlates the action of burning it not as an expression of an idea, but rather as an "inarticulate grunt or roar . . . indulged in . . . to antagonize others." *Johnson*, 491 U.S. at 432 (Rehnquist, C.J., dissenting). As Justice Rehnquist noted, Johnson, a flag burner, could have

Adler ultimately argues that images, because of their unique nature, should receive greater First Amendment protection than they currently do—that image-based pornography, for example, should be defended just as vigorously as textual pornography.[292] If Adler's argument is correct, then perhaps the converse ought to be true in the context of government-compelled speech. Because image-based communications are less rational, less controllable, and more powerful than textual communications, the Supreme Court ought to be particularly wary when state actors compel these communications.[293] Indeed, the Court's jurisprudence in the flag cases supports this argument. In these contexts, at least, constitutional law has recognized the fact that images are a unique, arational form of communication and has treated the compelled use of images with less deference. This history may suggest that there is some implicit precedent for affording emotionally triggering images less First Amendment protection. Thus, when the government wishes to use such images to persuade, perhaps it ought to face a higher burden.

B. First and Fourteenth Amendment Standards of Scrutiny Can Accommodate Concerns About the Emotional Impact of Imagery

To date, only one court, of those that have reached substantive conclusions about the constitutionality of the FDA's tobacco labeling regulations and state pre-abortion ultrasound laws, has set precedent that takes into account the emotional impact of state-compelled imagery.[294] In

expressed his opinion in many different ways, but it was his use of a symbolic image with which to make his point that suggested he should lose his First Amendment protections. *Id.*

292. Adler, *supra* note 38, at 43.

293. *See* Tushnet, *supra* note 117, at 696 (noting that, "for example, victim impact statements used at criminal sentencing now may incorporate video, sometimes set to haunting music, with resulting controversy over whether such presentations irrationally influence sentencing juries").

294. In other contexts, too, courts have been unwilling to find that the emotional impact of speech is enough to render the speech less worthy of First Amendment protection. In *Snyder v. Phelps*, for example, the Supreme Court asked whether the First Amendment prohibited holding Westboro Baptist liable in tort for picketing and making emotionally triggering statements at a service member's funeral. 131 S. Ct. 1207, 1213 (2011). It concluded that such speech, though hurtful to the family, was constitutionally protected. *Id.* at 1220. Because "any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself," the Court held that prohibition of such speech was not a legitimate time, place, and manner regulation. *Id.* at 1217–19. While the case did not deal with either compelled speech or commercial speech, it demonstrates that the Supreme Court has not traditionally considered the emotional impact of private speech as relevant to its constitutionality. Even in cases where the Court has considered the emotional harm resulting from commercial speech, its conclusions have not rested on the objectionable emotional content of the speech itself, but rather its impact on the industry the law seeks to regulate. In *Florida Bar v. Went For It, Inc.*, a case evaluating laws that prohibit attorneys from soliciting clients within thirty days of an accident, the Court noted that "[t]he Bar is concerned not with

R.J. Reynolds, the D.C. Court of Appeals cited the inflammatory emotional impact of graphic tobacco warnings to support its conclusion that the *Zauderer* test, which applies only to purely factual and uncontroversial compelled speech, was the wrong test to use in this context; the court ultimately applied the *Central Hudson* test and did not further consider the issue of emotional persuasion.[295]

The First and Fourteenth Amendment tests that apply to these cases, however, do offer numerous opportunities for considering the perils associated with compelled imagery that triggers emotional reactions. Four such proposals, which incorporate supporting empirical evidence from the social sciences, are explained in further detail below.

1. Truth and Controversy

Under the *Zauderer* standard, the state may, consistent with the First Amendment, compel "purely factual and uncontroversial" speech under certain circumstances.[296] *Casey* interprets the Fourteenth Amendment to permit laws requiring physicians to communicate "truthful and not misleading" information that is relevant to a woman's abortion decision, even if the information has "no direct relation to her health."[297] Where the communications in question are images designed to evoke an emotional or a rational response in viewers, as in the tobacco and ultrasound cases, the *Zauderer* and *Casey* inquiries—whether a compelled statement or image is factual (rather than opinion-based), uncontroversial (rather than controversial), truthful (rather than false), and fairly represented (rather than misleading)—ought to consider the unique characteristics of image-based speech.

As the D.C. Court of Appeals noted in *R.J. Reynolds*, emotionally inflammatory images "cannot rationally be viewed as pure attempts to convey information" and "certainly do not impart purely factual, accurate, or uncontroversial information."[298] In dissent, Judge Clay in *Discount Tobacco* discussed whether the FDA's graphic warnings were a "reasonably tailored" solution to achieve the government's goals, highlighting the inconsistency between appealing to emotions by way of graphic imagery

citizens' 'offense' in the abstract, but with the demonstrable detrimental effects that such 'offense' has on the profession it regulates." 515 U.S. 618, 631 (1995) (internal citations omitted).

295. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012).

296. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

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

298. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1216–17. *Cf.* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 560 (6th Cir. 2012) (Stranch, J., majority) ("*Zauderer* itself eviscerates the argument that a picture or drawing cannot be accurate and factual.").

and communicating factual information.[299] Not only does the use of graphic images "evoke a visceral response that subsumes rationale decision-making," Judge Clay wrote, but the interpretation of the images will inevitably vary from viewer to viewer.[300]

Judge Clay is correct in noting that images can be interpreted very differently by various viewers. While the gruesome images selected by the FDA for cigarette packaging are likely to trigger fear and disgust in all but the most hardened viewers, not all images are as homogeneously understood. Fetal ultrasound images are a primary example. While proponents of pre-abortion ultrasound laws maintain that their goal in presenting women with ultrasound images and fetal descriptions is to inspire feelings of love and maternal bonding, women on the receiving end of this message have interpreted these images very differently.[301] For instance, Dana Weinstein testified in *Nova Health Systems v. Pruitt* about her decision to choose abortion after learning that her unborn child had severe brain damage, which would cause it to be in a persistent vegetative state upon birth.[302] According to Weinstein, "[h]aving to listen to a detailed description of the ultrasound images would have caused [her] to experience the shock of the diagnosis all over again and would have intensified the feelings of grief and disappointment that [she] was struggling to cope with."[303]

Indeed, scientific research has confirmed the fact that women experience ultrasounds differently. Women experiencing normal pregnancies generally interpret the ultrasound event as a positive one; in contrast, some who experience risky pregnancies and subsequently miscarry report that they wish they had not seen the fetal image.[304] Two studies of

299. *See Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 528 (Clay, J., dissenting) (comparing the attempt to analogize colorful graphic warnings on tobacco products with extensive textual warnings on over-the-counter drugs).

300. *Id.* at 529–530.

301. *See generally* Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. (forthcoming 2014) (manuscript at 47–53), *available at* http://ssrn.com/abstract=2258742. Corbin notes that ultrasound images reflect particular social and cultural meanings, representing a "portrait" of a wanted child. *Id.* at 49–50. Therefore, she argues, the government's message "forc[es] doctors to tell women that their unwanted pregnancy should really be viewed as a wanted child." *Id.* at 50. She argues, however, that "[t]his reading of an ultrasound image is neither inevitable nor universal" and "most expectant couples need help interpreting the fetal image." *Id.* at 49.

302. Response in Opposition to Defendants' and Defendant Intervenor's Joint Motion to Strike Declarations of Linda Kerber, Ph.D., and Dana Weinstein, and Limit The Testimony of Marilyn Eldridge and David Grimes, M.D. at 5, Nova Health Sys. v. Pruitt, 292 P.3d 28 (D. Okla. 2012) (No. CV-2010-533), 2012 WL 381843.

303. *Id.* at 6 (internal quotation marks omitted).

304. Black, *supra* note 88, at 49–50.

women's responses to the possibility of ultrasound imaging prior to pregnancy termination likewise showed significant variations in emotional response.[305] In a 2010 study from the United Kingdom, approximately ten percent of women seeking abortions requested to see the ultrasound image, often expressing curiosity or a desire to ensure they had made the right decision, and referring to the experience as part of the grieving process.[306] In contrast, almost seventy percent of the women said that they did not want to view the ultrasound.[307] Of these, some believed the image would inspire feelings of sadness and guilt; others said that the experience would be unnecessary because they had already reached a decision—one woman said, "It's not just my baby."[308] A 2009 Canadian study, however, found that slightly over seventy-two percent of women seeking abortions opted to view the ultrasound when offered the opportunity.[309] Of these, eighty-three percent viewed it as a positive experience, reporting reinforcement of their decision and a sense of closure.[310] Others reported mixed feelings; as one woman noted, "It was interesting but sad."[311]

This research lends support to the argument that compelled images are unlikely to satisfy constitutional tests requiring them to be truthful, factual, uncontroversial, or not misleading. A contrast with textual messages may reinforce this point.[312] A statement like "smoking can cause lung cancer" is difficult to misinterpret.[313] While some listeners may overestimate the likelihood of developing cancer as a result of tobacco use while others may underestimate it,[314] both groups would, if asked, be able to accurately describe the message they received (if only by parroting the words). The fact that the message may have different effects on listeners' subsequent

305. *Compare* Graham et al., *supra* note 83, at 488 (finding a majority of women did not want to see ultrasound images because it "could potentially worsen the guilt and emotional turmoil felt"), *with* Wiebe & Adams, *supra* note 82, at 99 (noting most women felt that "viewing the [ultrasound] did not make it more difficult emotionally").

306. Graham et al., *supra* note 83, at 485–86.

307. *Id.* at 485.

308. *Id.* at 486 (internal quotation marks omitted).

309. Wiebe & Adams, *supra* note 82, at 99.

310. *Id.* at 99–100.

311. *Id.* at 100 (internal quotation marks omitted).

312. *See* United States v. Philip Morris USA, Inc., 907 F. Supp. 2d 1, 15–16 (D.C. Cir. 2012) (contrasting textual corrective statements about tobacco with the graphic images in *R.J. Reynolds*).

313. *Compare id.* at 5 (noting that the defendants were aware of the "'consensus in the scientific community that smoking caused lung cancer and other diseases'"), *with* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216 (D.C. Cir. 2012) ("[T]he image of a man smoking through a tracheotomy hole might be misinterpreted as suggesting that such a procedure is a common consequence of smoking—a more logical interpretation than the FDA's contention that it symbolizes 'the addictive nature of cigarettes.'").

