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INFORMED CONSENT LAWS AND THE CONSTITUTION: BALANCING STATE INTERESTS WITH A PHYSICIAN’S FIRST AMENDMENT RIGHTS AND A WOMAN’S DUE PROCESS RIGHTS

Sarah Runels*

I. INTRODUCTION

Informed consent to medical treatment is both an issue of medical ethics and a legally recognized doctrine of tort law.\(^1\) The early common law doctrine was based on an individual’s right to protect her body from unwanted physical intrusion.\(^2\) Since the development of an action in tort law, all fifty states have enacted statutes mandating informed consent before a physician provides any medical treatment.\(^3\) For consent to be informed, there are generally three requirements: the physician must communicate all necessary information to the patient, the patient must understand the

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3. American Medical Association, supra note 1 (stating that informed consent is a “process of communication between a patient and physician that results in the patient’s authorization or agreement to undergo a specific medical intervention”).
provided information, and the patient must consent to the treatment. Despite existing informed consent safeguards for all medical treatment, states have enacted informed consent requirements specifically targeting abortion procedures. States enacting these targeted requirements generally cite two reasons for doing so: protecting the potential for human life and ensuring women fully understand the psychological consequences of the procedure.

According to the American Medical Association, informed consent to medical treatment begins when a physician communicates all necessary information to the patient regarding any treatment or procedure. That information typically includes:

- the patient's diagnosis, if known;
- the nature and purpose of a proposed treatment or procedure;
- the risks and benefits of a proposed treatment or procedure;
- alternatives...
- the risks and benefits of the alternative treatment or procedure;
- and the risks and benefits of not receiving or undergoing a treatment or procedure.

Next, a physician must facilitate patient understanding by answering any questions regarding the treatment or procedure. Finally, a doctor must

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5. Guttmacher Institute, *Mandatory Counseling and Waiting Periods for Abortion*, St. Pol. in Brief, Sept. 1, 2009, at 1, available at http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf. For an example of a typical abortion informed consent law, see Ala. Code § 26-23A-1 et seq (2002). The author of this Note recognizes that many in the pro-choice community call these sorts of provisions “biased counseling” instead of “informed consent.” Both terms are politically charged and the use of “informed consent” in this Note connotes nothing more than the term’s wide use and recognition.


8. Id.

9. Id.
ensure that a patient has consented to the treatment or procedure. Failure to complete the informed consent process can result in both legal and ethical problems for the treating physician.

Abortion targeted informed consent provisions differ substantially from the traditional informed consent doctrine. First, the abortion targeted provisions require physicians to graphically detail the procedure. Second, twenty-four states require a waiting period between the date of counseling for the abortion and the actual procedure. The traditional form of the doctrine does not require waiting periods. Third, abortion targeted informed consent laws require a physician to detail certain risks associated with abortions that have not been scientifically proven. Under the traditional doctrine, data indicating that women receiving abortions are at greater risk than those who have not had the procedure must be established before the risk is communicated to the patient. Finally, abortion targeted provisions often require physicians to communicate “selective information about the moral dimensions” of the woman’s choice. Despite the large

10. Id.


12. Dresser, supra note 6, at 1617.

13. Id.

14. Guttmacher Institute, supra note 5.

15. See Tobin, supra note 4, at 111-12.

16. Guttmacher Institute, supra note 5. Some of these non-scientifically proven requirements include information regarding fetal pain, the link between abortion and breast cancer, and the increased risk of a “negative emotional response.” Id.

17. Dresser, supra note 6, at 1618-19.

18. Id. at 1619. This is in contrast to other medical decisions, like “the removal of life-sustaining treatment from patients in the persistent vegetative state,” which do not require physicians’ to communicate moral judgment. Id. See also Acuna v. Turkish, 930 A.2d 416, 427-28 (N.J. 2007) (stating that “the common law doctrine of informed consent requires doctors to provide their pregnant patients seeking an abortion only with material medical information.” (emphasis added)).
percentage of states with heightened informed consent provisions, litigation regarding the constitutionality of these requirements has been minimal.\textsuperscript{19}

The lines drawn in the abortion debate between the pro-choice and pro-life communities are accentuated in the informed consent debate. On one side, pro-choice advocates argue that many informed consent laws require the distribution of false and misleading information to women.\textsuperscript{20} These advocates believe that existing informed consent laws adequately protect women and the additional requirements only serve to inhibit a woman’s right to choose.\textsuperscript{21} However, pro-life advocates argue that informed consent laws are necessary to ensure that women are aware of the risks associated with their decision.\textsuperscript{22} This group believes that abortions have a negative psychological impact on women, necessitating the presentation of additional information.\textsuperscript{23} Both sides of the argument demonstrate that the main focus of these laws has been on women. However, informed consent laws also threaten the physician’s rights. Laws that require a physician to give women specific information regarding abortions must be analyzed from the perspective of the physician’s First Amendment free speech right.\textsuperscript{24}

