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SPOUSAL NOTIFICATION AND THE RIGHT OF PRIVACY

*Scheinberg v. Smith*
659 F.2d 476 (5th Cir. 1981)

MEERA WERTH, 1984*

Regulation and administration of family law has traditionally been considered within the purview of state control.1 For example, the age at which individuals may contract to marry and the acts which constitute grounds for divorce have always been regarded as matters of local rather than national concern.2 However, the states' power to intervene in domestic relations is not free from constitutional restraints. Where a state law infringes on fundamental human rights, it is subject to close judicial scrutiny which may result in the law being struck down if challenged on constitutional grounds.3 Thus, an important part of the analysis in deciding the constitutionality of a state law is the determination of which rights are to be considered fundamental. There is no simple formula for making this determination. In deciding whether a fundamental right is at stake, the Supreme Court has frequently turned to the "traditions and [collective] conscience of our people."4

In 1965, the Court recognized the right of privacy as a fundamental right.5 Less than a decade later, in *Roe v. Wade*,6 the Court reaffirmed the right of privacy as fundamental and held that this right encompassed a woman's decision to obtain an abortion. Consequently, since the holding in *Roe v. Wade*, any state regulation interfering with a woman's decision to obtain an abortion is subject to strict scrutiny. Under this mode of review, once the litigant has shown that a state

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2. Maynard v. Hill, 125 U.S. 190 (1888). The states' power to regulate family relationships stems from two sources, the police power and the *pares patriae* power. For a discussion on the sources of these powers see Note, *Developments in the Law, The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1198-1242 (1980).
statute poses some restriction on a fundamental right, the state is required to demonstrate that a compelling interest is served by the statute which justifies such interference. The types of state regulations that constitute a restriction on a woman's decision to obtain an abortion and the types of governmental interests that are to be considered compelling continue to be a source of debate and litigation.

In *Scheinberg v. Smith*, the United States Court of Appeals for the Fifth Circuit was confronted with the problem of determining whether a Florida statute requiring a woman to notify her husband of her decision to terminate her pregnancy was unconstitutional in light of the asserted state interests. The *Scheinberg* court held that the state's interests in protecting the husband's interest in the procreative potential of his marriage and in promoting marital integrity were sufficiently compelling to justify the burden imposed upon a woman by the notification statute. The court remanded the case, stating that if the lower court should find that an abortion has an adverse effect upon a woman's future procreative potential, thereby affecting the procreative potential of the marriage, the state can require spousal notification prior to the abortion.

This case comment will first briefly examine the nature and history of the right of privacy which protects a woman's decision to obtain an abortion free of unjustifiable state intrusions. Next, the analysis section will consider the impact of important Supreme Court decisions in this area and show that these decisions do not support the *Scheinberg* court's reasoning. Finally, the comment will discuss the resulting weakness in the *Scheinberg* court's rationale and assess the potential impact and the desirability of the *Scheinberg* decision.

**HISTORICAL BACKGROUND**

*The Right of Privacy in Abortion Cases*

In order to understand and evaluate the Fifth Circuit's decision in *Scheinberg v. Smith*, it is essential to trace the emergence of the right of privacy and its application to the abortion cases.

8. 659 F.2d 476 (5th Cir. 1981).
10. 659 F.2d at 483.
11. *Id.* at 487.
The general nature of the right of privacy\(^\text{12}\) is freedom from unwarranted state interference with the personal affairs and decisions of an individual.\(^\text{13}\) Although several earlier cases had indicated that there is a general right which protects certain private decisions and activities from state intrusion,\(^\text{14}\) the right of privacy was not explicitly recognized by the Supreme Court until 1965 in *Griswold v. Connecticut*.\(^\text{15}\) Even though the right of privacy is nowhere mentioned in the Constitution, the majority in *Griswold* firmly established the existence of such a right. The Justices disagreed, however, as to the constitutional source of the right. Justice Douglas' plurality opinion found this right in the "penumbras" surrounding the first, third, fourth, fifth and ninth amendments which created a zone of privacy. Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, found the right of privacy to stem from the ninth amendment, while Justice Harlan relied on the due process clause of the fourteenth amendment as the source of this right.

Having recognized the right of privacy as a fundamental right, the *Griswold* court invalidated a Connecticut statute which prohibited the use of contraceptives by married couples. Finding the statute to be an impermissible encroachment upon a married couple's personal procreative decisions, the Court stated that such state intrusion into fundamental personal liberties was justified only when necessary to achieve a compelling state interest.\(^\text{16}\)

The Supreme Court's focus in *Griswold* on the private nature of


\(^{13}\) In Roe v. Wade, 410 U.S. 113 (1973), the Court explained which personal decisions are protected by the right of privacy: "[o]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy. Such personal rights include decisions and activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* at 152-53 (citations omitted). The determination by the Court as to which rights are "fundamental" and therefore worthy of constitutional protection is necessarily a subjective one. Consequently, critics have attacked the recent Supreme Court decisions regarding privacy rights as a return to the *Lochner* era. *See infra*, note 22.


\(^{15}\) 381 U.S. 479 (1965).

\(^{16}\) *Id.* at 504. The two-part test used in scrutinizing legislation which impinges upon fundamental rights is discussed in text accompanying notes 27-31 infra. Compare this approach to the deferential "hands-off" approach adopted in the 1930's for scrutinizing economic legislation in which the Court upheld laws on the basis of mere rationality. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934). *See infra*, note 22.
marital relationships appeared to narrow the scope of the right of privacy to the matrimonial arena. Seven years later, however, in Eisenstadt v. Baird, the Court declared that this right affords similar protection on equal protection grounds to unmarried persons.

In its landmark decision of Roe v. Wade, the Supreme Court once again touched upon the source of the right of privacy. Writing for the majority, Justice Blackmun placed the source of this right in the due process clause of the fourteenth amendment. The invocation of the due process clause of the fourteenth amendment in Roe marks a return to the substantive due process approach originally used in the early part of the twentieth century. Under this doctrine of substantive due process, any legislation which limits life, liberty or property is subject to judicial reevaluation. Although this approach became discredited in the area of economic legislation, it has been reinstated in recent years as a means of protecting non-economic, personal values. Roe v. Wade and its progeny have established the due process clause of the fourteenth amendment as the source of the right of privacy in abortion cases.

