Who Decides--The Next Abortion Issue: A Discussion of Fathers' Rights

Maria F. Walters
West Virginia University College of Law

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I. INTRODUCTION

In 1973, in the landmark case of Roe v. Wade, the United States Supreme Court established that a mother’s right to privacy extends to her decision to terminate her pregnancy. In reaching its decision, the Court expressly refused to discuss “the father’s rights, if any exist in the constitutional context, in the abortion decision.” In the past, however, the Court has recognized that fathers have important constitutional rights concerning procreation, privacy, and parenthood. There is an apparent conflict between these earlier Supreme Court decisions and the refusal by the Roe Court to discuss the

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2. Id. at 165 n.67.
father's rights in the abortion decision. The Court should address this issue because it is an on-going controversy.\(^6\)

The scope of this article concerns a father's notification and prohibition\(^8\) rights in the decision of the mother to abort their child. In order to assess the extent of these rights, the author will analyze the following: 1) The constitutional rights of the mother and father recognized before \textit{Roe}; 2) the landmark case of \textit{Roe v. Wade};\(^9\) 3) how courts have decided the issues in the past; 4) the new approach fathers are taking today to challenge an abortion; 5) a prediction of how the West Virginia Supreme Court of Appeals would approach a father's right to be notified of or to prohibit the decision to abort a fetus he fathered; and 6) the possible effect the present makeup of the United States Supreme Court might have upon these issues.

\section{II. The Constitutional Rights Involved}

\subsection{A. Decisions Prior to \textit{Roe v. Wade}}

Long before \textit{Roe v. Wade},\(^10\) the United States Supreme Court began to recognize that individuals have privacy rights as well as certain other privacy-related interests. For example, in the nineteenth century the Supreme Court declared that the fourth\(^11\) and fifth\(^12\) amendments of the Constitution protected "the sanctity of a man's home and the privacies of life"\(^13\) from governmental intrusion. Later,

\begin{itemize}
  \item \textit{Roe}, 410 U.S. 113.
  \item \textit{Id.}
  \item "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. \textit{Constr.} amend. IV.
  \item "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. \textit{Constr.} amend. V.
  \item Boyd \textit{v. United States}, 116 U.S. 616, 630 (1886).
\end{itemize}

6. For example, some members of the National Right to Life Committee (pro-life) and the American Civil Liberties Union Reproductive Freedom Project (pro-choice) say that such cases asserting fathers' rights are likely to be a "new battleground on abortion rights." See N.Y. \textit{Times}, April 14, 1988, § A at 26, col. 1.

7. The author assumes that the spouse is the father of the unborn child, although the reader should be aware that this may not always be the view of a particular legislature.

8. The author uses the words "consent," "veto," and "prohibition" interchangeably. The right to consent is, in effect, the right to veto or to prohibit the abortion.


10. \textit{Id.}

11. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. \textit{Constr.} amend. IV.

12. "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. \textit{Constr.} amend. V.

in the early twentieth century, the Court recognized that the rights guaranteed by the fourteenth amendment\textsuperscript{14} included the right "to marry, establish a home and bring up children . . . ."\textsuperscript{15} These holdings were the forerunners of the "right to privacy" which the Court expressly recognized in \textit{Griswold v. Connecticut}.

In 1965, the \textit{Griswold} Court struck down a state statute that prohibited the use and distribution of information concerning contraceptives.\textsuperscript{17} In doing so, the Court recognized for the first time the existence of certain fundamental "liberties" or "zones" of privacy that are derived from the total scope of rights expressed in the Bill of Rights and the fourteenth amendment.\textsuperscript{18} The Court held that, although the right to privacy is not specifically set forth in the Constitution, its existence is necessary to make the express guarantees therein meaningful.\textsuperscript{19}

The \textit{Griswold} Court found that the zones of privacy are included in the following: the right to association ensured by the first amendment;\textsuperscript{20} the third amendment prohibition of the quartering of soldiers "in any house" in time of peace without the owner's consent; the fourth amendment right to be free from unreasonable searches and seizures;\textsuperscript{21} the fifth amendment self-incrimination clause; and the ninth amendment\textsuperscript{22} provision that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{14} U.S. \textit{ Const.} amend. XIV, § 1:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
\item \textsuperscript{15} \textit{Meyer}, 262 U.S. at 399.
\item \textsuperscript{16} \textit{Griswold}, 381 U.S. 479.
\item \textsuperscript{17} \textit{Conn. Gen. Stat.} §§ 53-32 (Rev. 1958) (providing that any person who uses any drug or other instrument for the purposes of preventing conception shall be fined or imprisoned).
\item \textsuperscript{18} \textit{Griswold}, 381 U.S. at 485.
\item \textsuperscript{19} \textit{id.} at 483.
\item \textsuperscript{20} \textit{id.} (citing NAACP v. \textit{Button}, 371 U.S. 415, 430-31 (1963)).
\item \textsuperscript{21} \textit{id.} (citing \textit{Mapp} v. \textit{Ohio}, 367 U.S. 643, 656 (1961); \textit{Boyd}, 116 U.S. at 630).
\item \textsuperscript{22} \textit{Griswold}, 381 U.S. at 491 (Goldberg, J., concurring) (ninth amendment supports the view that the "liberty" protected by fifth and fourteenth amendments is not restricted to rights specifically mentioned in the first eight amendments).
\item \textsuperscript{23} \textit{id.} at 484.
\end{itemize}
After *Griswold*, the Supreme Court again recognized an individual's privacy interests in *Eisenstadt v. Baird*.24 There the Court invalidated a Massachusetts statute which prohibited the distribution of any contraceptive drug or device to unmarried persons as a violation of the equal protection clause. The Court's reasoning emphasized the freedom of an individual to decide whether to bear or beget a child:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.25

