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Abstract

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KEYWORDS: abortion, spousal, notice

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Introduction

Historically, state government has regulated certain aspects of the marital relationship in order to further its interest in maintaining a stable and well-functioning society.[1] Regulation of marriage and divorce, and of marital duties and obligations, has always been considered within the purview of state powers.[2] In some circumstances the reach of state power impacts on the private decision-making processes of families. However, state intrusion in child bearing, contraception and abortion decisions has not been condoned.[3] The United States Constitution demands that state administration of family law in this area respect the individual's right of privacy as well as the zone of privacy protecting the family relationship.[4] This note examines the history of the state's role in regulating the abortion decision beginning with *Roe v. Wade*[5] and concluding with *Scheinberg v. Smith*,[6] which addressed the constitutionality of a spousal notice and consultation provision as a condition to abortion.

Historical Overview

Roe v. Wade[7] established that the right of privacy, "founded in the

1. *See* Sosna v. Iowa, 419 U.S. 393, 404 (1975); Estin v. Estin, 334 U.S. 541, 546 (1948).

2. *See, e.g.,* Maynard v. Hill, 125 U.S. 190, 205 (1888).

3. Griswold v. Connecticut, 381 U.S. 479 (1965); Poe v. Gerstein, 517 F.2d 787, 795 (5th Cir. 1975).

4. Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967). *See also* Note, *Developments In The Law-The Constitution And The Family,* 93 HARV. L. REV. 1156 (1980).

5. 410 U.S. 113.

6. Scheinberg v. Smith, 659 F.2d 476 (5th Cir. 1981); Jones v. Smith, 474 F. Supp. 1160 (S.D. Fla. 1979).

7. 410 U.S. 113 (1973).

Fourteenth Amendment concept of personal liberty and restriction upon state action,"[8] encompasses a woman's decision to terminate her pregnancy. The Court cautioned that "this right is not unqualified and must be considered against important state interests in regulation."[9] Any interference with this right requires a showing of "compelling state interests"[10] and narrowly drawn legislative enactments expressing "only the legitimate state interests at stake."[11] Consonant with this standard of review, the Court in *Roe* concluded that the state's interests in the health of the mother and in the protection of the potential human life of the fetus were not sufficiently compelling in the first trimester of pregnancy to justify interference with an abortion decision made by a physician and his patient.[12]

Focus on Medical Procedures

Since *Roe*,[13] state legislatures have promoted state interests in mothers' health and in potential human lives by regulating medical procedures associated with abortion. Courts have carefully reviewed regulation of medical procedures to determine whether those legislated measures constituted justifiable state interference with a woman's constitutional right to elect to terminate her pregnancy during the first trimester.[14]

One such regulatory measure was shown to be an undue invasion of privacy and was held unconstitutional by the United States Supreme Court in *Doe v. Bolton*.[15] The *Bolton* Court construed a Georgia law requiring both hospital committee approval of an abortion candidate

8. *Id.* at 153.
9. *Id.* at 154.
10. *Id.* at 155.
11. *Id.*
12. The Court in *Roe* noted that in light of present medical knowledge, state interests in safeguarding the health of the mother assume "compelling" stature approximately at the end of the first trimester. The point at which the state's interest in potential life becomes "compelling" is at viability, because this is when the fetus has the "capability of meaningful life outside the mother's womb." *Id.* at 154.
13. 410 U.S. 113 (1973).
14. *See* Note, *supra* note 4, at 1304.
15. Doe v. Bolton, 410 U.S. 179 (1973).

and her physician's decision to terminate the pregnancy.[16] Because committee review after the physician's approval would be review "once removed from diagnosis"[17] and "basically redundant,"[18] the Court could not find any "constitutionally justifiable pertinence"[19] for that requirement. Additionally, the Court invalidated a provision of the law which required that the abortion procedure be performed in an accredited hospital. It contended that the state failed to prove "that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, [satisfied the] health interests."[20]