314. Corbin, *supra* note 301, at 36.

choices does not negate the fact that listeners would be able to agree between themselves as to precisely what message was communicated to them. In contrast, tobacco users viewing pictures of diseased lungs and women viewing ultrasound images would likely have difficulty agreeing as to what factual message was being communicated by way of the image.[315]

A second argument for treating image-based communications as potentially misleading is grounded in social science research about cognitive biases. Some legal scholars have argued that when government communications "attempt[] to exploit mistakes . . . [or] intentionally exploit[] predictable cognitive errors," they distort speech by being misleading.[316] In addition, research has shown that image-based communications are more likely to trigger cognitive biases that detract from rational reasoning.[317]

Because images grab one's attention, people may give them more attention than they deserve—a prime example of inferential error.[318] Rather than processing emotional and visual information systematically, people tend to rely on heuristics or stereotypes, cognitive shortcuts for processing information that simplify decisionmaking at the expense of reasoned judgment.[319] In particular, vivid evidence leading to negative moods is especially likely to cause errors in reasoning,[320] such as perceiving greater

315. *See, e.g.*, Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 530 (6th Cir. 2012) (noting that color graphics can be viewed differently based on individual viewpoints and ideologies).

316. Corbin, *supra* note 301, at 17; *see also* Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 47 (2007) ("[I]ndividuals hearing emotionally laden communications eliciting fear or anxiety may be more susceptible to persuasion by that message.").

317. *See* Corbin *supra* note 301, at 26–27 (noting that the use of images in advertising to elicit "positive emotional responses . . . exploit[s] a distorting heuristic embedded in people's decisionmaking").

318. *See* Gold, *supra* note 155, at 518 (explaining that when evidence is selected for trial based on its vividness, the jury is exposed to the "danger of inferential error because vividness is normally only vaguely related to probativeness").

319. *See* Neal Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 30 L. & HUM. BEHAV. 143, 144 (2006) (recognizing that emotions and moods can "affect people's strategies for processing information" (emphasis omitted)); *see also* Joseph P. Forgas, *Affective Influences on Attitudes and Judgments*, *in* HANDBOOK OF AFFECTIVE SCIENCES 596, 608 (Richard J. Davidson, Klaus R. Scherer & H. Hill Goldsmith, eds., 2003) (recognizing that "[w]hen people pay little attention to the message and rely on simplistic, heuristic processing . . . , the affect often functions as a heuristic cue and produces a mood-congruent response to the message").

320. Blumenthal, *supra* note 75, at 15–16; *see also generally* John Cryderman & Kevin Arceneaux, *Does Fear Motivate Critical Evaluations of Political Arguments? Emotion and Dual-Processing Models of Persuasion* (APSA 2010 Annual Meeting Paper), *available at* http://ssrn.com/paper=1644637.

than actual risk.[321] In the context of advertising by tobacco manufacturers, for example, uniformly positive images of happy smokers exacerbate optimism bias and distort perceptions of risk.[322] Similarly, negative images presented by the government to counter these advertisements exploit risk biases.[323]

Thus, there is merit to the argument that compelled image-based communications run the risk of violating First and Fourteenth Amendment constitutional requirements that such communications be factual, truthful, non-misleading, and uncontroversial.

2. Tailoring to Government Interests

Both strict scrutiny and the *Central Hudson* tests for First Amendment violations take into account the strength of the relationship between the state's interests and the means used to achieve those interests.[324] Strict scrutiny requires that a governmental speech mandate be narrowly tailored to further a compelling state interest; intermediate scrutiny under *Central Hudson* requires that the regulation directly advance a substantial state interest in the least extensive way possible. When considering speech mandates that incorporate emotionally triggering imagery, it is reasonable, and indeed necessary, to ask whether the government might be able to achieve its goals through more effective means or through means imposing less of a burden on speakers and/or listeners.[325]

In his dissent in *Discount Tobacco*, Judge Clay argued that the use of "large scale color graphic[s]" intended to trigger "visceral response[s] that subsume[] rationale decision-making" is not a reasonably tailored response

321. *See* Loes T. E. Kessels et al., *Increased Attention but More Efficient Disengagement: Neuroscientific Evidence for Defensive Processing of Threatening Health Information*, 29 HEALTH PSYCH. 346, 353 (2010) (concluding that "high-threat smoking pictures capture more attention processes," while, at the same time, "caus[ing] more effective disengagement" that could lead to more defensive behavior and reactions in viewers); Richard L. Wiener et al., supra note 156, at 235 (identifying a study in which participants "provided with information about the risks of an activity developed negative affect, which in turn led to increased perceptions of risk").

322. Daniel Romer & Patrick Jamieson, *Advertising, Smoker Imagery, and the Diffusion of Smoking Behavior*, *in* SMOKING: RISK, PERCEPTION, & POLICY 127, 129 (Paul Slovic ed., 2001).

323. Keighley, *supra* note 11, at 2387.

324. *See supra* note 191 and accompanying text.

