POTENTIAL FATHERS AND ABORTION:
A WOMAN'S WOMB IS NOT A MAN'S CASTLE

INTRODUCTION

The controversial decision in *Roe v. Wade*\(^1\) has survived constant challenges since the decision was handed down by the Supreme Court in 1973. The Supreme Court has reaffirmed that *Roe* and its progeny clearly establish that an adult woman has an untrammeled constitutional right to choose an abortion in the first trimester.\(^2\) No state, by itself or vis-à-vis the spouse, has a legal right to interfere with a woman's decision to have an abortion in the first twenty-four weeks of pregnancy. Nevertheless, potential fathers have continued to challenge this assertion. In a relatively short span of time, a significant number of cases have been brought in state courts by putative fathers and husbands ("fathers-to-be")\(^3\) seeking to enjoin pregnant women from obtaining abortions.\(^4\)

\(^1\) 410 U.S. 113 (1973). At issue in *Roe* was a Texas statute which prohibited all abortions except when necessary to protect the pregnant woman's life. *Id.* at 157. The Court held that the statute unconstitutionally violated a woman's right to privacy. *Id.* at 164.

\(^2\) For a discussion of *Roe* and its progeny, see text accompanying notes 26-54 infra. In addition, although the Court's recent decision in *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989), gave states greater latitude in regulating abortion, the plurality decision left *Roe* intact. See notes 7-12 and accompanying text infra for a discussion of *Webster*.

\(^3\) The term "father-to-be" reflects the position of this Note that life begins at birth rather than conception, and the term includes both husbands and putative fathers (unmarried but alleged to be the father). *See Roe*, 410 U.S. at 161 (The "law has been reluctant to endorse any theory that life ... begins before live birth or to accord any legal rights to the unborn except ... when the rights are contingent upon live birth.").

The recent surge in the number of paternal rights cases appears to be a politically coordinated maneuver on the part of anti-abortion advocates to bring an abortion case before the Supreme Court. This is particularly timely given the conservative trend in the federal court system, including the Supreme Court since the Reagan administration. In 1973, the Roe decision carried a seven justice majority. However, by 1986, Thornburgh v. American College of Obstetricians and Gynecologists, which reaffirmed Roe, was a much closer decision with only a five-member majority.

Voice in Abortion Decisions, A.B.A. J. 20 (July 1, 1988), where the trial court's decision was reversed. Doe v. Smith, 530 N.E.2d 331 (Ind. Ct. App. 1988). In another case, John Doe v. Jane Smith, a putative father obtained a TRO enjoining the pregnant woman from obtaining an abortion and the physician from performing the abortion. See Doe v. Smith, 527 N.E.2d 177, 177 (Ind. 1988). The trial court later refused to grant a permanent injunction, yet continued the TRO to allow the parties to appeal the decision. Id. The Indiana Supreme Court granted an emergency appeal but refused to stay or extend the TRO. The court affirmed the trial court's decision that Danforth precluded injunctive relief and that the mother's interests outweighed the interests of the father. Id. at 178. John Doe then petitioned Justice Stevens, in his capacity as Circuit Justice for the Seventh Circuit, for an order enjoining Jane Smith from obtaining an abortion. Justice Stevens denied the application. John Doe v. Jane Smith, 108 S.Ct. 2136 (Stevens, Circuit Justice 1988). In Conn v. Conn, 525 N.E.2d 612 (Ind. Ct. App.), 526 N.E.2d 958 (Ind.), cert. denied, 109 S. Ct. 391 (1988), a husband obtained a TRO enjoining wife from having an abortion. The Indiana Court of Appeals unanimously overturned the lower court's permanent injunction. The Indiana Supreme Court refused to hear case and Indiana Court of Appeals reversed. The United States Supreme Court denied application for a stay and other relief pending timely filing and disposition of a petition for a writ of certiorari. See also Roe v. Doe, No. 88-17615 (Colo. Dist. Ct. Sept. 8, 1988) (District court and juvenile court in Denver refused to issue a TRO.); Williams v. Miller, No. EQ 12396 (Iowa Dist. Ct. Linn County Sept. 14, 1988) (Putative father obtained a TRO. Woman consented to TRO after reaching an agreement with the putative father.); Anderson v. Anderson, No. 88-21320 (Minn. D. Ct. July 8, 1988) (After granting husband's request for TRO, Minnesota Judge for Louis County District Court removed the order thereby allowing wife to obtain an abortion.); Steinhoff v. Steinhoff, 140 Misc. 2d 397, 551 N.Y.S.2d 78 (Sup. Ct. Nassau County June 30, 1988) (New York Supreme Court rejected husband's attempt to prevent wife from having an abortion.)


Compare Roe, 410 U.S. 113 (1973) (in which Justice Blackmun's majority opinion
Today, after *Webster v. Reproductive Health Services*, it is clear that a majority of the Supreme Court does not support the right to an abortion as articulated in *Roe v. Wade*. Chief Justice Rehnquist and Justices White and Kennedy found that although the right to an abortion is a “liberty interest protected by the Due Process Clause,” they would strike down the trimester framework established in *Roe* as “unsound in principle and unworkable in practice.” It is not clear, however, what standard they would use to protect the liberty interest but they have stated that a regulation which reasonably protects a viable fetus would be upheld. In a separate opinion, Justice O’Connor concurred in the result upholding the state regulations, but found no inclination to revisit the rationale of *Roe* at that time. Fin-

was joined by Justices Brennan, Marshall, Powell, and Stevens (concurring), Burger, C.J. (concurring), Douglas (concurring) and Stewart (concurring), with separate dissenting opinions by Justices Rehnquist and White, *with Thornburgh*, 476 U.S. 747 (1989) (in which Justice Blackmun, who wrote for the majority, was joined only by Justices Brennan, Marshall, Powell and Stevens (concurring), and the two dissenting opinions were filed by Chief Justice Burger, and by Justices White and O’Connor in which Justice Rehnquist joined).

7 109 S. Ct. 3040 (1989). The Missouri statute which the plurality upheld, inter alia, (1) sets forth in its preamble that life begins at conception and unborn children have protected interests in life, health and well being, (2) requires physicians who reasonably believe a woman is 20 weeks pregnant to perform a viability test, (3) prohibits the use of public funds, employees or facilities to assist or perform abortions which are not necessary to save the mother’s life, and (4) prohibits use of public funds, employees or facilities to counsel or encourage nontherapeutic abortions. *Id.* at 3042-43.

8 *Id.* at 3045.

9 *Id.* at 3044 (quoting García v. Metropolitan Transit Authority, 469 U.S. 528, 546 (1985)).

10 *Id.* at 3045.

11 *Id.* at 3046. Before Webster was decided, some commentators had argued that Justice Kennedy’s decision to uphold the right to an abortion established in *Roe* was contingent on the vote of Justice O’Connor who wrote a dissenting opinion in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), criticizing the Court’s trimester standard approach articulated in *Roe*. Nat’l L.J., Jan. 23, 1989, at 3 col. 1. Some commentators argue that the value which Justice Kennedy places on stare decisis outweighs his desire to overrule *Roe*. *Id.* Prior to Webster, Stanford Law Professor Jack Friedenthal predicted that while Justice Kennedy probably would not have voted for *Roe* in the first place, the question is “whether a person is going to reverse a Supreme Court decision that is now part of the fabric of society.” Church, *Far More Judicious*, Time, Nov. 23, 1987, at 16. However, “Kennedy could end up a swing vote, helping to refine the boundaries of the right to abortion, based on changing medical and social circumstances.” *Id.* As a result of *Webster* it appears that Justice Kennedy would not uphold the *Roe* standard regardless of Justice O’Connor’s opinion.

It appears that the swing vote on abortion solely rests with Justice O’Connor. Justice O’Connor prefers a limited right to abortion as seen in her dissenting opinion in
nally, Justice Scalia also concurred in the result but found that *Roe* should be overturned entirely and placed in the political arena where the legislature could make determinations that are responsive to public pressures.\(^1\) It is in this light that anti-abortion advocates have mobilized to bring the abortion issue to the forefront of the judiciary,\(^2\) and now political agendas.\(^3\)

Potential fathers who have joined the anti-abortion movement are at a disadvantage when they assert their own constitutional interests in the fetus. The central theme of the abortion debate focuses on a struggle between pregnant women and the fetuses they are carrying. The Court has never upheld a potential father's arguable right to stop an abortion.\(^4\)

Nevertheless, potential fathers have persisted in seeking to prevent women from obtaining abortions. The following scenario is a generalized description of the circumstances in which many paternal rights cases have been brought: A woman is pregnant with an unwanted child. After discussing the alternatives with her physician, she determines that it is not in her best interest to continue the pregnancy. She then decides to have an abortion.

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*Akron.* Given her ideal, Justice O'Connor probably would prefer to strike down the *Roe* trimester framework for a standard which considers whether denying an abortion would be unduly burdensome. However, if presented with anything other than an unduly burdensome standard, it is conceivable that she would uphold *Roe* to avoid being the deciding vote to overrule abortion, and consequently overrule one of the most important rights afforded to women in the twentieth century, considering she was the first woman to be appointed to the Supreme Court.

\(^1\) *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring).

\(^2\) In July 1989, the Court agreed to hear three other abortion related cases, Hodgson v. Minnesota, No. 88-1125, 88-1309, Ohio v. Akron Center for Reproductive Health, No. 88-805, both involving parental consent statutes for minors seeking abortions, and Turnock v. Ragsdale, No. 88-790, involving an Illinois law which required abortion clinics to meet standards similar to hospitals. See Nat'l L.J., Dec. 4, 1989, at 1, col. 4. *Turnock*, however, was settled out of court prior to the scheduled oral arguments. *Id.*

\(^3\) On November 17, 1989, the Pennsylvania Governor signed into law the broadest abortion regulations directly conflicting with *Roe* since the *Webster* decision. Nat'l L.J., Dec. 4, 1989, at 39, col. 4. Among other provisions, the statute bans abortion after 24 weeks except for the safety of the mother, prohibits abortions based on the fetus's sex, requires spousal notification before abortion, requires a 24-hour waiting period and mandatory counseling about the procedures, risks and alternatives and regulates the medical use of fetal tissue. *Id.* See *id.* for a "wrap-up" of other state activity.

\(^4\) The recently enacted Pennsylvania statute requiring spousal notification does not require spousal consent. Crimes and Offenses Act, 1989 Pa. Legis. Serv. 64 (Purdon). It is questionable whether even a spousal notification would be upheld by the Supreme Court. See notes 58-67 and accompanying text *infra* discussing *Planned Parenthood of Missouri v. Danforth.*
However, the father-to-be believes that it would be in his best interest if she carried the fetus to term. Consequently, he turns to the court for assistance in preventing the woman from obtaining an abortion. In persuading the court to permanently enjoin the woman from aborting the fetus, the putative father promises that he will bear the responsibility of child rearing and all costs and expenses related to childbirth if the woman carries the child to term. He urges the court to balance his interest in procreation and custody of the child against the pregnant woman’s interest in obtaining an abortion. Finally, the putative father-to-be argues that, in his particular case, his interests outweigh the woman’s interests.

The assertion of paternal rights in this context conflicts directly with a woman’s constitutional right to an abortion. If the Supreme Court were to determine, contrary to its own precedent, that the constitutional rights of fathers-to-be in their children attach prior to birth so as to compete with and consequently restrict a woman’s constitutional right to choose an abortion, such a decision would have a profound impact on a woman’s capacity of self-determination and right to personal autonomy.

Part I of this Note examines the doctrine set forth in *Roe v. Wade* and its progeny, which recognized and reaffirmed a woman’s constitutional right to obtain an abortion within the parameters of a trimester standard. Part II discusses a putative father’s legal interests in a child who has been born. Part III discusses paternal rights cases that were asserted before and after *Planned Parenthood of Missouri v. Danforth*. Part IV describes and analyzes the arguments recently asserted by fathers-to-be seeking to restrain pregnant women from aborting the fetuses they are carrying and provides an equal protection analysis under which the right to an abortion should be upheld.