Seven years later, Illinois was unable to show any compelling interest furthered by a statutory requirement that doctors inform abortion candidates of possible fetal pain caused by particular abortion methods.[21] The statute also mandated candidates wait twenty-four hours between the consultation and operation. The Court referred to the Supreme Court decision in *Planned Parenthood of Central Missouri v. Danforth,*[22] which cautioned that reading more meaning into the term "informed consent"[23] than "the giving of information to the patient as to just what would be done and as to its consequences . . . might well confine the attending physician in an undesired and uncomfortable strait-jacket in the practice of his profession."[24] In *Colautti v. Franklin*[25] the Court struck a Pennsylvania law which defined fetal viability vaguely and ambiguously, and subjected physicians to criminal liability for failure to follow prescribed standards of care for viable fetuses. This exercise of state power unreasonably burdened the medical profession. Moreover, this exercise unjustifiably hindered a woman's choice to terminate first trimester pregnancy, in contravention of *Roe.*[26]

16. *Id.*
17. *Id.* at 197.
18. *Id.*
19. *Id.*
20. *Id.* at 195.
21. Charles v. Carey, 627 F.2d 772 (7th Cir. 1980).
22. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 n.8 (1976).
23. 627 F.2d 772, 782.
24. *Id.*
25. 439 U.S. 379 (1979).
26. 410 U.S. 113.

Focus on the Marital Relationship

Early abortion legislation, which focused on regulating medical procedures, was predicated on state interests in protecting mothers' health and potential human life. Later enactments demonstrate a shift in focus as legislatures premise new statutes on the state's traditional and more widely accepted role of regulating the marital relationship. In support of a statute requiring a husband's written consent to his wife's first trimester abortion, Missouri referred to its authority to impose joint-consent requirements as conditions to child adoption and artificial insemination.[27] Despite Missouri's efforts to defend the statute as an incident of its power to regulate the marital relationship, the United States Supreme Court in *Planned Parenthood of Central Missouri v. Danforth* found the statute violative of standards enunciated in *Roe*.[28]

> [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.' 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.[29]

Florida's statute,[30] considered in *Poe v. Gerstein*,[31] also effected a husband's unilateral veto power over his wife's abortion decision. Like Missouri, Florida urged that this statute was a valid exercise of its general authority to promote society's interest in the marriage relationship. The fifth circuit acknowledged the state has power to regulate certain aspects of marriage or the marital relationship, but concluded that this

27. 428 U.S. 52, 68 (1976).
28. 410 U.S. 113 (citations omitted).
29. 428 U.S. at 69 (citations omitted).
30. Fla. Stat. § 458.22(3) (1975) states:
(3) WRITINGS REQUIRED - One of the following shall be obtained by the physician prior to terminating a pregnancy:
(a) The written request of the pregnant woman and, if she is married, the written consent of her husband, unless the husband is voluntarily living apart from the wife,. . . .
31. 517 F.2d 787 (5th Cir. 1975).

intrusion into intra-familial decision-making processes concerning childbearing could not be sanctioned[32] in light of the Supreme Court's holding in *Griswold v. Connecticut*.[33] Moreover, said the fifth circuit, *Eisenstadt v. Baird*[34] determined that the individual's right of privacy included the right to be free from state interference with the childbearing decision.[35]

In *Poe*, the State of Florida's primary contention was that the consent statute was necessary to protect the rights of a husband whose wife desires an abortion. This proposition was first examined in light of a husband's interest in paternity of the fetus. The court criticized this argument and referred to the common law's refusal to compensate fathers for tortious or criminal injury to the fetus.[36] Furthermore, because the Florida statute did not require that the husband sire the fetus, nor even that the woman be married at time of conception to the same man whose consent was later required for the abortion, the court found a husband's interest in paternity of the fetus inapplicable.

The state proposed a second source for a husband's interest in his wife's abortion decision — protection of procreative potential. Legislating against procreation outside marriage made a husband completely dependent on his wife for legitimate offspring. Florida asserted its need to legislate safeguards for a husband's procreative potential within the confines of marriage.[37] Noting that procreation of offspring is one of the primary purposes of marriage,[38] Florida postulated that a wife's repeated abortions could deny her husband the opportunity to have children. This result would impede the "right to have offspring" enunciated by the Court in *Skinner v. Oklahoma*.[39] The court in *Poe*[40] re-

32. *Id.* at 795.

