No. 91-744

# In the Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, ET AL.,

*Petitioners,*

*v.*

ROBERT P. CASEY, ET AL.,

*Respondents.*

*ON WRIT OF CERTIORARI TO THE*
*UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

## BRIEF FOR THE STATE OF UTAH AS AMICUS CURIAE SUPPORTING RESPONDENTS

R. PAUL VAN DAM
*Attorney General*
State of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1016

MARY ANNE Q. WOOD*
Wood and Wood
*Special Asst. Attorney General*
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
(801) 366-6060

*Counsel of Record

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## BRIEF FOR THE STATE OF UTAH AS AMICUS CURIAE SUPPORTING RESPONDENTS

### INTEREST OF THE AMICUS

The State of Utah has a vital interest in this case. The State is currently entangled in protracted litigation challenging the constitutionality of abortion regulations enacted by the 1991 Utah Legislature, as well as various pre-existing sections of the Utah Code. *Jane L. v. Bangerter*, No. 91-C-345-G (D. Utah filed Apr. 4, 1991). The Utah litigation involves, among other things, a claim that a long-standing spousal notification provision is unconstitutional.[1] The Court's decision regarding the constitutionality of Pennsylvania's analogous provision may well control the outcome of the Utah litigation on this point.

More importantly, however, the standard of review adopted by the Court in this case will decisively impact the constitutionality of abortion limitations enacted by the 1991 Utah Legislature. Contrary to petitioners' misrepresentation,[2] the Utah Legislature fashioned "a considered and moderate balance between the conflicting interests of fetal life and maternal autonomy."[3] That

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[1] *E.g.*, Utah Code Ann. § 76-7-304(2) (1990) (requiring a physician prior to an abortion to "[n]otify, if possible, . . . the husband of the woman, if she is married"). The full text of all statutes challenged in the Utah litigation is attached as Appendix A.

[2] Petitioners represent to the Court that "Utah passed a restrictive abortion law that would have subjected doctors to the death penalty. . . ." Petitioners Brief at 38 n.71, *Casey* (No. 91-744). This assertion is false. The Utah Criminal Code specifically classifies felonies in four categories: capital felonies and felonies of the first to the third degree. Utah Code Ann. § 76-3-103(1) (1990). The death penalty may *only* be imposed upon conviction of a capital felony. Utah Code Ann. § 76-3-206(1) (1990). Utah Code Ann. § 76-7-314(1)(a), as amended by Senate Bill No. 23 (entitled "Abortion Limitation"), provides that the intentional performance of "an abortion other than authorized by this part" is a *"felony of the third degree."* *Id.* (Supp. 1991) (emphasis added). An illegal abortion, therefore, simply *cannot* result in the death penalty.

[3] Richard G. Wilkins et al., *Mediating the Polar Extremes: A Guide to Post-*Webster *Abortion Policy*, 1991 B.Y.U. L. Rev. 403, 482.

balance, patterned after the abortion reform initiatives of the American Law Institute and the Commissioners on Uniform State Laws,[4] broadly authorizes abortion when, "in the professional judgment of the pregnant woman's attending physician," [5] the procedure will "prevent grave damage to the pregnant woman's medical health," will "prevent the birth of a child that would be born with grave defects," or where the pregnancy is the result of rape or incest. Utah Code Ann. § 76-7-302(2) (Supp. 1991). Far from being a regulatory regime "reminiscent of the dark ages" (*Webster v. Reproductive Health Servs.*, 492 U.S. 490, 521 (1989) (plurality opinion)), the Utah legislation follows the approach that was considered to be the cutting edge of the abortion liberalization and reform movement before *Roe v. Wade*, 410 U.S. 113 (1973), abruptly removed abortion regulation from the realm of political debate.[6]

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[4] *Id.* at 475 & n.278.

[5] The Utah Code provides that a physician, in the "exercise [of] his best medical judgment . . . shall:"

> (1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,
>
> > (a) her physical, emotional and psychological health and safety,
> >
> > (b) her age,
> >
> > (c) her familial situation.

Utah Code Ann. § 76-7-304 (1990).

[6] Prior to *Roe*, pro-abortion advocates routinely lauded regulation virtually identical to the Utah legislation. *E.g.*, Michael S. Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, 13 UCLA L. Rev. 285, 307 (1966) (arguing that a "therapeutic abortion" bill analogous to the Utah act would merely "legalize by statute what is actually being practiced by members of one of our most respected professions [medicine] acting according to their own best standards"); Robert E. Hall, *Abortions [sic] Laws: A Call for Reform*, 18 DePaul L. Rev. 584, 588 (1969) (making same argument); Zad Leavy & Jerome M. Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 Ohio St. L.J. 647, 657 (1966) (noting that a therapeu-

Abortion providers in the State of Utah, flanked by various other plaintiffs, have mounted a broad facial challenge to the Utah legislation. As this brief goes to press, attorneys for the American Civil Liberties Union are urging the Utah District Court to conduct a six-week trial, during which they will essentially recreate the legislative debate that preceded the passage of the Utah legislation. If plaintiffs obtain their desired forum, expert witnesses will opine at length that *any* abortion limitation is injurious and unsound.[7] The State's expert witnesses will counter that the Utah legislation is a workable proscription of non-therapeutic abortion that is amply justified by society's long-standing interest in the protection and care of the unborn.[8] In the end, the United

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tic abortion bill essentially identical to the Utah act had the support of "one thousand physicians, thirteen hundred clergymen, and one-hundred-fifty prominent attorneys").

[7] Plaintiffs and their attorneys hope to use the Utah litigation to publicly air their general opposition to abortion regulation. In a widely publicized interview, the lead counsel for the Utah plaintiffs conceded that her primary goal in the Utah litigation is to "stoke the political fires of abortion for the 1992 elections" by creating "a political show trial . . . featuring scores of witnesses who will testify on every aspect of abortion, including what life was like inside Romania . . . ." Elliot Pinsley, *Roe Warrior: The ACLU's Janet Benshoof Leads Abortion-Rights Charge and Prepares for Ultimate Showdown*, Legal Times, Dec. 2, 1991, at 1, 20.

[8] The nation's leading obstetrical textbook sets out what it calls the "most rational" therapeutic abortion policy. F. Gary Cunningham et al., *Williams Obstetrics* 501 (18th ed. 1989). According to this policy (*id.*):

> therapeutic abortion may be performed for the following medical indications:
>
> 1. When continuation of the pregnancy may threaten the life of the woman or seriously impair her health. In determining whether or not there is such a risk to health, account may be taken of the woman's total environment, actual or reasonably foreseeable.

[Footnote continued]

States District Court will be forced to pronounce a judgment that has already been made by every legislator in the State of Utah who voted for (or against) the challenged legislation: Is proscription of non-therapeutic abortion wise?

The Court's decision here may well determine whether the federal judiciary properly should undertake the task now facing the Utah District Court. There was a time, of course, when the federal bench routinely assessed the wisdom of social legislation under the Due Process Clause.[9] The Court, however, has purportedly abandoned this effort.[10] The various opinions in *Webster, Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), and *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972 (1990) (*Akron II*), demonstrate that a majority of this Court now concurs that intrusive judicial scrutiny of abortion legislation is inappropriate.[11] Unless this Court is comfortable with the continuing specter of extended "political show trial[s]" each time a state legislature enters into the abortion arena (Pinsley, *supra* note 7), it has an obligation to clarify the standard of review announced in *Webster, Hodgson*, and *Akron II*.

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[8] [Continued]

> 2. When pregnancy has resulted from rape or incest. In this case the same medical criteria should be employed in the evaluation of the patient.
>
> 3. When continuation of the pregnancy is likely to result in the birth of a child with severe physical deformities or mental retardation.