\begin{enumerate}
\item \textsuperscript{19} Tobin, supra note 4, at 114.
\item \textsuperscript{20} National Abortion Federation, Threats to Abortion Rights: Biased Counseling/Waiting Period Bills (2009), http://www.prochoice.org/policy/states/biased_counseling.html (last visited Dec. 12, 2009).
\item \textsuperscript{21} Id.
\item \textsuperscript{23} Mailee R. Smith, Informed Consent Laws: Protecting a Woman’s Right to Know, DEFENDING LIFE 2009, 2009, at 149, available at http://dl.aul.org/wp-content/uploads/pdfs/01/DL09InformedConsentLaws.pdf. This view has also been adopted by the Court in Gonzales v. Carhart. Gonzalez v. Carhart, 550 U.S. 124 (2007) (stating that “[w]hile we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained”). Id. at 127. It is important to highlight the fact that Justice Kennedy, writing for the majority in Gonzales, noted that there is no reliable data to show whether women do in fact regret their abortions.
\end{enumerate}
Accordingly, this Note argues that the constitutionality of informed consent laws must be analyzed from both the physician's and the woman's perspective. First, the laws must be examined to determine if they present an undue burden on a woman's right to choose, constituting an unconstitutional violation of a woman's due process rights. Second, the laws must be considered from the physician's perspective to determine if they infringe upon his or her freedom of speech. In Planned Parenthood v. Rounds, the Eighth Circuit Court of Appeals upheld a South Dakota informed consent law that requires physicians to inform women, in writing, "that the abortion will terminate the life of a whole, separate, unique, living human being." This Note argues that when the South Dakota law is analyzed from the perspective of the woman and the physician, it seriously jeopardizes the former's due process rights and the latter's free speech right. As such, this Note argues that Planned Parenthood v. Rounds was incorrectly decided.

Part I of this Note outlines the existence and use of the heightened informed consent requirements. In addition, this section discusses the failure of courts and advocates on both sides of the issue to fully address the extent to which these requirements implicate physicians' and women's rights. Part II summarizes existing case law on informed consent provisions and advocates for a more comprehensive framework challenging the constitutionality of informed consent provisions. This framework includes a legal analysis that takes both the woman's due process rights and the physician's First Amendment rights into consideration. Part III analyzes the recent Eighth Circuit decision in Planned Parenthood v. Rounds. Finally, Part IV of this Note will apply the framework developed in Part II to the Eighth Circuit decision in Rounds.

25. See infra Part II.A for a discussion of the necessity of analyzing informed consent provisions from the perspective of a woman's due process rights.

26. See infra Part II.B for a discussion of the necessity of analyzing informed consent provisions from the perspective of a physician's First Amendment right to free speech.


28. Id. at 726, 737-38.
II. FRAMEWORK FOR INFORMED CONSENT LAWS: TWO PERSPECTIVES

A. The Woman's Perspective: The Undue Burden Standard and Informed Consent

In the 1992 Supreme Court case Planned Parenthood of Southeastern Pennsylvania v. Casey, the Court was asked to determine whether a Pennsylvania law requiring women to be provided with certain information before receiving abortions was an unconstitutional violation of their due process rights. Although the Court upheld the basic premise developed in Roe v. Wade, that a woman has a right to terminate her pregnancy, it expanded the role the state can play in regulating abortion procedures. The Court replaced the trimester framework developed in Roe with a viability framework. Under this analysis, the state may regulate the abortion procedure throughout the pregnancy due to its interest in the potential for human life. Unlike the trimester framework developed in Roe, which favored the rights of women in the first trimester, the viability framework recognizes a state’s interest in the potential for human life from the moment

30. Id. at 844.
32. Id. at 153.
33. Casey, 505 U.S. at 876.
34. Roe, 410 U.S. at 163.
35. Casey, 505 U.S. at 872.
36. Id. (stating that “[e]ven in the earliest stages of pregnancy, the State may enact rules and regulations.”). The Court bases the change from a trimester to a viability framework on advances in neo-natal care. Id. at 860. The Court says that these advancements make it possible for a fetus to survive outside the womb at an earlier gestational age than when the Court decided Roe. Id. The viability framework establishes twenty-three to twenty-four weeks gestational age as a possible point for viability. Id.
37. Roe, 410 U.S. at 163.
of conception.\textsuperscript{38} The Court recognized that increased state regulation could certainly burden a woman’s pre-viability right to terminate her pregnancy, but resolved that such burdens are only unconstitutional when undue.\textsuperscript{39} The Court found that an undue burden exists when “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.”\textsuperscript{40}

According to \textit{Casey}, a law will be deemed an unconstitutional violation of a woman’s due process rights when it acts as a substantial obstacle to her ability to seek an abortion.\textsuperscript{41} Additionally, the Court found that truthful and non-misleading informed consent provisions may be constitutionally permissible.\textsuperscript{42} In the materials that follow, this Note will show that both the substantial obstacle test and the truthful, non-misleading standard are open to considerable interpretation and could lead to conclusions that some informed consent laws are unconstitutional.

\textbf{1. The Substantial Obstacle Test}

The substantial obstacle test in \textit{Casey} requires an examination into either the purpose of the law or its effect on a woman seeking an abortion.\textsuperscript{43} In overturning Pennsylvania’s spousal notification requirement, the \textit{Casey} Court found that “[i]n a large fraction of the cases in which [the abortion restriction] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.”\textsuperscript{44} Therefore, if the effect of the law impacts “a large fraction” of women, it may be considered impermissible.\textsuperscript{45} In \textit{Cincinnati v. Taft},\textsuperscript{46} the Sixth Circuit relied on data showing that a large

\begin{itemize}
\item \textsuperscript{38} \textit{Casey}, 505 U.S. at 873.
\item \textsuperscript{39} \textit{Id.} at 875-77.
\item \textsuperscript{40} \textit{Id.} at 877.
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Id.} at 882.
\item \textsuperscript{43} Tobin, \textit{supra} note 4, at 124-27.
\item \textsuperscript{44} \textit{Casey}, 505 U.S. at 895.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} Cincinnati Women's Servs., Inc. v. Taft, 468 F.3d 361 (6th Cir. 2006).
\end{itemize}
fraction of women seeking abortions would be impacted by Ohio’s abortion restrictions to overturn a judicial bypass law.47