33. 381 U.S. 479, 482 (1965).

34. 405 U.S. 438 (1972).

35. Poe v. Gerstein, 517 F.2d 787, 795 (5th Cir. 1975).

36. *See, e.g.*, Stidham v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 10 (1959). For a discussion of the father's right, see Note, *Abortion: The Father's Rights*, 42 CINN. L. REV. 441, 442-44 (1973).

37. 517 F.2d at 796.

38. *See, e.g.*, Kreyling v. Kreyling, 20 N.J. Misc. 52, 23 A.2d 800 (1942).

39. In *Skinner*, the Oklahoma Supreme Court overturned a statute providing for the sterilization by vasectomy or salpingectomy of habitual criminals on the grounds that the statute "deprives certain individuals of a right which is basic to the perpetuation of a race-the right to have offspring." 316 U.S. 535, 536 (1942).

sponded to this argument, explaining that *Skinner*[41] did not guarantee the individual a procreative opportunity, but merely safeguarded his procreative potential from state infringement. "As a consequence we do not read *Skinner* to permit state infringement upon the woman's fundamental right to abortion."[42]

The New Breed of Abortion Regulation

The constitutionality of governmental regulation of the marital decision-making process concerning abortion is currently defined by the holdings in *Poe*[43] and *Danforth*.[44] Thus, a statute granting a husband absolute veto power over his wife's decision to terminate pregnancy will be found unconstitutional notwithstanding the state's societal interests in the marital relationship nor the husband's interest in the procreative potential of the marriage. "However, neither *Danforth* nor *Poe* considered whether less intrusive measures designed to insure a husband's participation in the abortion decision could, within constitutional contours, be predicated on these interests."[45]

Scheinberg v. Smith[46] considered a challenge to the validity of a Florida statute requiring a wife to give her husband notice of the proposed abortion and an opportunity to consult with her concerning the procedure. The statute pertains only to a wife neither separated nor estranged from her husband. The notice and consultation provision requires as a condition to securing the abortion, that the wife provide her physician with either 1) a written statement that notice and opportunity have been given or 2) her husband's written consent.[47] The Act provides that "[a]ny person who willfully performs or participates in the termination of a pregnancy in violation of the requirements of this section is guilty of a felony."[48]

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40. 517 F.2d 787.
41. 316 U.S. 535 (1942).
42. 517 F.2d at 797.
43. 517 F.2d 787.
44. 482 U.S. 52 (1976).
45. Scheinberg v. Smith, 482 F. Supp. 529, 539 (S.D. Fla. 1979).
46. *Id.*
47. FLA. STAT. § 390.001(4)(b) (1981).
48. *Id.*

Scheinberg v. Smith

In 1979, the Florida Legislature enacted the Medical Practice Act, which contained the following provision governing abortions sought by married women:

> If the woman is married, the husband shall be given notice of the proposed termination of pregnancy and an opportunity to consult with his wife concerning the procedure. The physician may rely on a written statement of the wife that such notice and opportunity was given, or he may rely on the written consent of the husband to the proposed termination of the pregnancy. If the husband and wife are separated or estranged, the provisions of this paragraph for notice or consent shall not be required. The physician may rely upon a written statement from the wife that the husband is voluntarily living apart or estranged from her.[49]

Dr. Mark Scheinberg,[50] a licensed physician who performs abortions in Florida, filed a class action suit against state enforcement officials on behalf of all married pregnant women wishing to terminate their pregnancies. He sought injunctive and declaratory relief on the ground this provision unconstitutionally abridged married women's rights to privacy in the abortion decision.