In Roe, the Court held that the right of privacy is broad enough to encompass an unmarried woman's decision to terminate her pregnancy. Noting that a woman's decision to terminate her pregnancy is a fundamental right, the Court articulated a two-part test which a state

17. Justice Douglas expressed concern about allowing “the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives.” 381 U.S. at 485.
19. Writing for the majority, Justice Brennan stated: “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.” Id. at 453 (emphasis in original). These remarks by Justice Brennan proved significant as they were later relied on in Roe v. Wade.
21. Id. at 153.
22. See, e.g., Lochner v. New York, 198 U.S. 45 (1905). In such cases, the Court applied strict scrutiny to economic regulations, arguing that the fourteenth amendment's protection implicitly granted a fundamental substantive right to economic freedom. This approach became discredited because of the discretion and subjectivism it allowed the Court to inject into every decision, and was abandoned during the 1930's in favor of a presumption of validity in economic regulations. See, e.g., Nebbia v. New York, 291 U.S. 502 (1934). The substantive due process doctrine has reemerged in the right of privacy context and has once again been subject to criticism. Like the right to enter into a contract, upheld in Lochner, abortion is nowhere mentioned explicitly in the Constitution. By finding such unwritten rights to exist in the Constitution, the Justices were reverting back to the Lochner era. See generally Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703 (1975); Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920 (1973).
23. See U.S. CONST., amend. XIV.
24. See note 22 supra.
is required to meet in order to justify statutory intrusions impinging upon that right. First, the state must show that the statute serves a compelling state interest and, second, it must demonstrate that the statute is drafted so as to achieve only the state's interest at stake. This language indicates that strict scrutiny is the standard of review in abortion cases. Under this standard of review, once the challenger of the state law has shown that the law imposes some restriction on a fundamental right, the burden shifts to the state to meet the two-part test. The first part involves a showing by the state that the law impinging upon an individual's fundamental right serves such a vital governmental interest as to justify the interference with the right. However, the showing of a compelling governmental interest alone is not sufficient to render all state regulation valid. The second part of the two-part test requires the state to demonstrate that the regulation is narrowly drafted to serve only the interest sought to be achieved by the state. Thus, even a legitimate and substantial governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." In, the Court recognized two compelling state interests in regulating abortion. First, the state has a legitimate interest in preserving the mother's health. The Court found this interest to become compelling at approximately the end of the first trimester of pregnancy because prior to this point the "mortality in abortion may be less than mortality in normal childbirth." Consequently, after the first trimester, the state's interest in preserving maternal health allows some health-related regulation of the abortion procedure.

27. Id. at 155.
28. Id.
30. The challenger of the state law need not show that the law imposes an absolute obstacle to the exercise of the fundamental right. A mere showing of some restriction on the right is sufficient to trigger strict scrutiny. See Harris v. McRae, 448 U.S. 297 (1980); Roe v. Wade, 410 U.S. 113, 155 (1973).
32. 410 U.S. at 162.
33. Id. at 163. One commentator has noted that as medical technology advances, the mortality rate of abortions performed after the first trimester may decline, thus making the point at which the state's interest in maternal health becomes compelling arise at a later stage in the pregnancy. Tietz, New Estimates of Mortality Associated with Fertility Control, 9 Fam. Plan. Perspectives 74 (1977).
34. See, e.g., Doe v. Bolton, 410 U.S. 179, 194-95 (1973) (allowing licensing standards for facilities where abortion would be performed after the first trimester of pregnancy provided that the standards are related to the preservation of maternal health and do not unnecessarily limit performance of abortions to hospitals).
The second compelling state interest recognized by the *Roe* Court was in preserving the life of a viable fetus.\(^3\) Viability was defined as the point in time at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."\(^3\) At this point, thought to occur during the third trimester of pregnancy, the state could regulate and even proscribe abortion except when necessary to preserve the health or life of the mother.\(^3\)

In the companion case to *Roe*, *Doe v. Bolton*,\(^3\) the Court struck down certain procedural requirements of the Georgia abortion statute.\(^3\) This statute required that: 1) the woman seeking the abortion must be a resident of Georgia; 2) the abortion must be approved by a hospital committee; 3) the abortion must be performed in an accredited hospital; and 4) the judgment of the physician performing the abortion must be confirmed by two other physicians. Although these requirements did not prohibit abortion outright, they had the effect of restricting free access to abortions, a restriction which the Court had found impermissible in the first trimester of pregnancy. As a result, each of the requirements was found unconstitutional in whole or in part.\(^4\)

The *Griswold-Roe* line of cases have established a right of procreative autonomy by recognizing a right to prevent procreation through contraception\(^4\) and a right to terminate procreation through abortion.\(^4\) However, the right of procreative autonomy had been upheld by the Supreme Court as early as 1942 in *Skinner v. Oklahoma*,\(^4\) where

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35. 410 U.S. at 163.
36. *Id.* at 160. The point at which viability occurs was left flexible for anticipated advancements in medical skill and judgment. In *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 64 (1976) and *Colautti v. Franklin*, 439 U.S. 379, 387 (1979), the Court reiterated the need for this flexibility.
37. Commentators have noted that as medical advancement is made, the chances of survival outside the womb for less developed fetuses will increase. This could provide a basis for state intrusion into a woman's abortion decision at an earlier stage of pregnancy. *See* Horan, *Viability, Values, and the Vast Cosmos*, 22 CATH. LAW 1, 26-27 (1976). Indeed, medical progress may virtually eliminate all abortions if the fetus is able to survive outside the womb after the first month of pregnancy.
40. The residency requirement was found to violate the privileges and immunities clause. 410 U.S. at 200. The requirements of a hospital committee approval and confirmation by two other physicians were held to be unduly restrictive. *Id.* at 199. The requirement that the abortion be performed in an accredited hospital was struck down because it failed to exclude first trimester abortions and the state had "not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient." *Id.* at 195.
43. 316 U.S. 535 (1942).
the Court invalidated an Oklahoma statute that allowed compulsory sterilization of certain convicted criminals. The *Skinner* Court stated that "marriage and procreation are fundamental to the very existence and survival of the race." The *Griswold-Roe* line of cases reaffirmed and strengthened the concept of autonomy by allowing an individual not only the freedom of procreation but also the choice of preventing or terminating procreation free from state intrusions.