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17 Although the more general right to privacy encompasses the abortion right, an equal protection analysis provides a better framework to deal with abortion. The right to privacy is problematic because of the negative and elusive nature surrounding the doctrine. The right to privacy guarantees the right to be free from governmental intrusion with respect to certain intensely private acts which are deemed fundamental or “implicit in the concept of ordered liberty.” *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Palko v. Connecticut*, 302 U.S. 319 (1937)). These general terms leave little clarity as to what autonomous decisions the Court will find protected in the right to privacy, except that such personal acts will be protected if they are rooted in national history and tradition.
Note concludes that any determination that a potential father has a right which operates at the exclusion of a woman’s right to choose abortion is inconsistent with the state of the law and are represented by general societal values as ultimately interpreted by the Supreme Court. See Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (upholding a sodomy law which prohibited homosexual sex). The vagueness inherent in the right to privacy is further muddled by the tension point underlying the debate that exists between the individual’s right to determine what is private and, on the other hand, the right of society to determine, based on its collective values, what decisions ought to be private. See Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737 (1989). Leaving specific rights hidden under a more general guarantee of privacy leaves such rights subject to the uncertainty of expansive or restrictive Court decisions. Equality on the other hand is an affirmative right which guarantees that specific rights will be protected against discrimination. The notion of equal protection brings attention to a specific right itself, as compared to the negative right of privacy which takes the spotlight off the particular activity and provides, in simplistic terms, that the government will not look behind closed doors as long as it is kept behind the closed doors of privacy.

Although this Note provides an equal protection analysis in the end, it should be noted that an alternative to abandoning the right to privacy for an equal protection analysis would be to reinterpret the right to privacy. For a full discussion of these alternatives, see Rubenfeld, supra, which reinterprets the privacy doctrine to focus on whether prohibiting certain conduct would impermissibly compel a standardization of lives as opposed to the right to be individual. Thus, Mr. Rubenfeld focuses not on the fundamentality of the right but rather the consequences of prohibiting that right. Relating that analysis to abortion, Rubenfeld concluded that,

[I]t is difficult to imagine a single proscription with a greater capacity to shape lives into singular, normalized, functional molds than the prohibition of abortions. Even if the propensity of anti-abortion laws to exert power over the body and to instrumentalize was discounted, it remains the case that the law radically and affirmatively redirect women’s lives . . . . It is no exaggeration to say that mandatory childbearing is a totalitarian intervention into a woman’s life . . . . Roe v. Wade in this view was correctly decided.

Id. at 791. See also Copelon, Unpacking Patriarchy: Reproduction, Sexuality, Originalism, and the Constitution in A LESS THAN PERFECT UNION (J. Lobel ed. 1988). Professor Copelon merges the concepts of privacy and equality. She discusses the paradox of fitting equality principles into a structure founded on the opposite of sexual equality. Id. at 315. She explains how privacy initially respected not interfering with the home, but at the same time consequently denied legal relief to women who were economically and physically abused by their husbands, thereby perpetuating male dominance in the home. In concluding that privacy separates the person from the political, Professor Copelon found that privacy must be injected with equalitarian concepts and made into an affirm-ative right:

In both legal and political advocacy for reproductive and sexual rights, privacy need not be jettisoned but it must be transformed into an affirmative right to self-determination and grounded in the broader principles of equality and in the concrete conditions of peoples lives. Equality is important because it refutes the hierarchy of importance between the personal and the political and demands examination of the gendered assumptions that underlie this dichotomy.

Id. at 325-26.
would not only violate a woman’s constitutional right to choose an abortion, rendering it virtually meaningless but would violate a woman’s right to equal protection and amount to sex discrimination in its most quintessential form.

I. WOMEN’S INTEREST IN OBTAINING AN ABORTION

A. Pre-Roe v. Wade

At common law, a pregnant woman possessed great liberty in choosing to terminate her pregnancy.\(^{18}\) Abortions performed prior to the “quickening” were not considered criminal.\(^{19}\) However, by the late 1950s, many states had passed anti-abortion laws that made it a crime to perform an abortion, except when necessary to preserve the mother’s life.\(^ {20}\) During the 1970s, there was a trend toward liberalizing abortion restraints.\(^ {21}\) Rather than completely banning abortion, states created burdensome restrictions and imposed criminal sanctions.

Despite its illegality, pregnant women continued to seek abortions.\(^ {22}\) These illegal abortions posed serious health risks as well as deep psychological trauma to women who could find no alternative.\(^ {23}\) The existence of high mortality rates at these “ille-

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\(^ {18}\) Roe, 410 U.S. at 140.

\(^ {19}\) The “quickening” is the first movement of a fetus in utero. Id. at 132.


\(^ {21}\) Id. at 140. See also id. at n.37. Fourteen states adopted the ALI Model Penal Code section 230.3, which provides that procuring an abortion after 26 weeks is a felony. In addition, by the 1970s four states decriminalized early abortions. Id. See, e.g., N.Y. Penal Law § 125.5(3) (McKinney 1987), making an abortion a crime only after 24 weeks from “the commencement of her pregnancy” except to preserve the mother’s life.

\(^ {22}\) The reasons for abortions vary widely with each individual. Some women have obligations to existing family members and would be unable to handle another child. Other women lack the financial resources necessary to bring up a child. Still, some women prefer to actively pursue a full time career or education which would be delayed by the birth of a child. In addition, some women wish to avoid the medical risks associated with child bearing. Although this list is by no means exhaustive, it provides examples of possible reasons why women would want to obtain an abortion. See Roe, 410 U.S. at 153.

\(^ {23}\) See Paltrow, Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists, 9 Women’s Rts. L. Rep. 1 (Spring 1986). This brief contains a series of letters sent to the National Abortion Rights Action League during a “Silent No
gal "abortion mills" required states to regulate the conditions for abortion rather than prohibit abortions. Since abortion was legalized, abortion related injuries and deaths have been reduced dramatically, and abortion has become an extremely safe procedure.

B. Roe v. Wade

In 1973, the Supreme Court recognized in the landmark case of Roe v. Wade that a woman has a constitutionally protected interest in freely choosing whether to have an abortion in the first trimester. The Court held that the right to an abortion

More" campaign by women who obtained illegal abortions prior to Roe. Two such letters are as follows:

I remember Tijuana. I remember bugs crawling on walls as I waited for the "second part" of my abortion to take place. The first part was done in comparatively clean surroundings — "a clinic" — but I was too far along for the abortion to be done in one procedure, so I was sent to a "hotel" to wait three hours — a stinking cesspool of urine, sweat, filthy sheets and bugs — unidentifiable crawling creatures all over the walls, floors and crevices . . . . Where else could I have gone in 1963? A name from a hairdresser passed through the underground grapevine by other desperate women seeking a life of dignity and choice.

Id. at 14 (citation omitted).

I am 38 years old and have had two abortions — 1 legal, 1 illegal. My first was when I was 19 years old. It was illegal. I had to drive from North Jersey to Philadelphia for what I understand now was an ineffective treatment by a doctor who sexually abused me while supposedly giving me injections to induce a miscarriage. After a week of treatments (64 injections a day) he used a scalpel to rupture the opening of my uterus. I miscarried later that day. I was too frightened to go to the doctor and developed peritonitis. I almost died.

My second abortion was legal. When I discovered I was pregnant, I went to my doctor, who, with much concern and sympathy, told me of all the alternatives, including adoption. We both decided abortion would be best. The procedure was done in a hospital — it took three hours and I was back to work the next week. There was no trauma, other than the difficulty of making a decision that is always hard to make.

Id. at 16-17 (citations omitted).

See Lebolt, Grimes & Cates, Mortality from Abortion and Childbirth: Are the Populations Comparable?, 248 J. A.M.A. 188, 189 (July 9, 1982) (In 1972 the rate of abortion related deaths per 100,000 abortions was 4.1, but by 1978 the rate was only .5.).

410 U.S. 113 (1973).

Id. at 183. The Roe majority took great care to discuss the history of abortion as it was viewed in ancient times (abortion was performed "without scruple"); at common law (it was not a crime to perform an abortion prior to "the quickening"); English statutory law (it was a capital crime to abort a "quickened fetus"); and early American statutory law (it was not until the 1950s that abortion was generally prohibited by the states).
is guaranteed by the right to privacy. Justice Blackmun, delivering the opinion for the Court, held that a trimester standard should be used to determine when a state's interest in preserving the maternal health and the potential life of the fetus becomes compelling enough to warrant regulation of abortion procedures.

Although the right to privacy is not expressly provided for in the Constitution, the Court has long recognized that certain "zones of privacy" are guaranteed by the Constitution. This constitutional guarantee against state interference has been extended to marriage, procreation, contraception, child rearing and education. The commonality of these rights is that they are all so personal and private that they have been "deemed 'fundamental' or 'implicit in the concept of ordered liberty,'" and are therefore entitled to be free from government intrusion. In Roe the Court found that the right to an abortion was among those fundamental rights. Roe held that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her

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28 Id. at 129-48.
29 Id. at 153.
30 Id. at 152. The Court has found the right to privacy in the first amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969), the fourth and fifth amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Boyd v. United States, 116 U.S. 616 (1886), the penumbras of the bill of rights and the ninth amendment, Griswold v. Connecticut, 381 U.S. 479 (1965); id. at 487 (Goldberg, J., concurring), and in the "concept of liberty guaranteed by the first section of the Fourteenth Amendment," Meyer v. Nebraska, 262 U.S. 390 (1923).

Providing an historical perspective, the Court cited an early recognition of the right to privacy in Union Pacific Ry. Co. v. Botsford, 141 U.S. 250 (1891), in which the Court stated, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person." Id. at 251.

31 Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (invalidating a Massachusetts statute which prohibited the distribution of contraceptives to unmarried couples); Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating a Virginia statute prohibiting marriage between whites and non-whites); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (invalidating an Oklahoma statute which required sterilization of repeated felony offenders); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (invalidating an Oregon statute requiring students to attend public schools at the exclusion of private and parochial schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating a statute prohibiting foreign languages to be taught to young students).

32 Roe, 410 U.S. at 152 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
pregnancy."

The Court stated that to deny a pregnant woman the right to decide whether to terminate her pregnancy would impose undue physical and mental suffering on her in violation of the constitutional protections afforded by the right to privacy under the fourteenth amendment.

The fundamental right to choose an abortion, like all fundamental rights, may be limited by compelling state interests. In Roe, the Court found that a pregnant woman is not "isolated in her privacy" and therefore the state may legitimately legislate to preserve maternal health and protect potential fetal life. However, since any regulation of a fundamental right must be narrowly tailored to address the specific compelling interest asserted, the Court painstakingly delineated a trimester standard, incorporating medical technology, in which the woman's right to freely choose an abortion becomes increasingly qualified.

During the first trimester of pregnancy, when an abortion is an extremely safe procedure, the state may never interfere with a woman's decision to have an abortion. However, the state's

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33 Id. at 153.

34 Id. In reaching its decision, the Roe Court considered the negative mental and physical effects an unwanted child can have on a woman. The Court stated that producing an unwanted child would "force upon a woman a distressful life and future." Id. The necessary child care would be mentally and physically taxing on the mother and "[p]sychological harm may be imminent." Id. In addition, the Court noted the difficulties associated with forcing an unwanted child upon a family "already unable, psychologically and otherwise, to care for it." Id. Another factor considered by the Court was that, as a result of modern technology, the mortality rates related to abortion are equal to, or less than, those associated with child bearing. Id. at 149. Consequently, the state's interest in protecting maternal health from the dangers of an early abortion are virtually nonexistent. Id. See Cates, Smith, Rochat & Grimes, Mortality from Abortion and Childbirth: Are the Statistics Biased?, 248 J. A.M.A. 192, 195-96 (1982) (noting that the risk of death from childbirth is, at minimum, tenfold greater than the risk during an abortion procedure); Lebolt, Grimes & Cates, supra note 25, at 191.

35 Roe, 410 U.S. at 155.

36 Id. at 154. See also id. at 159. The Court distinguished the state's interest in the fetus from that of marital intimacy, procreation, and other interests guaranteed by right to privacy, on the grounds that the fetus can develop into a human being and that potentiality of life creates different interests which the state has a compelling interest to protect. It is in this respect that a woman is not "isolated in her privacy." In addition, the Court noted that since maternal health and life may be at stake, the state has a compelling interest to preserve maternal safety. Id.