The Utah legislation codifies this therapeutic abortion policy. Utah Code Ann. § 76-7-302 (Supp. 1991), § 76-7-304 (1990) (App. A, *infra*).

[9] *E.g., Lochner v. New York*, 198 U.S. 45 (1905).

[10] *E.g., Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963).

[11] Indeed, the State of Utah believes that these cases demonstrate that an extensive trial in Utah is inappropriate. Accordingly, the state has moved for summary judgment or dismissal of plaintiffs' claims. These motions are pending.

## SUMMARY OF THE ARGUMENT

Regulatory control of abortion properly resides in the legislative branch. The continuing furor over *Roe v. Wade* demonstrates that the decision did not articulate a principle that is deeply rooted in the history and tradition of American society. *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). On the contrary, the decision encroaches upon a sensitive area of social policy where there is simply no moral or constitutional consensus.

In recognition of the foregoing, the Court's most recent decisions have departed from *Roe* in precisely the same manner that the Court retreated from *Lochner v. New York*, 198 U.S. 45 (1905). Indeed, the decisions in *Webster*, *Hodgson* and *Akron II* demonstrate that a majority of the Court has rejected the two basic premises of *Roe*: *i.e.*, that abortion is a "fundamental" right, and that the State's interest in unborn life is not "compelling" throughout pregnancy. The time has come for the Court to clarify the impact of these developments by announcing that abortion regulations are constitutional so long as they are reasonably related to a legitimate state interest. An enduring, broad-based resolution of the abortion controversy is possible (and, indeed, might already have been achieved but for *Roe*). Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 Cal. L. Rev. 751, 766 (1991). That possibility, however, will only be fulfilled if the Court unambiguously returns abortion to the accommodation and compromise of the political process.

The spousal notification provision drafted by the Pennsylvania legislature should be sustained. Spousal notification protects significant state interests in the mutuality of marriage and the welfare of the family unit, as well as the husband's vital interest in his unborn child. Spousal notification, finally, does not burden access to abortion in any significant manner.

## ARGUMENT

### I. REGULATORY CONTROL OF ABORTION PROPERLY RESIDES IN THE LEGISLATIVE ARENA

Abortion remains a preeminently troublesome issue in the United States. In the past year alone, thousands of demonstrators took to the streets to protest the regime of abortion on demand erected by *Roe v. Wade*.[12] Other thousands crowded public squares to voice a contrary view.[13] Ironically, all of this controversy flows from a decision announcing a principle that is supposedly so "fundamental" as to be beyond reasonable debate in American society.[14]

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[12] Christine Spolar & Molly Sinclair, *70,000 March Against Abortion: Bush Encourages Demonstrators on 19th Anniversary of Roe*, Wash. Post, Jan. 23, 1992, at A1 (70,000 people from across U.S. march on Capitol Hill in Washington, D.C. to protest 19th anniversary of *Roe v. Wade*); Robert O'Harrow, Jr., *Abortion Protesters Take to the Highways*, Wash. Post, Oct. 7, 1991, at B3 (thousands of anti-abortion demonstrators line busy streets in towns in Virginia and Maryland as part of nationwide protest); Hugo Martin, *Anti-Abortion Protests Draw Thousands in South Bay*, L.A. Times, Oct. 7, 1991, at B1 (thousands of anti-abortion demonstrators line streets of Torrance, Cal., and surrounding cities, as part of series of nationwide demonstrations); Eric Harrison, *25,000 Abortion Opponents Cap Wichita Protests*, L.A. Times, Aug. 26, 1991, at A14 (anti-abortion activists from around nation cap six weeks of protest with gigantic rally in Wichita); *125 Arrested as Wichita Protesters Storm Clinic*, Wash. Post, Aug. 18, 1991, at A18 (125 anti-abortion protesters arrested for defying court order by storming Wichita family planning clinic); Felicity Barringer, *They Keep the Abortion Protest Alive*, N.Y. Times, Jan. 23, 1991, at A16 (Pres. Bush speaks to and encourages estimated 25,000 anti-abortion demonstrators).

[13] Don Terry, *A New Sight in Wichita: Rallying for Abortion Rights*, N.Y. Times, Aug. 25, 1991, § 1, at 26 (5,000 women's rights supporters rallied in Wichita); Tracey Wilkinson & Jane Fritsch, *Rallies Try to Put Abortion Issue Back in Spotlight*, L.A. Times, Aug. 25, 1991, at B1 (pro-abortion activists rallied at Federal Building in Los Angeles).

[14] *E.g., Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) ("rights qualifying for heightened judicial protection" include "those fundamental liberties that are 'implicit in the concept of ordered liberty,'

Of course, constitutional law is not made in the streets. Constitutional decisions are "sometimes justified on the ground that they remove highly divisive questions from the political process." [15] *Roe*, however, is difficult to defend on this ground. "By 1973 . . . state legislatures were moving firmly to expand legal access to abortion, and it is likely that a broad guarantee of access would have been available even without *Roe*." [16] Moreover, most other western nations have dealt with abortion as a matter of political give and take.[17] These nations, furthermore, have come to some relatively stable legislative consensus that accomodates both society's interest in the protection of unborn life and the needs of pregnant women.[18]

By contrast, the constitutionalization of the abortion debate in the United States has yielded strident polarization, rancor, and ever-mounting political discord. *Supra* notes 12, 13. And this disarray is not confined to the political scene. Rather than gaining acceptance as an established principle of constitutional law (as have many

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such that 'neither liberty nor justice would exist if [they] were sacrificed' ") (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.) (special judicial solicitude reserved for those principles that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental"). The utility of the foregoing tests of "fundamentality," of course, "lies in their effort to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 791 (1986) (White, J., dissenting). *See also* Lynn D. Wardle, *"Time Enough":* Webster v. Reproductive Health Services *and the Prudent Pace of Justice*, 41 Fla. L. Rev. 881, 938 (1989).

[15] Geoffrey R. Stone et al., *Constitutional Law* 480-81 (2d ed. 1991).

[16] Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 Cal. L. Rev. 751, 766 (1991) (footnotes omitted).

[17] Mary A. Glendon, *Abortion and Divorce in Western Law* (1987).

[18] *Id.* at 13-15 & Table 1.

other once-controversial decisions of the Court),[19] the legitimacy of *Roe* continues to be debated across a wide spectrum of legal commentators[20] and judges.[21]

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[19] For example, even the much-respected decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), was once severely criticized on technical legal grounds. *E.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 31-35 (1959). But those criticisms did not endure. Twenty years after the decision was handed down, no scholar of national repute called for *Brown's* repudiation. Whatever its technical shortcomings, history confirmed the practical wisdom of *Brown*. The same cannot be said of *Roe*. *Infra* note 20.

[20] *See, e.g.*, William W. Van Alstyne, *Closing the Circle of Constitutional Review from* Griswold v. Connecticut *to* Roe v. Wade: *An Outline of a Decision Merely Overruling* Roe, 1989 Duke L.J. 1677; James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181, 185-92 (1989); Charles F. Rice, *Implications of the Coming Retreat from* Roe v. Wade, 4 J. Contemp. Health L. & Pol'y 1 (1988); Archibald Cox, *The Court and the Constitution* 322-38 (1987); Lynn D. Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U. L. Rev. 231, 233-34, 245-51; John H. Ely, *Democracy and Distrust* 2-3, 248 n.52 (1980); Alexander M. Bickel, *The Morality of Consent* 27-29 (1975); Gerald Gunther, Commentary, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U. L.Q. 817, 819.