In July, 1979, the District Court denied Dr. Scheinberg's request to preliminarily enjoin enforcement of the spousal notice provision because it felt he had not demonstrated a substantial likelihood of success for proving the provision violated the equal protection clause of the fourteenth amendment. On final hearing two months later, the District Court did, in fact, declare the provision unconstitutional, finding it to be an overly inclusive means to promote marital harmony. State officers appealed the decision, and in October 1981, the United States Court of Appeals for the Fifth Circuit considered the case. The appellate court held state interests in furthering the institutional integrity of the marital relationship were compelling, and were sufficient justification for enacting the spousal notice and consultation provision. In the context of this state interest the court considered also the relation of paternal in-

49. FLA. STAT. § 390.001(10) (1981).

50. Formerly using the pseudonym John Jones, M.D. in Jones v. Smith, 474 F. Supp. 1160 (S.D. Fla. 1979).

terest in marital procreative potential. The case was remanded for factual determination of whether proper abortion procedures posed a greater than *de minimis* risk to future childbearing capabilities.

The court of appeals examined the burden the notice and consultation provision imposed upon a woman's constitutionally protected right to have an abortion. In order to trigger the strict scrutiny standard of review the district court had required plaintiffs to show the provision met the direct interference test of *Charles v. Carey,*[51] or constituted a new obstacle "in the path of a woman's exercise of her freedom of choice."[52] In *Charles,* the seventh circuit declared unconstitutional a provision of the Illinois abortion statute which required the physician performing an abortion to conduct a consent consultation with his patient at least twenty-four hours prior to the operation. Based upon the *Charles*[53] court's reasoning, both the district and appellate courts in *Scheinberg* required a showing that the burden imposed by the statute was "not de minimis".[54] State regulation not directly interfering with a woman's abortion decision is *not* strictly scrutinized and thus does not call for a compelling state interest. The court of appeals, while recognizing that the notice and consultation provision of Florida's statute left a married woman "with something less than the completely untrammeled freedom of choice,"[55] compared that burden with the burden imposed by Missouri's statute stricken in *Danforth.*[56] The statute in *Danforth* required husband consent as a *prerequisite* to abortion. The *Scheinberg* court concluded "the intrusion into a woman's ability to exercise freedom of choice is thus much less here than in *Danforth.*"[57]

It is ironic that while citing *Charles,* the fifth circuit engaged in that weighing process explicitly cautioned against in *Charles.* The *Charles* decision proposed that "undue" defines the ultimate constitu-

51. 627 F.2d 772 (7th Cir. 1980).

52. *Harris v. McRae* proposed this as an alternative indication for strict scrutiny review. 448 U.S. 297, 316 (1980).

53. 627 F.2d 772.

54. *Id.* at 777.

55. 659 F.2d at 486.

56. 428 U.S. 52 (1976).

57. 659 F.2d at 485. The court noted here that since the statute requires notice and not consent, the intrusion into a woman's ability to exercise her freedom of choice is therefore less here than in *Danforth.*

tional issue, not merely the threshold requirement for imposing strict scrutiny.[58] Further, the court in *Charles* found the defendant's proposed statutory interpretation — that the burden imposed must be undue in order to invoke strict scrutiny — contained no guidelines for defining "undue" and would virtually preclude the application of strict scrutiny to any state interference with the abortion decision.[59] The *Charles* court recognized the dangers of deferring to state legislative wisdom and therefore proscribed the permissible reach of state power into the abortion decision. This reasoning led the *Charles*[60] court to conclude the Illinois abortion statute, requiring a twenty-four hour mandatory waiting period between consultation and operation, constituted a burden unjustified by state interests in a woman's first trimester abortion decision. Similarly, the court of appeals in *Scheinberg,* after acknowledging the provision's burden on a woman's freedom to terminate pregnancy during the first trimester, and recognizing the Court's recent reaffirmation of *Roe's*[61] mandate, could have invalidated the statute. A recent sixth circuit case illustrates this point:

> Since the State has no compelling interest during the first trimester of pregnancy, no balancing [of State interests] is required. If a regulation results in a legally significant impact or consequence on a first trimester abortion decision, it is invalid.[62]

Instead of ending its inquiry at this point, the *Scheinberg* court considered the state's claim of compelling interests in maintaining and promoting the marital relationship and in protecting the husband's interest in the procreative potential of marriage. It stated:

> [T]hese interests, weighed together and, for purposes of analysis, telescoped into a state interest in furthering the integrity of state-created and regulated institutions of marriage and the family, are 'sufficiently weighty,' *Poe,* to justify the burden on a woman's abor-