The Court also has recognized the right of an individual to marry a member of another race. In *Loving v. Virginia*,26 a Virginia statute restricted the freedom of whites to marry members of other races. Relying on the fourteenth amendment, the Supreme Court held that this right resided with the individual and could not be infringed upon by the state; therefore, the statute was unconstitutional.27

In addition to the pre-*Roe* decisions mentioned above, which recognized the rights of individuals, the Supreme Court has decided other cases which recognize the rights of a father specifically. For example, in *Skinner v. Oklahoma*,28 the Court recognized a man's right to procreate. There, a statute which authorized the sterilization of habitual criminals was held to be a violation of the equal protection clause.29 Justice Douglas, delivering the opinion of the Court, emphasized that the statute deprived an individual of a right which is basic to the perpetuation of a race, the right to have offspring.30

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25. *Id.* at 453 (emphasis in original).
27. *Id.* at 12.
29. *Id.* at 541. The Oklahoma statute was unconstitutional because it denied equal protection of the law to certain habitual criminals by providing for their sterilization but not for that of other criminals who committed the same quality of offense.
30. *Id.* at 536.
The Court reasoned that "marriage and procreation are fundamental to the very existence and survival of the race."31

Another father's right, the right to parenthood, was specifically recognized by the Court in Stanley v. Illinois.32 The Court invalidated an Illinois statute under which the children of unwed fathers automatically became wards of the state upon the death of the mother. There, the Court acknowledged "[t]he interest of a parent in the companionship, care, custody, and management of his or her children. . . ."33

The Supreme Court, up to this point in time, had acknowledged privacy rights of both men and women. However, the Court had not yet decided if a woman's right to privacy extended to the decision to terminate her pregnancy. Nevertheless, lower federal and state courts were addressing the abortion issue. Some courts extended the "zones" of privacy recognized in Griswold to include the right of a mother, in her early stages of pregnancy, to decide whether to bear the child.34 In Babbitz v. McCann,35 a Wisconsin District Court held that the ninth amendment36 protected this right. The court invalidated the abortion statute, which only legalized the procedure when "necessary . . . to save the life of the mother."37 It declared the statute unconstitutional on the grounds that recent Supreme Court decisions38 concerning the ninth amendment could not allow a state to deprive a woman of her private decision of whether to bear her "unquickened child."39

In United States v. Vuitch,40 the United States District Court for the District of Columbia invalidated an abortion statute which pro-

31. Id. at 541.
32. Stanley, 405 U.S. 645.
33. Id. at 651.
35. Babbitz, 310 F. Supp. 293.
36. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
37. Babbitz, 310 F. Supp. at 297-98. (The court did not invalidate the statute on grounds of vagueness, rather it invalidated it as violative of the ninth amendment).
38. Id. at 299-300 (citing Supreme Court decisions such as Meyer, 262 U.S. 390, Skinner, 316 U.S. 535, & Griswold, 381 U.S. 479).
hibited abortion unless performed "for the preservation of the mother's life or health." The court held the statute unconstitutional for vagueness and for undue infringement upon the mother's right to privacy. The district judge noted that previous Supreme Court decisions indicated that a mother's right to privacy extended to family, marriage, and sex matters and may include the right to terminate an unwanted child, at least in the early stages of pregnancy. Although the vagueness issue was reversed on appeal, the United States Supreme Court later noted that it did interpret the statute as one which favored abortion in specific circumstances.

The lower courts had begun to expand the mother's privacy rights without addressing the privacy rights of the father. However, the United States Supreme Court had not yet decided whether privacy rights were involved in the abortion decision and, if so, whose rights were involved—those of the mother or those of the mother and the father.

B. Roe v. Wade

In 1973, the United States Supreme Court decided the landmark case of Roe v. Wade. An unmarried pregnant woman brought a class action challenging the constitutionality of Texas criminal abortion statutes. The woman claimed that the Texas statutes were un-

41. "Whoever . . . produces . . . an abortion . . . on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned. . . ." D.C. CODE ANN. §§ 22-201 (1973).
42. Vuitch, 305 F. Supp. at 1035.
43. Vuitch, 402 U.S. at 70 (discussion of Congressional judgment that women should be able to obtain abortions needed for the preservation of their lives or health).
44. Roe, 410 U.S. at 158-59 (discussion that the word "person," as used in the fourteenth amendment, does not include the "unborn"). The Court stated, "Indeed, our decision in United States v. Vuitch . . . inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to fourteenth amendment protection." Id. (citations omitted).
45. See supra notes 34-42 and accompanying text.
47. TEX. PENAL CODE ANN. arts. 1191-94, 1196 (Vernon 1961). These statutes provided in part: If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary. . . . By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.
Id. at art. 1191.
constitutionally vague and that they infringed upon her right of personal privacy, as protected by the first, fourth, fifth, ninth, and fourteenth amendments. Counsel for the state argued that life begins at conception and that the state, therefore, had a compelling interest in protecting life from and after conception. The district court held that the right to choose whether to have children was protected by the ninth amendment and that the statutes were unconstitutionally vague. However, that court refused the grant of an injunction against their continued enforcement.

On appeal, the United States Supreme Court affirmed the decision of the lower court by a seven to two majority. Justice Blackmun delivered the opinion of the Court. Based upon an analysis of the right to privacy, the Court held that a mother's privacy right is broad enough to encompass her decision whether or not to terminate her pregnancy. Here, as in Griswold, the Court recognized that the Constitution does not explicitly mention a right of privacy; however, a guarantee of certain zones of privacy does exist.