The decisions in *Roe v. Wade* and *Doe v. Bolton* left certain important issues unresolved. For example, the Court expressly did not decide whether a state may protect the husband’s interest in his wife’s abortion by requiring a woman to obtain his consent prior to an abortion. Neither did the Court address the constitutionality of parental consent requirements in the case of unmarried minors seeking abortions. Proponents of anti-abortion laws employed these omissions by the Supreme Court to pass legislation curtailing the availability of abortions. States began to enact legislation requiring spousal or parental consent before a woman could obtain an abortion.

**Consent Requirements**

In the years following the *Roe* decision, several lower federal courts were confronted with the issue of the constitutionality of spousal consent requirements. Challenges to these state requirements were made on the grounds that such interference by the state in the first trimester of pregnancy violated the standards established by *Roe v. Wade*.

In *Planned Parenthood of Central Missouri v. Danforth*, the

44. *Id.* at 541. *Cf.* Buck v. Bell, 274 U.S. 200 (1927) in which the Supreme Court upheld a Virginia statute providing for sterilization of inmates afflicted with hereditary forms of insanity or imbecility.

45. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court stated: "Neither, 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 rights have been asserted in either of the cases. . . ." *Id.* at 165 n.67.


Supreme Court finally provided additional guidelines for abortion legislation. Addressing several issues left unresolved in Roe and Doe, the Court spoke for the first time on the constitutionality of parental and spousal consent statutes.\(^{51}\) The Missouri parental consent statute\(^{52}\) required all unmarried minor women, without regard to age or maturity, to obtain consent from their parents prior to obtaining an abortion.\(^{53}\) The Court found that this blanket provision gave parents an absolute veto power over a woman’s abortion decision.\(^{54}\) Invalidating the statute, the Court denounced the state’s attempt to “give a third party an absolute, and possibly arbitrary, veto over the (abortion) decision.”\(^{55}\) The Court indicated that a state cannot delegate the power of absolute veto to a third party when the state itself lacks this power.\(^{56}\)

The *Danforth* decision was an important step forward for the rights of minors. It was the first explicit recognition that the right of privacy is not reserved for adults alone. This decision did not mean, however, that every minor “regardless of age or maturity” is capable of giving effective consent; rather, it simply meant that a minor might be mature and competent enough to give consent.\(^{57}\)

The Court further delineated the abortion rights of minors in *Bellotti v. Baird*.\(^ {58}\) The challenged state law\(^ {59}\) in *Bellotti* required a minor seeking an abortion to obtain the consent of both parents. If one or both parents refused consent, a state judge could authorize the abor-

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51. Other provisions under attack in *Danforth* were the following: Mo. Ann. Stat. § 188.050 (Vernon 1975) (prohibiting the abortion procedure by saline amniocentesis); Mo. Ann. Stat. § 188.020 (2) (Vernon 1975) (requiring the pregnant woman to give her informed consent); Mo. Ann. Stat. §§ 188.055 through 188.060 (Vernon 1975) (requiring physicians and health facilities to record and report all abortions to the State of Missouri); and Mo. Ann. Stat. § 188.035 (Vernon 1975) (requiring the physician performing the abortion to exercise professional medical care to preserve the life and health of the fetus).


53. Id. Missouri recognized the “mature minors” rule whereby a minor capable of understanding the medical procedure involved could give informed consent to surgery. Nonetheless, the Missouri statute imposed a blanket parental consent requirement for abortions, failing to differentiate between immature minors and those capable of making an intelligent, informed choice.

54. 428 U.S. at 75.

55. Id. at 74.

56. Id.


58. 443 U.S. 622 (1979). This case was originally argued before the Supreme Court on the same day as *Danforth* in Bellotti v. Baird, 428 U.S. 132 (1976). This earlier *Bellotti* case was remanded without decision for a state interpretation of the Massachusetts statute in question.

tion. In an eight to one decision, the Court found the statute unconstitutional. However, the majority was split in its reasoning. Justice Powell, joined by Chief Justice Burger and Justices Stewart and Rehnquist, offered some guidelines as to how a state may constitutionally provide for adult involvement in a minor's abortion decision. According to Justice Powell, a minor should be entitled to a proceeding which allows her to demonstrate that she is mature enough to make the abortion decision on her own. If she fails to do so, she must be permitted to show that the abortion nevertheless would be in her best interests. Only if she fails on both counts may the judge decline to allow the operation. Justice Stevens, joined by Justices Brennan, Marshall and Blackmun, argued that a state may never condition a minor's right to an abortion on a third party consent.

_Danforth_ also invalidated the Missouri spousal consent statute which required that a married woman obtain written consent from her husband prior to obtaining an abortion. This provision applied in all instances except when the abortion was necessary to preserve the woman's life. The Court reasoned that a state cannot "delegate to a spouse veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." The Court thus reaffirmed the holding in _Roe v. Wade_ that a state may not interfere with a woman's fundamental right to decide to terminate her pregnancy in the first trimester. Moreover, since the state itself lacks the authority to veto a woman's abortion decision in the first trimester, it cannot grant this authority to a third party. In defense of the spousal consent requirement, Missouri asserted that it had a sufficiently strong state interest in protecting the integrity of marriage to justify the stat-

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60. 443 U.S. at 647.
61. Justice White was the sole dissenter.
64. As of this date, the Supreme Court has not addressed the question of whether a spousal consent requirement can be imposed for abortions performed during the second trimester of pregnancy. Several lower court holdings, however, have indicated that the husband's consent as a prerequisite to abortions in the second trimester would be unconstitutional. See, e.g., Wolfe v. Schroering, 541 F.2d 523, 525 (6th Cir. 1976); Coe v. Gerstein, 376 F. Supp. 695, 697-98 (S.D. Fla. 1973).