37 Id. at 163.

38 The low degree of risk associated with abortion in the first trimester renders the state interest noncompelling. Id. at 163.
interest in protecting the health of the pregnant woman becomes compelling enough to permit limited state regulation of abortion during the second trimester.\(^{39}\) It is during the second trimester that mortality rates related to abortion may exceed that of childbirth.\(^{40}\) When a fetus becomes viable, which is generally during the third trimester,\(^{41}\) the state obtains a compelling interest in preserving the potential life of the fetus and may regulate or proscribe abortions, except those necessary to preserve maternal life or health.\(^{42}\) This scientific approach employed to determine when abortion is permissible has been criticized as inconsistent with modern technology.\(^{43}\)

Although the state may proscribe abortion after the point of viability, the Supreme Court emphasized that a fetus is not considered a "whole person" within the meaning of the fourteenth amendment.\(^{44}\) Therefore, in reconciling the value of potential

\(^{39}\) Id. at 164. By way of example, the Court set forth a list of permissible state regulations: "requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility." Id. at 163.

\(^{40}\) Id.

\(^{41}\) Id. at 164. The attending physician must determine the specific point of viability since it may differ with each woman, although it is usually during the third trimester. Id.

\(^{42}\) Id. at 164. The Court justified fetal viability as a compelling point because at this stage "the fetus . . . presumably has the capacity of meaningful life outside the mother." Id.


The Roe framework . . . is clearly on a collision course with itself. As medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Id. Justice O'Connor would have used an "unduly burdensome" test in which all state regulation would be upheld unless it unduly burdened a woman's right to have an abortion. The problem with this standard, however, is that it is difficult to determine from her dissent what would not be considered unduly burdensome. But see Kolata, Survival of the Fetus: A Barrier is Reached, N.Y. Times, Apr. 18, 1989, at C1, col. 4 (city ed.) (A fetus is not capable of surviving if born before 23 or 24 weeks and there is little medical science can do to change the point of viability.).

In addition, other commentators have suggested that statutes falsely casting the abortion decision as a medical question contingent on a doctor's determination of viability denies women equality and "gives doctors undue power by falsely casting the abortion decision as primarily a medical question." Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1020 (1984).

\(^{44}\) Roe, 410 U.S. 157-59. This is also true for any other portion of the Constitution.
life and the value of maternal life, the Court stated that in preserving potential life the state "may go so far as to proscribe abortion . . ., except when it is necessary to preserve the life or health of the mother." The state must always recognize that the life of the woman is paramount to the potential life of the fetus. Thus, a statute which proscribes post-viability abortions will be unconstitutional unless it contains specific language or clearly implicit language providing an exception when the life or health of the woman is at issue.

C. Post-Roe v. Wade

Since Roe, the Supreme Court has sought to preserve a woman's right to privacy by limiting the scope of state regulation of abortion. The Court has invalidated overly intrusive informed consent requirements, second trimester hospitalization requirements, and spousal and blanket parental consent requirements.

\[\text{Id.}\]

\[\text{Id. at 163-64 (emphasis added).}\]

\[\text{Id. at 602. Additionally, every move a woman makes during pregnancy can potentially affect the fetus and often does. This raises profound concerns as to how far the law may expand fetal rights at the expense of women's rights to privacy, personal autonomy and bodily integrity. Id. at 602-04.}\]

\[\text{See also Annas, Pregnant Women as Fetal Containers, Hastings Center Report (Dec. 1986) (discussing the implications of a California case in which a pregnant woman was criminally prosecuted for failing to adhere to the advice of her physician resulting in the birth of a brain dead child and its subsequent death. The case was dismissed.); Note, Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus — Is This a Mother's Crime?, 53 Brooklyn L. Rev. 807, 815 (1987) (Granting a fetus a cause of action in tort and criminal law for unintentional damage or death caused by the exercise of the pregnant woman's physical autonomy results in a deprivation of a pregnant woman's constitutional rights to privacy and bodily integrity.).}\]

\[\text{Id. at 163-64 (emphasis added).}\]


\[\text{Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983). In Akron, the Court invalidated an Ohio statute that, inter alia, required second trimester abortions to be performed at a hospital, required parental consent for minors seeking abortions and required the pregnant woman to provide informed consent. All of the provisions were found unconstitutional because they interfered with the woman's decision.}\]
In each of these cases, the Court recognized that pregnant women have a fundamental right to make an intensively private and personal decision free from governmental intrusion, while acknowledging that the state may impose procedural requirements in certain limited and restricted instances.

The Supreme Court emphasized the autonomous nature of the abortion decision in *Thornburgh v. American College of Obstetricians and Gynecologists.* In *Thornburgh,* the Court stated, "it is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties." The Court held that the Pennsylvania provisions impermissibly withheld from pregnant women the opportunity and the right to freely choose an abortion and consequently invaded the very essence of a woman's right to privacy. In addition, the Court invalidated portions of the act that did not clearly establish that maternal health and life are paramount to the life of

The Court noted that an abortion performed in a hospital costs twice as much as that in a clinic and held that a hospital requirement unnecessarily burdened "women's access to a relatively inexpensive, otherwise accessible and safe abortion procedure." *Id.* at 438. Furthermore, the parental consent statute did not provide a reasonable judicial bypass to allow a minor to obtain a court order in lieu of parental consent to the abortion. *Id.* at 441. Finally, the Court found that the informed consent statute intruded "upon the discretion of the pregnant [woman and her] physician." *Id.* at 445. The Court noted that requiring the physician to provide a detailed description of the fetus was "a 'parade of horribles' intended to suggest that abortion is a particularly dangerous procedure." *Id.*


See also the discussion of Planned Parenthood of Missouri v. Danforth, notes 55-67 and accompanying text infra.

*50* *Thornburgh,* 476 U.S. at 766 (quoting *Bellotti,* 443 U.S. at 655).

*51* Indeed, the Court stated that the reporting requirements would impermissibly allow "public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy." *Id.* at 767.
the fetus.52

Thornburgh reaffirmed the constitutional principles set forth in Roe and advanced the notion that the choice to terminate a pregnancy is an individual decision that belongs to the woman made under the guidance of her physician.53 In addition, Thornburgh supports the right of a woman to maintain bodily integrity and self-determination, and reinforces the notion that a woman's life and health is paramount to the interest of third parties.54

II. PATERNAL INTERESTS

A. Spousal Consent

The Court explicitly refused to rule in Roe v. Wade and its companion case Doe v. Bolton55 on the rights of potential fathers in the abortion decision.56 Following these decisions, states

52 Section 3210(b) imposed criminal penalties on a physician who did not use an abortion method that would "provide the best opportunity for the unborn child to be aborted alive unless . . . that technique would present a significantly greater medical risk to the life or health of the pregnant woman." Id. at 768 (quoting § 3210(b) (emphasis added)). The Court found this provision unconstitutional because it required a trade-off between the health of the mother and the life of the fetus. As written, the statute unconstitutionally subjected the woman to increased medical risks for the sake of the viable fetus. Id. at 769-70.

53 As the Thornburgh Court concluded:

Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision — with the guidance of her physician and within the limits specified in Roe — whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Id. at 772. Justice Blackmun concluded that "[a]ny other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees to all." Id. This conclusion implies that a woman's right to choose an abortion can find support in the equal protection clause of the fourteenth amendment. See notes 181-203 and accompanying text infra.

54 Most recently, however, the Supreme Court demonstrated its willingness to pull back on women's rights in Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989). Although the decision itself left Roe intact the practical effects are the eventual demise of the Roe decision. See id. at 3067 (Blackmun, J., dissenting); see also id. at 3064 (Scalia, J., concurring). For a discussion of Webster, see notes 7-14 and accompanying text supra.


56 See Roe, 410 U.S. at 165 n.67 (In dicta the 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." (citation omitted)).
sought to protect the husband’s interest in the fetus by enacting statutes that required spousal consent and notification prior to the performance of an abortion. However, these statutes did not withstand constitutional attack.

In Planned Parenthood of Missouri v. Danforth the Supreme Court specifically ruled on the validity of spousal consent. At issue in Danforth was a Missouri statute that required a spouse’s written consent before the pregnant woman could obtain an abortion during the first twelve weeks of pregnancy unless the abortion was to protect the mother’s life. The Court held that it was unconstitutional to require spousal consent as a condition precedent to a woman’s abortion. The Court stated that a “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.’”

The Court expressed sympathy toward “the deep and proper concern and interest that a devoted and protective husband has in his wife’s pregnancy and in the growth and development of the fetus she is carrying” and recognized “the importance of the marital relationship in our society.” However, the Court was unwilling to grant the husband “unilaterally the ability to prohibit the wife from terminating her pregnancy.” Such a statute would violate the constitutionally protected interest espoused in Roe by presenting an insurmountable obstacle to a woman’s decision to have an abortion.

The Court noted that the right to privacy is individual in nature and that married couples are not “independent entities”

59 Id. at 68. The Court also struck down other provisions of the Missouri statute that were challenged relating to the preservation of fetal life during the abortion, id. at 82-84, and mandatory parental consent for minors. Id. at 72-75.
60 Id. at 69.
61 Id.
62 Id. at 70.
63 Id. at n.11.
but rather collective entities made up of two individuals. The Court stated, "If the right to privacy means anything, it is the right of the individual, married or single, to be free from governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." In addition, the Court noted that when a husband and wife are pitted against each other on a given issue, only one spouse can prevail. When the issue is whether to terminate a pregnancy, the "balance weighs in [the woman's] favor" since it is the woman who would necessarily carry the child.

Danforth established the limited role of the potential father in determining whether a woman may obtain an abortion. More significantly, Danforth held that Roe may not be circumvented by delegating a spousal veto to the potential father. Within the parameters of Roe v. Wade, the right to an abortion is the individual right of the pregnant woman. In addition, the Court suggested that balancing the competing interests of the pregnant woman against those of her spouse would necessarily favor the woman.

B. When the Child is Born: Supreme Court Evaluation of Putative Father's Rights

The putative father has a constitutionally protected right to the care, custody, and nurturing of his child (which were previ-

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64 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (The Court invalidated a statute allowing the distribution of contraceptives only to married couples because it discriminated against unmarried couples.).
65 Danforth, 428 U.S. at 70 n.11 (emphasis in original) (quoting Eisenstadt, 405 U.S. at 453). The Court cited this proposition in response to the decision of the district court which upheld the constitutionality of spousal consent provision because of the "'interest of the state in protecting the mutuality of decisions vital to the marriage relationship.'" Id. at 71 (quoting Planned Parenthood of Missouri v. Danforth, 392 F. Supp. 1362, 1370 (E.D. Mo. 1975)).
66 Id. See also id. at 90 (Stewart, J., concurring): [A] man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom . . . [b]ut the Court has recognized as well that the Constitution protects a "woman's decision whether or not to terminate her pregnancy" . . . . I agree with the Court that since "it is the woman who bears the child and who is the more directly and immediately affected by the pregnancy . . . . the balance weighs in her favor."
Id. (emphasis in original, citations omitted).
67 Although the decision specifically discusses husbands, it is unlikely that the Court would reach a different conclusion if the interests of a putative father were asserted.
ously unavailable at common law) provided that he takes an affirmative step towards the recognition of those rights. Beginning with Stanley v. Illinois, the Supreme Court acknowledged that unwed fathers have the right to establish and maintain a relationship with their illegitimate children. The Stanley Court held that an unwed father had a "cognizable and substantial" interest in retaining custody of his children. In subsequent cases, the Supreme Court defined and redefined the constitutional standards delineating the application of that interest. As a result, putative fathers now have a constitutionally protected interest in the parent-child relationship. However, that constitutional protection is contingent on the affirmative actions of the putative father, either legally or socially, in asserting that interest. That is, biological ties alone are an insufficient basis for exertion of paternal rights in a child.

In Stanley, the Supreme Court struck down an Illinois statute which precluded putative fathers from retaining custody of their illegitimate children upon the death of the unwed mother. Pursuant to the statute, putative fathers were presumed unfit parents and were deprived of custody without a hearing. In contrast, divorced or married fathers and unwed mothers were deprived of custody only after neglect proceedings which entitled them to a hearing on parental fitness. The Court held that the statute violated the due process and equal protection rights of the putative father as well as thwarting the state's own goals in protecting the best interests of the child.