[21] A survey of more than 200 federal and state judges conducted about three years after *Roe* was decided reported that "[m]any judges . . . labeled *Roe v. Wade* massive 'judicial legislation.' For these judges, the justices' opinions on abortion in *Roe* lacked sufficient reasoning to justify this judicial excursion into the field of morals." Greg A. Caldeira, *Judges Judge the Supreme Court*, 61 Judicature 208, 212 (1977). While most judges have loyally refrained from publicly condemning *Roe* while the Court has been under fierce public attack (Lynn D. Wardle, *The Abortion Privacy Doctrine* 303-06 (1980)), a significant and growing body of lower court opinions have protested. *See, e.g., Ragsdale v. Turnock*, 841 F.2d 1358, 1383 (7th Cir. 1988) (Coffey, J., dissenting), *appeal dismissed*, No. 88-790, 1992 WL 42867 (March 9, 1992) (noting criticism that *Roe* is "unworkable," and "fundamentally misguided"); *Margaret S. v. Edwards*, 794 F.2d 994, 995, 996 n.3 (5th Cir. 1986) (referring to the "exceptionally severe and sustained criticism" of *Roe*, and noting that "we are not obliged to give expansive readings to a jurisprudence that the whole judicial world knows is swirling

The genesis and rancorous reception of *Roe* finds some parallel in the decision and aftermath of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). As with abortion in the early 1970's, the

> pressures for judicial intervention in the mounting sectional conflict over slavery [were very] strong. . . . More than a few Americans apparently believed that at [the Supreme Court's] command, agitation of the slavery question would subside and the years of crisis would come to an end. Indeed, some members of the Court itself seem to have harbored the belief that it possessed some such extraordinary power.[22]

The Court, therefore, rendered a constitutional decision designed to eliminate political debate and avoid a public crisis on a grave social issue. But, "[i]n the long run, the decision contributed to a war. . . ." [23] Thus, in the end, *Dred Scott* did not resolve a moral crisis, it merely rendered the political process (which ultimately *did* resolve the crisis) more intense and difficult.

Much the same can be said regarding *Roe*. The decision was designed to bypass an on-going political struggle regarding abortion reform.[24] Many apparently believed in

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in uncertainty"); *Sojourner v. Roemer*, 772 F. Supp. 930, 931 (E.D. La. 1991) (endorsing Justice White's dissenting opinion in *Roe*); *Gary-Northwest Indiana Women's Servs. v. Bowen*, 421 F. Supp. 734, 736-738 (N.D. Ind. 1976) (Sharp, J., concurring), *aff'd*, 429 U.S. 1067 (1977) ("We ought to reexamine the denial of personhood to all unborn children," *Roe* has plunged the federal judiciary into "a medical and moral thicket"). *See also Nelson v. Krusen*, 678 S.W.2d 918, 935 (Tex. 1984) (Gonzalez, J., concurring and dissenting) ("[*Roe*] has contributed to a 'disposable society' . . . . It is my hope that the courts and legislatures of this nation, and our society, will continue to ponder the meaning and value of life, even that of those yet unborn. . . . [H]opefully the pendulum of public opinion will swing toward the recognition of the rights of the unborn").

[22] Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 208 (1978).

[23] Stone et al., *supra* note 15, at 481.

[24] Sunstein, *supra* note 16, at 766.

1973 that, at the Court's command, "agitation of the [abortion] question would subside." [25] However, the hoped-for judicial intervention has not calmed public agitation. Instead, commotion has increased to the point where mass arrests of protestors and widespread civil disobedience are commonplace. *Supra* note 12. Furthermore, and somewhat ironically, *Roe* has not produced the results anticipated by its proponents:

> [T]he decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents. At the same time, *Roe* may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out long-lasting solutions based upon broad public consensus.[26]

Thus, in the end, *Roe* has not resolved the abortion debate, nor appreciably furthered the sociological goals of its supporters. It has merely rendered the political process (which ultimately *must* resolve this particular moral crisis) more intense and difficult.

*Roe* encroaches upon a sensitive area of social policy where there is simply no moral or constitutional consensus.[27] Three years after the decision in *Roe*, one noted constitutional commentator expressed his belief that the "Court's implicit evaluation of conventional moral cul-

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[25] Fehrenbacher, *supra* note 22, at 208. *E.g.*, Hall, *supra* note 6, at 590 (while applauding "reform bills based upon the American Law Institute proposals," commentator asserts that "[t]he ultimate solution will, in this author's opinion, come from the courts"); Leavy & Kummer, *supra* note 6, at 675 (making same assertion).

[26] Sunstein, *supra* note 16, at 766 (footnotes and citations omitted).

[27] Wardle, *supra* note 14, at 937-42 (demonstrating lack of a national legislative consensus supporting *Roe*); *id.* at 983-984 (numerous polls conducted between 1975 and 1988 show that public opinion does not support the results dictated by *Roe*).

ture [in *Roe* was] essentially accurate." [28] However, approximately six years later, after observing the difficulties created by the actual operation of *Roe*, this same scholar radically changed his mind:

> [I am now convinced that] there are no consensual values sufficiently determinate to be of help to the Court, and [that] the values that do enjoy significant support are, in our pluralist culture, fragmented and point in many different directions.

Michael J. Perry, *The Constitution, the Courts, and Human Rights* 94 (1982). Because of this fact, state legislative authority should be freed from the substantive due process fetters of *Roe* so that "the law might come to reflect a tolerable accommodation of competing views." Terrance Sandalow, *Federalism and Social Change*, 43 Law & Contemp. Probs., Summer 1980, at 29, 36.

## II. THE COURT HAS IMPLICITLY ABANDONED THE *ROE* STRICT SCRUTINY STANDARD

*Roe v. Wade* rejected, at least formally, the assertion that a woman "is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." 410 U.S. at 154. The right announced in *Roe* was not "absolute." *Id.* at 154. But, in reality, the abortion right thereafter became essentially absolute. Indeed, post-*Roe* strict scrutiny rendered "constitutional law in this area a virtual Procrustean bed." *Webster*, 492 U.S. at 517 (plurality opinion). *Roe*, at least as applied in *Thornburgh*, 476 U.S. 747, invalidates virtually every regulation (no matter how minor) of the abortion decision.

The State of Utah, however, believes that the Court has implicitly abandoned strict scrutiny of abortion regulations. In fact, the controlling opinions in *Webster*, *Hodgson*, and *Akron II* rest upon grounds fundamentally

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[28] Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. Rev. 689, 733 (1976).

inconsistent with *Roe*. This becomes apparent when the Court's recent decisions are viewed in historical perspective.

As the Court is well aware, the analytical approach of *Roe* is not unique. At the turn of the century, the Court invoked another "fundamental" right, *e.g.*, "liberty of contract," to invalidate numerous legislative initiatives.[29] But this judicial technique soon proved problematic. *Lochner v. New York* and its progeny stifled the creativity of state legislatures, thereby depriving the Nation of one of the primary virtues of federalism: state experimentation.[30] This cost—especially in areas of pressing social concern—is particularly high. The single ideal and all-encompassing solution to any social problem (whether it be labor regulation, welfare reform, or abortion) has yet to be discovered, and *Lochner* essentially forbade exploration of possibly meritorious legislative alternatives.

As the costs of strict scrutiny under the Due Process Clause became apparent, the Court backed away from *Lochner*. Importantly, however, the Court never expressly held that the "liberty of contract" upon which *Lochner* was predicated was not entitled to constitutional protection. Rather, the Court merely changed its classification of the right. "Liberty of contract" was not torn from the Constitution, it simply was no longer deemed

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[29] *E.g.*, *Lochner v. New York*, 198 U.S. 45 (1905) (labor regulation prescribing maximum hours for bakers declared invalid); *Adair v. United States*, 208 U.S. 161 (1908) (federal pro-union legislation declared invalid); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (minimum wage law for women declared invalid).