58. 627 F.2d at 777.
59. *Id.*
60. 627 F.2d 772.
61. 410 U.S. 113.
62. Akron Center for Reproductive Health v. City of Akron, 651 F.2d 1198, 1204 (6th Cir. 1981).

tion decision imposed by the spousal notification requirement.[63]

The *Scheinberg* court manipulated Supreme Court precedents, *Zablocki v. Redhail*[64] and *Griswold v. Connecticut*,[65] to support its conclusion that the institution of marriage, the cornerstone of civilized society, is deserving of heightened protection under the constitution. In *Zablocki*,[66] the Court invalidated a Wisconsin law prohibiting remarriage of non-custodial parents under support orders absent court approval. Justice Stewart's concurring opinion identified "[t]he problem in this case [as] not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected freedom."[67] The statute found unconstitutional in *Griswold*[68] operated directly on an intimate relation between husband and wife, as well as their physician's role in one aspect of that relation.[69] The Court viewed the relationship as "lying within the zone of privacy created by several fundamental constitutional guarantees."[70]

Furthermore, the court's decision in *Poe*[71] specifically rejected the notion that state intrusion into intra-familial decision-making processes concerning childbearing could be justified by state interests in promoting the marital relationship. The fifth circuit read *Zablocki*,[72] *Griswold*[73] and *Poe*[74] to *support* state regulation of the marriage relationship. Somehow the circuit court avoided the stress those decisions placed on the importance of marriage as an area of privacy deserving of respect and protection from government interference. Thus, the *logical* extension of the principles denoted in *Zablocki, Griswold,* and *Poe* is that the notice and consultation provision unconstitutionally impinges upon a husband's and wife's individual right to be free from govern-

63. 659 F.2d at 483 (citations omitted).
64. 434 U.S. 374 (1978).
65. 381 U.S. 479 (1965).
66. 434 U.S. 374.
67. *Id.* at 391-92 (J. Stewart's concurring opinion).
68. 381 U.S. 479.
69. *Id.* at 503 (J. White's concurring opinion).
70. *Id.* at 485 (J. Douglas, opinion for the majority).
71. 517 F.2d 787.
72. 434 U.S. 374.
73. 381 U.S. 479.
74. 517 F.2d 787.

ment intrusion into their personal relationship.

The *Scheinberg* court urged that the notice and consultation requirement has the effect of furthering "the integrity of marital, and hence familial, life."[75] This conclusion was adduced from expert testimony on record from the district court. The experts, a professional array of communication encouragers, included gynecologists, obstetricians, psychiatrists and psychologists.[76] No matter how persuasive the appellate court found that testimony, the court failed to draw a distinction between a qualified professional's *recommendation* that his married patients communicate and a state's *mandate* that its married citizens communicate.

Because "the 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 make-up,"[77] the decision to terminate a pregnancy is not always the product of mutual agreement. Differences in individual moral and religious convictions might account for a deadlock between mates in the abortion decision. Additionally, in situations where a woman has become pregnant by someone other than her husband, either voluntarily or as the consequence of rape, and fears physical or emotional abuse, communication of her intention to terminate the pregnancy could have a deleterious effect on the future of the marriage.[78] The experts indicated that *forced* communication does not necessarily enhance the quality of a marriage and might in many instances produce anxiety and stress, causing the wife to self-abort or to procure an illegal abortion.[79] It is ironic that under these circumstances, the notice and consultation provision could contribute to the destruction of the same state interest the legislation was designed to protect, namely the "authenticity"[80] of marriage. The state's stated

75. 659 F.2d at 484.

76. The precise nature of this testimony and the qualifications of the experts are explained in Scheinberg v. Smith, 482 F. Supp. at 538.

77. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

78. 482 F. Supp. at 538.

79. *Id.*

80. "By authenticity we mean a marital relationship characterized by institutional integrity . . . the concept we wish to convey is that the state has an interest in attempting to ensure that the institution of marriage maintains its identity with its conceptual essence." 659 F.2d at 484.

goal — *preserving* the integrity of the marital relationship — could be better achieved by refraining from involvement in private marital communications concerning childbearing. Certainly, this result would be consistent with the *Zablocki,*[81] *Griswold,*[82] and *Poe*[83] decisions.