The Court found that the roots of these zones of privacy are in the first amendment, in the fourth and fifth amendments, in the penumbra of the Bill of Rights, and in the concept of liberty guaranteed by the first section of the fourteenth amendment. However, "only personal rights, those that can be deemed 'fundamental' or 'implicit' in the concept of liberty," are included in this guarantee

48. Roe, 410 U.S. at 120.
49. Id. at 159.
51. Id. (abstention was warranted with respect to the requests for an injunction).
52. Roe, 410 U.S. at 114. (The mother appealed the denial of injunctive relief, and the Supreme Court granted the appeal because the arguments as to both injunctive and declaratory relief were necessarily identical.).
53. Id. (Justice White and Justice Rehnquist dissented).
54. Id. at 152.
55. Id. (citing Griswold, 381 U.S. at 483).
56. Roe, 410 U.S. at 152 (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)).
57. Id. (citing Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Boyd, 116 U.S. at 630).
58. Id.
59. Id. (citing Meyer, 262 U.S. at 399).
of personal privacy. The Court further noted that past decisions make it clear that the right has some application to activities related to marriage,\textsuperscript{61} procreation,\textsuperscript{62} contraception,\textsuperscript{63} family relationships,\textsuperscript{64} and child rearing.\textsuperscript{65}

The Court also emphasized the specific and direct harm that the state would impose upon women if it denied the abortion decision altogether. For example, maternity could force upon the mother a distressful life and future, the problems of bringing a child into a family already unable to care for it, or the stigma of unwed motherhood.\textsuperscript{66}

However, the Court also recognized that state regulation is appropriate in some instances. A state may assert the important interests of safeguarding health, maintaining medical standards, and protecting potential life.\textsuperscript{67} The Court refused to resolve the question of when life begins,\textsuperscript{68} but noted that a "person" as used in the fourteenth amendment, does not include the unborn.\textsuperscript{69} Nevertheless, these state interests, at some point in the pregnancy, become compelling.\textsuperscript{70} As a result, the privacy right involved is not absolute.\textsuperscript{71}

The Court established the "trimester" system to balance the mother's privacy rights against these state interests.\textsuperscript{72} That is, prior to the end of the first trimester of pregnancy, the state may not interfere with or regulate the decision made by the mother and her physician that the pregnancy should be terminated. During the second trimester, the time from and after the first trimester until the

\textsuperscript{61} Id. (citing Loving, 388 U.S. at 12).
\textsuperscript{62} Id. (citing Skinner, 316 U.S. at 541-42).
\textsuperscript{63} Id. (citing Eisenstadt, 405 U.S. at 453-54).
\textsuperscript{64} Roe, 410 U.S. at 153 (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
\textsuperscript{65} Id. (citing Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)).
\textsuperscript{66} Id. at 152.
\textsuperscript{67} Id. at 154.
\textsuperscript{68} The Court stated, "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." Id. at 159.
\textsuperscript{69} Roe, 410 U.S. at 158.
\textsuperscript{70} Id. at 155. Regulation may only be justified by a compelling state interest where fundamental rights are involved).
\textsuperscript{71} Id. at 154.
\textsuperscript{72} Id. at 163-64.
fetus becomes viable, the state may regulate the abortion procedure only to the extent that such regulation relates to the preservation and protection of human health. From and after viability (the third trimester), the state may prohibit abortions altogether except those necessary to preserve the life or health of the mother.

Thus, the "compelling point," in light of medical knowledge at the time of the Court's decision, was determined to be approximately the end of the first trimester. At this point, the Court acknowledged the legality of state regulation of the abortion procedure which reasonably relates to the preservation and protection of maternal health. At the end of the second trimester, the Court acknowledged regulation with respect to the state's interest in potential life. This point is important because the fetus then has the presumed potential of meaningful life outside the mother's womb.

The Texas statutes made no distinction between abortions performed early in the pregnancy and those performed later. They further limited abortion to instances where the procedure was necessary to save the mother's life. The Roe Court found that the statute was unconstitutional on the grounds that it was unduly prohibitive and unreasonably interfered with the mother's right to decide whether to abort or carry the child to term.

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73. The Court defined viability as when the fetus is presumed to have the capability of meaningful life outside the mother's womb, which occurs approximately at the end of the second trimester. "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Id. at 160.

74. Note that the Court does not say "abortion decision" during the second trimester. However, during the third trimester, the Court held that the state may prohibit abortions altogether, thereby affecting the abortion decision. Roe, 410 U.S. at 114. Perhaps this leaves room for the father to assert his constitutional rights during the third trimester.

75. Id. at 163.

76. Id. (e.g., requirements as to the qualifications of person who performs the abortion; as to the licensure of that person; as to the facility where the abortion is to be performed; and, as to the licensure of that facility).

77. Id. at 163-64. The Court stated that "If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." Id.

78. Id. at 163; See also Reidinger, Will Roe v. Wade Be Overruled?, 74 A.B.A. J. 68-69 (1988) (discussing that the point of viability is not moving backward).

79. Roe, 410 U.S. at 164.

80. Id. at 166.
Roe v. Wade stands today as law, holding that a mother's privacy rights encompass her decision whether or not to terminate her pregnancy. However, Skinner v. Oklahoma,81 Stanley v. Illinois,82 and Griswold v. Connecticut83 also stand today as law, holding that a man has constitutionally protected rights in the areas of procreation, parenthood, and privacy. The Roe decision appears to conflict with these earlier father's rights recognized by the Court. How did the Court address this conflict? It stated in a footnote of the Roe opinion that:

[n]either in this opinion nor in Doe v. Bolton . . . do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances . . . . [W]e need not now decide whether provisions of this kind are constitutional.84

Although the Roe Court chose not to discuss this issue, the father's rights have now become, fifteen years later, the next question in the abortion debate.