325. *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (finding that "the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech" would be relevant to a *Central Hudson* analysis); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993) ("[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.").

for correcting an information deficit among tobacco users.[326] According to Judge Clay, different viewers can interpret images differently, particularly when they include a subjective component.[327] This, combined with the FDA's alleged failure to consider other options for achieving its interests, proved fatal for the FDA in Judge Clay's *Central Hudson* analysis.[328]

Likewise, in *Stuart*, the Middle District of North Carolina, applying strict scrutiny, held that even if the state did have a compelling interest, the statute was not "narrowly tailored to achieve that interest."[329] The court faulted the state for not considering other alternatives to the mandatory abortion ultrasound statutes that might nevertheless achieve the state's goals, such as offering written information about fetal development or offering the ultrasound as a voluntary measure.[330] These alternatives, according to the court, would be less burdensome to the physicians whose speech is compelled, as well as to the listeners subjected to unwanted images.[331]

These judicial opinions offer strong justifications for why compelled visual disclosures, as compared to textual disclosures, might be insufficiently tailored to the state's interests and therefore violate the First Amendment's restrictions on compelled speech. As noted by Judge Clay in his dissent, images are subject to a variety of interpretations, which makes it far less likely that most viewers will be persuaded to act in accordance with the state's interests. When viewers interpret a message differently, it may be difficult to demonstrate that the communication of that message is sufficiently tailored to achieve the state's interests. Thus, any inquiry into an image-based campaign's effectiveness ought to begin by asking whether the campaign's message is likely to be interpreted consistently by a heterogeneous population.

For example, consider anti-drug advertisements that were criticized in the late 1990s for portraying drug use as sexy or appealing. Frank Rich of the *New York Times* described one of the anti-heroin advertisements:

> In this elegantly shot display of high-concept Madison Avenue creativity, a young woman armed with a skillet angrily smashes an egg and then an entire kitchen to dramatize the destructiveness

326. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 528–29 (6th Cir. 2012) (Clay, J., dissenting).

327. *See id.* at 530 ("Although elements of the color graphics requirement may remain constant, the underlying message that they convey will vary with the interpretation and context of its viewer.").

328. *Id.* at 529–30.

329. 834 F. Supp. 2d 424, 432 (M.D.N.C. 2011), *aff'd*, 706 F. 3d 345 (4th Cir. 2013).

330. *Id.* at 432–33.

331. *Id.*

> of heroin. . . . [I]t sends bizarrely mixed messages. The woman looks like Winona Ryder; she's wearing a tight tank top; there are no visible track marks on her junkie-thin arms; and the kitchen representing her drug-induced hell is echt Pottery Barn, if not Williams-Sonoma.[332]

If the FDA's graphic tobacco images caused some people to consider smoking to be a more attractive option (which, admittedly, seems unlikely), the communications could hardly be deemed well-tailored to achieving the government's goals. Indeed, this seems to be the case with the abortion ultrasound images—studies show that some women interpret these images positively and others, negatively.[333] Perhaps because the ultrasound image communicates no singular message, research has found that exposure to ultrasound images does not cause women to change their minds about their abortion decision.[334]

Images are a form of speech subject to various interpretations depending on who the viewer may be.[335] For this reason, predicting how a heterogeneous audience will respond when exposed to such images is difficult (though responses to some images may be more predictable than to others),[336] and this may ultimately affect the outcome of the constitutional analysis.[337] Given the emphasis federal courts tend to place on empirical evidence of effectiveness when deciding constitutional challenges,[338] it is

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332. Frank Rich, *Journal; Just Say $1 Billion*, N.Y. TIMES (July 15, 1998), www.nytimes.com/1998/07/15/opinion/journal-just-say-1-billion.html; *see also* Rebecca Cullers, *10 Anti-Drug Ads That Make You Want to Take Drugs*, ADWEEK (Apr. 29, 2011, 10:31 AM), http://www.adweek.com/adfreak/10-anti-drug-ads-make-you-want-take-drugs-131158.

333. *See supra* Part V.B.1.

334. *See* Wiebe & Adams, *supra* note 82, at 99 (finding that in a sample of 254 women who chose to view their fetal ultrasound before abortion, none of the women changed their minds about the abortion procedure).

335. *See* Tushnet, *supra* note 117, at 692 ("The apparent reality of images obscures the fact that meaning always comes from interpretation.").

336. *See id.* at 694 ("[T]here are certain features of human perception that work in predictable ways depending on the perceptual input.").

337. *See id.* at 703 ("[B]ecause images implicate First Amendment considerations, it is important to understand whether images are meaningless or whether they have a meaning that can't be reduced to words. The answer determines their constitutional status, but that determination is extremely difficult.").

338. In the tobacco labeling cases, the decisions of the U.S. Courts of Appeal for the District of Columbia and the Sixth Circuit were ultimately based on the strength of the evidence relating to the effectiveness of image-based tobacco warnings in reducing smoking rates. *See supra* text accompanying notes 236, 238. The courts focused on the connection (or lack thereof) between viewers' intentions to stop smoking and their actual behavior. *See supra* text accompanying notes 236–238. Both courts agreed that there was evidence to suggest that viewing the images caused people to think about stopping smoking, but the courts generally disagreed as to whether it could be proven, as an empirical matter, that these thoughts translated into actions. *See* R.J. Reynolds

reasonable to think that campaigns communicating factual messages more directly may be a more tailored means of achieving government goals than campaigns communicating through indirect image-based messaging.[339]