The rationale of _Danforth_ suggests that there would be no constitutional basis for upholding a spousal consent statute in the second trimester. The question as to whether spousal consent may be required for an abortion during the third trimester has apparently never been litigated as most states continue to proscribe nontherapeutic abortions during this period of pregnancy.
The Court rejected this argument, expressing doubt that giving a husband unilateral veto power over his wife's decision to abort would promote family ties.66

**Notification Requirements**

The Supreme Court's decision in *Roe v. Wade* has been vigorously contested and criticized since 1973. Today, a decade after the decision, the abortion controversy shows no signs of abating. In fact, the intensity over the abortion debate has increased in recent years as anti-abortion forces relentlessly campaign against women's right to choose abortion, while abortion rights advocates continue to oppose any attempts to overturn the 1973 decision.67 After 1976, when the Court invalidated spousal and parental consent requirements, several states enacted laws requiring women to notify their husbands or parents of their decision to obtain an abortion.68

The constitutionality of a Utah state law requiring a minor to notify her parents prior to terminating her pregnancy was recently addressed by the Supreme Court in *H.L. v. Matheson*.70 In a six to three decision, the Court held that Utah's parental notification statute was constitutional as applied to an unemancipated minor living with and dependent upon her parents. In reaching this conclusion, Chief Justice Burger's majority opinion emphasized the important rights of parents in bringing up their children. Noting that the statute did not provide for a veto over the minor's decision to abort, the Court balanced the interests served by the statute against the burden imposed on the minor. The majority identified preservation of family integrity and protection of adolescents as important state interests which, although insufficient to warrant a consent statute such as the one involved in *Danforth*, justified parental notification requirements.71

Unlike *Danforth*, the *Matheson* decision is limited to immature or unemancipated minors dependent on and living with their parents.

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65. 428 U.S. at 68. This argument was used by the State of Florida and upheld by the Fifth Circuit in justifying spousal notice requirements in *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981). See infra, text accompanying notes 98-111.

66. 428 U.S. at 71.

67. See *National NOW Times*, March 1983, at 1 col. 4. See also *Jaffe*, supra note 46, at 113-22.


71. *Id.* at 411-13.
The Court specifically refused to rule on the constitutionality of the parental notification statute as applied to mature minors, saying: "We cannot assume that the statute when challenged in a proper case, will not be construed . . . to exempt demonstrably mature minors." Justice Powell's concurrence, joined by Justice Stewart, emphasized that he joined the majority only with the understanding that the ruling did not apply to mature minors or to those whose best interests would not be served by notification. In light of the Court's emphasis on the role of the parent-child relationship as an important factor in upholding parental notification and the intimation that the Utah statute would be unconstitutional if applied to emancipated minors, the Matheson decision appears to have little bearing on the issue of spousal notification. Rather, the case seems to signal a warning to state legislatures that an exception should be provided for minors who demonstrate a capability of making an informed decision (and for minors whose best interests would not be served by notifying the parents).

The underlying issue in the spousal notification controversy is whether there is any justification for statutory recognition of the husband's interest in his wife's abortion. Although the protection of both the wife's as well as the husband's interests in procreation would be desirable, the Supreme Court has made it clear that a husband's interests may not be protected at the expense of stifling the wife's rights. Thus, if notifying the husband of his wife's abortion would create an overbearing burden upon the woman, it is questionable whether a state may constitutionally require notification on behalf of the husband. There has never been a constitutional recognition of the husband's

72. Id. at 406. The Court also pointed out that the United States District Court for Utah had held the statute inapplicable to emancipated minors. As there has been no appeal on that issue, this holding of the district court was controlling on the state. Id.

73. Id. at 413-14. Only Justice Stevens found that the statute was constitutional as applied to all minors, regardless of age or maturity. Id. at 424-25.

74. The husband's interest in the fetus was not recognized at common law. See Note, Abortion: The Father's Rights, 42 U. CIN. L. REV. 441 (1973). Consequently, the basis for interference with the wife's abortion decision on behalf of the husband cannot be his interest in the fetus.

75. Some courts have recognized a valid state interest in protecting the husband's procreative rights. See, e.g., Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), aff'd mem. sub nom., Gerstein v. Coe, 428 U.S. 901 (1976). In Poe, the Fifth Circuit suggested that abortion should be made grounds for divorce as a means of protecting the husband's interests without violating the wife's right to choose an abortion. The court referred to Kreyling v. Kreyling, 20 N.J. Misc. 52, 23 A.2d 800 (1942), in which a woman was granted a divorce on the grounds of her husband's repeated refusals to participate in sexual intercourse without the use of contraceptives. See also Note, A Spouse's Right to Marital Dissolution Predicated on the Partner's Contraceptive Surgery, 23 N.Y.L. SCH. L. REV. 99 (1977); Note, Abortion and the Husband's Consent, 13 J. FAM. L. 311 (1974).

right to be notified of his wife's decision to abort. *Sheinberg v. Smith*[^77] is a case of first impression on this issue.

**Sheinberg v. Smith**

*Statement of the Case*

Dr. Mark Scheinberg, a licensed physician in the State of Florida, brought a class action[^78] against Florida's state enforcement officials.[^79] The plaintiff challenged the constitutionality of the Florida statute[^80] which regulated the termination of pregnancies. He sought a declaratory judgment that the statute was unconstitutional on its face and requested preliminary and permanent injunctions prohibiting the defendants from prosecuting him or members of his class for alleged violations of the statute.

Specifically, the plaintiff challenged the constitutionality of subsections (4)(a)[^81] and (4)(b)[^82] of the statute. Subsection (4)(a) of the statute required an unmarried minor seeking an abortion to provide her physician with either the written consent of a parent, custodian or legal guardian or an order from the circuit court authorizing abortion. Subsection (4)(b) required the physician to ensure that a married woman seeking an abortion notify her husband of the proposed abortion and allow him the opportunity to consult with her concerning the procedure. This provision did not apply if the husband and wife were separated or estranged.