III. THE STATE OF THE LAW AFTER Roe v. Wade

A. Danforth and Other Holdings: The Father's Right to Consent/Veto

Constitutional challenges to abortion statutes which required the prior written consent of the spouse were frequent after Roe v. Wade.85 However, since that decision, the Supreme Court has spoken only once on a father's rights, in the case of Planned Parenthood of

82. Stanley, 405 U.S. 645.
83. Griswold, 381 U.S. 479.
84. Roe, 410 U.S. at 165 n.67 (citations omitted).
Central Missouri v. Danforth. Although Danforth involved other issues, its importance with regard to a father's rights involved a constitutional attack on a Missouri statute. This statute required the prior written consent of the spouse of the woman seeking an abortion. The appellees contended that marriage is an institution (implying that the participants in the marriage are co-equals) and that any changes in the family status must be made jointly. They also argued that the legislature had enacted the provision for the betterment of the state as a whole. The appellants argued that the statute effectively afforded the spouse a unilateral right to prevent or veto the decision to abort.

The Court agreed that "[t]he State cannot delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." It went on to recognize that the mother, too, acts unilaterally when she, with the approval of her physician, decides to terminate her pregnancy. However, the Court reasoned thus:

The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the [one] more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.

87. The statute provided in part that "No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except: . . . (3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother." Act of June 14, 1974, 1974 Mo. Laws 809 (codified as amended at Mo. Ann. Stat. §§ 188.010-.085 (Vernon 1983)).
88. Danforth, 428 U.S. at 57. Appellees were the Attorney General of Missouri and the Circuit Attorney of the city of St. Louis.
89. Id. at 67-68.
90. Id.
91. Id. at 56-57. Appellants were Planned Parenthood of Central Missouri, a not-for-profit corporation which performs abortions, and two licensed physicians who also performed abortions.
92. Danforth, 428 U.S. at 68-69 (appellants emphasized that the spouse may or may not have been the father of the unborn child).
93. "Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." Id. at 69.
94. Id. at 71.
95. Id.
Thus, the Court declared the consent provision unconstitutional.

Justice White, joined by Chief Justice Burger and Justice Rehnquist, dissented, stating that:

[a] father's interest in having a child—perhaps his only child—may be unmatched by any other interest in his life. [It] is truly surprising that the majority finds in the [Constitution] a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child. Such a rule cannot be found there, nor can it be found in Roe v. Wade. 96

In a footnote to the majority opinion, Justice Blackmun addressed the arguments of the dissent:

The dissenting opinion of our Brother White appears to overlook the implications of this statement upon the issue whether § 3(3) is constitutional. This section does much more than insure that the husband participate . . . . [T]he State instead has determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part . . . . [T]he State, accordingly, has granted him the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her Pregnancy. This State determination not only may discourage the consultation that might normally be expected to precede a major decision affecting the marital couple, but also, and more importantly, the State has interposed an absolute obstacle to a woman's decision that Roe held to be constitutionally protected from such interference. 97

One argument recently made with reference to these two passages was that the dissent condemned the majority for stating a "per se" rule that the mother's rights in the abortion decision always outweigh those of the father. 98 However, the majority denied any "per se" finding and replied that it was this particular statute which was unconstitutional because it gave a unilateral power of veto to the spouse in all instances. 99 Therefore, the majority left open other possibilities for finding rights of the father, such as determination on a case-by-case basis.

96. Danforth, 428 U.S. at 93 (White, J., dissenting).
97. Id. at 70 n.11.
After Danforth, a number of lower courts invalidated statutorily imposed consent provisions. In Wynn v. Scott, the United States District Court for the Northern District of Illinois struck down an Illinois statute which contained a spousal consent provision, reasoning that if the abortion regulation was identical or similar to a provision before the Supreme Court in one of its abortion cases, then the holding of the Court would be directly applicable and further analysis would be unnecessary. This decision illustrates the approach taken by many courts that rule in accord with Roe and Danforth, find that a mother has this right, and refuse to address the rights of the father. However, in light of recent cases in the lower courts where fathers are asserting their rights, it appears that some court must eventually address the father’s rights in the abortion decision.

B. The Right To Be Notified

Although the Supreme Court has not addressed the issue of whether a state may compel a mother to notify the father of a decision to have an abortion, the Court addressed a similar issue


102. The statute provided in part: “(3) With the written consent of the woman’s spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life or health of the mother.” Ill. ANN. STAT. ch. 38 § 81-23(3) (Smith-Hurd Supp. 1977).

103. Wynn, 449 F. Supp. at 1307 (if the provision is not significantly similar to one passed on by the Supreme Court, the court will analyze and apply relevant constitutional principles. Regulations which interfere with a mother’s right to privacy must be narrowly drawn to meet legitimate state interests.).

in *H. L. v. Matheson*.105 *Matheson* involved a statute which required that a minor notify her parents of a pending abortion. In such a case, where the minor is immature or incompetent, the Court declared that the notification requirement is constitutionally valid.106 The Court found that the notification requirement served a significant state interest by providing an opportunity for parents to supply essential medical and psychological information to a physician.107 Its reasoning appears to be in accord with the general idea that parents should have the right to protect minor children.

Constitutional challenges to abortion statutes requiring spousal notification have been common in state courts, and, like challenges to statutes requiring spousal consent, most have been successful.108 To succeed, the plaintiff must prove that the statute unjustifiably burdens or directly interferes with the pregnancy termination decision.109 If the challenger establishes that it is a "direct interference" with the abortion decision or imposes restrictions that did not already exist,"110 the state must then prove that the statute is justified by a compelling state interest.111 To determine if a state interest is compelling, the court considers both the legitimacy of the interest and the existence of a rational relationship between the interest involved and the means chosen to advance it.112

The most common state interests that are offered to justify spousal notification statutes include the following: the promotion of marital harmony;113 "the father's interest in the procreative potential of