3. Relevance and Undue Burden

When dealing with pre-abortion ultrasound laws in particular, there is yet another alternative for incorporating concerns about emotional impact into the constitutional analysis. Recall that Judge Sam Sparks of the District Court for the Western District of Texas criticized the Fifth Circuit's decision to uphold Texas's abortion ultrasound law.[340] In his opinion, Judge Sparks expressed concern that the Fifth Circuit's broad definition of *Casey*'s "reasonable regulation" requirement would permit even "an extended presentation, consisting of graphic images of aborted fetuses, and heartfelt testimonials about the horrors of abortion."[341]

Judge Sparks's argument that some types of emotionally persuasive appeals may violate a woman's Fourteenth Amendment right to reproductive privacy is persuasive. Grounding this argument in the definition of reasonable regulation, however, seems unsatisfactory. The Supreme Court in *Casey* explicitly held that truthful and not misleading information relevant to a woman's abortion decision is constitutionally permissible, even if the information has "no direct relation to her health."[342] That is, the Court expressly acknowledged that some types of information may be relevant for the purposes of constitutional analysis despite the fact that they are not, strictly speaking, medically relevant to a woman's

Tobacco Co. v. FDA, 696 F.3d 1205, 1219 (D.C. Cir. 2012) (finding the evidence insufficient to show a "direct[]" and "material decrease in smoking rates" (emphasis omitted)); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 566 (6th Cir. 2012) (finding the evidence "more than substantial" and the warnings "reasonably related to the purpose Congress sought to achieve"); *see also* Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 902 (8th Cir. 2012) (relying on empirical evidence about the risk of suicidal ideation associated with abortion in evaluating a First Amendment challenge to a compelled disclosure requirement).

339. One strong counterargument, however, is the fact that textual messages (which are often more direct) are not typically as effective as image-based messages. Indeed, this is precisely why the FDA chose the approach that it did. *See* Bennett, *supra* note 50, at 1925 (noting that the FDA's use of graphic images on tobacco packages, rather than enlarging the already present textual warnings, was due in part to a concern that consumers either do not notice or do not remember textual warnings). In such cases, an evaluation of the effectiveness of possible messages might suggest that an image-based message is indeed more narrowly tailored than a textual one or an image-based message that is less emotionally gripping. *See supra* Part V.B.2.

340. Tex. Med. Providers Performing Abortion Servs. v. Lakey, No. A-11-CA-486-SS, 2012 WL 373132, at *3 n.8 (W.D. Tex. Feb. 6, 2012).

341. *Id.* at *3.

342. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) (plurality opinion).

health.[343] Indeed, federal courts' willingness to uphold state laws requiring that women seeking abortions be provided with information about non-medical crisis pregnancy centers, child support, and paternity establishment support this reading.[344]

Perhaps a better understanding of Judge Sparks's concern is that *Casey*'s requirements of truth and relevance are inadequate to ensure that messages communicated during the abortion informed consent process do not impose an "undue burden."[345] *Casey* defines the undue burden test as "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[346] For a law to pass scrutiny under the undue burden test, the means chosen by the state to further its interests "must be calculated to inform the woman's free choice, not hinder it."[347]

If we believe that free choice is rational choice, unhindered by cognitive biases or undue pressure from third parties,[348] the case could be made that some truthful, not misleading, and relevant messages may nevertheless have the purpose or effect of placing a substantial obstacle in the path of a woman's reproductive choices.

Recall that imagery and emotional triggers are often viewed as short-circuiting the reasoning process. While the precise neurological mechanism by which graphic imagery affects information-processing is unknown,[349] the most common layperson's explanation seems to align with Errol Morris's and Richard Posner's reasoning—that the emotional responses triggered by

343. *Id.*

344. *See id.* at 968–69 (holding that the required presentation of the availability of paternal support and state-funded abortion alternatives was "rationally related" to a woman's informed choice, even though the information presented was not medically relevant to a woman's health); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 584 (5th Cir. 2012) (holding that the required presentation of paternity establishment and child support was not constitutionally flawed).

345. *See* Blumenthal, *supra* note 75, at 36 (arguing for a broader reading of *Casey* that would reject certain mandated disclosures as unduly burdensome, even if they are technically truthful and not misleading).

346. *Casey*, 505 U.S. at 877.

347. *Id.*

348. *See supra* Part III.

349. *See* Karolien Poels & Siegfried Dewitte, *How to Capture the Heart? Reviewing 20 Years of Emotion Measurement in Advertising*, 46 J. ADVERTISING RES. 18, 18 (2006) ("Emotional reactions function as the gatekeeper for further cognitive and behavioral reactions."); Feigenson & Park, *supra* note 319, at 144–45 (citing evidence about emotion's effect on information-processing); Forgas, *supra* note 319, at 599, 601 (suggesting that contemporary cognitive theories may offer more convincing theories of how affect impacts information-processing, especially as compared to "psychoanalytic [and] associationist explanations" and noting that "[a]ffect can influence not only the content of people's attitudes and judgments but also the way they go about computing their responses.").

vivid imagery "'stop us from thinking'"[350] and "short-circuit[] reason."[351] Indeed, there is a large body of research to support the idea that emotionally arousing visual messages are highly effective.[352]