[30] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility"). *See also Whalen v. Roe*, 429 U.S. 589, 597 (1977) ("State legislation which has some effect on individual liberty or privacy [should] not be held unconstitutional simply because a court finds it unnecessary, in whole or in part" because states must have "broad latitude in experimenting with possible solutions to problems of vital local concern").

"fundamental." [31] And, as a result, instead of triggering strict scrutiny, "liberty of contract" prompted rational basis review.[32] *Lochner*, in short, was not explicitly "overruled." The Court simply changed the standard of review.

The Court's most recent abortion decisions evidence a virtually identical shift in the standard of review. Although the various opinions comprising the controlling majorities in *Webster*, *Hodgson*, and *Akron II* do not explicitly reverse *Roe*,[33] they do establish beyond reasonable dispute three important factors. First, five Justices no longer classify abortion as a "fundamental right." Instead, like the right of contract, abortion is a "liberty interest" protected by the Due Process Clause.[34]

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[31] *E.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (overruling *Adkins*, *supra* n. 29) ("The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process . . .").

[32] *E.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955) ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"); *Ferguson*, 372 U.S. at 729, 732 ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation").

[33] *E.g.*, *Webster*, 492 U.S. at 520 (plurality opinion); *id.* at 525-31 (O'Connor, J., concurring in judgment); *id.* at 535-37 (Scalia, J., concurring); *id.* at 537-38 (Blackmun, J., dissenting). *See also Hodgson*, 110 S. Ct. at 2952 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part) ("*Roe* remains the law of the land").

[34] Chief Justice Rehnquist, along with Justices White, O'Connor, and Kennedy, have asserted that abortion is a "liberty interest protected by the Due Process Clause." *Webster*, 492 U.S. at 520 (plurality opinion); *Hodgson*, 110 S. Ct. at 2949 (O'Connor, J., concurring) (abortion is " 'a component of . . . liberty that is protected by

Second, five Justices now concur that the State has a compelling interest in the protection of unborn life that exists throughout pregnancy.[35] Third, the most intrusive form of judicial review that will be invoked by any five-member majority inquires whether a challenged regulation bears a reasonable relationship to a compelling state interest; the Court *will not* demand that legislation be strictly "necessary." [36]

Taken together, these developments demonstrate that *Roe* currently has about the same precedential force as *Lochner*. The abortion liberty interest announced in *Roe* is still extant (as is the "liberty of contract" that animated the Court's earlier substantive due process precedents). However, this liberty interest (like "liberty of

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the Due Process Clause' ") (quoting *Hodgson*, 110 S. Ct. at 2936 (opinion, part III, of Stevens, J., joined by Brennan, J.)). Justice Scalia, for his part, flatly asserts that "the Constitution contains no right to abortion." *Akron II*, 110 S. Ct. at 2984 (Scalia, J., concurring).

[35] *Webster*, 492 U.S. at 519 (Rehnquist, C.J., joined by White & Kennedy, JJ.) (state has " 'compelling interest' in protecting potential human life throughout pregnancy") ; *id.* at 532 (Scalia, J., concurring in part and concurring in the judgment) (agreeing that the state has a compelling interest in life throughout pregnancy and concluding that this fact "effectively would overrule *Roe v. Wade*") ; *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) ("State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy' ") (citing *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 461 (1983) (*Akron I*) (O'Connor, J., dissenting)).

[36] Justice O'Connor, who appears somewhat more reticent to depart from *Roe* than the other members of the governing majorities in *Webster*, *Hodgson*, and *Akron II*, has clearly stated that "strict scrutiny" of the kind enunciated in *Roe* is *never* applicable to any abortion statute. Justice O'Connor has emphasized that the states must have " 'latitude in adopting regulations of general applicability in this sensitive area.' " *Akron I*, 462 U.S. at 468 n.11 (O'Connor, J., dissenting). Accordingly, regulations under Justice O'Connor's analysis need not be "narrowly drawn" or "necessary" to serve a compelling interest. Instead, even highly restrictive regulations must be upheld if they are " 'reasonably related' to the state compelling interest." *Id.*

contract") is subject to the broad regulatory powers of the State because the right to elective abortion is no longer "fundamental," and the State's regulatory interest in protecting unborn life is "compelling." Thus, while *Webster*, *Hodgson*, and *Akron II* did not explicitly "overrule" *Roe*, that result is implicit in the decisions.[37]

## III. THE COURT SHOULD END LOWER COURT CONFUSION BY EXPLICITLY ADOPTING RATIONAL BASIS REVIEW

Despite the clear implication of the Court's most recent decisions, lower courts are confused regarding the standard of review applicable to abortion cases. The Third Circuit here, as well as the Eighth Circuit,[38] have correctly concluded that *Roe* is no longer controlling. Different courts, however, have determined otherwise.[39] The Court has an obligation to end this confusion by explicitly

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[37] *See Thornburgh*, 476 U.S. at 796 (White, J., dissenting) ("Both the characterization of the abortion liberty as fundamental and the denigration of the State's interest in preserving the lives of nonviable fetuses are essential to the detailed set of constitutional rules devised by the Court to limit the States' power to regulate abortion"). The notion that subsequent decisions of this Court can implicitly overrule prior precedent is hardly novel. *Asher v. Texas*, 128 U.S. 129, 132 (1888) ("[W]e had supposed that a later decision in conflict with prior ones had the effect to overrule [the previous ones], whether mentioned and commented on or not. And as to the constitutional principles involved, our views were quite fully and carefully, if not clearly and satisfactorily expressed in the [later case]"). Moreover, implicit reversal occurs even if there is no single opinion comprising the majority of a subsequent case. *Marks v. United States*, 430 U.S. 188 (1977) (holding that the obscenity standard established in *Roth v. United States*, 354 U.S. 476 (1957), did not survive the adoption of a different standard by a splintered Court in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966)).

[38] *Coe v. Melahn*, No. 90-1552, 1992 WL 37328 (8th Cir. Mar. 2, 1992).

[39] *E.g.*, *Planned Parenthood Fed'n v. Sullivan*, 913 F.2d 1492, 1501-02 (10th Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991); *Massachusetts v. Secretary of Health and Human Servs.*, 899 F.2d 53, 55 (1st Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991); *Arnold v. Board of Educ.*, 880 F.2d 305, 311 & n.6 (11th Cir. 1989).

clarifying the import of *Webster*, *Hodgson* and *Akron II*.[40]

In clarifying the standard of review, the State of Utah believes the Court should announce that, while abortion is a right "subject to the general protections of the Due Process Clause," it does not "call into play anything more than the most minimal judicial scrutiny."[41] As set out at length in Section I, abortion arouses intense debate in areas where "there are no consensual values sufficiently determinate to be of help to the Court. . . ."[42] There is no indisputably "right" or "wrong" answer to such questions as when life "begins" or when "life" (as such) merits legal protection.[43] There is also no single resolution of the conflict between procreative choice and the protection of unborn life that is so " 'deeply rooted in this Nation's history and tradition' " that " 'neither liberty nor justice would exist if [it] were sacrificed.' "[44] In such circumstances, resolution of the abortion controversy requires the accommodation and compromise that can only be achieved in the political arena.

An enduring political resolution of the abortion controversy is possible. Indeed, this result might already

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[40] *E.g.*, *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991) (*stare decisis* is " 'usually the wise policy,' " but "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent' ") (citations omitted).

[41] *Thornburgh*, 476 U.S. at 790 (White, J., joined by Rehnquist, J., dissenting).