The court of appeals remanded *Scheinberg* for factual findings necessary to determine whether the provision could withstand constitutional attack despite its failure to limit the notice and consultation requirements to jointly-conceived children.[84] The court also directed the district court to inquire whether abortion procedures detrimentally affect future childbearing capabilities,[85] which in turn might hamper the procreative potential of the marriage.

The fifth circuit, by remanding to learn whether abortion has more than a *"de minimis"* effect on a woman's fertility, may be indicating that a husband's procreative potential can constitute a compelling state interest—a status not acknowledged in previous decisions. The Supreme Court in *Danforth*[86] expressed an awareness of the "deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy."[87] Yet in balancing a husband's concern against his wife's freedom of choice in undergoing abortion, the Court in *Danforth* concluded: "it is the woman who physically bears the child and who is more directly and immediately affected by the pregnancy [;therefore,] as between the two, the balance weighs in her favor."[88] The propriety of a husband's concern in his wife's pregnancy was also recognized in *Griswold.*[89] From *Danforth* and *Griswold* one may deduce a husband has a proper concern and interest in his wife's pregnancy. But *Griswold*[90] and *Danforth*[91] cannot be read to suggest that

81. 434 U.S. 374.
82. 321 U.S. 479 (1965).
83. 517 F.2d 787.
84. 659 F.2d at 486.
85. The authors concluded "that induced abortion has no or little, if any, effect on risk of ectopic pregnancy in subsequent reproduction under a generally favorable condition." C.S. Chung, M. Mi, R.G. Smith, P.G. Steinhoff, *Induced Abortion and Ectopic Pregnancy in Subsequent Pregnancies* (Rev. man. at 12) (19___).
86. 428 U.S. 52 (1976).
87. *Id.* at 69.
88. *Id.* at 71.
89. 321 U.S. 479 (1965).
90. *Id.*

the husband's interest in the procreative potential of the marriage should be considered a compelling state interest justifying legislation which burdens a woman's fundamental right to a first trimester abortion.

Nevertheless, the court of appeals in *Scheinberg,* relying upon the authority of *Skinner,*[92] found the husband's ability to procreate entitled to constitutional protection. As a corollary to this proposition, the court acknowledged that the state has a "compelling interest in requiring a wife to inform her husband when she is contemplating termination of a pregnancy."[93] In *Skinner,*[94] the Supreme Court protected an individual from sterilization by the State of Oklahoma. The rights established in that case were intended to protect an individual from unjustified governmental intrusion in matters of procreation. As noted earlier, the court in *Poe*[95] explained, "*Skinner* did not guarantee the individual a procreative opportunity; it merely safeguarded his procreative potential from state infringement."[96] Consequently, *Poe*[97] did not interpret *Skinner*[98] to permit state infringement upon a woman's fundamental right to an abortion. As noted in appellee's petition for rehearing in *Scheinberg,* "the court has misapprehended the decision in *Poe* as it interprets the rights established in *Skinner,* . . . [which] were intended as a shield against governmental interference with individual rights. The decision was not intended to be a sword which could be used to enhance a State's power over its citizens."[99] Rehearing was denied.

Constitutional Objections

The notice and consultation provision in the Florida Medical Practice Act is prone to attack as an infringement upon first amendment freedom of speech guarantees. Because this provision requires a wife to

91. 428 U.S. 52.
92. 316 U.S. 535 (1942).
93. 659 F.2d at 485.
94. 316 U.S. 535 (1942).
95. 517 F.2d 787.
96. *Id.* at 797.
97. 517 F.2d 787.
98. 316 U.S. 535.
99. Appellee's Petition for Rehearing, Case No. 80-5023 at 3-4.

notify and consult with her husband on the abortion decision, it necessarily compels speech in the marital relationship. The court in *Scheinberg*[100] failed to address the issue, though the argument was clearly preserved and the request for a rehearing of the case rested on it. A statute having the potential to impair an individual's freedom of speech is deserving of careful consideration.