Although a majority of courts have relied on Casey’s large fraction test, another way to determine whether a law places a substantial obstacle in the way of a woman seeking an abortion is to consider its purpose.48 There are two ways to determine whether the purpose of the law is to set a substantial obstacle in the path of a woman seeking an abortion.49 Although the legislative history of a law can help to determine what the legislature actually intended, the purpose served by the legislation can be used to determine whether a substantial obstacle exists.50 In Planned Parenthood of Greater Iowa v. Atchison,51 the Eighth Circuit found that when a law treated clinics providing abortions differently from clinics that did not, an undue burden was placed on women seeking abortions.52 In this case, the Eighth Circuit found that the disparate treatment of clinics that perform abortions and non-abortion performing clinics was enough to demonstrate that the state action placed a substantial burden on women seeking abortions.53 While the action in Atchison may have been constitutional under the large fraction test, the court found that since the purpose of the action was to place a substantial obstacle in the way of women attempting to receive abortions, it was unconstitutional.54

47. Id. at 372-73. The court in Taft also considered the constitutionality of an in-person, informed consent requirement and a waiting period. Id. Applying the Casey large fraction test, the court found that neither requirement was unconstitutional. Id. at 372-74.

48. Tobin, supra note 4, at 125-27.

49. Id. at 126.

50. Id.

51. Planned Parenthood of Greater Iowa v. Atchison, 126 F.3d 1042 (8th Cir. 1997).

52. Id. at 1049. This case arose when an application process for health institutions, which had been ignored for ten years, was suddenly imposed on Planned Parenthood of Iowa. Id. at 1044. The court held that the sudden use of this largely defunct application process was unconstitutional, stating “[w]here a requirement serves no purpose other than to make abortions more difficult, it strikes at the heart of a protected right, and is an unconstitutional burden on that right.” Id. at 1049.

53. Id. at 1049.

54. Id.
2. Truthful and Non-Misleading Statements May Not Be an Undue Burden

In *Casey*, the Court upheld Pennsylvania’s informed consent provision by finding that even though the law attempted to encourage a woman to carry the pregnancy to term, it did not impose an undue burden on a woman’s right to choose. The Court stated that “[i]f the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.”5 This statement by the Court raises several relevant questions that have yet to be answered. First, by finding that truthful and non-misleading statements may be permissible, the Court has implicitly held that false and misleading statements would be an undue burden on a woman’s right to choose.57 Second, by using the word “may,” the Court leaves open the possibility that truthful and non-misleading information *may not* be permissible. Third, the Court does not resolve whether a statement can be permissible if it is truthful and misleading. Take, for example, a hypothetical state law mandating that the abortion procedure is explained in vivid detail to a patient. While the information is certainly true, the gruesome detail of the procedure may mislead women by

55. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883 (1992). *Casey* was not the first time that informed consent provisions had been an issue before the Court. In *City of Akron v. Akron Center for Reproduction Health*, the Court invalidated the provisions at issue because they required a doctor to go beyond what informed consent calls for. *City of Akron v. Akron Ctr. for Reproduction Health*, 462 U.S. 416, 452 (1983). The Court said that informed consent is “the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of medicine.” *Id.* at 443 (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67 n. 8 (1976)). In *Thornburgh v. American College of Obstetricians & Gynecologists* the Court invalidated Pennsylvania’s informed consent provisions, stating that the giving of information regarding possible effects on a woman’s mental health was “compelled information” that is “the antithesis of informed consent.” *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 764 (1986). The *Casey* Court overruled aspects of both *Akron* and *Thornburgh* saying, “when the government requires . . . the giving of truthful, nonmisleading information . . . those cases [*Akron* and *Thornburgh*] go too far, are inconsistent with *Roe’s* acknowledgment of an important interest in potential life, and are overruled.” *Casey*, 505 U.S. at 882.

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

56. *Id.* at 882.

57. See Tobin, *supra* note 4, at 123.
portraying this procedure as particularly horrific. In reality, a detailed description of any major medical procedure would be gruesome. In fact, the heightened description requirements that are part of some informed consent laws disclose far more information than is required for riskier procedures.\(^{58}\) Fourth, it is not clear whether a false and non-misleading statement would be permissible. Finally, the Court has not resolved what truthful or non-misleading means in the context of abortion procedures.\(^{59}\)

B. The Physician’s Perspective: Compelled Speech and Informed Consent Laws

Since informed consent provisions require physicians to communicate certain information to their patients, a physician’s First Amendment right to freedom of speech is necessarily implicated.\(^{60}\) In addition to addressing a woman’s due process rights, a court ruling on the constitutionality of an informed consent provision must also address the physician’s First Amendment right to free speech.\(^{61}\)

58. See supra Part I which discusses the usual requirements for informed consent. In fact, this issue raises another interesting point regarding informed consent. It is in this author’s opinion that the purpose of informed consent is not to focus on the procedure involved, but instead to focus on the patient. Requiring heightened descriptive requirements for a relatively low risk procedure, like an abortion, shifts the focus away from the patient and to the particulars of the procedure involved.