Studies show that the brain processes images more quickly than it processes words.[353] Accordingly, images trigger viewers' emotional responses almost instantaneously.[354] Research suggests that these emotional responses precede cognitive or rational responses, and that decisions affected by these emotional triggers (particularly moral judgments) are made intuitively and automatically, long before any reasoning or rationalization could occur.[355] Recall, as noted in Part V.B.1, that emotionally gripping visual information has been found more likely to trigger cognitive biases and detract from rational reasoning. Moreover, decisions made on the basis of emotions tend to be made with greater confidence, causing people to be "less inclined . . . to process information systematically, because they are more confident that they already know what they need to know to address the task at hand."[356]

If this research, which suggests that emotionally gripping imagery is likely to short-cut the process of rational decisionmaking and lead to errors in reasoning, is correct, then it may be difficult to argue that the use of

350. Tushnet, *supra* note 117, at 691.

351. Posner, *supra* note 86, at 310.

352. *See, e.g.*, Julie L. Andsager et al., *Questioning the Value of Realism: Young Adults' Processing of Messages in Alcohol-Related Public Service Announcements and Advertising*, 51 J. COMM. 121, 121 (2001) (finding that "realistic but logic-based PSAs were not as effective as unrealistic but enjoyable ads"); Annie Lang & Narine S. Yegiyan, *Understanding the Interactive Effects of Emotional Appeal and Claim Strength in Health Messages*, 52 J. BROAD. & ELEC. MEDIA 432, 435 (2008) (citing research concluding that "emotional messages, negative messages, and arousing messages are more effective than nonemotional messages" (citations omitted)); Blumenthal-Barby & Burroughs, *supra* note 20, at 4 (citing research that emotional associations elicited by "novel, personally relevant, or vivid examples and explanations" are more memorable and therefore more likely to influence behavior); Farrelly et al., *supra* note 49, at i41, i44 (finding that tobacco countermarketing messages that elicit strong emotional responses are more effective and appealing to young audiences, and describing a CDC study finding that advertisements that "'graphically, dramatically, and emotionally portray the serious consequences of smoking' were the most effective"); Tushnet, *supra* note 117, at 696 (discussing the "unique effects vision has on decisionmaking, effects that can't be produced with informational pamphlets").

353. Tushnet, *supra* note 117, at 691.

354. *See* Feigenson & Park, *supra* note 319, at 145 (discussing affective intuition theories); *see generally* R. B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151 (1980) (demonstrating that affective, emotional judgments precede cognitive efforts and are made with greater confidence).

355. *See* Zajonc, *supra* note 354, at 160–65 (discussing experimental and clinical evidence on affective reactions).

356. Feigenson & Park, *supra* note 319, at 148. This applies to some emotions, like anger, disgust, and happiness; however, other emotions, like hope, anxiety, and sadness, are associated with uncertainty and greater reasoning. *Id*. at 147–48.

images in the abortion context is truly aimed at informing a woman's free choice, as required by the Supreme Court in *Casey*.[357] Even if an ultrasound image is deemed to be truthful, not misleading, and relevant under the Supreme Court's reasoning in *Casey*, it may still run afoul of the Fourteenth Amendment's protections of reproductive privacy if its emotional impact makes it more difficult for a woman to exercise free choice.

4. Captive Audience Doctrine

A final option exists for incorporating arguments against emotional persuasion into constitutional analyses of the tobacco and ultrasound laws: the captive audience doctrine. While the First Amendment does not explicitly recognize a "right not to listen,"[358] the captive audience doctrine does permit the state, in limited circumstances, to protect unwilling listeners from messages communicated in ways that make them difficult or impossible to avoid.[359]

This doctrine, based on privacy considerations, is quite limited in its application, however. According to the Supreme Court, the government's right to "shut off discourse solely to protect others from hearing it" consistent with constitutional principles is "dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[360] Where individuals can simply "avert their eyes" to avoid a message, courts have prohibited the government from intervening because those individuals are not sufficiently "captive."[361] In contrast, case law

357. *See* Corbin, *supra* note 301, at 17 (arguing that "compelled speech that attempts to exploit mistakes" or "intentionally exploits predictable cognitive errors" distorts public discourse).

358. *See* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 943 (2009) (arguing for the recognition of a right not to listen).

359. *See id.* (arguing that the captive audience doctrine is a "starting point for constructing a right against compelled listening"); Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?*, 67 NW. U. L. REV. 153, 193–95 (1972) (proposing general guidelines for how and when the government should protect people from speech); G. Michael Taylor, *"I'll Defend to the Death Your Right to Say It . . . But Not to Me"—The Captive Audience Corollary to the First Amendment*, 8 S. ILL. U. L.J. 211, 211–12, 226 (1983) (describing a captive audience and proposing that the government intervene on behalf of an "unwilling listener"). According to some authors, however, "the Court's treatment of the captive audience doctrine has been inconsistent and limited." Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 99 (1991).