Historically, first amendment freedom of speech and thought has received special protection as a fundamental liberty serving as the "indispensable condition, of nearly every other form of freedom."[101] Judicial and philosophical justification for free speech emphasizes the importance of individual self-expression and its forwarding impact on the goals of representative democracy and self-government.[102] In past cases, first amendment issues have typically focused upon the permissibility of an individual's *exercise* of free speech in the *public forum.* Government interference with this right, in the form of state regulation, has been upheld where the speech is directed to producing or inciting imminent lawless action,[103] encouraging subversive activities during wartime[104] or interfering with public order and tranquility.[105]

The Florida statute represents a significant and novel departure from first amendment issues considered in the past. A distinguishing characteristic of the statute is that it attempts to compel speech, rather than inhibit its free exercise. Additionally, the statute seeks to regulate purely *private* speech in the context of the marital relationship, in contrast to previous instances of permissible state regulation of speech in the public forum. There is no case law precedent permitting a state to compel purely private speech, though several court decisions have interpreted the nature of this first amendment right.

Wooley v. Maynard[106] establishes that the right of freedom of thought, protected against state action by the first and fourteenth amendments, includes both the right to speak freely and the right to refrain from speaking at all. Both are "complementary components of

100. 659 F.2d 476.
101. *Id.* at 327.
102. G. GUNTHER, CONSTITUTIONAL LAW 1108 (10th ed. 1980).
103. Brandenburg v. Ohio, 395 U.S. 444 (1969).
104. Schenk v. United States, 249 U.S. 444 (1969).
105. Cox v. New Hampshire, 312 U.S. 569 (1941).
106. Wooley v. Maynard, 430 U.S. 705 (1977).

the broader concept of individual freedom of mind."[107] Freedom of speech and association are not, however, absolute.[108] "They are susceptible of [state] restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."[109] Accordingly, state restrictions on free exercise of speech in the public forum have been justified by state concerns for public welfare. However, the right to remain silent enjoys an even greater protection than the right to speak freely. Involuntary speech may be "commanded only on even more immediate and urgent grounds"[110] than those for which the state can prohibit speech. Following this analysis, a court should determine whether the notice and consultation requirement prevents an immediate threat to the husband's procreative ability and whether this threat, like speech

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107. *Id.* at 714.

108. Konigsberg v. State Bar of California, 353 U.S. 252 (1957).

109. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

110. *Id.* at 633. The classic right to silence cases have arisen in the context of state interests in controlling subversive activities. In *Gibson v. Florida Legislative Investigation Comm.*, the Court reversed a contempt conviction arising from a witness' refusal to disclose to a state legislative committee names of local NAACP chapter members. The committee sought this information in connection with its investigation of local Communist activities. Though this was considered a valid legislative interest, the Court nevertheless required a showing that this interest outweigh the individual's constitutionally protected right of privacy in his views or associations. Further, in order to establish an overriding legislative interest, the Court required that a "substantial connection" between the information sought and the subject matter of the inquiry be shown. Because no nexus was proved between the local NAACP and Communist activities, the Court refused to compel disclosure. 372 U.S. 539 (1963). *Cf.* Uphaus v. Wyman, 360 U.S. 72 (1959). Thus, in *Scheinberg*, the state must not only prove that its interest in the procreative potential of a marriage is a valid legislative concern, but must also show that this interest outweighs or subordinates the married woman's right to privacy in her communications. Further, the state must show that a nexus exists between the information sought to be compelled and its interest in the procreative potential of the marriage. 659 F.2d 476 (5th Cir. 1981).

Additionally, the requirement that legislation infringing upon protected speech be precisely drawn to express only the legitimate state interests at stake emerged in cases involving disclosures of organizational membership where an individual sought public employment or office. Garner v. Board of Pub. Works, 341 U.S. 716 (1951). The Court in this case held that a governmental employer could not condition employment upon an oath that the employee has not or will not engage in protected speech activities. *Id.* Similarly, the court in *Scheinberg* should not condition a married woman's access to an abortion upon consultation with her husband.

inciting riot, is a lawful subject for state regulation. Since infringements on the right to remain silent must be justified by more urgent state interests than those interests justifying restrictions on the right to speak freely, it is imperative to compare the nature of the state's interests in both situations. By way of illustration, where dangers of subversive activity and hostile demonstrations are exacerbated by an individual's exercise of free speech in a public place, the state has the duty to protect its citizens. When a wife desires an abortion, is it proper for the state to intrude into the private realm of marital communication by requiring her to voice such an intention as a means of protecting the husband's procreative potential?[111] The nature of the individual rights involved in this question render it worthy of a judicial response.