59. An example of this scenario would be the link between abortion and depression discussed in Justice Kennedy’s majority opinion and Justice Ginsberg’s dissent in Gonzales. Justice Kennedy concedes that no data shows that a link between abortion and depression has been discovered. See Gonzalez v. Carhart, 550 U.S. 124, 124 (2007). Yet, Justice Kennedy maintains that “[s]evere depression and loss of esteem can follow” an abortion. Id. Justice Ginsberg notes that no scientific studies have conclusively shown an increased risk of depression following an abortion. Id. at 184 n. 7 (Ginsberg, J., dissenting). Additionally, Justice Ginsberg highlights the paternalistic nature of the Court’s decision. Instead of allowing a woman to be informed of different procedures and their risks, the Court has denied one type of abortion procedure by upholding the partial-birth abortion ban based on a woman’s “fragile, emotional state.” Id. at 184. Justice Ginsberg argues that this kind of reasoning “reflects ancient notions about a women’s place in the family and under the Constitution ideas that have long since been discredited.” Id. at 185.

60. See generally Post, supra note 24.

61. Id.
1. Compelled Speech is Unconstitutional

To determine whether a violation of a person's freedom of speech has occurred, a court must first determine whether an action implicates the First Amendment. In *Wooley v. Maynard*, the Supreme Court addressed a New Hampshire law prohibiting people from covering up the state's motto "Live Free or Die" on their license plate. The Court considered whether this statute violated the right to freedom of speech. Maynard, a Jehovah's Witness, felt that the state's motto was contrary to the tenets of his religion. In overturning the law, the Court first determined whether First Amendment protections were implicated. The Supreme Court held that the "right of freedom of thought protected by the First Amendment against state action includes the right to speak freely and the right to refrain from speaking at all." Therefore, a state law that compels citizens to adopt a certain point of view necessarily implicates the First Amendment right not to speak.

Next, the Court considered whether the state had a compelling interest to justify the infringement on Maynard's First Amendment right. New Hampshire advanced two theories to justify the infringement: identification and "history, individualism, and state pride." The Supreme Court dismissed both of these arguments by stating that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such

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63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 707-15.
67. *Id.* at 714-15.
69. *Id.*
70. *Id.* at 716.
71. *Id.*
interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.\textsuperscript{72}

The Supreme Court addressed the issue of what constitutes compelled speech again in \textit{Pacific Gas & Electric Company v. Public Utilities Commission.}\textsuperscript{73} In this case, the Court determined whether a First Amendment violation existed when California required privately held utility companies to distribute disputed third-party speech in their billing envelopes.\textsuperscript{74} In ruling in favor of the utility company, Pacific Gas, the Supreme Court found that the company's First Amendment free speech right was implicated because "the choice to speak includes within it the choice of what not to say."\textsuperscript{75} Applying the second step in the \textit{Wooley} analysis, the Court held that California had not justified the intrusion on the company's First Amendment right because the requirement imposed on the utility companies was not a "narrowly tailored means of furthering a compelling state interest."\textsuperscript{76} Based on the two prongs of this analysis, the Court found that the law was unconstitutional.\textsuperscript{77}

2. Applying the Supreme Court's Compelled Speech Analysis to Informed Consent Provisions

The Court in \textit{Casey} briefly addressed whether or not Pennsylvania's informed consent law violated a physician's freedom of speech.\textsuperscript{78} It began by noting that informed consent laws do implicate this right.\textsuperscript{79} In so doing, the Court cited \textit{Wooley}'s proposition that freedom of speech includes the freedom not to speak.\textsuperscript{80} After a brief discussion, the Court ruled that the

\textsuperscript{72} \textit{Id.} at 717.

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.}
compelling state interest in regulating "part of the practice of medicine, subject to reasonable licensing and regulations by the state" was a permissible infringement of a physician's freedom of speech. This ruling raises three issues that may form the basis for challenging the constitutionality of informed consent provisions. First, Professor Robert Post labeled regulated physician speech "professional speech." In his analysis, professional speech is not afforded the same sort of protection as other forms of speech. In addition, he distinguishes this sort of speech from "physicians' speech that does not form part of the practice of medicine." This distinction may be crucial to upholding challenges to informed consent laws. Second, the Court in Casey did not say whether a compelling state interest exists when the state regulations are unreasonable. These provisions could be invalidated by arguing that informed consent provisions are an unreasonable regulation of physicians’ speech. Third, the Casey Court did not discuss whether laws not aimed at regulating the practice of medicine could still justify infringing upon a physician's freedom of speech. Although the Court has ruled on whether states may regulate physician speech through informed consent laws, the ruling is not dispositive. Questions regarding what constitutes "reasonable regulation" of physician speech remain unresolved and answers will not be reached until additional litigation occurs.

C. Applying the Woman/Physician Framework to Informed Consent Provisions

In order for courts to comprehensively address the constitutional issues raised by informed consent provisions, they must analyze these provisions from both the perspective of women's due process rights and physicians'
First Amendment right to free speech. Although the Court analyzed Pennsylvania’s informed consent provisions from both perspectives in Casey, it gave too cursory a review of a physician’s rights. Additionally, the lack of litigation concerning these provisions has caused the constitutional issues that are implicated in requiring physicians to communicate certain information to women to be underdeveloped.