*Lower Court Holdings*

A preliminary hearing was held in July 1979 to consider the plaintiff's request for a preliminary injunction.[^83] At this hearing, the district

[^77]: 659 F.2d 476 (5th Cir. 1981).

[^78]: The classes included: 1) all unmarried minor pregnant women desiring abortions, and their physicians; and 2) all married pregnant women desiring abortions, and their physicians. *Jones v. Smith*, 474 F. Supp. 1160, 1162 (S.D. Fla. 1979).


[^80]: FLA. STAT. ANN. § 390.001(4)(a) and (4)(b) (West 1981). This statute was previously codified as the Medical Practice Act, FLA. STAT. ANN. § 458.505(4)(a) and (4)(b) (West 1979).

[^81]: FLA. STAT. ANN. § 390.001(4)(a) (West 1981) (Previously codified as FLA. STAT. ANN. § 458.505(4)(a) (West 1979)).

[^82]: FLA. STAT. ANN. § 390.001(4)(b) (West 1981) (previously codified as FLA. STAT. ANN. § 458.505(4)(b) (West 1979)).

court, relying on *Bellotti v. Baird*, enjoining the state from prosecuting plaintiff or any member of the class he represented under the statutory provision requiring minors to obtain parental consent. In *Bellotti*, the Supreme Court had held that a judge cannot determine that abortion is not in the best interest of a minor if the minor has been adjudged mature enough to make an informed decision on her own. The district court found that the language of subsection (4)(a) empowered a judge to do precisely what the *Bellotti* decision prohibited; that is, it allowed a judicial veto power over a minor's abortion decision. Accordingly, the court granted a preliminary injunction as to that provision of the Florida statute. The same relief, however, was denied for subsection (4)(b) as the court found that plaintiff had failed to demonstrate a substantial likelihood that the spousal notification requirement would be found unconstitutional on the merits.

At the final hearing, the district court found that the spousal notice and consultation provision of the statute imposed a substantial interference upon a woman's decision to obtain an abortion in the first trimester of pregnancy. The court found the asserted state interests insufficient to justify the intrusion imposed by this notice requirement. Accordingly, this regulation also was invalidated.

The United States Court of Appeals for the Fifth Circuit affirmed the district court's holding on the provision regulating a minor's access

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84. 443 U.S. 622 (1979).
86. 443 U.S. at 647. *See supra*, text accompanying notes 59-61.
87. Jones v. Smith, 474 F. Supp. at 1167. At the final hearing, the district court first considered whether in light of the doctrine enunciated in *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), abstention was appropriate for subsection (4)(a). In *Pullman*, the Supreme Court articulated a theory of abstention. Abstention comes into play where an unclear or unconstrued state law, which is susceptible to an interpretation that would render it constitutional, is challenged on federal constitutional grounds. In such cases, deference is given to state courts to interpret the unsettled state law, thereby avoiding the possibility of unnecessarily deciding a federal constitutional question. *Id.* at 500. Under the *Pullman* doctrine, the usual course adopted by the federal court is to retain jurisdiction over the case, but stay the federal suit until the state law questions are decided by the state court. *See Harris County Comm'nrs Court v. Moore*, 420 U.S. 77, 88 (1975). In the *Scheinberg* case, since no possible ambiguity existed in the interpretation of § (4)(a), the court found that the *Pullman* abstention was not warranted. 482 F. Supp. at 535.
90. The State of Florida asserted two compelling interests to justify requiring spousal notification: 1) promoting marital relationships, and 2) protecting the husband's interest in the procreative potential of the marriage. 482 F. Supp. at 538-39.
91. *Id.* at 539.
92. *Id.* at 540.
to abortion. It vacated and remanded the holding on the spousal notification provision for specific findings as to the effect of a properly performed abortion procedure upon a woman's child-bearing capacity. If the Florida legislature could have reasonably concluded that such abortions create a greater than de minimis risk to a woman's child-bearing capacity, the spousal notice provision was to be upheld.

**Reasoning of the Court**

On appeal to the Fifth Circuit, the State of Florida admitted that the parental consent requirement in subsection (4)(a) could not withstand constitutional attack in light of *Bellotti v. Baird*. The court then focused on the spousal notice and consultation requirement set forth in subsection (4)(b). It agreed with the district court's findings that this provision created a substantial interference with a woman's abortion decision so that it could be justified only by compelling state interests. The State of Florida asserted two compelling interests: promoting the marital relationship and protecting the husband's interest in the procreative potential of the marriage. Unlike the district court, the Scheinberg court found that the two interests, weighed together, "telescoped into a state interest" in furthering the integrity of marriage.

94. Id.
95. Id.
96. 443 U.S. 622 (1979). See supra, notes 58-61 and accompanying text. The State of Florida argued, however, that the district court should have abstained or certified the question of the parental consent requirement to the state court for proper interpretation of the statute. 659 F.2d at 480. After determining that no possible ambiguity existed in the interpretation of subsection (4)(a), the Scheinberg court found that neither abstention nor certification was proper in this case. Id. at 481. See supra, note 87 for a discussion on the doctrine of abstention relied on by the State of Florida.
97. FLA. STAT. ANN. § 390.001(4)(b) (West 1981) provides:
   (b) 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. The physician may rely on a written statement of the wife that such notice and opportunity has been given, or he may rely on the written consent of the husband to the proposed termination of 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.
98. 659 F.2d at 482. In arriving at this conclusion the court relied on Charles v. Carey, 627 F.2d 772 (7th Cir. 1980), in which the United States Court of Appeals for the Seventh Circuit stated that when a fundamental right is subjected to regulation a plaintiff need only show "interference [that] is sufficiently substantial and not de minimis." Id. at 777.
99. See supra, text accompanying notes 26-31.
100. 659 F.2d at 483.
101. The district court had rejected both the interests asserted by the state as insufficient to justify interference with a woman's abortion decision in the first trimester of pregnancy. Scheinberg v. Smith, 482 F. Supp. 529, 539-40 (S.D. Fla. 1979).
and family and were sufficient to justify the burden imposed upon a woman by the spousal notification statute.\textsuperscript{102}