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106. *Id.* at 409-10.
107. *Id.*
110. *Scheinberg*, 659 F.2d at 482 (quoting Charles v. Carey, 627 F.2d 772, 777 (7th Cir. 1980)).
111. *Scheinberg*, 659 F.2d at 482.
the marriage;'114 and protection of the father’s interest in the potential life of the fetus.115 Although states have asserted these interests, the courts have generally declined to find any of them compelling. For example, the promotion of marital harmony has not been a sufficiently compelling state interest. On the contrary, some courts believe the notification requirement may even promote marital disharmony.116 Similarly, the father’s interest in the procreative potential of the marriage has not withstood challenge either. Courts have reasoned that abortion has only a temporary effect on the mother’s ability to bear children.117

For example, in Scheinberg v. Smith118 a woman challenged the constitutionality of a Florida statute which required that she furnish her husband with notice of her pending abortion to give him the opportunity to consult with her concerning the procedure.119 The state enunciated two compelling state interests in support of the statute: 1) promotion of the marital relationship and 2) "the husband’s interest in the procreative potential of the marriage."120 Witnesses testified in support of the woman’s challenge that compulsory spousal notification would produce anxiety and stress for the woman and the marital relationship.121 Specifically, the expert testimony out-

114. Id.
115. Scheinberg, 659 F.2d at 476 (Court of Appeals raised as an issue the interest of the potential life of the fetus).
116. See, e.g., Eubanks, 604 F. Supp. at 148:

Marital happiness arises from within the marriage relationship and not by virtue of actions required by the state. The state should not be in the position of forcing a wife to tell her husband, in many situations, where the two are not living together, or where, even if living together, there has been physical abuse or emotional disharmony, about her vitally important decision.

117. See, e.g., Scheinberg, 550 F. Supp. at 1114 (abortion procedure found not to pose greater than de minimus risk to a future ability to bear children, so it was unconstitutional).
118. Scheinberg, 482 F. Supp. 529.
119. The Florida Statute provided in part:

If the woman is married, the husband shall be given notice of the proposed termination of pregnancy and an opportunity to consult with the wife concerning the procedure. . . . If the husband and wife are separated or estranged, the provisions of this paragraph for notice or consent shall not be required.

FLA. STAT. ANN. § 390.001(4)(b) (West 1979) (previously codified as FLA. STAT. ANN. § 458.505(4)(b) (West 1979)).
121. Id. at 538.
lined the following situations where a woman considering an abortion might be unduly burdened by such a requirement: 1) where the husband is not the father of the unborn child; 2) where the mother has been a rape victim and has not disclosed the incident; 3) where the husband would object to the abortion for religious reasons; 4) where the husband is seriously ill or emotionally unstable; and 5) where the mother is a battered wife.122 The testimony also revealed what are known as “skewed relationships,” where “the power of the husband is so overwhelming that he will, if consulted, obstruct, or altogether prevent, a [mother] from freely deciding to secure an abortion.”123

After hearing this testimony, the district court declared the statute unconstitutional and held that mandatory spousal notification would result in an undue burden on the right of a mother to terminate her pregnancy.124 In reaching its decision, the court found that the statute did not promote marital harmony and that it created potential danger to the mother.125

On appeal, the Fifth Circuit reviewed the interests in marital harmony and the procreative potential of the marriage which the state advanced.126 In addition, it noted that the state’s interest “encompasses more than merely the husband’s interest in a particular fetus.”127 After it acknowledged the importance of each of the state’s interests, the appellate court determined that the constitutionality of the spousal notification statute depended on whether abortion presents more than a de minimis risk to women’s procreative capabilities.128 The court reasoned that a spousal notification requirement would be constitutional if abortion, as a medical procedure, significantly endangers women’s ability to bear children. It then re-

122. Id.
123. Id.
124. Id. at 540 (district court found the statute underinclusive in that it did not require notification of a hysterectomy or tubal ligation, and overinclusive in that it made no exception where husband was not the father).
125. Id.
126. Scheinberg, 659 F.2d at 483-86.
127. Id. at 486.
128. Id.
manded the case to the district court for determination of this issue.\textsuperscript{129}

On remand, the district court considered the risks to women's procreative capabilities presented by abortion.\textsuperscript{130} The court determined that abortion poses less than a \textit{de minimis} risk to women's procreative capabilities. As a result, it declared the spousal notification statute unconstitutional.\textsuperscript{131}

As this decision illustrates, attempts to strike down statutes requiring spousal notification have been successful. However, whether states can draft statutes which do not impose too great a burden on the mother's right to privacy is an open question. For example, in \textit{Doe v. Deschamps},\textsuperscript{132} the United States District Court of Montana held that a spousal notification requirement,\textsuperscript{133} as \textit{written}, was unconstitutional. The statute did not specify a conclusive and uncontrovertible method of giving notice to the spouse so that a mother could be certain that criminal liability for any violation of the statute could be avoided.\textsuperscript{134} The court reasoned that the statute did not afford the mother nor her physician protection from criminal liability because it lacked a prescribed method of giving notice, and there was no provision for constructive notice.\textsuperscript{135}

Two suggested solutions to faulty construction of statutes containing notification provisions are for the legislature 1) to draft a waiver provision in the statute or 2) to draft exceptions to the notification requirement.\textsuperscript{136} A waiver could be obtained by court order, allowing the court to decide if the mother should notify the father as to the pending abortion. By means of this case-by-case analysis, a mother who had legitimate reasons for not giving the father notice would be protected and would not be subjected to criminal penalties for failure to notify. The Supreme Court has indicated, in \textit{Bellotti

\textsuperscript{129} Id. at 487.  
\textsuperscript{130} \textit{Scheinberg}, 550 F. Supp. at 1116.  
\textsuperscript{131} Id.  
\textsuperscript{132} \textit{Deschamps}, 461 F. Supp. 682.  
\textsuperscript{133} Id. at 684 (\textit{Mont. Code Ann.} § 94-5-616(2) (1974) provided in part that an abortion was prohibited without written notice to the woman's husband).  
\textsuperscript{134} Id. at 686 (emphasis added).  
\textsuperscript{135} Id.  
v. Baird, that it would uphold the waiver alternative with respect to a minor mother and parental notification. Exceptions to the notification requirement, similar to those presented by the plaintiff in Scheinberg, would also protect the mother. For example, a case involving a battered wife would be excepted from the applicability of the statute.