Generally, states may legislate in areas of family law, including child custody, adoption, parent-child relationships, marriage, and divorce. However, the federal Constitution prohibits states from interfering in the individual interest of family members and their relationships, which may at times be weightier than the interests of the State. Lehr v. Robertson, 463 U.S. 248 (1983) (Once a father has implicated constitutional protections, a state may not legislate to interfere with such rights.). See Dallas, Rebutting the Marital Presumption: A Developed Relationship Test, 83 COLUM. L. REV. 369 (1988), for a discussion of various statutory schemes.

Id. at 652.

Id. at 645.

Id. at 649-50. Putative fathers were not included in the definition of "parent" and, therefore, the child was declared a ward of the state through a dependency proceeding.

Id. at 649-52. The Court held that since the unwed father had a legitimate constitutionally protected interest in a parent-child relationship, the state must have a compelling interest in depriving the unwed father of custody. Id. at 649. The Court stated
The Court emphasized the importance of the family unit and the preexisting social and biological relationships between the unwed father and his children. The Court recognized that the putative father has a legitimate constitutional interest in maintaining "companionship, care, custody, and management of his . . . children" and found that he may not be deprived of this interest without a hearing on fitness. The Court stated that the test of constitutional protections should rest not on the "legal" relationship, but rather on the biological relationship between father and child.

Stanley sets forth two possible standards. First, the Court implied that a "biological relationship standard" — regardless of the legal relationship between the parties — was sufficient to afford putative fathers the equal protection provided to married or divorced fathers and unwed mothers. Second, the putative father must have an actual relationship with the child, in addition to the biological relationship, to receive the protection of due process.

In Quilloin v. Walcott, the Supreme Court limited the rights of putative fathers who exhibited only minimal interest in their illegitimate children. In Quilloin the Court rejected the due process challenge of a putative father who had sought to

that the mere convenience of showing that the father was not married to the mother, rather than proving that the father is unfit, does not constitute a compelling state interest. Id. Furthermore, the state had a legitimate interest in protecting the welfare of the child including strengthening family ties. Id. at 652 (quoting ILL. REV. STAT. ch. 37, ¶ 701-2). These goals would be impeded, however, by removing the child from a fit parent, with whom the child has bonded, simply because there exists no "legal" relationship. Id. at 652-53.

Id. at 651.

Id.

Id. at 652 (quoting Glona v. American Guarantee Co., 391 U.S. 73, 75-76 (1968) ("To say that the test of equal protection should be legal instead of biological is to avoid the issue.").

See Quilloin v. Walcott, 434 U.S. 246 (1978). See also Donovan, The Uniform Parentage Act and Nonmarital Motherhood by Choice, 11 N.Y.U. REV. L. & SOC. CHANGE 193, 205 (1982-83) (suggesting that the equal protection argument that demands biological fathers be afforded the same rights as marital fathers and nonmarital mothers implies that the mere biological link is sufficient to give rise to constitutional protections).

This can be construed by the emphasis the Court placed on the family unit and the social relationships that exist between an unwed father and his child. See Stanley, 405 U.S. at 651-52.

434 U.S. 246 (1978). At issue in Quilloin was a Georgia statute which required only a mother's consent for the adoption of an illegitimate child. Id. at 246.
prevent the adoption of his illegitimate child by the mother's husband, because the unwed father had never sought legal or actual custody.\textsuperscript{80}

\textit{Quilloin} gave the social relationships the child had developed with his mother and her husband significantly greater weight than the biological tie between the unwed father and the child. The Court distinguished \textit{Stanley} by noting that \textit{Stanley} did not address the situation in which there were countervailing interests greater than the interests of the unwed father.\textsuperscript{81} In addition, \textit{Quilloin} gave marital fathers greater protection than putative fathers, based on the presumption that marital fathers accept greater responsibility than putative fathers.\textsuperscript{82} According to \textit{Quilloin}, the mere biological link between an unwed father and his illegitimate child will be inadequate to invoke constitutional protections when the biological father has taken no steps to assert that interest.

One year after \textit{Quilloin}, in \textit{Caban v. Mohammed},\textsuperscript{83} the Supreme Court attempted to bridge the gap between the rights of unwed mothers and unwed fathers with respect to the adoption of the illegitimate child. In \textit{Caban}, a putative father who had established a social relationship with his child challenged a New York statute that permitted unwed mothers, but not unwed fathers, to veto the adoption of an illegitimate child.\textsuperscript{84} The Court

\textsuperscript{80} According to the Georgia statute at issue, until the child has been legitimized by the father, only the mother would be recognized as the parent and "is given exclusive authority to exercise all parental prerogatives." \textit{Id.} at 249 (citing \textsc{Ga. Code Ann.} \textsection{} 74-203 (1975)). In addition, the state's interest in the parent-child relationship was not threatened because the child would not have been placed with new parents but rather, would have been recognized in a preexisting family. \textit{Id.} at 255. The Court found that since there was no social relationship between the unwed father and the child, only the best interests of the child needed to be evaluated in granting the adoption and denying the unwed father's petition to legitimize the child. \textit{Id.}

\textsuperscript{81} \textit{Id.} at 248.

\textsuperscript{82} \textit{Id.} The Court rejected the unwed father's equal protection argument, holding that the state may properly grant different levels of veto authority in adoption proceedings to nonmarital and marital fathers in accord with different levels of responsibility. The Court noted that, unlike marital fathers who are no longer living with their children due to divorce or separation, the illegitimate father in \textit{Quilloin} never assumed any significant responsibilities with respect to child rearing. \textit{Id.} at 256. Although the putative father did give financial support to the child, in accordance with Georgia law, the Court did not consider this substantial because it was provided only on an "irregular basis." \textit{Id.} at 251 n.9 and accompanying text.

\textsuperscript{83} 441 U.S. 380 (1979).

\textsuperscript{84} \textit{Id.} at 381-82. The statute allowed an unwed mother to prevent the adoption of an
held that the statute violated equal protection by treating unmarried persons differently according to sex. 86 The Court found that the importance of maternal and paternal roles are not significantly different once the child is no longer a newborn infant. 86 The Court also rejected the argument that the statute was substantially related to an important government objective of promoting the adoption of illegitimate children. 87 The Caban Court reasoned that unwed fathers are no more likely to oppose the adoption of their illegitimate children than unwed mothers. 88 However, the Court did note that in situations in which the unwed father had not participated in the child's life, it would not be a violation of the equal protection clause to deny him a veto power in adoption proceedings of his illegitimate child. 89

Thus, in Caban, the rights of the unwed father were protected because of the social relationship which developed between the child and the unwed father. In addition, Caban reveals an effort to provide greater equality among the rights of unwed mothers and unwed fathers who have both contributed to the well-being and development of the child.

In Lehr v. Robertson 90 the Supreme Court limited the rights of putative fathers who had no more than a biological link to their illegitimate children. In Lehr, an unwed father who learned of the adoption proceedings of his illegitimate child after he filed a petition for paternity, sought to vacate an order granting the adoption of his child by the mother's husband. 91 The Supreme Court rejected the putative father's assertion that the adoption illegitimate child by simply withholding her consent. Unwed fathers, on the other hand, had to establish that an adoption was not in the best interests of the child. Id. at 388 (referring to N.Y. DOM. REL. LAW § 111 (McKinney 1977)).

85 Id.
86 Id. at 389. By specifically refusing to rule on a situation which involved a newborn infant, the Court left open the possibility of a different outcome in that context. Id. at 392 n.11. See Matter of Baby M., 109 N.J. 396, 462, 537 A.2d 1227, 1261 (1988) ("When father and mother are separated and disagree, at birth, on custody, only in an extreme, truly rare, case should the child be taken from its mother . . . .").
87 Caban, 441 U.S. at 390. The lower court upheld the statute finding that permitting putative fathers to withhold consent for adoption would impede the adoption of illegitimate children. Id.
88 Id. at 389.
89 Id. at 392-93.
91 Id. at 250.
proceedings were unconstitutional.\textsuperscript{82} The Court held, inter alia, that when the father had no connection beyond a biological link to his illegitimate child, his constitutional rights were not violated by an inability to participate in the adoption proceedings.

In \textit{Lehr}, the Court emphasized the importance of a father establishing a social relationship with his child in order to receive the protections afforded by the Constitution. The Court quoted Justice Stewart's dissenting opinion in \textit{Caban v. Mohammed}, "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."\textsuperscript{83} The Court added that the only consequence of the biological relationship is that it affords the putative father an opportunity to enjoy a relationship with his child. However, the putative father must "grasp[] that opportunity and accept[] some measure of responsibility for the child's future," otherwise the Constitution does not oblige the state to entertain the putative father's concerns about the child.\textsuperscript{84} In \textit{Lehr}, the Court concluded that the New York statute afforded the unwed father ample opportunity to develop a relationship with the child.\textsuperscript{85}

The decisions in \textit{Stanley}, \textit{Quilloin}, \textit{Caban}, and \textit{Lehr} delineate the Supreme Court standard for evaluating the rights of putative fathers in their illegitimate children. These decisions establish that a biological link without more does not vest the putative father with constitutional protections. Rather, the biological link acts as a legal "springboard" and presents an opportunity for the putative father to "grasp" a relationship with his

\textsuperscript{82} Id. at 249-50.
\textsuperscript{83} Id. at 260 (citations omitted) (quoting \textit{Caban}, 441 U.S. at 397). In addition, the Court noted that since the mother bears the child, her relationship to the child has already been more clearly determined. Conversely, the father must demonstrate his parental relationship by another method. \textit{Id.} at 260 n.16 (quoting \textit{Caban}, 441 U.S. at 397). See \textit{Id.} at 261 n.17.
\textsuperscript{84} \textit{Id.} at 262.
\textsuperscript{85} The New York statutory scheme provided a "putative father registry" where putative fathers could avail themselves of notice of any proceedings which might terminate their parental rights. \textit{Id.} at 250-51 n.4 and accompanying text. In addition to the putative father registry, New York law contained several other classes of fathers who were required to receive notice of adoption proceedings, including men who were adjudicated as the father, indicated as the father on the birth certificate, living with the child and her mother while claiming to be the father, sworn by the mother in a written statement to be the father, and lastly, those who were married to the mother prior to when the child was six-months old. \textit{Id.} at 251-52 n.5.
child.\footnote{Similarly, prior to the birth of a child, the rights of putative fathers are limited with respect to custody, care, management, and adoption. See, e.g., In the Matter of Baby M, 109 N.J. 396, 412, 537 A.2d 1227, 1253-54 (1988). In Baby M, the New Jersey Supreme Court invalidated a surrogate contract holding, inter alia, that a mother could not voluntarily and irrevocably terminate her parental rights in her child prior to its birth. The court also stated that the right of procreation does not include the right of custody because to assert that the father’s “right of procreation gives him the right to custody . . . would be to assert that [the mother’s] right of procreation does not give her the right to custody.” Id. at 448, 537 A.2d at 1254 (emphasis in original). The consequence of that assertion would be “that the constitutional right of procreation includes within it a constitutionally protected contractual right to destroy someone else’s right of procreation,” id. (citing Skinner v. Oklahoma, 316 U.S. 535 (1942), for the proposition that forced sterilization of habitual criminals violates equal protection and deprives them of a basic liberty).} However, once the putative father has demonstrated his interest in the child by developing an actual or legal relationship using the procedures provided by the state, the court will then recognize the putative father’s constitutionally protected interest in the parent-child relationship.