The \textit{Scheinberg} court reasoned that regulation of marriage has long been considered a matter of state concern.\textsuperscript{103} The court relied on several Supreme Court cases\textsuperscript{104} in which the state's broad regulatory powers over several aspects of marriage had been noted, and found that the State of Florida had a valid interest in strengthening the state-created and regulated institution of marriage by fostering the mutuality of decisions between a husband and wife.\textsuperscript{105}

Similarly, the court found that the state had a substantial interest in protecting the husband's interest in the procreative potential of his marriage.\textsuperscript{106} Relying on \textit{Skinner v. Oklahoma},\textsuperscript{107} the court stated that the husband's procreative rights are entitled to constitutional protection.\textsuperscript{108} Without the protection afforded the husband via the spousal notification statute, the husband's procreative interests could be secretly frustrated by his wife without his ever discovering it.\textsuperscript{109} Thus, although the state's interest in protecting the husband's procreative potential has been found to be insufficiently compelling to justify a spousal consent requirement,\textsuperscript{110} the \textit{Scheinberg} court held that it is sufficient to justify the lesser intrusion imposed by the spousal notification requirement.\textsuperscript{111}

Next, the court inquired whether the statute was narrowly drafted to further only the state's interests at stake.\textsuperscript{112} The court rejected the district court's reasoning that the spousal notification statute was not drafted in a constitutionally acceptable manner.\textsuperscript{113} According to the court, the fact that the state required the husband to be notified of his wife's abortion decision without requiring the same for other medical

\textsuperscript{102} 659 F.2d at 483.
\textsuperscript{103} \textit{Id.} at 483-84.
\textsuperscript{105} 659 F.2d at 483-84.
\textsuperscript{106} \textit{Id.} at 485.
\textsuperscript{108} 659 F.2d at 485.
\textsuperscript{109} \textit{Id.}
\textsuperscript{111} 659 F.2d at 485.
\textsuperscript{112} In Roe \textit{v. Wade}, 410 U.S. 113 (1973), the Supreme Court articulated a two-part test which the state is required to meet in order to justify statutory intrusions into the right of privacy. \textit{See supra}, text accompanying notes 27-31.
\textsuperscript{113} 659 F.2d at 486.
procedures which would affect the wife's procreative abilities was not significant. Similarly, the fact that the statute did not distinguish between the married woman's husband and the father of the child did not make it over-inclusive. In light of the fact that the state's interest was in preserving the marital relationship and the procreative potential of the marriage, rather than in protecting the father's rights in the fetus, the court found the issue of paternity to be peripheral.

Because the Scheinberg court's primary justification for the spousal notification statute was the state's interest in protecting the procreative potential of the marriage, it was necessary to determine the effects of abortion procedures on a woman's ability to bear children in the future. Accordingly, the court remanded the case for specific findings to that effect, holding that if the findings indicate that abortions have the potential to affect a woman's future procreative abilities adversely, the state may require notification to the husband.

On remand, United States District Judge Sidney Aronovitz held that an abortion, performed properly by licensed medical practitioners in accordance with procedures approved by prevailing medical authorities, does not pose a greater than de minimis risk to a woman's procreative abilities. Accordingly, Judge Aronovitz held subsection (4)(b) to be unconstitutional.

Analysis of the Opinion

Scheinberg is the first case to address the constitutionality of a state statute requiring that a woman notify her husband prior to obtaining an abortion. Having accepted at the outset that this requirement created "an obstacle, hitherto nonexistent" to a woman's ability

114. Id.
115. The court explained:
   The question is not whether notice should be required if a husband is not the father of the fetus, but rather whether the abortion procedure poses a substantial enough risk of a decrease in fertility to affect detrimentally, e.g., in more than a de minimis fashion, the procreative potential of a marriage.
116. Id.
117. At the trial the parties had presented conflicting evidence concerning the degree of risk an abortion posed to the procreative potential of a marriage. Scheinberg v. Smith, 482 F. Supp. at 539. Some federal courts, although faced with this issue, have not addressed the constitutionality of spousal notice and consultation statutes. See, e.g., Roe v. Rampton, 535 F.2d 1219 (10th Cir. 1976) (court found that abstention was proper and remanded the issue to the state court to interpret the statute in question); Doe v. Deschamps, 461 F. Supp. 682 (D. Mont. 1976) (the statute as written was unconstitutional because it provided no method of giving notice whereby a physician would know how to avoid criminal liability).
to procure an abortion in the first trimester of pregnancy, the court's discussion concentrated primarily on the compelling interests asserted by the state. The court held that the state's interests in promoting marital relationships and protecting the husband's procreative potential in the marriage are sufficiently compelling to justify the burden imposed by the spousal notification statute.

In reaching this decision, however, the Scheinberg court completely ignored the mandate of Roe v. Wade, in which the Supreme Court held that state regulations burdening a woman's decision to obtain an abortion in the first trimester are unconstitutional.

In subsequent cases, such as Planned Parenthood of Central Missouri v. Danforth and Connecticut v. Menillo, the Supreme Court did uphold some state regulation over first trimester abortions. However, it did so only on the grounds that the regulation was not overly burdensome and was related to maternal health. For example, in Danforth, the Court found that the Missouri state law requiring the physician to obtain the woman's informed consent prior to abortion was reasonable and not overly burdensome. The Danforth Court also found the record keeping provision, requiring physicians and health facilities to record and report all abortions to the state of Missouri to be a reasonable measure to protect maternal health, provided adequate confidentiality was maintained. Similarly, in Menillo the Court upheld a state law prohibiting nonphysicians from performing abortions, finding such a regulation to be nonoverbearing and reasonably related to preserving maternal health. In fact, as early as 1973, in Doe v. Bolton, the Court recognized the need for some reasonable health-related state regulation for abortions.