C. A New Approach: "A Balancing of Constitutional Rights"

Today, fathers continue challenging the right of mothers to choose to abort their unborn children. However, the approach taken in the courtroom today is different from approaches previously used to challenge abortion statutes. Instead of relying solely on the constitutional rights of procreation or parenthood as grounds for prohibiting the abortion, fathers now request that the mother's right to privacy be balanced against the father's privacy interests. They also argue that, although Danforth prohibited an absolute veto power on the part of the husband for any reason, the Court did not exclude other forms of relief. That is, the Court left open the possibility of considering the competing rights of the mother and the father on a case-by-case basis. Fathers contend that the mothers' rights do not outweigh their own rights in all instances.

For example, in In re The Unborn Child H, an eighteen year-old mother wanted to have an abortion because she wished to "look nice in a bathing suit this summer" and did not want to share the baby with the father. The circuit judge permanently restrained the mother from having the

138. Id. at 643-44 (state must provide an alternative procedure whereby the authorization for the abortion can be obtained).
139. See supra notes 121-23 and accompanying text.
142. Roe, 410 U.S. at 152. (Constitution does not explicitly mention a right of privacy, but certain "zones" of privacy exist); see supra notes 17-23, 55-61 and accompanying text.
143. Id.
144. In re The Unborn Child H, No. 84C01-8804-JP-185, slip op. (Vigo County Cir. Ct., Indiana, April 8, 1988).
145. Id. at 2.
abortion and distinguished the case from Danforth and Roe. The court reasoned that Danforth involved a state statute and a marriage relationship and that Roe involved state action. Neither of these factors were present in the instant case. The court held that the rights of the father in the life of his unborn child are of constitutional dimension under the fourteenth and ninth amendments as well as the Indiana common law. The father’s constitutional rights were found to outweigh those of the mother “on the basis of the facts.” The case is presently before the Indiana Supreme Court. However, the mother violated the restraining order and had the abortion.

In Conn v. Conn, a nineteen year-old pregnant wife filed a petition to dissolve her marriage. At the time of filing the petition, the woman told her husband that she would terminate the pregnancy unless he agreed to give the child up for adoption once it was born. The father sought to stop the abortion, urging that his case should be decided by a “case-by-case” analysis because, at some point in time, a father’s constitutional rights outweigh interests such as those asserted by the mother. The mother attempted to justify the decision by telling the father that the couple could not afford another child.

The father urged that Danforth did not apply to this case but rather, that it is applicable when the criminal statute gives an absolute veto power. The circuit court held that neither Roe nor Danforth addressed the question of whether a father’s interests need be recognized and balanced against the mother’s desire to have an abortion. Further, it noted that balancing is an appropriate judicial

146. Id. at 4.
147. Id. at 3.
148. In re The Unborn Child H, No. 84C01-8804-JP-185, slip op. at 3 (This case involved a dispute between two individuals.).
149. Id.
150. Id.
153. Telephone interview with Roger Bennett, counsel for the father in Conn (July 14, 1988).
155. See supra note 98 and accompanying text.
156. Conn, No. 73C01-8806-DR-127, slip op. at 5.
function where constitutional rights are asserted.\(^\text{157}\) The mother was preliminarily enjoined from having the abortion.\(^\text{158}\) The court set forth the following factors to be considered when a party requests a permanent injunction:

1. Whether the [mother] has consulted with a physician, and if so, is he in agreement with [the mother's] decision to abort,
2. The likelihood of the child being born with grave mental or physical defects,
3. Should [the mother] be ordered not to have an abortion whether she would likely suffer any harm—medical, emotional, psychological, or otherwise,
4. Whether the continuation of the pregnancy and childbirth will likely interfere with [the mother's] education, employment, or employment opportunities,
5. Whether an abortion will likely cause any harm to [the father], either emotionally, psychologically, or otherwise,
6. Whether [the mother] is sincere in her desire for an abortion, and whether [the father] is sincere in his desire that [the mother] not terminate the pregnancy,
7. Whether the [mother] will properly care for herself during the pregnancy,
8. How the expenses associated with prenatal care and delivery of the child will be paid,
9. Whether the pregnancy, followed by birth of a child, will cause financial hardship on either [the father] or [the mother], or their respective families,
10. Whether [the father] is capable of fathering another child, and
11. Whether [the father] is likely to be capable, and willing, to rear the child upon birth.\(^\text{159}\)

Further, a father would be required to overcome a presumption that the mother is entitled to an abortion by clear and convincing evidence. The court held that this rebuttable presumption exists because of the greater physical and emotional burden on the mother which is associated with pregnancy and childbirth.\(^\text{160}\)

On review, the Indiana Court of Appeals reversed the trial court’s injunction which prohibited the abortion.\(^\text{161}\) In its analysis, the court found that Roe and Danforth were dispositive and held that the abortion decision concerned only the mother.\(^\text{162}\) The Indiana Su-

\(^{\text{157}}\) Id.
\(^{\text{158}}\) Id. at 6.
\(^{\text{159}}\) Id. at 6-7.
\(^{\text{160}}\) Id. at 6.
\(^{\text{162}}\) Id. at 613.
Supreme Court affirmed the decision of the appellate court.\textsuperscript{163} Recently, the United States Supreme Court denied certiorari.\textsuperscript{164}

In a recent Minnesota case, \textit{Anderson v. Anderson},\textsuperscript{165} a father asked that a district court balance his interests in the life of his child against those of the mother seeking an abortion. Asserting his parental rights, the father noted that the United States Supreme Court has recognized a parent’s right to be notified of a minor child’s decision to seek an abortion in order to safeguard the health and well-being of that minor child.\textsuperscript{166} The father argued that surely his interest in the very life of his child was equal, if not paramount, to the parents’ interest in the well-being of a minor child.\textsuperscript{167}