[42] Perry, *supra*, at 94; Wardle, *supra* note 14, at 937-42, 983-984.

[43] The *Roe* Court itself recognized that it could not resolve the difficult question of when life begins. *Roe*, 410 U.S. at 159. But, if "those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus" regarding the beginning of life, *id.*, a judicial decision mandating total disregard of "potential life" until it is "viable" is highly questionable. Van Alstyne, *supra* note 20, at 1680-81; Wilkins et al., *supra* note 3, at 415-416 & nn. 39-40.

[44] *Bowers*, 478 U.S. at 191-92 (quoting *Moore*, 431 U.S. at 503; *Palko*, 302 U.S. at 325).

have been achieved had the Court stayed its hand in 1973. Cass R. Sunstein, *supra* note 16. And, only a firm and unwavering return to restrained rational basis scrutiny will assure this outcome. As the Solicitor General explained in his amicus brief in *Webster* (Brief for the United States as Amicus Curiae Supporting Appellants at 22, No. 88-605):

> It is possible to envision a standard of review more deferential than that adopted by *Roe v. Wade*, yet more stringent than rationality review, such as the "undue burden" analysis thoroughly delineated by Justice O'Connor in her separate opinions in *Akron* and *Thornburgh*. . . . On reflection, however, we believe that any such intermediate standard would inevitably fall prey to the same difficulties that have beset the *Roe* framework. The concept of an "undue burden" obviously is not self-defining; in giving effect to such a concept, the Court would be required to develop a new regime of substantive abortion rights. Like the regime it would replace, this new system would lack any moorings in the Constitution and would quickly reintroduce the arbitrary linedrawing characteristic of *Roe*. And because it would hold forth the promise of continued and intensive (albeit not strict) judicial arbitration of the competing interests, it would undermine the attempts of the legislative branch to negotiate a compromise among those interests. If such a political resolution of the abortion controversy is ever to become a reality, the Court must unequivocally announce its intention to allow the States to act "free from the suffocating power of the federal judge, purporting to act in the name of the Constitution." *Planned Parenthood of Missouri v. Danforth*, 428 U.S. at 93 (White, J., dissenting).

The Court should firmly announce that legislation affecting the abortion decision is constitutional so long as it is rationally related to a legitimate state objective. The lessons of history (*supra* notes 29-32), as well as the imperative need for lasting political accommodations

in this troublesome area, counsel returning the abortion debate to the people.

## IV. PENNSYLVANIA'S SPOUSAL NOTIFICATION REQUIREMENT IS CONSTITUTIONAL

Utah and Pennsylvania are among the eleven states with legislation that provides in some manner for spousal participation in abortion decisions of married women.[45] Utah, like Pennsylvania, generally requires that the husband of a married woman be notified of his wife's decision to have an abortion. Utah Code Ann. § 76-7-304(2) (1990) (see Appendix A). Utah's spousal notification provision was enacted by the state legislature in 1974.[46] For eighteen years it has operated without problem, without hamstringing doctors, without unduly restricting

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[45] Six states provide for spousal notification: Fla. Stat. Ann. § 390.001(4) (West Supp. 1992) (husband entitled to notice unless spouses are separated or estranged, wife states she has notified husband, or husband gives written consent); Ky. Rev. Stat. Ann. § 311.735 (Michie/Bobbs-Merrill 1990) (prior notice to husband unless medical emergency); Mont. Code Ann. § 50-20-107 (1991) (written notice to husband unless spouses are voluntarily separated); 18 Pa. Cons. Stat. Ann. § 3209 (1983 & Supp. 1991) (married woman must give signed, notarized statement that she has notified her husband unless he is not the father of the child, husband could not be located, pregnancy results from sexual assault, woman believes she will suffer bodily assault, or there is a medical emergency); R.I. Gen. Laws § 23-4.8-1 to -5 (1989) (physician to notify husband if reasonably possible unless woman states he is not the father, that he has been notified, or there is a medical emergency); Utah Code Ann. § 76-7-304 (1990) (notice to husband if possible). Five states require spousal consent in at least some cases: Colo. Rev. Stat. § 18-6-101(1) (1986) (spousal consent generally required); Ill. Ann. Stat. ch. 40, para. 1015(b) (Smith-Hurd Supp. 1991) (husband not liable for expense of abortion unless he consents); La. Rev. Stat. Ann. § 40:1299.33(D) (West 1977) (spousal consent required if woman is a minor); S.C. Code Ann. § 44-41-20(c) (Law. Co-op. 1985) (husband's consent required for third trimester abortion); S.D. Codified Laws Ann. § 34-23A-7 (1986) (consent of husband of minor).

[46] *See generally* Act of February 1, 1974, ch.33, 1974 Utah Laws 129.

access to abortion.[47] While the spousal notification laws of Utah and Pennsylvania are not identical,[48] they are alike in policy and concept and both are constitutional.

The essential question raised by the attack on 18 Pa. Cons. Stat. Ann. § 3209 is whether the Constitution mandates that Pennsylvania's domestic relations laws conform to petitioners' novel model of nonmutual marriage. Petitioners' attack on spousal notification presupposes the existence of a constitutionally-mandated, radically individualistic marriage model that requires Pennsylvania, Utah, and all other states to accept petitioners' standards of irresponsibility by married men for their procreative activities, and noninvolvement regarding family childbearing decisions. Nothing in the text, history, or prior interpretations of the Constitution, however, supports that presumption.

Textually, the authority to define and regulate marriage is not among the powers expressly or implicitly conferred by the Constitution on any branch of the federal government.[49] Historically, the regulation of family

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[47] Despite soliciting witnesses in full-page ads in state-wide newspapers, the plaintiffs in the Utah litigation have been unable to produce a single witness who can testify that the spousal notification requirement prevented her from getting an abortion, or forced a doctor to notify a husband when it was not in the patient's interest to do so. *See* Memorandum in Support of Defendants' Motion for Summary Judgment at 108-115, *Jane L. v. Bangerter*, Civ. No. 91-C-345-G (D. Utah filed April 4, 1991).

[48] For example, Utah's spousal notification provision contains a broad, flexible exception while Pennsylvania's provides narrow, specific exceptions; Utah law requires the doctor, not the woman, to notify (if possible), and the doctor, not the woman, is subject to liability for noncompliance.

[49] *See The Federalist No. 45* (James Madison); *id., No. 17* (Alexander Hamilton); *see also id, No. 14* (James Madison). While many constitutional amendments to give the national government power to regulate marriage and divorce have been proposed, none have been adopted. *See* M. Musmano, *Proposed Amendments to the Constitution*, House Doc. No. 551, 70th Cong., 2d Sess. 104-105 (G.P.O. 1929) (sixty constitutional amendments to give Congress power

relations has been considered to be within the "virtually exclusive province of the states." [50] And this Court's precedents have consistently upheld laws protecting the joint and mutual nature of marriage.[51] As a result, the Pennsylvania legislature's spousal notification provision should be sustained so long as it is rationally related to a legitimate state interest.

### A. Spousal Notification Advances Important State Interests

At least three important state interests are fostered by spousal notification: the mutuality of the unique partnership of marriage, the psychological health of family members and family relationships, and the irreplaceable interests of a huband in the fate of his existing-but-unborn offspring.

*Mutuality in Marriage.* Pennsylvania's spousal notification provision applies only when the woman seeking abortion is married.[52] Unmarried women are not required to notify their nonmarital cohabitants or sex partners.

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to establish uniform marriage and divorce laws proposed between 1884-1929).

[50] *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). *Accord, Simms v. Simms*, 175 U.S. 162, 167 (1899); *In Re Burrus*, 136 U.S. 586, 593-94 (1890).