The Right of Privacy

Certain aspects of an individual's right of privacy are infringed by state limitations on first amendment guarantees of freedom of thought and speech. Privacy, in the abortion context, involves both an individual's interest in avoiding disclosure of personal matters and independence in making important decisions.[112] The Florida statute attempts to compel a woman to speak on a private matter about which she might choose to remain silent. Further, if a woman is forced to notify and consult her husband, she loses that feature of privacy which protects one's independence in decision-making. These characteristics of the statute are antithetical to fundamental notions of privacy.

The Equal Protection Argument

In addition to first amendment and privacy attacks on the statute, perhaps the most severe criticism is based upon equal protection grounds. Where fundamental rights are involved the equal protection

111. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

112. Whalen v. Roe, 429 U.S. 589, 599-600 (1977). (But note the Court in *Whalen* permitted the state to keep computerized records of the names of persons who obtain certain drugs by prescription owing to its effective security system to prevent unauthorized disclosure.)

inquiry must consider whether the notice and consultation provision is necessary and effective in furthering state interests and whether the legislation is narrowly drawn to express only the legitimate state interests at stake.[113]

The district court in *Scheinberg* found the statute inadequately drawn because it was both over and underinclusive. It was held overinclusive because it made "no exception for a married woman carrying the child of someone other than her husband."[114] As the statute is written, the husband's interest in the fetus arises from his marriage, not his paternity. Despite the district court's analysis, the court of appeals side-stepped this anomaly, focusing instead on whether the abortion procedure had more than a "*de minimis*" effect on his wife's childbearing capabilities.[115] The district court found the statute underinclusive because "it does not require a woman to notify and consult with her husband about an impending hysterectomy or tubal ligation,"[116] and these surgical procedures altogether foreclose marital procreative potential. It concluded that these failings in the statute rendered it unconstitutional. It should also be noted that a husband does not have to consult with his wife if he desires a vasectomy. The court of appeals acknowledged that the statute *was* indeed underinclusive. Nevertheless, it reversed the lower court's ruling finding that court's analysis unpersuasive; Florida's legislature may properly choose abortion as singularly deserving of special legislation.

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113. 410 U.S. 113. For a discussion of the necessary relationship between classifications and legislative objectives for equal protection purposes, see Tussman & ten Broek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949). The Constitution's demand for equal protection of the laws requires that those who are similarly situated be similarly treated. The success of a classification is determined by the measure of its ability to treat similarly those similarly situated with respect to furthering a valid state interest. Where fundamental rights are involved, the legislative means must bear a "tight fit" to the legislative ends sought. G. GUNTHER, *supra* note 102.

114. 482 F. Supp. at 540.

115. "The state interest sought to be furthered by this legislation encompasses more than merely the husband's interest in a particular fetus. . . . It encompasses furthering the institutional integrity of the marital relationship, and of the family." 659 F.2d at 486. *Cf.* 518 F.2d 787.

116. 659 F.2d at 486.

Conclusion

The spousal notice and consultation provision should have been declared unconstitutional once the court of appeals determined it constituted an obstacle to a married woman's first trimester abortion choice. By purporting to balance an individual's actual constitutional guarantee of privacy against a state's compelling interest in marital procreative potential, the appellate panel invited a novel —albeit ill-advised— approach to the abortion question. Certainly, opponents of abortion may take advantage of this new potential weapon and structure restrictive statutes under the pretext of procreative potential. One must wonder whether procreative potential would command equal attention if a woman sought to regulate or restrict her husband's vasectomy decision. Finally, one must not ignore the personal protections afforded by *Roe* and wonder whether procreative potential will succeed to ultimately erode what progress *Roe* has intelligently effected.

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