III. THE CHALLENGES OF PUTATIVE FATHERS-TO-BE

Even prior to the Supreme Court holding in \textit{Danforth} that the state may not delegate to the spouse a veto over the abortion decision, courts had rejected potential fathers’ assertions of paternal rights that operate to the exclusion of women’s right to abortions. In \textit{Jones v. Smith},\footnote{278 So. 2d 339 (Fla. Dist. Ct. App. 1973), \textit{cert. denied}, 415 U.S. 958 (1974).} a Florida appellate court affirmed the lower court’s decision denying a father-to-be’s petition enjoining his lover from obtaining an abortion.\footnote{Id. at 344.} The potential father argued that by consenting to sexual intercourse the woman had waived her right to an abortion, and that by seeking an abortion the woman had “abandoned” the child and was, therefore, unfit. The court rejected these arguments and held that a woman’s right to privacy could not be vitiated by the sexual act. The court also stated that seeking an abortion could not equal abandonment since the mother must be affirmatively proven to be an unfit parent. The court found this argument tenuous as a practical matter because there were so many authorized abortions. Furthermore on this point, the court stated that assuming arguendo an abortion did equal abandonment, it must always yield to maternal health and life. In addition, the court found the potential father’s agreement to support the child irrelevant.
because he was already required to do so under state law. Finally, although the Florida court recognized the expanding rights of unwed fathers, it held that these rights could not extend so far as to constitute a right to prevent women from choosing abortions. The court interpreted Supreme Court precedent specifically regarding the rights of a father-to-be to enjoin a woman from having an abortion and found that "[n]o such 'right' exists."

Similarly, in 1974, in *Doe v. Doe* the highest state court in Massachusetts held that an estranged husband had no statutory or constitutional right to decide whether the fetus should be aborted. In *Doe*, a husband told his wife he did not want the responsibility of a child. However, when his wife sought an abortion, he objected and sought to enjoin her based on his constitutional right to decide whether to bear children. The court rejected the potential father's constitutional arguments, stating that cases involving the right to procreate and the right to privacy were protections against government intrusion, not vehicles to control decisions of other private citizens.

Even after the Supreme Court's decisions in *Roe* and *Danforth*, potential fathers still sought to prohibit abortions. Courts confronted with the issue have refused injunctive relief relying

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99 Id. at 342-44. In addition the court noted the implications of recognizing a "right to prevent abortion" in the potential father:

If we were to conclude that a putative father has the standing to prevent the natural mother from terminating the pregnancy would the putative father have the corresponding standing to compel the termination of the pregnancy notwithstanding the mother-physician relationship or the considerations imposed by the state? Could a potential putative father (or . . . husband) seek an injunction to restrain the woman from using contraceptives or compel the woman to bear children? Such circumstances would seem ludicrous. It is unquestioned that a woman has a fundamental right to determine whether or not to bear a child, . . . and it would be beyond the province of logic and reason to suggest that she could be compelled to procreate.

100 Id. at 344 (emphasis in original) (citations omitted).


102 Id. at 559-60, 314 N.E.2d at 130 (relying on *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (finding that the fundamental rights protected by the fourteenth amendment are not limited to the specific terms of the bill of rights)).

103 Id. at 560, 314 N.E.2d at 130 (Such cases "involved a shield . . . against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens.").
on Roe and/or Danforth. For example, in Rothenberger v. Doe\(^{104}\) the New Jersey Superior Court refused to grant a husband’s petition to enjoin his wife from obtaining an abortion.\(^{105}\) The court rejected the husband’s argument that his constitutional right to procreate mandated that the wife carry the child to term.\(^{106}\) The court stated that such an argument had been “categorically rejected” and that it is exclusively the woman’s right to choose an abortion.\(^{107}\) Furthermore, the court explained that although there was no statute at issue, the court’s order itself would constitute “unauthorized and unconstitutional state interference.”\(^{108}\) Finally, the court noted that even if a woman’s right to an abortion was not a settled area of law, courts would be hard-pressed to find methods of enforcing an injunction against an abortion. The court stated that it would not send a woman to jail for having an abortion, nor would it “place a monetary value on either a woman’s right to terminate pregnancy or on the potentiality of the four to six-week-old fetus.”\(^{109}\)

Since Roe, courts have been unwilling to act on behalf of the potential father and enjoin a woman from obtaining an abortion. However, several recent attempts to enjoin abortions have been successful in lower courts which have granted restraining or-

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\(^{104}\) 149 N.J. Super. 478, 374 A.2d 57 (Super. Ct. Ch. Div. 1977). See also, e.g., Coleman v. Coleman, 57 Md. App. 755, 471 A.2d 1115 ( Ct. Spec. App. 1984), in which the Maryland appellate court held that a husband is “constitutionally prohibited from enjoining the abortion of the wife.” Id. at 763, 471 A.2d at 1119. In addition, the court stated that “a woman . . . is most definitely entitled, as a matter of right to a medically induced abortion in the first trimester, notwithstanding the objections of the State or any other person, firm, corporation or association.” Id. at 764, 471 A.2d at 1120.

\(^{105}\) Rothenberger, 149 N.J. Super. at 482, 374 A.2d at 58.

\(^{106}\) Id. at 480, 374 A.2d at 58.


\(^{108}\) Rothenberger, 149 N.J. Super. at 481, 374 A.2d at 59 (citing Shelley v. Kraemor, 334 U.S. 1 (1948)). The court also noted that “where there is no marital relation involved, the natural father has even less equity in compelling the mother to suffer an unwanted pregnancy.” Id.

\(^{109}\) Id. See Przybyla v. Przybyla, 87 Wis. 2d 441, 275 N.W.2d 112 ( Ct. App. 1978) (court rejected husband’s attempt to recover compensatory and punitive damages of one million dollars, for intentional infliction of emotional distress by his wife for having an abortion without his consent).
ders. These recent successes at the lower court level might be attributed, in part, to the novelty of the potential father's arguments. Rather than asserting that one interest is paramount to another, or that the potential father has an absolute statutory or constitutional right to prohibit abortion, potential fathers have argued that the potential father has certain constitutional interests which should be balanced against the competing constitutional interests of the pregnant woman on a case-by-case basis.

In Reynolds v. Reynolds, the twenty-six-year-old husband sought to enjoin his eighteen-year-old wife from terminating her pregnancy. The lower court in Utah granted the husband's request for a temporary restraining order (TRO). However, the appellate court refused to grant a preliminary injunction and dissolved the order about a week later, at which time the wife had an abortion.

In Indiana, three paternal rights cases were brought by potential fathers seeking to prevent abortions. In John Smith v. Jane Doe, the putative father-to-be petitioned the court to establish paternity and to obtain a TRO to prevent his girlfriend from having an abortion. The county court granted the TRO and then a preliminary injunction. The court found no evidence

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110 Recent attempts refer to those cases which have been brought in state courts since March 1988. See note 4 supra.

111 No. D-88-944 (3d Dist., Salt Lake Cty., Utah, May 31, 1988), appeal dismissed, No. 880420-CA (3d Dist., Salt Lake Cty., Utah, Mar. 6, 1990) (Since the woman had an abortion, the court dismissed the case as moot and refused to consider the case on the merits.).

112 Moss, supra note 4, at 19-20 (husband also initiated divorce proceedings and sought custody of their one-year-old son).

113 Id. at 19. See also Reynolds, No. 880420-CA, slip op. at 1.


that the woman would suffer any medical risks, that pregnancy would force a "distressful life or future" on her, or that her mental or physical health would be "taxed by childcare." The court noted that the woman wanted to avoid childbirth because she wanted to "look nice in a bathing suit" and did not want to "share the [potential father] with the baby." The court also noted that the woman was "a very pleasant young lady, slender in stature, healthy, and well able to carry a baby to delivery without an undue burden." In addition, the court found that the father-to-be was "able and willing to provide a suitable home for the child." Finally, the court concluded, inter alia, that the "[f]actors considered in Roe v. Wade do not exist here where the mother was relying on abortion rather than contraception. That fact, and her other reasons for abortion are indicative of an extremely immature young woman which lessens the weight and nature of her privacy interest." Nevertheless, the woman violated the order and had the abortion.

In another Indiana case, John Doe v. Jane Smith, which involved similar facts, the juvenile court denied the same request and arguments for injunctive relief. The court found Danforth to be dispositive. On appeal, the Indiana Supreme Court refused to issue the injunction pending appeal, relying on Danforth and the lower court decision. Furthermore, Justice Stevens denied an unofficial request for certiorari on the matter, citing Danforth.

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116 Id. (order granting preliminary injunction, findings of fact).
117 Id.
118 Id. (order granting preliminary injunction, conclusions of law). This type of language is exactly the type of archaic and stereotypic notions that the Supreme Court has discouraged. See Brief of Amici Curiae for the Appellant, at 16-17 Jane Doe v. John Smith (Ind. Ct. App. 1988) (No. 84A01-8804-CV-00112) [hereinafter Amici Curiae, Jane Doe v. John Smith]. The judge's findings of fact reflect on his own moral values to determine what is an appropriate reason to have an abortion. These values are clearly adverse to the woman's own desires and not necessarily reflective of society at large. His decision forces the woman to "pay the price" of expressing her own sexuality and perpetuates the notion that it is the woman's moral duty to give birth.

119 See N.Y. Times, Apr. 12, 1988, at A26, col. 1. Since the woman aborted the fetus, the Indiana Supreme Court declined to hear the case on emergency status and remanded the case to the Indiana Court of Appeals. See Moss, supra note 4, at 20.

120 See John Doe v. Jane Smith, 527 N.E.2d 177, 178 (Ind. 1988).
121 Id.
122 Justice Stevens stated, in his capacity as Circuit Justice for the Seventh Circuit, that he had "serious doubts concerning the availability of a federal remedy for [the father-to-be's] claim in view of the fact that Jane Smith's decision to obtain an abortion
In Conn v. Conn, the Indiana Court of Appeals reversed the lower court's order enjoining the woman from having an abortion. The court explicitly found that the language of Danforth was "unambiguous and unqualified" and that "[a]lthough the moral concepts of abortion... are troublesome... [o]ur duty consists only of applying the law as announced by the Supreme Court." Conn v. Conn was the first paternal rights case since March, 1988 to reach the Supreme Court's normal docket. The Supreme Court denied the request for certiorari without opinion or dissent. The Court's refusal to hear the case, in conjunction with the decisions of appellate courts, suggests that the limited role of the father-to-be established in Roe and its progeny is a settled area of the law which the Supreme Court does not consider subject to debate.

IV. Analysis

Potential fathers have advanced two main arguments in support of permanent injunctions prohibiting abortion. First, the action of a court balancing competing parental interests does not constitute state action and, therefore, Roe and Danforth are inapplicable since they preclude only action by a state legisla-
Alternatively, fathers-to-be argue that even if such court evaluation does constitute state action, *Danforth* is not controlling because it precludes the state from granting an absolute veto to a husband (or putative father) and, therefore, leaves open a case-by-case balancing test of competing constitutional rights. In addition, potential fathers have sought to buttress their arguments by drawing an analysis between a judicial balancing test in this situation with the judicial balancing test the Court has used when a pregnant minor has sought an abortion.

These arguments attempt to create a loophole in order to circumvent *Roe* and *Danforth*. However, such manufactured avenues do not exist in reality and, therefore, *Roe* and *Danforth* are dispositive on the issue of potential fathers' rights. A contrary determination would misrepresent the principles embodied in the right to privacy and the right to procreation. In addition, a determination in favor of the potential father's arguments would be a regression back to archaic stereotypes in violation of equal protection.

A. State Action

The fourteenth amendment protects individuals from government intrusion into certain protected areas, such as the right to privacy. In order to invoke the protections afforded by the Constitution, an individual must demonstrate that actions by the state are infringing upon the individual's personal rights. Thus, the threshold issue in any case alleging violations of the fourteenth amendment is whether the action involved constitutes state action. In paternal rights cases, the issue becomes

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128 See, e.g., Brief for Appellee at 27-35, Jane Doe v. John Smith (Ind. Ct. App. 1988) (No. 84A01-8804-CV-00112) [hereinafter Brief for John Smith]. The briefs in Jane Doe v. John Smith are referred to throughout this section because they are illustrative of the general arguments made by fathers-to-be on the issue of the rights of fathers as fathers.

129 See, e.g., id. at 36.


132 Id. at 43.

133 See U.S. Const. amend. XIV, § 1 ("No State shall... "). See, e.g., In re Civil Rights Cases, 109 U.S. 3 (1883) (wrongful acts by private citizens, unsupported by state authority, are not subject to fourteenth amendment scrutiny). See also L. Tribe, AMERI-
whether the actions of the court in enjoining the abortions fall within the definition of state action.

The landmark case finding that the actions of a court can constitute state action is *Shelley v. Kraemer*. In *Shelley*, the Supreme Court invalidated a racially restrictive covenant holding that state court enforcement of the covenant constituted state action and violated the fourteenth amendment. The Court found that "but for" court enforcement, the willing buyers and sellers could have transferred the property regardless of race. In addition, the Court held that it was irrelevant that enforcement resulted from common-law policies rather than statutory laws.