[51] *Wolfe v. United States*, 291 U.S. 7, 14 (1934) ("The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential as to outweigh the disadvantages to the administration of justice which the privilege entails"); *see also Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (presumption that husband is father of children born to his wife); *Trammel v. Trammel*, 445 U.S. 40, 51 (1980) (privilege against adverse spousal testimony); *Blau v. United States*, 340 U.S. 332, 333-34 (1951) (privilege protecting confidential marital communications); *Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 222 (1839) (same).

[52] Less than twenty percent of women obtaining abortions are married. Stanley K. Henshaw et al., *Characteristics of U.S. Women Having Abortions, 1987*, 23 Fam. Plan. Persp., March/April 1991 at 76, Table 1.

This is consistent with the unique nature of marriage and with numerous legal protections of marital ties. Under the laws of the United States and all the states, marriage creates a unique joint relationship, a special kind of partnership, in which mutual consent and/or spousal notification is required for many decisions affecting the essentials of the relationship.[53] Mutuality characterizes the legal relationship of husbands and wives in Pennsylvania [54] and Utah.[55]

Participation by both spouses in decisions as important as the decision to destroy the life-in-being of a joint heir is a reasonable way to protect the unique sharing relationship and binding commitment that marriage entails. Spousal notification models a standard of husband-wife joint responsibility for, involvement in, and commitment to childbearing decisions.[56] The crucial importance of

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[53] Some of the common legal doctrines protecting the mutual and joint character of marriage are (1) the privilege against disclosure of confidential marital communications, 2 *Contemporary Family Law* § 13:07 at 33 n. 1 (Lynn D. Wardle et al. eds., 1988) (collecting statutes) (hereinafter cited as "*Contemporary Family Law*"); *Wolfe v. United States*, 291 U.S. 7 (1934); (2) the universal requirement that both parties fully and freely consent to enter into marriage, 1 *Contemporary Family Law* § 2:28 at 87; (3) the presumption that a child born to a married woman is the child of her husband, *id.* § 9:02, at 8; Uniform Parentage Act § 4, 9B U.L.A. 298 (1987 & Supp. 1991); (4) the requirement of spousal consent before adoption, Uniform Adoption Act § 5, 9 U.L.A. 24 (1988); 23 Pa. Cons. Stat. Ann. § 2711 (Supp. 1991); Utah Code Ann. §§ 78-30-3 to -4.1 (1992). So deeply imbedded is the notion of joint responsibility for procreative consequences in marriage that most states now encourage joint parental responsibility even after marriage is ended. *Hodgson*, 110 S. Ct. at 2964 (Kennedy, J., joined by Rehnquist, C.J. and White and Scalia, JJ., concurring in part and dissenting in part).

[54] *See* Appendix B (collecting statutes).

[55] *See* Appendix C (collecting statutes).

[56] Declining involvement of men in the lives of their wives and children appears to be a nationwide pattern. *See, e.g.*, Frank F. Furstenberg, Jr., *Good Dads—Bad Dads: Two Faces of Fatherhood, in The Changing American Family and Public Policy* 193, 200-206

spousal communication, especially in times of crisis, has long been recognized.[57] The value of intra-spousal communication in the abortion context has been specifically acknowledged by a majority of the members of this Court.[58]

By confirming at least minimal mutuality (*i.e.*, mere notification) regarding such a fundamental family matter as the decision whether to terminate a pregnancy, the law

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(Andrew J. Cherlin ed., 1988) (literature review). American society is "in some way giving up on men," encouraging them to "retreat from paternal obligations," treating them in a manner that relegates them to always being "transients" in the lives of their wives and children. *Id.* at 198-200 (citing Barbara Ehrenreich, *The Hearts of Men: American Dreams and the Flight from Commitment* 181 (1983)).

[57] *See,* Beatrice Paolucci et al., *Family Decision Making: An Ecosystem Approach* 171 (1977) ("Effective communication is essential to conflict resolution and the harmonious adaptation of family members to one another and their environs"); Mirta T. Mulhare, *Couple Communication and Marital Enhancement: A Didactic Approach, in The Handbook of Marriage and Marital Therapy* 363, 364 (G. Pirooz Sholevar ed., 1981) (spousal communication correlates with marital adjustment). *See also supra* note 51 (cases).

[58] *See Hodgson,* 110 S. Ct. at 2944 (Stevens, J., & O'Connor, J.) (upholding 48-hour prior parental notification because, *inter alia,* it provided the mother or father "the *opportunity to consult with his or her spouse* . . . [and] discuss the religious or moral implication of the abortion decision") (emphasis added); *id.* at 2950 (O'Connor, J.) (protection for "the *family's* decisionmaking process") (emphasis added); *id.* at 2964 (Kennedy, J., joined by Rehnquist, C.J., White & Scalia, JJ.) ("How the *family unit* responds to such notice is, for the most part, beyond the State's control") (emphasis added); *Akron II,* 110 S. Ct. at 2984 (Kennedy, J., joined by Rehnquist, C.J., White & Scalia, JJ.) ("It is both rational and fair for the State to conclude that, in most instances, the *family* will strive to give . . . advice that is both compassionate and mature") (emphasis added). Indeed, by upholding a *two-parent* notification law, this Court has already endorsed the principle that both spouses be notified of and involved in an abortion decision. *Hodgson,* 110 S. Ct. at 2969-71 (Kennedy, J., joined by Rehnquist, C.J., White & Scalia, JJ.); *id.* at 2950-51 (O'Connor, J., concurring in part and concurring in part in the judgment).

encourages husbands and wives to make the kinds of commitments to, investments in, and sacrifices for marriage that are essential for marital success and stability.[59] Fostering such marital commitment is well-justified in our legal tradition.[60]

Petitioners' attack on spousal notification, as well as the judgments below, are predicated on two equally unrealistic characterizations of marriage: marriages are either so ideal that perfect communication will exist between the spouses at all times, or marriages are so horrible that communication will do no good. In fact, even in very good marriages there are times when conflicts develop, when communications fall off, when temporary estrangement occurs.[61] It is tragically myopic to assume that imperfect and temporarily dysfunctional marriages are so worthless that spousal communication about a decision as important as abortion would not be beneficial.

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[59] As distinguished sociologist, Amitai Etzioni, wrote (in *The Husband's Rights in Abortion*, 12 Trial, Nov. 1976, at 56, 58):

> [T]he law does not merely regulate our lives, it articulates and symbolizes our values and mores. In an era when the family has been rendered increasingly vulnerable to dissolution, we should not gratuitously add to the stress by enshrining in law the starkly individualistic view that a child in the making, a future shared project of the family, is wholly and completely a "private" matter for the woman to determine, with no concern at all for the wishes of the father—when he is her husband.

[60] Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 485-86 (1983).

[61] Professor Max Rheinstein put it well when he wrote (in *Marriage Stability, Divorce, and the Law* 433 (1972)):

> [T]ensions and crises are necessary parts of married life . . . . [T]hey are inevitable in even the most harmonious marriage. . . . [I]t is the essence of a good marriage that crises arise and that they are overcome through common effort of both parties to understand, to be patient, to endure, to stick together, and thus to grow to ever fuller understanding, to become one not only in flesh but in mind and spirit.

*See* John Bradshaw, *Bradshaw on: The Family* 52 (1988).

*The Welfare of Family Members.* "The medical, emotional, and psychological consequences of an abortion are serious and can be lasting . . . ." *H.L. v. Matheson*, 450 U.S. 398, 411 (1981). Spousal notification provides a potentially positive resource for the pregnant woman who is considering abortion, is an essential step to reduce interspousal alienation, and may provide valuable support for other family members who may be affected by abortion.