In order to further cultivate these constitutional issues, courts must apply the following dual-perspective framework. When courts are faced with a constitutional challenge to an informed consent provision, they must analyze it from both the woman’s and physician’s perspective. First, while analyzing a woman’s due process rights, courts must look to see if the purpose or effect of the law places a substantial burden on a woman’s right to terminate her pregnancy.87 Additionally, in these types of cases, courts must ascertain whether the statements are truthful and non-misleading.88 Second, when analyzing a physician’s First Amendment free speech right, the courts must decide whether the physician’s speech is actually implicated.89 This inquiry involves determining whether the speech is “professional speech” that is not granted the same protection as other forms of speech.90 If it is not professional speech, the inquiry turns to whether a physician is unconstitutionally compelled to speak.91 Then, if the court does indeed determine that the physician’s speech rights are implicated, it must decide if the state is justified in regulating the speech.92 Recent informed consent provisions in South Dakota and the subsequent litigation concerning those provisions offer a chance to apply this framework.93


88. See, e.g., id. at 882.


90. See Post, supra note 24, at 952-53.

91. See, e.g., Maynard, 430 U.S. at 715-16.

92. Id.

93. See Part III, infra.
III. ANALYSIS: PLANNED PARENTHOOD V. ROUNDS

A. Background Information

Since 1993, South Dakota has required that any woman considering an abortion must be informed of the risks associated with the procedure and the gestational age of the fetus.\textsuperscript{94} A woman must also be told that the father may be liable for child support payments and that other assistance might be available to help her if she carries the pregnancy to term.\textsuperscript{95} In 2005, South Dakota expanded existing informed consent provisions\textsuperscript{96} by passing a new law that requires physicians to present the following information, in writing, to a woman seeking an abortion prior to the procedure:

(b) That the abortion will terminate the life of a whole, separate, unique, living human being;
(c) That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;
(d) That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated;
(e) A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including:
   (i) Depression and related psychological distress;
   (ii) Increased risk of suicide ideation and suicide.\textsuperscript{97}

Further, the law requires that the woman sign a document stating that the abortion provider has given her the required materials.\textsuperscript{98} The physician must also sign a document stating that the woman has received the materials, read over them, and as far as the physician can tell, understands them.\textsuperscript{99}

\textsuperscript{94} S.D. CODIFIED LAWS, § 34-23A-10.1 (2005) (setting forth the language of the 1993 statute in the "Historical and Statutory Notes" following the text of the amended statute).

\textsuperscript{95} Id.

\textsuperscript{96} Id.

\textsuperscript{97} Id. at §§ 34-23A-10.1(1)(b)-(e)(ii).

\textsuperscript{98} Id. at § 34-23A-10.1.

\textsuperscript{99} Id.
Prior to the enactment of this law, Planned Parenthood of Minnesota, North Dakota, and South Dakota brought an action against the Governor of South Dakota, Mike Rounds, to enjoin the act from taking effect.\textsuperscript{100} Planned Parenthood attacked the South Dakota provision as a violation of a physician's freedom of speech and an undue burden on a woman's right to choose.\textsuperscript{101} The District Court ruled in favor of Planned Parenthood and issued a preliminary injunction against the state.\textsuperscript{102} Thus, the law was prevented from taking effect.\textsuperscript{103} In so ruling, the Court held that this statute violated a physician's freedom of speech.\textsuperscript{104}

\textbf{B. The District Court's Ruling}

The District Court noted that while informed consent laws do implicate a physician's First Amendment right to free speech, this only occurs "as part of the practice of medicine, which is subject to reasonable licensing and regulation by the state."\textsuperscript{105} Following this line of reasoning, the District Court then distinguished the 2005 provisions from those considered under \textit{Casey}.\textsuperscript{106} Adhering to \textit{Casey}'s reasoning, the District Court held that a state may express a preference for childbirth, but may not require physicians to "espouse the State's ideology," as this would violate their First Amendment speech right.\textsuperscript{107} It further found that the law at issue would require physicians to express the State's view on an "unsettled medical, philosophical, theological, and scientific issue, that is, whether a fetus is a

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\textsuperscript{100} See generally Planned Parenthood Minn., N.D., S.D. v. Rounds, 375 F. Supp. 2d 881 (D.S.D. 2005), aff'd, 467 F.3d 716 (8th Cir. 2006), vacated, 530 F.3d 724 (8th Cir. 2008), modifying, No. 05 Civ. 04077 (D.S.D. 2009).

\textsuperscript{101} Id. at 885.

\textsuperscript{102} Id. at 889.

\textsuperscript{103} Id.

\textsuperscript{104} Id. at 885-88 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992)).

\textsuperscript{105} Id. at 885.

\textsuperscript{106} \textit{Rounds}, 375 F. Supp. 2d at 886.

\textsuperscript{107} Id. at 887.
\end{flushleft}
human being.” Additionally, the District Court found it troubling that, unlike the provisions at issue in Casey, the South Dakota statute did not allow a physician to dissociate himself from the required statements because the statute demands that he make sure the woman understands the information. If doctors were to dissociate themselves from the statements, they would not be able to fulfill the state’s mandate that requires them to ensure that women understand the information. The District Court concluded that “the informed consent provisions of the statute are unconstitutional compelled speech, rather than reasonable regulations of the medical profession.” Although the District Court correctly analyzed the South Dakota provisions from the physician’s perspective, they did not address whether a woman’s due process rights were also implicated.

C. The Eighth Circuit Panel’s Ruling

South Dakota appealed the District Court’s ruling, arguing that the statements presented scientific facts. Thus, it argued that they are constitutional as part of a state’s reasonable regulation of physician speech. The State’s first argument on appeal was that because the 2005 provisions referenced “human being” and this phrase had been defined elsewhere in the code as a “living member of the species Homo sapiens,” a medical and scientific consensus existed. The Eighth Circuit panel rejected this argument. The panel found that the term “human being” is a

108. Id.

109. Id.


111. Rounds, 375 F. Supp. 2d at 887.

112. Planned Parenthood Minn., N.D., S.D. v. Rounds, 467 F.3d 716, 723 (8th Cir. 2006), vacated, 530 F.3d 724 (8th Cir. 2008) (rehearing en banc), modifying, No. 05 Civ. 04077 (D.S.D. 2009).