Fathers-to-be have argued that the right of parents to raise their children originates "outside the power and authority of the state" and derives from "something akin to 'natural' law." Thus, it is argued, the mere adjudication involving that right is not state action within the meaning of the fourteenth amendment. Fathers-to-be reject *Shelley* and seek to discredit its impact by arguing that the holding in *Shelley* is limited to its particular facts and has had no enduring effect. Furthermore, fathers-to-be assert that it is in the nature of a court to resolve state action.

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*Can Constitutional Law* 1688-89 (2d ed. 1988). State action is involved if a party is attacking a statute or a common-law rule of decision. In addition, state action can exist by the government's inaction. That is, if a private party's action is really an inherently public function, the government's silence may be acquiescence constituting a delegation of government authority to that party. *Id.*

134 334 U.S. 1 (1948).
135 *Id.* at 19.
136 *Id.* at 20.
138 See *id.* at 29 (citing R. Kluger, *Simple Justice* 528 (1976); Chemerinsky, *Rethinking State Action*, 80 Nw. U.L. Rev. 503, 526 (1985) ("The Supreme Court has recoiled from [its] conclusion and largely has refused to apply *Shelley*’"); Wechsler, *Foreword: Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, § 1 ("*Shelley* was an 'ad hoc determination of [its] narrow problem[], yielding no neutral principles for their extension or support."). See also Evans v. Abney, 396 U.S. 435 (1970) (The Court found no state action when a state court ruled that a will which devised a park to a city on condition that it be used by whites only could not be altered to force integration and thus the trust property must revert to the heirs of the testator. Rather, the Court relied on property law to resolve the issue.). But see Evans v. Newton, 382 U.S. 296 (1965) (Supreme Court held that municipal maintenance of the private park in a racially restrictive manner constituted state action because running the park is a traditional municipal function that serves the community.).
differences between private parties. Therefore, if "[m]ere state court involvement" by itself were considered state action, then "all legally significant private action would be state action." Thus, the fathers-to-be assert that since the right to bring up children is derived from "intrinsic human rights" rather than state law, and since the involvement of the court is merely to balance competing private interests, the court action is not an expression of common law and, therefore, does not constitute state action. It would follow that if no state action is found, Roe and Danforth are inapplicable because they preclude only state interference with the abortion decision. In addition, fathers-to-be suggest that without state action a woman has no "right to an abortion, as her 'right' exists only with regard to state action." In other words, Roe and Danforth guarantee a woman the right to choose an abortion free from government intrusion. However, absent state action the woman no longer has that constitutional right. Instead, she has a private interest which must be balanced against competing private interests, such as the potential father's "interest in procreation and parenthood."

The potential fathers' argument that no state action exists when a court enjoins a woman from having an abortion is easily discredited. The Supreme Court has stated, on more than one occasion, that state action can be found regardless of whether the actor is legislative, executive, or judicial. Indeed, when a

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139 Brief for John Smith, supra note 128, at 29-30.
140 Id.
141 Id. at 30.
142 Id. at 32. The potential fathers argue that there is no judicial precedent establishing that a woman's interest in choosing an abortion is weightier than a father's rights in his child. Consequently, the court must make such a determination in the particular case. Id. at 33.
143 See, e.g., Brief for Jane Doe, supra note 131, at 49-50; Amici Curiae, Jane Doe v. John Smith, supra note 118, at 8 n.5:
Amici reject as completely without merit John Smith's argument that the Juvenile Court's order does not constitute state action . . . The . . . [c]ourt was plainly not acting passively to ratify . . . preexisting rights. Rather, . . . Smith enlisted the support of a government official to accomplish that which he was powerless . . . to accomplish on his own . . . [T]his is an example of state action in its simplest form.
Id. (emphasis in original) (citing New York Times v. Sullivan, 376 U.S. 254, 265 (1964)).
father-to-be sought to enjoin a woman from having an abortion, the Florida district court of appeals held that preventing a woman from having an abortion would be "tantamount to the type of state interference or infringement proscribed by Roe v. Wade." Therefore, "but for" a court's granting of injunctive relief, pregnant women would be able to obtain abortions. Consequently, the affirmative actions of the court constitute state action.

B. Constitutional Interests

1. Roe and Danforth Distinguished

Fathers-to-be have argued that even if the court's participation in enjoining an abortion constitutes state action, Roe v. Wade and Planned Parenthood of Missouri v. Danforth are not controlling because they addressed different circumstances. Roe did not address the rights of fathers, and Danforth addressed statutory spousal consent rather than a case-by-case balancing approach. Fathers-to-be do not seek an absolute veto in which their rights would always outweigh those of the mother. Instead, they want a neutral third party — the court — to balance their constitutional interest in the fetus against the woman's constitutional right to choose an abortion, and to determine on a case-by-case basis whose interest should prevail.

Roe addressed only the rights of the pregnant woman and specifically refused to consider the rights of potential fathers.

officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment")). See also New York Times v. Sullivan, 376 U.S. 254, 265 (1964). Here the Court rejected the argument that the fourteenth amendment applies only to state action because it was improperly used to insulate the determinations of the judiciary. The Court stated:

'Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power been applied but, whatever the form, whether such power has in fact been exercised.'

Id. at 265 (quoted in Brief for Jane Doe, supra note 131, at 47) (citation omitted).


Brief for John Smith, supra note 128, at 41.

See note 56 supra.
Potential fathers argue that *Roe* specifically stated that the right to choose an abortion is not absolute, and that competing state interests must be considered.\(^{148}\) They assert that the potential father's interest in the fetus constitutes such a compelling state interest which must be weighed against a woman's interest in choosing an abortion.\(^{149}\) Potential fathers argue that *Danforth* only precludes the spouse from unilaterally vetoing the abortion decision by withholding his consent but does not prohibit the court from balancing his constitutional interest in the fetus against the pregnant woman's interest in obtaining an abortion.\(^{150}\)

In addition, potential fathers argue that the Supreme Court has entertained analogous "judicial veto" procedures when pregnant minors have sought abortions.\(^{161}\) They argue that *Danforth* rejected the parental consent provision because it called for a

\(^{148}\) The fathers-to-be rely on this statement from *Roe*:
Some . . . argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree . . . . We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests . . . .


\(^{149}\) In addition to the right to procreate, see *Skinner v. Oklahoma*, 316 U.S. 535 (1942), fathers-to-be assert a vested compelling interest in the care, custody and nurturing of a child. See *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quillioin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972). For a discussion of these interests, see text accompanying notes 68-96 *supra*.

\(^{150}\) The fathers-to-be rely on the following quote from *Danforth*:

This section does much more than insure that the husband participate in the decision whether his wife should have an abortion. The State, instead, has determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it irrespective of the condition of their marriage. The State, accordingly, has granted him the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her pregnancy. This state determination . . . has interposed an absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference.

Brief for John Smith, * supra* note 128, at 39 (quoting Planned Parenthood of Missouri v. *Danforth*, 428 U.S. 52, 70-71 n.11 (1976) (emphasis added)). "Thus, the *Danforth* Court struck down a *per se* rule, not case-by-case judicial balancing of rights." *Id.*

\(^{161}\) *Id.* at 40 n.6 (citing Planned Parenthood Ass'n of Kansas City v. *Ashcroft*, 462 U.S. 476 (1983) (Supreme Court upheld a statute which allowed a minor to seek judicial authorization from a court for an abortion when her parents withheld consent); *Bellotti v. Baird*, 443 U.S. 622 (1979) (Supreme Court found a statute which allowed the minor to obtain a court order for an abortion without parental consent did not delegate an absolute veto to a third party.).
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blanket parental veto over the pregnant minor's abortion decision. However, the state may have a qualified parental consent statute which provides for a judicial bypass so that the minor can acquire a court order to obtain an abortion in lieu of parental approval. The court would evaluate the maturity of the minor to determine whether it would be in the minor's best interest to have an abortion. The fathers-to-be argue that, similarly, the court could act as a judicial bypass by balancing the best interests of the potential father and the pregnant woman and determine whose best interests are weightier. 162

It is clear that the Court in Danforth considered whether a husband could preclude a woman from having an abortion, and held that he could not. The use of a balancing test would be inappropriate because it could result in a complete deprivation of a woman's constitutional right to freely choose an abortion in the first trimester in violation of Roe and Danforth, 153 and would require women to sacrifice their right to privacy by disclosing deeply personal and intensely private matters. 164 In addition, the right to an abortion as espoused in Roe does not allow for a case-by-case analysis. Women have argued that “the abortion right is not fact-specific and an individual woman's personal circumstances and preferences are legally irrelevant to her possession of the abortion right.” 155 Contrary to the assertions of the fathers-to-be, Danforth did balance the interests of the potential father and found that they can never prevail. 156

It is also irrelevant that the court has entertained a judicial balancing test regarding a minor's decision to have an abortion. 157 Parental consent statutes emphasize the significance of

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152 Id. at 40-41.
153 See Danforth, 428 U.S. at 71 (noting that any balancing test would favor the woman since she would bear the child).
154 Brief for Jane Doe, supra note 131, at 19-20. See also id. at 18 n.7 (citing Binkin, Gold & Cates, Illegal Abortion Deaths in the United States: Why Are They Still Occurring?, 14 Fam. Plan. Persp. 163, 165 (May/June 1982) (noting that the primary reason that women in the United States seek illegal abortions, despite their constitutionally protected right to seek a safe and legal abortion, is due to their desire to keep the abortion private)).
155 Id. at 14. In addition the brief stated, “abortion decision[s] may not be subject to ad hoc determinations of [a] hospital committee” (citing Doe v. Bolton, 410 U.S. 179, 195-98 (1973)).
156 Danforth, 428 U.S. at 71, 90 (Stewart, J., concurring).
157 See Amici Curiae, Jane Doe v. John Smith, supra note 118, at 14 n.8:
[T]he factors that prompted the Supreme Court's conclusion that, although
the parents' part in child rearing. They also assist minors who often find it difficult to make mature, informed decisions. The bypass allows judicially deemed mature minors to escape the parent's consent. However, to assert that the court must consider, in a judicial balancing test, the reasons why an adult woman wants an abortion reduces the adult woman to the legal capacity of a minor and as such sexually discriminates against the woman by denying her the opportunity of self-determination which is available to the adult male.

2. The Right to Procreate and the Right to Custody, Care, and Nurturing

Fathers-to-be assert two constitutional interests to be considered. First, the potential fathers assert a constitutional interest in the fetus via the right to procreation which is derived from the right to privacy. Second, they seek to protect their interest in the "custody, care, and nurture" of the potential child. The potential fathers argue that these constitutional rights clearly outweigh the restriction on abortion, which they characterize as less restrictive than the right to travel.

Potential fathers have defined the right to procreate as the "right to have a natural child." For support, they rely, in part, on In re Baby M. In that case, the Supreme Court of New

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Jersey found that the natural father had a right to procreate, which is "simply . . . the right to have natural children." However, the court distinguished that right from the right to custody of the child upon birth. Thus, it is asserted that once a child is conceived through "consensual sexual intercourse," the potential father's right to procreate vests in the fetus and lasts until birth.

Fathers-to-be also assert that they have a constitutional right to the care, custody, and companionship of the child and argue that this right attaches at conception. The advocates of paternal rights have recognized that the right to establish a relationship does not exist solely by nature of the biological relationship. Rather, as stated earlier, when a child is born it is necessary for the putative father to have a biological and actual or legal relationship with the child in order to ensure that a court will recognize their constitutional interest in the child. Fathers-to-be assert that their actions in protecting the potential child have "grasp[ed] that opportunity and accept[ed] some measure of responsibility for the child's future," and, thus, their constitutional interest should be recognized.