In most of the current cases, fathers have been successful in obtaining temporary restraining orders.\textsuperscript{168} However, pending final determination of the rights involved, many mothers have violated these orders and have had abortions, leaving the fathers discouraged and unwilling to press the issue.\textsuperscript{169} Whether a state supreme court will ultimately balance the conflicting constitutional rights, taking the rights of the father into account, remains to be seen.\textsuperscript{170}

\textbf{D. West Virginia: An Analysis and a Prediction}

The West Virginia Supreme Court of Appeals has never decided a case concerning a father’s right of participation in the abortion

\textsuperscript{163} Conn, 526 N.E.2d 958 (1988).
\textsuperscript{166} Matheson, 450 U.S. at 409-10 (holding that parental notice requirement serves a significant state interest by providing an opportunity for the parents of a minor to supply essential medical and psychological information to a physician).
\textsuperscript{167} Plaintiff’s Memorandum of Law at 20, Anderson, No. 88-21-320.
\textsuperscript{168} E.g., Conn, No. 73C01-8806-DR-127, slip op. (Telephone interview with Roger Bennett, counsel for the plaintiff, (July 14, 1988)); Anderson, No. 88-21-320 (Telephone interview with Rodney Brodin, counsel for the plaintiff, (July 7, 1988)). See also In re The Unborn Child H, No. 84C01-8804-JP-185; Moss, \textit{Fathers’ Rights Sought} 74 A.B.A. J. 19 (1988).
\textsuperscript{169} For example, in Buel v. Doss, a case originating in Dallas District Court, Dallas, Texas, a father became discouraged and dropped his action after the mother violated a temporary restraining order by having an abortion. Telephone interview with Eric Borseth, counsel for the father in \textit{Buel} (Dallas D. Ct.) (June 14, 1988).
\textsuperscript{170} Even after a father is granted a “balancing” test, he must overcome the strong language used by the Supreme Court in \textit{Danforth}, 428 U.S. at 71; See infra note 93, §§ 16-2F-1 to 9, and accompanying text.
decision. The West Virginia Code does not require spousal consent or spousal notification for an abortion, although it does require parental notification where an abortion is to be performed upon an unemancipated minor.171

Predicting how the West Virginia Supreme Court of Appeals might resolve such an issue involves two questions. First, if the state legislature enacted a spousal consent or spousal notification provision, would it be held unconstitutional? Secondly, even in the absence of a statute, would a father prevail on a petition for a "balancing" of his constitutional rights with those of the mother?

An abortion statute requiring spousal rights has not been proposed by West Virginia legislative committees in recent years. However, some amendments to current laws have been proposed which would limit public assistance medical services funding172 to those abortions that are necessary to save the life of the mother or to those where incest or rape has occurred.173 Other amendments have sought to make abortions illegal at the point of viability.174

However, if spousal rights were codified into West Virginia's abortion laws, requirements of notification or consent would probably be declared unconstitutional. With regard to a spousal consent statute, Simopoulos v. Virginia,175 a Virginia Supreme Court case, is helpful to the analysis. In that case, a physician was convicted of employing abortion procedures during the second trimester, outside of the hospital, in violation of a Virginia statute.176 Although

176. The physician violated the statute's requirement that second trimester abortion procedure be employed in a hospital; however, the Virginia Supreme Court declared the statute unconstitutional in a footnote of the opinion. The statute read as follows: "Consent required. Before performing any abortion or inducing any miscarriage or terminating a pregnancy . . ., the physician shall obtain the written consent of the woman . . .; [T]hen only after permission is given in writing . . . by her husband, may the physician perform such abortion . . .." VA. CODE ANN. § 18.2-76 (Repl. Vol. 1975).
the court held that the "hospital" requirement was not an obstacle in the path of the mother’s decision to abort, it affirmed the conviction of the physician. More important to this discussion, the court stated in a footnote, citing Danforth, that when imposed by the state, spousal and parental consent requirements are unconstitutional.177 Because the West Virginia Supreme Court of Appeals finds Virginia law persuasive, it might consider not only Danforth, but might also look to this decision and declare a spousal consent statute unconstitutional. Similarly, the court would probably declare a spousal notification provision unconstitutional. Although no West Virginia cases address the notification issue, most courts have struck down these statutes,178 and the West Virginia Court would likely do the same.

Even in the absence of statutorily imposed rights, would the court grant a father’s petition for a "balancing" of the constitutional rights involved? Because of the absence of any West Virginia cases addressing a father’s rights in the abortion decision, this article analyzes West Virginia cases where the Supreme Court of Appeals has recognized parental rights. For example, in In re R.J.M.,179 a trial court terminated parental rights because the parents refused to care for the child. On appeal, a majority of the court affirmed the circuit court’s decision. However, more important to the discussion of a father’s rights is Justice Miller’s dissent. In In re R.J.M.,180 Justice Miller emphasized the constitutional grounds of parenthood and argued that the proper disposition would have been a rehabilitative program for the parents.181 His opinion referred to such landmark cases as Stanley v. Illinois182 (right to parenthood), Skinner v. Oklahoma183 (right to procreate), and Griswold v. Connecticut184 (right to privacy). His opinion stated that "[w]here the constitutionally

177. Simopoulos, 221 Va. at 1076 n.8, 27; S.E.2d at 204 n.8 (when imposed by the state, spousal and parental consent requirements for access to hospital abortion services are unconstitutional).
178. See supra note 108.
180. Id.
181. Id. at 509-10, 266 S.E.2d at 121 (Miller, J., dissenting).
protected interests of parenthood are at stake, overriding considerations permit impingement only to the minimum extent necessary to achieve the particular goal.” In addition, the dissenting opinion noted that the West Virginia Supreme Court of Appeals had held in an earlier case that Article III, Section 10 of the West Virginia Constitution protected the fundamental right of parenthood.