113. Id.


115. Rounds, 467 F.3d at 723.
much broader concept than indicated by the statute's definition. Additionally, it found the provision requiring physicians to tell patients "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being" troubling under the standards outlined in *Roe*. As assessed by the circuit panel, the Supreme Court held in *Roe* that Texas could not forbid abortions from the moment of conception because "there was no medical, scientific, or moral consensus about when life begins, making the question of when a fetus or embryo becomes a human being one of individual conscience and belief." The panel agreed with the District Court that the phrase "whole, separate, unique, living human being" was the type of value judgment prohibited by *Roe* because it was an attempt by the state to settle the question of "when a fetus . . . becomes a human being."

South Dakota's second argument on appeal was that the State is justified in infringing upon a physician's First Amendment free speech right. To rebut this proposition, Planned Parenthood argued that the State was required to use the least burdensome means available to meet its interest in protecting maternal health and the potential for human life. The panel agreed with Planned Parenthood, finding that South Dakota failed to show that they employed the least burdensome means available. Additionally, South Dakota argued that the informed consent provisions could be construed as constitutional because the provisions permitted physicians to dissociate themselves from the statement. The panel disagreed with the State on this point. It adopted the District Court's finding that a

116. *Id.*

117. S.D. CODIFIED LAWS, § 34-23A-10.1(b) (2005); see *Rounds*, 467 F.3d at 724.


119. *Id.*

120. *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

121. *Id.*


123. *Id.* at 725.

physician’s ability to dissociate herself from the statement was hindered by the requirement that the physician certify a patient’s understanding of the materials presented to her.\textsuperscript{125}

The Court went further by distinguishing the provisions at issue in this case from those addressed in \textit{Casey}.\textsuperscript{126} The court found that the right of dissociation was only implicated under \textit{Casey} when the statements were generally accurate, even if they were potentially misleading to a given patient.\textsuperscript{127} Where, like the 2005 provisions, the required statement is subjective and political in nature, “the issue becomes not the message itself, but the physician’s right to control her own expression for ‘the choice to speak includes within it the choice of what not to say.’”\textsuperscript{128} The panel held that the 2005 provisions constituted compelled speech because the informed consent provisions required a physician to communicate the state’s ideology and provided criminal sanctions for failure to comply with the statute.\textsuperscript{129} Thus, they were an unconstitutional violation of a physician’s First Amendment right to free speech.\textsuperscript{130}

Unlike the District Court, the panel addressed whether the 2005 provisions violated a woman’s due process rights.\textsuperscript{131} Employing the undue burden framework from \textit{Casey}, it began by noting that a state may enact regulations involving the practice of medicine.\textsuperscript{132} The panel held that “[d]isclosure requirements which hinder a woman’s free and informed choice rather than assist it would violate \textit{Casey}.”\textsuperscript{133} The panel distinguished the South Dakota provisions from informed consent laws previously

\begin{flushright}
\textsuperscript{125} \textit{Id.}
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\textsuperscript{126} \textit{Id. at 726.}
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\textsuperscript{127} \textit{Id.}
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\textsuperscript{128} \textit{Id. at 725} (quoting \textit{Pac. Gas & Elec. Co.}, 475 U.S. at 16).
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\textsuperscript{129} \textit{Id. at 724-25.}
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\textsuperscript{130} \textit{Rounds}, 467 F.3d at 727-28.
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\textsuperscript{131} \textit{Id. at 726.}
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\textsuperscript{132} \textit{Id.} (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876-77 (1992)).
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\textsuperscript{133} \textit{Id.}
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considered by other courts, including those laws considered in *Casey*. The Court found it dispositive that a woman, in a vulnerable state, was forced to read page after page of content indicating the "state’s moral and philosophical objections to the procedure." This situation, the panel noted, was different from that in *Casey*, where a woman was required to read only factual information. Its conclusion stated that the provisions "are far more onerous than what federal courts have previously reviewed, and there is at least a 'fair chance' that they pose an undue burden."

**D. Rehearing En Banc**

On April 11, 2007, the Eighth Circuit elected to grant a rehearing en banc to reconsider the standard a moving party must meet in order for the court to issue a preliminary injunction. Over a year later, on June 27, 2008, the en banc court reversed the Eighth Circuit panel's decision, and ruled in favor of South Dakota. Central to this ruling was the statutory definition of "human being." The en banc court began by noting that the state cannot compel a physician to provide the state's ideological position. However, "it can use its regulatory authority to require a physician to 'provide truthful, non-misleading information relevant to a patient's decision to have an abortion.'" The en banc court seemed to concede that, read in isolation, the 2005 provisions may convey the state's ideological position.

134. *Id.* at 726-27.
135. *Id.* at 727.
136. *Rounds*, 467 F.3d at 726.
137. *Id.* at 727.
139. *Id.* at 738.
140. *Id.* at 735.
141. *Id.* at 733.
142. *Id.* at 734-35.
143. *Id.* at 735.
However, it stated that their role is to “examine the disclosure actually mandated, not one phrase in isolation.” Therefore, the en banc court rejected Planned Parenthood’s assertion that a woman would interpret the term “human being” more broadly than what is mandated by the code. The en banc court asserted that when a statute defines a term, its definition controls. Accordingly, the informed consent provisions were meant to be read “in concert” with the statutory definition of “human being.” When read together, the narrow meaning of “human being” becomes apparent and thus would not mislead women.