These cases do not demonstrate a retreat from the holding in Roe. Rather, they establish that state regulations that are not overbearing upon a woman's abortion decision need only have a rational relationship to the asserted state interest. The rational basis test is used when the litigant fails to show that the state law interfered with a fundamen-

119. 659 F.2d at 483.
120. Id.
121. 410 U.S. 113 (1973).
122. See supra, text accompanying notes 26-37.
125. See supra, note 51.
127. See supra, note 34.
tal right. Under this standard of review, there is a presumption of validity in favor of the state law. As long as the regulation is rational, it is to be upheld and the state need not justify it by showing that it protects a compelling state interest. If, on the other hand, the regulation is found to burden a woman’s abortion decision, the state must show a compelling interest; no compelling interest, however, exists in the first trimester of pregnancy. Nonetheless, the Scheinberg court reached the conclusion that the interests asserted by the State of Florida were indeed compelling in the first trimester of a married woman’s pregnancy.

This conclusion by the Scheinberg court is particularly difficult to understand in light of Doe v. Bolton. In Doe, the Supreme Court invalidated health-related regulations because they were found unduly burdensome. Though a legitimate state interest in preserving maternal health exists throughout the entire phase of pregnancy, the courts have consistently held that regulations which apply to first trimester abortions must not be overbearing.

The Scheinberg court’s justification for finding the state’s interests compelling rests on the balancing of the interests at stake. In certain recent cases, the Supreme Court does appear to have used a balancing approach to substantive due process review. Under the balancing

129. Compare this approach to the strict scrutiny applied to state legislation when the litigant is able to show that the legislation impinges upon a fundamental right. See supra, notes 26-31 and accompanying text.
131. 659 F.2d at 483.
133. See supra, notes 26-28 and accompanying text.
134. In Roe, the Court recognized that the state had a legitimate interest in the health of the mother. This interest became compelling, however, only after the first trimester of pregnancy. Id. at 162-63.
135. See, e.g., Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) (the court invalidated sections of the informed consent statute requiring a woman to view pictures of a fetus at various stages of gestational development and requiring that she be told of the possibility of organic pain to the fetus); Planned Parenthood Ass’n of Kansas City, Mo., Inc. v. Ashcroft, 483 F. Supp. 679 (W.D. Mo. 1980) (informed consent provision requiring physician to tell every patient about the anatomical and physiological characteristics of a fetus were found an impermissible intrusion into the privacy of the doctor-patient relationship, depriving the woman of the right to consult freely with her physician).
136. 659 F.2d at 485. The court stated: In essence, therefore, the spousal notice provision is a statutory burden on a woman’s abortion decision that, in the final analysis, takes less from a woman’s untrammelled right to secure an abortion than it adds to the protection of the integrity and dignity of family life. Id. (footnote omitted).
approach, the court weighs the degree of interference the state regulation imposes on the right against the asserted governmental interest. As the interference with the protected right diminishes, it may be outweighed by governmental interests of lesser importance. However, even if it used such a balancing approach, the Scheinberg court's rationale still must fail. In deciding that the state's interests outweighed the degree of burden imposed upon the woman by the notification statute, the court necessarily made two assumptions. First, the court automatically concluded that the spousal notification statute furthers the integrity of marital relationships. The only support provided for this conclusion was the district court's finding that mutual communication between a married couple is considered by experts to promote marital harmony. However, there is no indication from the testimony heard by the district court that a state law forcing a woman to notify her husband of her abortion decision strengthens marital relationships. On the contrary, the district court cited specific instances in which forcing a woman to notify her husband of her decision to abort would harm rather than benefit the marriage. Moreover, in Planned Parenthood of Central Missouri v. Danforth, the Supreme Court found that requiring the husband's consent prior to an abortion did not further the state's interests in promoting marital harmony. The Scheinberg court failed to explain how this state interest is served any better by forcing a woman to notify her husband of her decision.

The second assumption made by the Scheinberg court was that the spousal notification statute imposed a lesser degree of burden than did


138. 659 F.2d at 485.

139. The court found it apparent “that notice and consultation does, in general, further the integrity of marital and familial life.” Id. at 484 (footnote omitted).

140. Id. (quoting Scheinberg v. Smith, 482 F. Supp. at 537).


142. The testimony of experts in the areas of psychiatry, gynecology, psychology and obstetrics as well as that of social workers and counselors indicated that in certain instances, the requirement of compulsory notification would, at least, produce anxiety and stress for the woman and her marriage. Some specific instances where forcing a woman to communicate her decision to her husband would produce adverse effects were: 1) where the husband is not the father of the fetus; 2) where the wife has been a rape victim and does not wish to disclose that fact; 3) where the husband's strong religious or moral precepts would object to abortion; 4) where the husband is emotionally or physically unstable and incapable of participating in the decision; and 5) where the woman fears physical abuse from her husband. Id. at 538.


144. Id. at 69. The Danforth Court did not approach the issue of whether the state interest in promoting marital relationship was compelling; instead it rejected the state interest because it found it would be unlikely to be furthered by the spousal consent requirement.
the spousal consent statute involved in *Danforth*.\(^{145}\) In an effort to distinguish this case from *Danforth*, the *Scheinberg* court stated that the Florida statute "does not run afoul of the concerns emphasized in *Danforth*" because it requires notice rather than consent.\(^{146}\) However, as the district court noted, there are several instances in which a compulsory requirement that forces a woman to notify her husband of her decision will create substantial obstacles in the woman's path.\(^{147}\) For many women the consequences of notifying their husbands of their decision could include physical or emotional abuse and withdrawal of financial support.\(^{148}\) In order to avoid such consequences, many women may seek other alternatives such as obtaining an illegal abortion. Also, some women may delay the decision to get an abortion past the first trimester of pregnancy after which the dangers of abortion begin to increase. Indeed, it is not inconceivable that many women when forced to notify their husbands may forego the decision to obtain an abortion altogether. Thus, especially in the face of the evidence presented by experts at trial,\(^{149}\) it is indeed naive to believe that, for many women, notifying their husbands of their decision to abort would not amount to the same degree of interference as that imposed by a spousal consent statute.