Finally, potential fathers suggest that it is not unconstitutional to restrict the fundamental rights of the mother to protect the rights of the father vis-à-vis the child. In support of this position, potential fathers suggest that a woman's fundamental right to travel has been restricted by court orders "that the mother remain in proximity to the father's residence to protect

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162 Id. at 448, 537 A.2d at 1253 (quoted in Brief for John Smith, supra note 128, at 43).
163 Id. at 448-49, 537 A.2d at 1253-54 ("The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation; they are rights that may also be constitutionally protected, but that involve many considerations other than the right of procreation.").
164 Brief for John Smith, supra note 128, at 43 ("[T]he Father and the Mother have conceived a child, by consensual sexual intercourse. As a result, the Father's general procreation right has become particularized in that unborn child. He has, therefore, a distinct constitutional interest, in continuing the procreation already begun to birth . . . .")
165 Id. at 47.
166 Id. at 45-46.
167 See notes 69-96 and accompanying text supra.
168 Brief for John Smith, supra note 128, at 46 (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983)).
169 Id. at 50.
the father's rights of visitation." Fathers-to-be argue that since such restrictions on travel which effectively burden a woman's autonomy are constitutional, it should follow that a balancing test which is less intrusive to a woman's autonomy should also be upheld. Potential fathers have stated that "[w]hen, as in divorce and custody cases, the restriction [on a woman's constitutional right to travel] may be intended to last for a number of years, forcing a woman to forego job or marriage opportunities, the restriction is far more burdensome than a requirement that a woman forego an abortion during a seven month period." Thus, by analogy, if the right to travel may be restricted, then the right to an abortion may be restricted if the particular facts indicate that the father's interests outweigh the pregnant woman's interests.

Although creative, the potential fathers' arguments are, nevertheless, inconsistent with the state of the law. Potential fathers have misconstrued the holding in Danforth and the purpose of the constitutional protections of the right to procreate. The constitutional guarantee of the right to procreate is a guarantee against government intrusion. Since the government has not acted to restrict the potential father's right to procreate when a woman chooses to have an abortion, no constitutional right has been invoked. Finally, potential fathers improperly rely upon a line of cases dealing with the care, custody, and nurturing of a child. These cases, by definition, involve a born child, and, therefore, they have no place in the abortion context.

The right to procreate is an individual right. As such, a

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171 Brief for John Smith, supra note 128, at 50.


173 See Brief for Jane Doe, supra note 131, at 37 ("the right to procreate is a purely individual right that protects every man and woman from government intrusion into matters involving childbearing, whether that intrusion is asserted to be for the benefit of the state or for a third party"). To illustrate the Supreme Court's position on the right to procreate, the appellant quoted the following:

[D]ecisions of this Court have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on [the marital relationship]. Eisenstadt v. Baird, holding that the protection is not
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man's right to procreate may not prohibit a woman's abortion decision because to do so would require her to procreate with him against her individual right.\(^{174}\)

Assuming that potential fathers have a right to procreate and a right to the care, custody, and nurturing of a child, it is inappropriate to expand these rights to include compelling a woman to carry a child against her will. For example, when a child is born, the putative father's paternal rights may be terminated unless he has taken affirmative steps to demonstrate an interest in the child. The law will not recognize solely a biological link. Nor will the mere payment of child support suffice to establish a relationship because such payments are statutorily required. The law requires something that can only occur when the child is born, such as the development of an actual emotional relationship with the child. The fathers-to-be misplace their right to the

limited to married couples, characterized the protected right as the “decision whether to bear or beget a child.” Similarly, \textit{Roe v. Wade}, held that the Constitution protects “a woman’s decision whether or not to terminate her pregnancy.” These decisions put \textit{Griswold} in proper perspective. \textit{Griswold} may no longer be read as holding only that a State may not prohibit a married couple’s use of contraceptives. Read in light of its progeny, the teaching of \textit{Griswold} is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.


\(^{174}\) In addition, women have affirmatively asserted that a court order compelling a woman to bear a child constitutes involuntary servitude in violation of the thirteenth amendment. Although the thirteenth amendment was originally passed to prohibit the slavery of blacks in the United States, the “thirteenth article... forbids any other kind of slavery, now or hereafter.” \textit{Id.} at 50 (quoting the Slaughter-House Cases, 93 U.S. 36 (1873)).

Appellants quote \textit{United States v. Kozminski}, 821 F.2d 1186 (6th Cir. 1987) (en banc), aff'd, 108 S. Ct. 2751 (1988), which defined involuntary servitude as occurring when, inter alia, “(1) an individual believes he has no viable alternative but to perform services for another; and, that belief is based on: (a) the use or threatened use of physical force; or, (b) the use or threatened use of state-imposed legal coercion” (quoted in Brief for Jane Doe, \textit{supra} note 131, at 51).

Compelling a woman to have a child easily fits this definition: “[C]arrying and delivering a child is labor; it was against [the woman’s] will; and she was ordered to do so for another... solely as a result of... the coercion of [a] court[] order and... threat of the court's contempt powers, including possible imprisonment,” thus leaving no viable alternative. Brief for Jane Doe, \textit{supra} note 131, at 51. Pregnancy can easily be equated with work when the enormous physical and emotional burdens pregnant women must encounter throughout their pregnancy are considered. \textit{Id.} at 51-52. \textit{See also} notes 194-97 and accompanying text \textit{infra}. Thus, by suggesting that a woman unequivocally delay her goals and desires for six months so that the putative father-to-be may have the child would constitute unconstitutional involuntary servitude.
care, custody and nurturing of their children. These rights cannot vest until the child is born because until then there is no way for a potential father to establish something more than a biological link.

Furthermore, the initiation of litigation cannot suffice as an affirmative step vesting interests in the putative father-to-be because the litigation is premised on a promise of future actions that is not binding and, thus, unreliable. For example, in *In re Baby M*, the court held that the surrogate mother could not irrevocably surrender her rights to the child prior to birth. The court heavily weighed the fact that the mother had no way to determine the impact of the emotional bond that may form between her and the child until the child was born. In the same breath, the court stated that neither could the father be held to accept responsibility for the child in that he may not be aware of the responsibilities of parenthood. By analogy, the putative father-to-be cannot rely on an assertion that he will fulfill his "duties" as a father because there is no way to be assured that some measure of responsibility will actually develop. The requirement that the father accept some measure of responsibility to have the right to the care, custody, and nurturing of his child is retrospective in nature. The courts do not inquire whether the putative father-to-be will accept some measure of responsibility, but rather, whether the putative father has already demonstrated such commitment.

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176 *Id.*
177 *Id.*
178 The cases discussing the care, custody, and nurturing of a child all involved a born child. The courts stated that the putative father must demonstrate that he has taken some action which shows that he has accepted responsibility for the child. See notes 68-96 and accompanying text supra.

In addition, if the father's right to procreate was vested in the child at the moment of conception and lasted until birth, at which time the right to the care, custody, and nurturing of the child would attach, the father's rights would effectively force a woman to waive her right to an abortion simply by agreeing to engage in sexual intercourse. This waiver of a constitutional right has been held impermissible. In *Jones v. Smith*, 278 So. 2d 339 (Fla. Dist. Ct. App. 1973), cert. denied, 415 U.S. 958 (1974), the court rejected the potential father's claim that by consenting to sexual intercourse the woman waived her right to an abortion, and that by seeking an abortion the woman had abandoned her child. *Id.* at 342-43. However, in recent paternal rights cases, potential fathers do not suggest that the woman waives her right, but rather that his right vests in the unborn child. This argument merely shifts the focus from the waiver of the woman's rights to the assertion of paternal rights, but the effect is the same. That is, the impermissible
Initially, it would appear that the balancing test endorsed by putative fathers-to-be provides a feasible compromise in a highly sensitive area. For example, it would allow the potential father to participate in decisions regarding the birth of the child while still considering the woman's determination. However, the use of such a test merely allows fathers to circumvent the teachings of Roe and Danforth with a unilateral veto under the guise of a balancing test. The potential father would be able to invoke the court's authority to issue injunctive relief, to preclude the woman's decision to abort the fetus. The only difference between this balancing test and the unilateral veto in Danforth is that the potential father relies upon the court to "sometimes" grant the injunctive relief, rather than upon a statute that always grants relief. However, abortion is not an area that can be compromised by a balancing test. As Danforth recognized, when two people disagree on this issue, only one may prevail. Inasmuch as it is the woman that carries the fetus to term, the balance would necessarily weigh in her favor. In Danforth, the state was precluded from delegating to the spouse a veto over the abortion decision which the state itself lacked. Thus, it would contravene Roe and Danforth to hold that the state, via the court, may sometimes delegate to the potential father an opportunity to veto the abortion decision by administering a judicial balancing test.

waiver of a woman's constitutional right to an abortion as a result of consensual sexual intercourse.

Furthermore, a waiver of constitutional rights in a criminal case must be knowing and voluntary. Johnson v. Zerbst, 304 U.S. 458 (1938). However, in a criminal case a defendant is entitled to receive Miranda warnings. Miranda v. Arizona, 384 U.S. 436 (1966). By analogy, in this civil context, should a woman be read a version of Miranda before engaging in sexual intercourse? Additionally, if a woman's consent to sexual intercourse is a waiver of her constitutional rights, then when a man fails to use birth control that should also constitute a waiver of his constitutional rights.


180 A tort analogy regarding the duty to aid may be made with respect to the fetus. It is well established that one party is generally not required to render aid to another individual. W. Keeton, D. Dobbs, E. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 56, at 373-77 (5th ed. 1984). In the context of abortion, requiring a woman to carry a child to term for the sake of the putative father-to-be would violate the notion that there is no duty to do something for another person. In Regan, Rewriting Roe v. Wade, 77 Mich. L. Rev. 1569 (1979), Professor Regan suggests that requiring a woman to continue a pregnancy actually compels her to be a "good samaritan" and render aid to the fetus. Id. at 1576. Although on its face an abortion may appear to be a
C. Equal Protection

The equal protection clause of the fourteenth amendment provides that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."181 This amendment ensures that similarly situated people are treated similarly, and people who are not similarly situated are not treated similarly. Sex-based classifications must serve important governmental objectives and be substantially related to those objectives to pass scrutiny by constitutional measures.182 However, such sex-based classifications may not serve to perpetuate antiquated stereotypes of sex distinctions.183

An injunction that compels a woman to carry the pregnancy is "inherently sex-based" and discriminates in violation of the equal protection clause.184 Since only women have the ability to give birth, only women are capable of being subjected to such orders. However, women have historically been denied equal participation in the work place and political system because of their reproductive capacity and maternal role.185 Thus, the ability to have children has been used as a ball and chain to manip-

positive act that should result in liability, upon further analysis it is evident that an abortion is an omission for which there is no duty to act. Childbearing and childbirth are extremely "burdensome, disruptive, uncomfortable, and . . . painful activities," and the fetus makes constant demands on the woman which effectively requires the woman to render aid by responding. Id. at 1574. See Doe v. Doe, 365 Mass. 556, 563, 314 N.E.2d 128, 132 (1974) ("We would not order . . . a husband or a wife to do what is necessary to conceive . . . or to prevent conception, any more than we would order either party to do what is necessary to make the other happy . . . . [T]he same considerations prevent us from forbidding the wife to do what is necessary to . . . prevent birth.").

181 U.S. Const. amend. XIV, § 1.

182 Craig v. Boren, 429 U.S. 190 (1976) (the Court struck down an Oklahoma statute which made it illegal to sell certain beer to males under twenty-one and females under eighteen using middle level scrutiny). But see Frontiero v. Richardson, 411 U.S. 677 (1973) (treating gender as a suspect classification).

183 Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (Supreme Court found the University policy barring men from the nursing program unconstitutional because there was no "exceedingly persuasive justification" and it perpetuated stereotypes about the role of women.). But see note 193 infra.