To emphasize that the mandated statement was truthful, the en banc court used Planned Parenthood’s own affidavit that indicated that the scientific and factual way to describe a fetus is by stating that it is a “developing organism of the species Homo Sapiens.” The en banc court found that this statement supported the “biological underpinnings” advanced by the state in requiring the disclosures. Having found the statement to be truthful and non-misleading, the court found that Planned Parenthood had not met its burden of showing that the mandated statement represented unconstitutionally compelled speech.

IV. THE EIGHTH CIRCUIT DID NOT APPLY THE APPROPRIATE FRAMEWORK FOR ANALYZING THE INFORMED CONSENT PROVISIONS AT ISSUE

In reaching its decision, the Eighth Circuit en banc court failed to employ the appropriate framework for determining the constitutionality of South Dakota’s informed consent provisions. One issue that was not addressed by

144. Rounds, 530 F.3d at 735.

145. Id. at 735, 737.


147. Id. at 735-36.

148. Id.

149. Id. at 736.

150. Rounds, 467 F.3d at 736.

151. Id. at 737-38.
the circuit court was whether the mandated statement presents an undue burden on a woman's due process rights. This issue was not considered by the District Court either. While it may have been appropriate to not raise the issue en banc, Judge Murphy was correct in his dissent that the en banc court "depart[ed] from established practice by not remanding for the district court to have the opportunity to apply the new standard [for granting a preliminary injunction] to the constitutional issues raised by Planned Parenthood." On remand, the District Court could have addressed the additional constitutional issues raised by Planned Parenthood, including: (1) that the provisions violate a woman's due process rights; and (2) that the other sections of the 2005 provisions violate a physician's First Amendment right to free speech.

Had the case been remanded, it is possible that the court would have found that South Dakota's informed consent provisions placed an undue burden on a woman's due process rights. When analyzing whether an undue burden exists, courts must determine whether a substantial obstacle has encumbered a woman's right of access to an abortion. While it is not exactly clear how false and misleading information would be treated under the substantial obstacle test, this case presents a good opportunity to clarify the issue. Judge Murphy's dissent argues that the "apparent intent and probable effect [of the informed consent provisions] is to place substantial obstacles in the way of a woman . . ." seeking an abortion. Stating that a woman seeking an abortion is terminating a "whole, separate, unique, living

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152. *See id.*


154. *Rounds, 530 F.3d at 739 (Murphy, J., dissenting).*

155. *See supra Part II.A.1.*

156. Use of the words "may be permissible" when referring to "truthful, non-misleading statements" in *Casey* seems to confirm that false, misleading statements may not be permissible. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992). Since permissibility of provisions is judged against the undue burden standard, the use of the word "may" suggests that when the issue may not be permissible, that statement has been deemed an undue burden.

157. *Rounds, 530 F.3d at 747 (Murphy, J., dissenting).*
human being” violates the central tenet of liberty as defined in *Casey*. This definition provides that “[a]t the heart of liberty is the right to define one’s own concept of existence, or meaning, of the universe, and of the mystery of human life.” By mandating this definition of “human being,” the state inevitably defines the concept of “the mystery of human life,” and deprives an individual of the right to decide this concept for herself; a right which is protected by the Due Process Clause of the Fourteenth Amendment.

In addition to the en banc court’s failure to account for due process violations, they also neglected to sufficiently review the First Amendment claim of the physician. It placed particular importance on the fact that the term “human being” as used in Section 7(1)(b) was previously defined by the South Dakota legislature. Thus, the initial definition was controlling. However, the dissent rightly points out that this definition of “human being” should be inapplicable in the context of abortion. In the debate over the legality of abortion, the definition of what constitutes a human being is often the linchpin of each argument. As the dissent states, “the term ‘human being’ has an overwhelmingly subjective, normative meaning, in some sense encompassing the whole philosophical debate about the procedure.”

Requiring physicians to use such a politically, emotionally, and spiritually charged term in the context of a doctor-patient

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159. *Casey*, 505 U.S. at 851.

160. *Id*. The dissent points out other grounds for due process violations including void for vagueness, and an unconstitutional interference in doctor patient privacy. *Rounds*, 530 F.3d at 748-49. These issues, not addressed by either the District Court or the Eighth Circuit en banc, would have been addressed had the court remanded for further proceedings consistent with the new standard they enunciated for determining when a preliminary injunction would be granted.

161. See *Rounds*, 530 F.3d at 733-38.

162. *Id*. at 735-36.

163. See supra Part III.D.

164. *Rounds*, 530 F.3d at 742 (Murphy, J., dissenting).

165. *Id*.

166. *Id*. 

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relationship goes beyond professional speech and crosses over to compelled speech that does not form "part of the practice of medicine."\textsuperscript{167}

The dissent then questions whether the definition of "human being," as defined by the legislature, is constitutional.\textsuperscript{168} Since the majority finds the constitutionality of Section 7(1)(b) to be dependent on the legislature's definition of "human being" in Section 8(4), it is necessary to also determine whether Section 8(4) itself is constitutional.\textsuperscript{169} The dissent argues that the definition of "human being" found in Section 8(4) is not constitutional.\textsuperscript{170} This section defines "human being" as "an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation."\textsuperscript{171} The dissent, citing \textit{Roe v. Wade}, also points out that "a state may not adopt one theory of the beginning of life."\textsuperscript{172} By adopting the "metaphysical viewpoint that a 'human being' is 'living . . . from fertilization,'" the state has explicitly adopted a theory of the beginning of life that is unconstitutional under \textit{Roe}.\textsuperscript{173}

The dissent further points out that the issue in this case was not merely the use of the phrase "human being" but the whole phrase in Section 7(1)(b).\textsuperscript{174} The terms "separate" and "whole" are also included in the language of the

\textsuperscript{167} See Post, supra note 24. See also, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992). The dissent in the Eighth Circuit en banc court points out that "[t]he philosophical or religious question of when a human life comes into existence is distinct from the scientific question of whether a fetus is biologically a member of the species." \textit{Rounds}, 530 F.3d at 747 (Murphy, J., dissenting). This is precisely why the term "human being" as used in the South Dakota statute may not be constitutional under \textit{Casey}’s ruling that allows states to compel speech which forms “part of the practice of medicine.” \textit{Casey}, 505 U.S. at 884.