First, it is well-established that abortion often involves less trauma and fewer negative psychological sequelae for a woman when she has the support of her husband or male partner.[62] Indeed, support of the woman's husband or male partner has been called "the most critical factor" in the abortion-decision process,[63] and "a crucial factor in her post-abortion adjustment." [64] Spousal notification insures that this potentially valuable emotional resource will not be unnecessarily ignored.[65]

Second, spousal notification alleviates unnecessary alienation and stress on marital relations that may result from

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[62] *See* Arden Rothstein, *Men's Reactions to Their Partners' Elective Abortions*, 128 Am. J. Obst. & Gyn. 831, 831 (1977) (including male in abortion process is "likely to have direct bearing upon his ability to offer assistance to his partner in her own subsequent adjustment"); *see also* Linda B. Francke, *The Ambivalence of Abortion* 47, 116 (1978) (abortion related stress on relationships and marriage).

[63] Linda B. Francke, *The Ambivalence of Abortion* at 47; *see also* Julius C. Butler & Byron N. Fujita, *Abortion Screening and Counseling: A Brief Guide for Physicians*, 50 PostGrad. Med. 208, 212 (1971).

[64] D.T. Moseley et al., *Psychological Factors That Predict Reaction to Abortion*, 37 J. Clin. Psychol. 276, 277 (1981) ("The Woman's relationship with her partner in conception was confirmed as a crucial factor in her post-abortion adjustment"); *see also* James M. Robbins, *Out-of-Wedlock Abortions and Delivery: The Importance of the Male Partner*, 31 Soc. Prob. 334, 336, 347 (1984) (male support "an important factor in emotional adjustment.").

[65] Of course, the statutory exceptions provide outlets for those rare cases where spousal notification would likely harm rather than help the woman.

secret abortion.[66] It may also reduce (or provide a necessary step to overcome) the detrimental consequences of unilateral abortion upon the psychological well-being of a husband.[67]

Third, spousal notification allows a husband to prepare for and better cope with the potential effect of abortion on other family members. Some studies suggest that abortion may cause serious damage to the psychological well-being and adjustment of a mother's other children,[68] and

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[66] Professor Amitai Etzioni has written:

> The principal sociological rationale for requiring consultation with the spouse is to encourage an airing of the feelings between the couple before any irreversible action is taken. Husband and wife may not necessarily end up with the same views, but alienation resulting from one person taking a unilateral and clandestine step will be avoided.

Etzioni, *supra note* 59, at 58; *see* Janet Mattinson, *The Effects of Abortion On a Marriage, in Abortion: Medical Progress and Social Implication* 165, 167, 170 (1985) ("married couples still troubled by an abortion" after many years, some spouses surprised to learn partner's feelings); Elizabeth M. Belsey et al., *Predictive Factors in Emotional Response to Abortion: King's Termination Study-IV*, 11 Soc. Sci. & Med. 71, 76, (1977) (five of eight women who did not discuss abortion with husbands experienced mental disturbance later); *see also* Arthur B. Shostak & Gary McLouth, *Men and Abortion, Lessons, Losses and Love*, 105-07, 120-23 (1984) (detrimental effects on men and stable committed relationships).

[67] The psychological effects of abortion may be very severe for the husband or father. *See, e.g.*, Linda B. Francke, *supra* note 62, at 116 (men feel helpless and angry over abortion); Arthur B. Shostak & Gary McLouth, *supra* note 66, 154-57; *see also* Bruce Blumberg et al., *The Psychological Sequelae of Abortion Performed for a Genetic Indication*, 122 Am. J. Obst. & Gyn. 799, 803-08 (1975) (describing severe psychological problems experienced by the husband of woman who had eugenic abortion).

[68] *See, e.g.*, Anita H. Weiner & Eugene C. Weiner, *The Aborted Sibling Factor: A Case Study*, 12 Clinical Social Work J. 209, 209 (1984) ("elements of secrecy around an abortion in most families . . . may make the pattern of distrust and fear typical of the 'haunted child' more prevalent than generally acknowledged"); Betty G. Harris, *Induced Abortion, in Parental Loss of a Child* 241,

to parent-child relationships.[69] Thus, spousal notification protects the welfare of the family and its members, including the woman having the abortion. *See Doe v. Bolton*, 410 U.S. 179, 192 (1973).

*Husband's Parental Interest.* By allowing a husband to consult with his wife before she makes an irreversible choice, spousal notification provides at least minimum protection for a husband's interest in the fetus, an interest that "may be unmatched by any other interest in his life." *Planned Parenthood v. Danforth*, 428 U.S. 52, 93 (1976) (White, J., dissenting). The fetus his wife carries is presumptively his child; he has legal responsibilities for the unborn child, including liability for prenatal expenses and child support.[70] He also has relational rights, expectancies, and interests.[71] These interests are undeniably as important and worthy of protection

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247 (Therese A. Rando ed. 1986) (negative behavioral changes in 19 of 22 children whose mothers had abortions); Regina M. Furlong & Rita Besk Black, *Pregnancy Termination for Genetic Indications: The Impact on Families*, 10 Social Work in H. Care, Fall 1984, at 17, 26 (some children of women who had abortions exhibited sleep and appetite disturbances, fear, guilt, sense of fault, and other behavioral problems even if not told of abortion).

[69] *See* Mary I. Benedict et al., *Perinatal Risk Factors and Child Abuse*, 9 Child Abuse & Neglect 217, 222-223 (1985) (families where women had prior abortion "at significantly higher risk" of child abuse); Victor Calef, *The Hostility of Parents to Children: Some Notes on Infertility, Child Abuse and Abortion*, 1 Int'l J. Psychoanalytic Psychotherapy, Feb. 1972, at 76 (some parental hostilities associated with abortion).

[70] *See* 23 Pa. Cons. Stat. Ann. §§ 4321, 4323(b), 4343 (Supp. 1992) (paternity and liability for support); Utah Code Ann. §§ 30-1-17.2 (presumed child of marriage) (1991) & 78-45a-1, -2 (1992) (Uniform Act on Paternity, liability for pregnancy and confinement expenses as well as child support).

[71] *See, e.g.*, 23 Pa. Cons. Stat. Ann. §§ 2501-2504, 2511-2513, 2711-2714 (Supp. 1991-92) (relinquishment and consent in adoption); *id.* at § 5103 (notice before termination of parental rights); *see also* Utah Code Ann. §§ 78-30-4.1 to -4.10 (1992) (adoption); *Ellis v. Social Serv. Dep't of the Church of Jesus Christ of Latter-day Saints*, 615 P.2d 1250 (Utah 1980).

as the interests sustained by the Court in the numerous cases upholding parental notification prior to abortion. Indeed, they are the same (parental) interests.[72]

The Constitution does not impose a zero-sum paradigm of bipolar rights upon the childbearing decisions of married couples.[73] By requiring spousal notification before abortion, the legislatures of Pennsylvania and Utah have reached a reasonable and mutually accommodating compromise respecting the interests of both husband and wife in making an abortion decision.[74]

### B. Spousal Notification Does Not Unconstitutionally Limit Access To Abortion

The foregoing demonstrates that under rational basis analysis, Pennsylvania's spousal notification statute is clearly constitutional: the required notification rationally furthers numerous legitimate interests. The statute, furthermore, is constitutional even if an intermediate stand-

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[72] Spousal notification also protects the husband's rights and interests created by marriage, giving him the opportunity to express his feelings to his wife about "important decisions" (*Matheson*, 450 U.S. at 410) "that for some people raise[] profound moral and religious concerns" *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (*Bellotti II*).