360. Cohen v. California, 403 U.S. 15, 21 (1971).

361. *See id.* (suggesting that viewers encountering an offensive jacket could "avoid further bombardment of their sensibilities simply by averting their eyes"). *Cf.* Snyder v. Phelps, 131 S. Ct. 1207, 1219–20 (2011) (allowing protests at military funerals); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 541–42 (1980) (rejecting restrictions on inserts placed in utility bills mailings); Erznoznik v. City of Jacksonville, 422 U.S 205, 210–12 (1975) (invalidating a law

suggests that the government faces fewer hurdles in regulating speech to protect individuals from audible and otherwise unavoidable messages, such as the sound of protesters outside an abortion clinic;[362] the sound of picketing;[363] or unavoidable intrusions into the home.[364] In fact, an early Supreme Court case distinguished between tobacco advertisements on billboards and placards from those in newspapers and magazines on the grounds that public forms of advertising (as opposed to print advertisements) "are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part."[365]

One might expect plaintiffs in the abortion ultrasound cases to raise First Amendment claims based on the captive audience doctrine. To date, however, the parties have not made such claims, and therefore the courts have had no opportunity to consider them.[366] That said, the psychological principles highlighted above support the idea that emotionally compelling visual messages might, even if a viewer is able to "avert his eyes," nevertheless run afoul of the captive audience doctrine.

Because of the way the brain processes visual and verbal messages, it is much more difficult to avoid a visual message than a verbal one. The brain processes graphic images more quickly than it processes words; therefore, messages conveyed in visual terms trigger emotional responses more quickly than textual or verbal messages.[367] Further, empirical work in social psychology demonstrates that emotionally triggering appeals—in particular, vivid images—may have an inescapable impact on future

forbidding drive-in movie theaters from displaying films with nudity); Martin v. City of Struthers, 319 U.S. 141, 148–49 (1943) (striking down an ordinance banning door-to-door solicitation).

362. *See* Hill v. Colorado, 530 U.S. 703, 734 (2000) (upholding an abortion picketing prohibition as merely empowering citizens to "prevent a speaker . . . from communicating a message they do not wish to hear" by noting that "[p]rivate citizens have always retained the power to decide for themselves what they wish to read, and . . . what oral messages they want to consider"); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 773 (1994) (upholding part of an injunction restricting protest noises audible within an abortion clinic, but invalidating the part restricting "images observable" from within the clinic because "it is much easier for the clinic to pull its curtains than for a patient to stop up her ears" (internal quotation marks omitted)).

363. *See* Frisby v. Schultz, 487 U.S. 474, 486 (1988) (upholding an ordinance banning targeted residential picketing).

364. *See, e.g.*, *id.* (calling the residential picketing in question an "especially offensive" intrusion into the home); *see also* FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978) (permitting the FCC to regulate certain types of broadcasting because broadcast media is unavoidable to some degree); Kovacs v. Cooper, 336 U.S. 77, 86–87 (1949) (allowing an ordinance that forbid the use of sound trucks in public streets).

365. Packer Corp. v. Utah, 285 U.S 105, 110 (1932).

366. *See supra* Part IV.A.1 and Part IV.B.

367. *See supra* Part V.B.1.

choices, in part because they are more memorable and engaging.[368] In layman's terms, it is far simpler for a listener to avoid a verbal message, which requires increased time and energy to process, than a graphic message. Accordingly, even if a viewer is not captive in a particular location (such a purchaser of cigarettes at a drugstore), he might be able to argue that the instantaneousness with which images imprint themselves on our brains is enough to trigger the captive audience doctrine.

Consider, for example, laws requiring nutritional information on food labels,[369] or requiring that people seeking loans be presented with a stack of paperwork describing the risks of borrowing money.[370] It is relatively simple for a consumer to avoid these disclosures. Food labels tend to be discreet and unobtrusive, and a borrower is free to sign loan documents without reading them. Even patients considering medical procedures are legally permitted to waive their right to informed consent.[371] If the consumer chooses to avoid this information, the state cannot be blamed for the consumer's ignorance. The graphic images associated with tobacco labeling and ultrasound requirements, however, are different in kind. As a matter of course, it is much easier to avoid reading words and understand their meaning than to avoid looking at an image, even briefly, and internalizing it.

Supporters of tobacco and ultrasound laws could argue that a smoker need not look at the package of cigarettes she is purchasing, and that a woman seeking an abortion can "avert her eyes" when her physician is displaying the ultrasound.[372] But these suggestions are flatly unrealistic. When a color image composes fifty percent of the front of cigarette packaging, it is nearly impossible for a purchaser to avoid the image. To avoid the ultrasound image and description, a woman seeking abortion must shut her eyes and cover her ears, much in the manner of a toddler throwing a tantrum. It is for these reasons that a court might legitimately conclude that image-based emotional campaigns, even where not presented in a traditionally private sphere, violate the captive audience doctrine.

VI. CONCLUSION

Ethical arguments against the state's use of emotion to persuade have a long history, beginning with Aristotle and continuing through contemporary

368. *See supra* Part V.B.1.

369. *See, e.g.*, 21 U.S.C. § 343(q) (2006) (describing requirements for food labels).

370. *See, e.g.*, 15 U.S.C. § 1604 (2000) (dictating required disclosures for mortgage transactions).

371. Although, of course, a physician is free to refuse to treat a patient who does so.

372. *See supra* note 72.

theories of applied ethics and deliberative democracy. Recent research in the social sciences demonstrates that visual communications (in contrast with textual communications) are far more likely to attract attention, trigger emotional response, and influence action. In light of these considerations, it is perhaps surprising that policymakers at both the federal and state levels have renewed their use of image-based health campaigns.