The *Scheinberg* court relied on *Skinner v. Oklahoma*\(^{150}\) to reach the conclusion that the state has a compelling interest in requiring a wife to inform her husband of her abortion decision.\(^{151}\) In *Skinner*, the Supreme Court struck down a state law providing for compulsory sterilization of certain convicts, stating that the right of procreation is fundamental.\(^{152}\) *Skinner* appears to protect the right to procreate only against state interference; it does not guarantee a procreative opportunity. The *Scheinberg* court took the *Skinner* rationale a step further by

\(^{145}\) 659 F.2d at 485.
\(^{146}\) *Id*.
\(^{147}\) *See supra*, note 142.
\(^{148}\) In *H.L. v. Matheson*, 450 U.S. 398 (1981), Justice Marshall's dissent noted the adverse effects that a parental notice statute could pose:

> In addition to parental disappointment and disapproval, the minor may confront physical or emotional abuse, withdrawal of financial support, or actual obstruction of the abortion decision. Furthermore, the threat of parental notice may cause some minor women to delay past the first trimester of pregnancy, after which the health risks increase significantly. Other pregnant minors may attempt to self-abort or to obtain an illegal abortion rather than risk parental notification.

*Id.* at 438-39 (Marshall, J., dissenting). Similar problems face a woman in notifying her husband under certain situations.

\(^{149}\) *Id*.
\(^{150}\) 316 U.S. 535 (1942).
\(^{151}\) 659 F.2d at 485.
\(^{152}\) *See supra*, text accompanying notes 43-44.
holding that a state may take affirmative steps in order to protect an individual's procreative rights. It is not at all clear from *Skinner*, however, that protecting a husband's procreative interests would justify encroaching upon his wife's conflicting right to choose an abortion without state intrusion during the first trimester of pregnancy.

This askew reading of *Skinner* is particularly incomprehensible in light of the Fifth Circuit's decision in *Poe v. Gerstein*, in which the same court found that *Skinner* does not guarantee the husband a willing partner, but merely protects procreative rights against state intrusions. Moreover, in *Danforth*, the Supreme Court explicitly stated that the interests of the husband in the abortion decision are subordinate to those of the wife. Yet, the *Scheinberg* court construed *Skinner* as authority to elevate the husband's procreative rights to a level where the state may be authorized, on the husband's behalf, to interfere with the woman's abortion decision.

Once the state's interest in limiting a fundamental right is deemed compelling, the state must nonetheless demonstrate that the challenged state law is necessary to fulfill that interest. The Supreme Court in *Roe* stated that "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." As the district court in *Scheinberg* observed, the notification statute is grossly underinclusive to meet this standard articulated in *Roe*. For example, the State of Florida does not require a woman to notify or consult with her husband prior to other surgical procedures, such as hysterectomy, which would totally foreclose marital procreative potential.

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154. 517 F.2d at 797. In *Poe*, the Fifth Circuit invalidated a Florida statute which required that a physician obtain the consent of a married woman's husband prior to performing an abortion. The court found that the asserted state interest of protecting the father's procreative potential was not served by the consent requirement. *Id.*
155. 428 U.S. at 71. The Court stated:

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

*Id.*
157. *Roe* v. *Wade*, 410 U.S. 113, 155 (1973). *See also* Planned Parenthood of Cent. Mo. v. *Danforth*, 428 U.S. 52 (1976), in which the state asserted that its interest in promoting marital relationships justified a spousal consent requirement. The Court rejected this assertion upon the theory that the statute did not further the asserted state interest. Therefore, the unarticulated theory in *Danforth* seems to be that a statute must be necessary to achieve the state interest at stake.
158. 482 F. Supp. at 540.
159. *Id.*
quently, any assertion that the notification statute is necessary to protect the marital procreative potential is greatly undermined.

The Scheinberg court’s cursory treatment of this issue indicates the court’s apparent failure to recognize the basic question of whether the notification statute is necessary to achieve the asserted state interests. Relying on Danforth, the court simply observed that “a state may single out abortion for special legislative regulation because of its unique character and profound ramifications.”

Public Policy Considerations

Some troubling impacts are foreseeable from the Scheinberg ruling. The distress caused by a possible exposure to an adverse reaction of a husband may compel a woman to choose a less desirable alternative to abortion rather than to notify her husband. As was true prior to Roe v. Wade, many women may subject themselves to illegal abortions "fraught with the myriad possibilities of mutilation, infection, sterility and death." Furthermore, as the testimony presented at trial indicates, for a woman confronted with the possibilities of physical or emotional abuse by her husband, a notification requirement could pose a major obstacle in her ability to effectuate her decision to obtain an abortion. Finally, if the Scheinberg court upholds the notice statute, the result will be to allow the interjection of a third party into the patient-physician conference held to be private in Roe v. Wade. This may affect the right of a woman and her attending physician to make an unfettered abortion decision through private consultation.

Conclusion

The Fifth Circuit’s decision is disturbing as it undermines the fundamental right of a woman, as recognized by the Supreme Court in Roe v. Wade, to make an abortion decision free of undue state interference. The court’s holding that the state’s interests in promoting marital relations and protecting the procreative potential of the marriage are sufficiently compelling to justify a spousal notice requirement defies Supreme Court rulings in Roe v. Wade and its progeny. The court fails to take into account the intrusive nature of the statute or consider whether the state interests are furthered by it. Had the court found that the notice statute does not impose a substantial burden upon the wo-

160. 659 F.2d at 486.
man, thereby requiring merely a rational relationship between the statute and the asserted state interests, the court's reasoning would perhaps have been more sound. Having accepted the substantial nature of the burden imposed by the notification requirement, the court was not justified in upholding the interest asserted as compelling by the State of Florida.

In the final analysis, spousal notification should be regarded as a private judgment. In the absence of any consensus that spousal notification is beneficial, legislation mandating such notification should not override a woman's judgment.