[73] *See* Earl M. Maltz, *The State, The Family, and the Constitution: A Case Study in Flawed Bipolar Analysis*, 1991 B.Y.U. L. Rev. 489, 496-518 (bipolar constitutional rights analysis in family conflicts causes the Court to ignore the interests of persons not before the Court and frustrates pluralism); *see also* Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 Calif. L. Rev. 151, 151-64 (1988) (rights analysis fails in dilemmas regarding treatment of severely ill or handicapped infants); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. Rev. 79, 121-127 (equality-rights analysis inadequate in the context of the ongoing marriage).

[74] "[T]here exists a reasonable middle course between forcing a woman to bear a child she does not want on the one hand and utterly disregarding the wishes of the father on the other. The husband's consent ought not to be required; evidence that he has been notified and consulted, should be." Etzioni, *supra* note 59, at 58.

ard of scrutiny is applied because, contrary to the conclusion of the lower court, spousal notification is neither legally nor practically an "undue burden" on access to abortion.[75]

Legally, it is not an undue burden because the woman retains the complete legal authority to choose abortion. Her husband has no legal "veto power." Thus, Pennsylvania's notification requirement is critically different from the spousal consent requirement invalidated in *Danforth*.[76] This Court has repeatedly distinguished family notification requirements from family consent requirements,[77] and has upheld mandatory notification in every

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[75] The State of Utah agrees with Judge Alito that the lower court's holding is based on a misreading of Justice O'Connor's opinion in *Hodgson*. *Planned Parenthood v. Casey*, 947 F.2d 682, 719-25 (3d Cir. 1991). Furthermore, the Third Circuit's conclusion that spousal notification creates an "undue burden" (*id.* at 709-710) is incompatible with its holding that other, less-speculative impediments are *not* unduly burdensome. The restrictive provisions upheld by the Court of Appeals include a 24-hour waiting period that "may result in delays considerably longer than 24 hours" and most heavily burdens "battered wives who often find it difficult to free themselves of their husband's surveillance" (*id.* at 706); a requirement of parental consent with judicial bypass, which gives absolute veto-power to either a minor's parents or a judge (*id.* at 708); mandatory informed consent and counselor disclosure requirements, which could increase the cost of abortion (*id.* at 703-04); medical reporting requirements that might "have a 'chilling effect' on the exercise of the physician's judgment" (*id.* at 717); and public disclosure of data regarding abortions performed at publicly funded clinics, which could lead to hostile demonstrations (*id.* at 718).

[76] 428 U.S. at 69 (invalidating spousal consent requirement because it gave the husband "a veto power which the state itself is absolutely and totally prohibited from exercising").

[77] In *Akron II*, six members of the Court acknowledged that mere notice requirements avoid "the greater intrusiveness of consent stautes . . . ." 110 S. Ct. at 2979. *Accord*, *Hodgson*, 110 S. Ct. at 2969 (Kennedy, J., with Rehnquist, C.J., White & Scalia, JJ., concurring in part and dissenting in part). In *Matheson*, the Court "expressly declined to equate notice requirements with consent

notification case to come before it.[78]

Practically, petitioners argue (and the Third Circuit agreed) that spousal notification constitutes an undue burden because of speculation that the husband "may effectively prevent the abortion or may severely penalize the woman in other ways if she exercises her right to obtain an abortion." 947 F.2d at 710. This is erroneous for three reasons. First, the same (if not greater) risks exist with regard to divorce, child custody, and other domestic disputes in which notice to a potentially abusive husband is constitutionally required.[79] Second, Pennsylvania and Utah statutes provide abundant, accessible, powerful protections for any woman who fears physical or emotional abuse from her husband.[80] Third, this Court has repeatedly rejected claims that more intrusive requirements are unduly burdensome.[81]

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requirements." 450 U.S. at 411 n.17. *See also Bellotti I*, 428 U.S. 132, 145-148 (1976).

[78] *See H.L. v. Matheson*, 450 U.S. 398, 411 (1981); *Hodgson*, 110 S. Ct. at 2951 (O'Connor, J., concurring); *Akron II*, 110 S. Ct. at 2993. In *Hodgson*, the Court initially invalidated mandatory two-parent notification without judicial bypass, 110 S. Ct. at 2947, but upheld the same provision when supplemented by a modest judicial bypass provision. *Hodgson*, 110 S. Ct. at 2971 (Kennedy, J., joined by Rehnquist, C.J., White, J., & Scalia, J.). In *Matheson*, the Court upheld a two-parent notification statute without a bypass provision. 450 U.S. at 411.

[79] *See generally*, Lynn D. Wardle & Mary Anne Wood, *A Lawyer Looks At Abortion* 79-83 (1982); 1 *Contemporary Family Law*, *supra* note 53, at § 6:12, pp. 68-74 (1988 & Supp. 1989).

[80] *See, e.g.*, 23 Pa. Cons. Stat. Ann. §§ 6101-6117 (1991) (Protection From Abuse Act); Utah Code Ann. §§ 30-6-1 to -11 (1989 & Supp. 1991) (Cohabitant Abuse Act, including provisions for expedited, ex parte relief, including orders that one or both parties not contact the other); *id.* § 77-36-1 to -8 (Supp. 1991) (Cohabitant Abuse Procedures, including provisions for police training, special court procedures, specific provision for enforcement of noncontact orders); § 76-5-108 (criminal penalty for violating protective orders). In addition, the ordinary criminal laws prohibiting assault, battery, and other forms of abuse, coercion, and intimidation are fully applicable.

[81] In *H.L. v. Matheson*, the Court rejected the argument that mere delay rendered a two-parent notification provision unconstitu-

"The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortion." [82] Petitioners speculative assertions that spousal notification may create an undue burden in some cases is simply inadequate to support their facial attack on the statute.

## CONCLUSION

The Court should adopt rational basis review and sustain the constitutional validity of all the challenged regulations.

Respectfully submitted,

R. PAUL VAN DAM
Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1016

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tional. 450 U.S. at 412. The Court held that the statute was not invalid simply because parental notification "may inhibit some minor women from seeking abortions." *Id.* at 413. In *Webster*, the Court upheld viability testing requirements that were much more intrusive and risk-creating than simple spousal notification. 492 U.S. at 530 (O'Connor, J., concurring) (finding no undue burden); *id.* at 519 (plurality opinion); *id.* at 543 (Blackmun, J., dissenting in part) (describing the viability tests as "significant additional health risks" and "arbitrary imposition of discomfort, risk and expense"). In *Hodgson*, the Court upheld a mandatory 48-hour waiting period (110 S. Ct. at 2944 (Stevens, J., joined by O'Connor, J., concurring); *id.* at 2950 (O'Connor, concurring); *id.* at 2966 (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., White & Scalia, JJ.)), even though it could "create a delay of a week or longer." 110 S. Ct. at 2944 (Stevens, J., joined by O'Connor, J., concurring); *id.* at 2954 (Marshall, J., dissenting, joined by Brennan & Blackmun, JJ.). In *Akron II*, the Court upheld a judicial bypass requirement that the dissenters described as "barricade" and a "labyrinth" (110 S. Ct. at 2986 (Blackmun, J., dissenting, joined by Brennan & Marshall, JJ.)) filled with "a risk of violence" for abused children (*id.* at 2991). Nevertheless, the Ohio law did not impose an undue burden. 110 S. Ct. at 2983 (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ.); *id.* at 2993 (Stevens, J., concurring).

[82] *Matheson*, 450 U.S. at 413.

MARY ANNE Q. WOOD *
WOOD AND WOOD
Special Asst. Attorney General
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
(801) 366-6060

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* Counsel of Record