\textsuperscript{168} \textit{Rounds}, 530 F.3d at 742 (Murphy, J., dissenting).

\textsuperscript{169} \textit{Id.} at 742-46.

\textsuperscript{170} \textit{Id.} at 745.


\textsuperscript{172} \textit{Rounds}, 530 F.3d at 745 (Murphy, J., dissenting).

\textsuperscript{173} \textit{Id.} at 745-46.

\textsuperscript{174} See \textit{id.} at 744.
statute.\textsuperscript{175} Based on their everyday meaning, each of these words requires a physician to provide a non-medical and non-scientific statement.\textsuperscript{176} The word “separate” conveys the idea of detachment, or being disconnected.\textsuperscript{177} To use “separate” when describing a fetus would be incorrect since the fetus is attached to the woman by the umbilical cord.\textsuperscript{178} Additionally, the word “whole” conveys a sense of completeness that would not be appropriate for a still-developing fetus.\textsuperscript{179} While the term “human being” may be defined by statute and have a biological meaning, the other words preceding “human being” do not have such a meaning.\textsuperscript{180} Requiring physicians to make non-medical and non-scientific assertions clearly goes beyond the reasonable regulation requirement as defined in \textit{Casey}.\textsuperscript{181} The statement mandated by the statute represents unconstitutionally compelled speech. Thus, the decision reached by the Eighth Circuit en banc court was incorrect.

Although the en banc court addressed a physician’s First Amendment right of free speech,\textsuperscript{182} they failed to do so in a thorough manner. The court focused their analysis too narrowly on the statutory definition of “human being” in an effort to uphold the informed consent provisions.\textsuperscript{183} Additionally, the court did not address whether the definition is constitutional.\textsuperscript{184} In failing to address the constitutionality of the phrase as defined in Section 7(1)(b), the en banc court’s analysis of a physician’s First Amendment rights was incomplete.\textsuperscript{185} Furthermore, the en banc court failed

\begin{itemize}
  \item S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (Supp. 2009).
  \item \textit{Rounds}, 530 F.3d at 742 (Murphy, J., dissenting).
  \item \textit{Id.} at 744.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{Id.} at 741-42.
  \item \textit{See Rounds}, 530 F.3d at 733-48.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{Id.} at 744 (Murphy, J., dissenting).
\end{itemize}
to apply the first prong of the comprehensive framework test outlined in this Note. The test states that informed consent provisions must take into account both a woman’s due process rights and a physician’s First Amendment right to free speech. In failing to perform the first prong of the comprehensive framework test, the en banc court’s ruling in the case was incomplete. Had the en banc court followed precedent and remanded the case to the District Court for application of the new standard for granting preliminary injunctions, the District Court could have comprehensively ruled on all the constitutional issues raised by South Dakota’s informed consent provisions.\footnote{On August 20, 2009, the District Court released the most recent opinion in the case. Planned Parenthood Minn., N.D., S.D. v. Rounds, No. 05-04077, 1 (D.S.D. 2009). The en banc court had remanded the case to the district court for consideration of outstanding issues. Rounds, 530 F.3d at 738. Both Planned Parenthood and the South Dakota Governor and Attorney General filed Motions for Summary Judgment. Rounds, No. 05-4077 at 2. Planned Parenthood argued that the remaining sections of South Dakota’s informed consent provision violated the Constitution. Id. at 1-2. The Governor and Attorney General of South Dakota argued that the remaining sections of the state’s informed consent provision did not violate the Constitution. Id. In ruling that parts of the informed consent provision were constitutional and parts were not, the District Court relied on the truthful, non-misleading standard from Casey and the void for vagueness doctrine. Id. at 6, 12, 17, 22, 33. As this Note has argued, in order for a court to comprehensively decide whether informed consent provisions are constitutional, the court needs to analyze the provisions from both the woman’s and the physician’s perspective. In this case, the District Court evaluated the constitutionality of the provisions from the woman’s perspective by employing the truthful, non-misleading standard. See, e.g., id. at 12. However, the court completely ignored the physician’s perspective. It is unclear whether this is because Planned Parenthood failed to include it in their Motion for Summary Judgment or because the court failed to include the physician’s perspective in their analysis. What is clear is that the court ignored a major aspect of the analysis.}

V. CONCLUSION

When analyzing informed consent provisions, courts should first determine whether the provisions place an undue burden on a woman’s due process rights. Second, they should determine whether the provisions are an unconstitutional violation of a physician’s First Amendment free speech right. Only after analyzing the informed consent provisions through this framework can the provisions be deemed constitutional. In Planned Parenthood v. Rounds, the District Court was correct in finding that the provisions violated a physician’s First Amendment right to free speech. Additionally, the Eighth Circuit panel decision was correct in finding that the provisions further violated a woman’s due process rights. By confining their analysis to whether a particular part of the 2005 provisions violated a
physician’s First Amendment free speech right and not remanding the issue to the District Court for reanalysis under a different standard, the en banc court failed to address important constitutional issues that affect the citizens of their circuit.