This Article argues that the constitutional challenges facing tobacco and ultrasound laws can and should be bolstered by reference to these claims from ethics and social science. While only one precedential court opinion has found that the emotional impact of compelled imagery is constitutionally relevant,[373] an analysis of Supreme Court precedent in free speech cases suggests that there may be reason to treat compelled imagery differently from compelled text. Although the Court has declined, in its prior analyses, to draw a firm line between images and text, its language in cases dealing with obscene images and patriotic symbols seems to recognize the unique dangers that image-based communications pose.

In evaluating the challenged tobacco and ultrasound laws, there is reason to take into account the nature of the image-based communications and their emotional impact on viewers. While courts addressing these challenges have applied a variety of constitutional tests—strict scrutiny, *Zauderer*, *Central Hudson*, and *Casey*—there is room within each of these tests to incorporate arguments about the emotional impact of images.

Indeed, evidence demonstrating that various viewers interpret images differently is surely relevant to the question of whether a compelled communication is factual, uncontroversial, and not misleading under the *Zauderer* or *Casey* standards. Likewise, the fact that images have been found to be particularly likely to trigger cognitive biases suggests that image-based campaigns may be more likely to mislead viewers than text-based campaigns.

The tailoring test used in strict scrutiny and *Central Hudson* analyses takes into account whether alternate means of communication might be more effective and impose less of a burden on speakers and listeners. Again, the extent to which image-based campaigns might be interpreted differently, depending on the viewer and her context, may certainly help answer the question of whether the means used by the state to achieve its goals is sufficiently tailored to its ends.

Casey's test for ensuring protection of reproductive privacy asks whether a given law imposes an undue burden on a woman's free choice.

373. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012) (rejecting application of the *Zauderer* test on the grounds that the compelled images were "inflammatory" and "unabashed attempts to evoke emotion" rather than factual statements).

Where laws are aimed not at informing free choice, but rather are aimed at using arational techniques to trigger an emotional response of which a woman might not even be aware, there is a strong argument to be made that the *Casey* test is violated.

Finally, the First Amendment's captive audience doctrine, while it has not been used in recent tobacco and ultrasound litigation, provides yet another opportunity for incorporating concerns about the emotional impact of imagery. Research demonstrating that images have a near instantaneous impact on viewers in a way that text does not could be used to argue that viewers of unwanted images are "captive" to them, even if they are not confined to a space that has traditionally been viewed as private.

The argument presented in this Article is, of course, necessarily limited. The First Amendment protects citizens from government intervention, but does not impose direct restrictions on the government's own speech.[374] In the tobacco and ultrasound cases, it is only because the government's messages are filtered through an unwilling third party that we even have the opportunity to evaluate their constitutionality. Moreover, while government messages in the context of reproductive care are subject to the *Casey* undue burden standard under the Fourteenth Amendment, no such protections exist for government communications in other medical or health contexts. In other words, it is a unique set of facts about the tobacco and ultrasound cases that even permits us to judge the content and means of these government communications. For this limited set of circumstances, however, the argument that constitutional analyses ought to take into account concerns about the emotional impact of images is compelling.

That said, public concerns about emotional persuasion in general, and the emotional impact of images in particular, are broader. If we are worried about the government's use of emotional imagery in compelled speech contexts, there are likewise reasons to be concerned in contexts where the government itself is doing the speaking. Consider, for example, a recent anti-obesity campaign by the Health Department of the City of New York, which features a video of a man drinking a tall, refreshing glass of solid fat.[375] The video concludes with the message, "Drinking one can of soda a day can make you ten pounds fatter a year" and an image of ten pounds of fat dropping onto a dinner plate.[376] The fact that this message is communicated directly by the New York City Department of Health, rather than by an unwilling third party, is simply not relevant to the viewer. Its

374. *See supra* note 173 and accompanying text.

375. New York City Dep't of Health, *Are You Pouring on the Pounds?*, YOUTUBE (Dec. 14, 2009), http://www.youtube.com/watch?v=-F4t8zL6F0c.

376. *Id.*

effect on listeners—including groups of seasoned professors of health and public health law, who groaned with disgust when shown the video at conferences[377]—is the same.

For this broader set of cases, then, the constitutional constructions described in this Article will not be dispositive. Where the government itself is using emotionally gripping images to communicate a message, challenges must be brought on policy grounds, rather than legal grounds. To that end, a forthcoming article by this author offers a broader normative framework for evaluating emotional and arational persuasion by the government; this framework can be used by policymakers to guide their decisions about state communications.[378]

In the meantime, however, the legal challenges to the tobacco and ultrasound laws remain unresolved. The FDA has announced its intent to develop new tobacco labeling rules that are more consistent with constitutional principles, and opponents to state abortion ultrasound laws continue to press their challenges in court. This Article suggests that the emotional impact of the compelled images are relevant to their constitutionality, and that therefore both policymakers and courts ought to take these considerations into account when moving forward. Ultimately, policymakers and courts will need to decide how much weight to give these arguments—as compared to, for example, utilitarian arguments about the effectiveness of state messaging—and it is by no means certain that the presence of emotional imagery will have a dispositive effect in any given context. Incorporating these ideas into the constitutional analysis, however, is an important step for bringing contemporary constitutional jurisprudence in line with ethical arguments and empirical evidence about the psychology of human decisionmaking.

377. Specifically, the 2012 annual conferences of the American Society of Law, Medicine and Ethics, as well as the American Society for Bioethics and the Humanities.

378. Sawicki, *supra* note 18, at 46–47.