Considering this analysis, the West Virginia Supreme Court may decide in the future that the constitutional rights of procreation, parenthood, and privacy apply to fathers and agree to balance them against the constitutional right of privacy of mothers. The United States Supreme Court has already declared that mothers’ rights to privacy encompass the abortion decision. However, there is no indication that the West Virginia Supreme Court will balance the conflicting constitutional rights.

E. The Effect of the Present Make-up of the United States Supreme Court

Currently, a mother’s right to privacy encompasses her decision whether or not to abort her unborn child, as established in Roe v. Wade. The Roe case was decided by a seven to two majority. The majority opinion was written by Justice Blackmun; the other majority members included Justices Douglas, Brennan, Marshall, and Stewart, with Chief Justice Burger and Justice Powell concurring. The dissenting members were Justices White and Rehnquist.

Today, the Court is composed of Justices Blackmun, Brennan, Marshall, White, Stevens, Rehnquist, O’Connor, Scalia, and Kennedy. Significantly, only three members of the Roe majority remain on the Court. What would happen to Roe if a statute prohibiting abortion were challenged again? Would the challenge make it to the

186. “No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” W. Va. CONST. art. III, § 10.
188. Roe, 410 U.S. 113.
189. Id.
Supreme Court? How would the present Court decide? Both mothers and fathers wonder what the outcome would be, considering the present composition of the Court.

Although only three members of the Roe majority remain, Justice Stevens takes a comparatively liberal view of abortion rights, probably increasing the number supporting Roe to four.190 Justice O'Connor, however, indicated in her dissent in a case reaffirming Roe, Akron v. Akron Center for Reproductive Health,191 that she would join Justices White and Rehnquist.192 Her vote, along with the votes of Justices Scalia and Kennedy, would be critical. All three of the Justices are Reagan Administration appointees. President Reagan's support of the pro-life movement may be an indication of what view the Justices will take.193

Whether a challenge will make it to the present Supreme Court remains to be seen. However, the prospect appears likely. For example, on April 25, 1988, the Arizona legislature rejected by one vote a bill that would have outlawed abortions in Arizona.194 Similarly, the next challenge may be made by a father seeking to assert his rights. If the Supreme Court grants certiorari to such a case, it may overrule Roe, or it may simply limit the privacy right given to the mother in Roe by subjecting that right to the balancing test that fathers seek today. If the mother's privacy right is ultimately limited, a father will have either a right to consent and/or a right to be notified, or be entitled to a balancing of his rights with those of the mother.

IV. CONCLUSION

Constitutional challenges to abortion statutes that require spousal consent and/or spousal notification have been common.195 In the
past, state courts and lower federal courts have declared these statutes unconstitutional on the basis that *Roe v. Wade*196 established that a woman’s right to privacy encompasses her decision whether or not to terminate her pregnancy.197 In addition, the courts have relied upon *Planned Parenthood of Central Missouri v. Danforth*198 to invalidate consent provisions that give the spouse an absolute veto power in the abortion decision.199 Finally, the courts, in accord with *Roe* and *Danforth*, have refused to address what rights, if any, the father has in the abortion decision.200

Today, however, the courts are beginning to acknowledge that fathers’ contentions may be valid. Fathers are asking for a “balancing” of their constitutional rights against those of the mother.201 They argue that the Supreme Court, in striking down an absolute veto power in *Danforth*, left open the possibility of determining case-by-case whether a father’s rights outweigh the mother’s,202 and that a hearing should be granted to balance the rights involved. The lower courts have distinguished *Roe* as involving state action and *Danforth* as involving the constitutionality of an absolute veto power.203 From their analysis of the facts and the constitutional rights involved, these lower courts have held that the father’s rights outweigh those of the mother in cases before them and have issued restraining orders, prohibiting the mother from having an abortion.204

The West Virginia Supreme Court of Appeals has never addressed the issue of whether a father has rights in the abortion decision. However, the court would likely follow the majority of courts that have addressed the issue and declare any statutorily imposed spousal consent or notification provision unconstitutional.205 Whether

197. See *supra* notes 46-79 and accompanying text.
199. See *supra* notes 84-96 and accompanying text.
200. See *supra* notes 100, 108 and accompanying text.
201. See *supra* notes 140-67 and accompanying text.
202. See *supra* notes 155-56 and accompanying text.
203. See *supra* notes 148-49 and accompanying text.
204. See *supra* note 168 and accompanying text.
205. See *supra* notes 175-78 and accompanying text.
the court would recognize a "balancing" of the constitutional rights of the mother and father is questionable.\(^{206}\)

Another factor impacting upon decisions regarding the father's rights is the present makeup of the United States Supreme Court. The new justices on the Court will play significant roles, as only three members of the \textit{Roe} majority remain. Two of the Justices, Scalia and Kennedy, have yet to participate in an abortion case.\(^{207}\) Should the Court overrule or limit \textit{Roe v. Wade},\(^{208}\) the mother's right to decide whether to abort may be subject to a balancing against the constitutional rights of the father.

Fifteen years ago, the United States Supreme Court refused to discuss the father's rights in the abortion decision. In doing so, the Court created its own destiny. Fathers will continue to raise constitutional challenges to a woman's unilateral right to terminate her pregnancy. Although the lower courts have wrestled with these issues for some time, the Supreme Court must eventually decide what the father's rights are in the abortion decision.

\textit{Maria F. Walters}

\(^{206}\) See \textit{supra} notes 179-87 and accompanying text.
\(^{207}\) See \textit{supra} notes 188-90 and accompanying text.
\(^{208}\) \textit{Roe}, 410 U.S. 113.