184 Brief for Jane Doe, supra note 131, at 41.

185 Hoyt v. Florida, 368 U.S. 57, 62 (1961) (although men were required to serve on jury duty, women had no such duty); Goesaert v. Cleary, 335 U.S. 464 (1948) (women were prohibited from employment as bartenders unless the woman was the daughter or wife of the owner); Muller v. Oregon, 208 U.S. 412, 421 (1908) (women were prohibited from working more than a legislatively set amount of hours because additional work might interfere with their reproductive capacity).
ulate and deprive women of their right to participate in the workforce equally with men.\footnote{That is not to say that a woman who chooses to have children perpetuates women's inequality. Rather the issue is one of free choice to determine one's future. To compel childbirth removes choice and consequently equal rights.} Perhaps in 1872 it was the "paramount destiny and mission of women . . . to fulfill the noble and benign offices of wife and mother."\footnote{Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring) (Bradwell, the editor of a leading legal newspaper, had passed the bar exam but was nevertheless denied admission to the bar because she was a woman. The Court cited the woman's role as wife and mother as the will of the Creator and, as such, inalterable.)} But today, referring to forced childbearing as a "noble and benign" duty only furthers the man's procreational interest. For women who have other goals, it is a euphemism for compelled treatment as fetal containers.\footnote{By enjoining abortions, the court "revert[s] to the outdated and unconstitutional approach of treating women solely as reproductive vessels whose decisions and autonomy are so undeserving of respect that women may not even control if and when they reproduce." Brief for Jane Doe, \textit{supra} note 131, at 43. In addition, it would be unconstitutional to pay so much "respect for . . . the man's . . . right to procreate and his desire to have a child . . . [so as to require the woman] . . . to sacrifice her life's choices and bodily integrity in order to provide [the man] with a child." \textit{Id.}}

Fathers-to-be contend that since equal protection violations occur when two classes are similarly situated and treated differently, and since men and women are not similarly situated with respect to pregnancy, there is no sex discrimination.\footnote{Brief for John Smith, \textit{supra} note 128, at 63.} Furthermore, they argue that even if an injunction prohibiting an abortion did violate equal protection, it is not unconstitutional because it "bears a fair and substantial relationship" to an important governmental objective, namely the protection of potential fathers' constitutional rights.\footnote{\textit{Id.} at 64-65.} Fathers-to-be rely on \textit{Geduldig v. Aiello},\footnote{417 U.S. 484 (1974).} in which the Supreme Court held that classifications relating to pregnancy are not always sex-based. The Court found that an insurance program that did not include pregnancy as a compensable disability did not violate the equal protection clause. The Court reasoned that the distinction was based on a physical condition rather than a gender distinction.\footnote{\textit{Id.} at 494-97.} Therefore, the fathers-to-be state that an equal protection argument is against Supreme Court precedent.
The arguments of fathers-to-be are flawed with respect to both assertions. Although it is true that men and women are not similarly situated physically when it comes to actual pregnancy and childbirth, this does not defeat an equal protection argument. Rather, an equal protection argument can be made which takes this difference into account.\(^9\) Restricting abortions imposes tremendous burdens on women. There is considerable discomfort and pain associated with pregnancy and childbirth.\(^{10}\) In

\(^{10}\) Professor Regan provides a lengthy but noteworthy list of the burdens associated with pregnancy:

First, complaints involving general inconvenience or discomfort: a tendency to faintness . . .; nausea and possibly vomiting . . .; tiredness . . .; insomnia (difficulty going to sleep caused by an inability in late pregnancy to find a comfortable position in bed, compounded by difficulty going back to sleep when wakened by a kicking fetus or by the need for frequent urination which accompanies pregnancy, also compounded by general disruption of the body's internal temperature-regulation mechanism); slowed reflexes; poor coordination; uncertainty of balance . . .; manual clumsiness in the morning (caused by swollen fingers and carpal-tunnel syndrome); shortness of breath following even mild exertion; and new aversions to certain foods or smells . . . .

More specific complaints, still involving inconvenience or discomfort, are: tender breasts; stuffy nose; constipation; heartburn . . .; nosebleeds; edema of the feet and ankles; a metallic taste in the mouth; special difficulty in curing any vaginitis that may occur; increased susceptibility to and difficulty of curing urinary tract infection; increased frequency of urination . . .; occasional extreme urgency of urination (as the fetus bumps the bladder); and occasional stress incontinence from the same source . . . .

Among complaints not merely uncomfortable but painful . . .: backache; costal-marginal pain (caused by the enlarged uterus pushing against the lower
addition, the health risks associated with childbirth and pregnancy make abortion a much safer procedure. 195

Furthermore, restricting abortions removes from women the capacity of self-determination. 196 Pregnant women may be forced to delay career or educational opportunities for the sake of childbirth. 197 As one commentator has stated,

When the state prohibits abortion, all women of childbearing age know that pregnancy may violently alter their lives at any time. This

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Ribs; abdominal "round ligament" pain; abdominal muscle pain; pelvic ache; pelvic shooting pain (as the fetus bumps a nerve at the rim of the pelvis); foot and leg cramps; the different pain and leg cramps associated with varicose veins; hemorrhoids; pain and pins-and-needles in the wrist (carpal-tunnel syndrome); and mastitis. Finally, as a result of the general softening of ligaments during pregnancy, along with the extra weight and the loss of balance, there is an increased susceptibility to sprains and to aching feet.

The pregnant woman also experiences changes in her appearance: most obviously, the pronounced change in the shape of her body as a whole; consequent upon the change of body shape, an awkward gait and inability to wear her normal wardrobe; increased dryness of skin . . .; thin, brittle unmanageable hair; varicose veins (in the legs or the vulva, and sometimes in pelvis, abdomen, or breasts (citation omitted); swelling of the face; changes in pigmentation (darkening of the nipples and areolae; sometimes darkening of larger patches of the breast; darkening of freckles or moles; the linea nigra from the pubic area to the navel; the often blotchy "butterfly mask" or chloasma); stretch marks . . . .

Finally as a result of hormonal changes, the pregnant woman is likely to be at times markedly irritable, volatile in her moods, or subject to periods of depression. She may also experience a loss of sexual desire.

After the period of pregnancy, there is the actual delivery of the fetus. The days when a woman had a reasonable chance of spending twelve hours or more in sweaty agony are happily gone. But it is still true that for many women parturition is a thoroughly unpleasant and significantly painful experience. It can also involve a major operation, with all the added risk and discomfort that entails, if the fetus is delivered by cesarean section . . . .

The permanent physical effects of pregnancy . . . are . . . [:] perhaps some darkening of the nipples areolae, sometimes varicose veins and hemorrhoids . . . , and, when a cesarean is performed, the scar from that operation . . . [:] weight gain, anemia, constipation, skin damaged by dryness, damaged hair, sagging breasts, weak bladder, and painful feet or back.

Regan, supra note 180, at 1579-83.

195 See Cates, Smith, Rochat & Grimes, supra note 34; LeBolt, Grimes & Cates, supra note 35; N.Y. Times, Jan. 15, 1989, at A21, col. 4 (stating that between 1972 and 1985 the death rate from abortion dropped from 4 percent per 100,000 to .5 per 100,000).

196 Law, supra note 193, at 1017.

197 N.Y. Times, Nov. 11, 1988, at B5, col. 1. The article refers to a pregnant woman working at a large law firm as "the perfect candidate for the 'mommy track,' the second-class status to which women who want to lead balanced lives are often relegated . . . . Clearly, the path toward partnership remains steeper for women, particularly mothers, than for men." Id.
pervasively affects the ability of women to plan their lives, to sustain relationships with other people, and to contribute through wage work and public life. The right to equal citizenship encompasses the right "to take responsibility for choosing one's own future . . . . [T]o be a person is to respect one's own ability to make responsible choices in controlling one's own destiny, to be an active participant in society rather than an object." Denying abortion denies women the capacity of responsible citizenship.\textsuperscript{198}

The effect of restricting abortions results in impermissible oppression of women.\textsuperscript{199} It denies women the equal right of choice to act as equal participants in all of life's activities. Compelling an otherwise unwilling woman to continue pregnancy and childbirth forces a woman to "fulfill the noble and benign offices of wife and mother" at the dictate of another.\textsuperscript{200}

\textsuperscript{198} Law, supra note 193, at 1017 (quoting Karst, The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 58 (1977)). Professor Law also explains how restrictions on abortion inhibit a woman's freedom of sexual expression. Id. at 1019 (citing C. Gilligan, In a Different Voice 64-105 (1982)).

\textsuperscript{199} Although it can be argued that an equal protection analysis requires women to have full determination of the abortion decision throughout the pregnancy, from conception until birth, this Note does not make that assumption. Whether fetuses should have rights so as to curtail the woman's right to an abortion after viability does not affect the rights of potential fathers. The competing interests in that situation are the woman's right to an abortion versus the state's interest in preserving potential life. However, the interests of the woman remain the same as against the potential father. See also Regan, supra note 180. Here Professor Regan suggests that prohibiting abortion denies women equal protection. Professor Regan relies on the principle that a person is not generally required to come to the aid of another, that "our law does not require people to be Good Samaritans." Id. at 1569. He argues that by compelling a woman to carry a fetus to term, the state forces her to be a good samaritan. Furthermore, he states that the degree to which a pregnant woman is burdened by forced pregnancy and child birth, compared to only trivial burdens, if any, on other potential samaritans, leads to the inescapable conclusion that compelled child birth is a violation of equal protection. Id. at 1569-70.

\textsuperscript{200} Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872).

In addition, the emerging methods and desires for alternative reproductive technology have increased the need for total reproductive autonomy. Recently, many women have decided to be single parents, or co-parent with a person other than the natural father. Thus, many of these women have turned to, inter alia, artificial insemination by donor (AID), or in vitro fertilization. See Donovan, The Uniform Parentage Act and Nonmarital Motherhood-by-Choice, 11 N.Y.U. Rev. L. & Soc. Change 193 (1982-83). Whatever the method, it calls for a complete termination of paternal rights. Although the law has not completely recognized single parenting by AID, see Shaman, Legal Aspects of Artificial Insatmination, 18 J. Fam. L. 331 (1979-80), or lesbian relationships in which one partner is not the natural parent, alternative methods of reproductive technology represents an area in which women have gained more control over their own bodies. It is safe to presume that sperm is not difficult to obtain. Therefore, when combined with women asserting their interest in reproduction apart from men, reproduction is becoming
Potential fathers’ second contention, that if the injunction violates equal protection, it is nevertheless constitutional because it is substantially related to a legitimate governmental objective, must also fail. Potential fathers assert that issuing an injunction is substantially related to the state’s legitimate objective: protecting man’s right to procreate, and to the care, custody, and nurturing of a child. The most obvious flaw in this assertion is that even if the man’s right to procreate was a substantial state interest, would it not then follow that the woman’s right not to procreate is at least equally substantial? In which case, as the Court noted in Danforth, as among competing interests between a man and a woman, as it is the woman who must bear the child, the balance necessarily must weigh in her favor. Furthermore, under the method the courts use, that objective cannot survive constitutional scrutiny\textsuperscript{201} if the state’s action “reflects archaic and stereotypic notions.”\textsuperscript{202} By issuing an injunction the court’s action imposes upon women the notion that it is the woman’s duty to assume the role of mother and as such would remove from women the advantages of equal participation in a world outside the traditional nuclear family in violation of equal protection.\textsuperscript{203}

**Conclusion**

Although the arguments presented by fathers-to-be may

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\textsuperscript{199} See Craig v. Boren, 429 U.S. 190 (1976) (established intermediate level of scrutiny as standard for classification based on sex).

\textsuperscript{202} Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions . . . . [If the statutory objective is to exclude or “protect” members of one gender because they are presumed to suffer from an inherent handicap or to be inately inferior, the objective itself is illegitimate.

\textsuperscript{203} For a discussion on how activities which restrict the right to an abortion violate the right to privacy as well as alternative interpretations of such rights, see note 17 supra.
arouse sympathy, they fall short of providing a convincing basis for the creation of paternal rights that would operate to the exclusion of the right to an abortion. The assertion that the father has a constitutional right to procreate fails because that right may only be asserted to protect him from government intrusion, and may not be used as a vehicle to compel another individual to procreate. The argument that the potential father has a right to the care, custody, and nurturing of a child also must fail because that right does not accrue until birth, and even then the father must affirmatively seek to establish a relationship with the child that goes beyond the biological link.

If, after balancing the respective interests, a court ordered a woman to carry her pregnancy to term, the necessary result would not be a simple restriction on her interests or a compromise on all interests as suggested by potential fathers. Rather, the result would be a total deprivation of the right to choose an abortion under the guise of a balancing test in violation of the privacy concepts of Roe and Danforth. Furthermore, the life-altering consequences that compelled childbirth would have on women are so profound that the deprivation of the right to an abortion for the benefit of potential fathers would violate women's rights to equality founded in the fourteenth amendment. Such deprivation would be a paradigm of impermissible sex discrimination.

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