THE SUPREME COURT OF MINNESOTA:
A LEGACY OF ACTIVISM

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The Supreme Court of Minnesota has undergone several major changes of personnel in the past 17 years. Beginning with a pro-life majority in 1990, three new justices appointed in by the following year had shifted the Court to a strongly pro-abortion majority. From 2002 to the present five new justices had been appointed to the Court without a record on pro-life issues. Where the Court stands at present is therefore an open issue, but there is nothing in the new justices background to suggest that they might undo the legacy of the past.

I. LIFE ISSUES

From 1990 to 1998, the Chief Justice of the Supreme Court was Alexander "Sandy" Keith. Keith was appointed to the Supreme Court as Associate Justice in 1989 by Governor Rudy Perpich and became Chief Justice the next year. Perpich, who claimed to be pro-life, also appointed two Associate Justices to establish a pro-abortion majority on the Court.[2]

Prior to Governor Perpich's Supreme Court appointments, the Minnesota legislature had a strong pro-life record, passing statutes restricting public funding of abortion to cases of rape, incest, and a threat to the life of the mother and criminalizing the killing of a child in the womb outside of abortion. With the Perpich appointments, the attorneys for the Center for Reproductive Law and Policy saw the opportunity to reverse the work of the legislature.

Abortion

Medical assistance is composed of both federal and state funds. Federal law prohibited the use of federal medical assistance funds to pay for abortion except in limited situations. In *Harris v McCrae*,[3] lawyers for an abortionist challenged these restrictions in federal court, but

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2 STAR TRIBUNE, Jan. 21, 1994.
3 448 U.S. 297 (1980).

the U.S. Supreme Court ruled a woman's right to an abortion does not mean the government has to pay for the abortion. The Center for Reproductive Law and Policy then turned to the state courts, alleging the state constitutions required the state portion of medical assistance to pay for abortion-on-demand. In Minnesota, the Center filed a suit, *Women of the State of Minnesota v Gomez*,[4] claiming it represented a woman it named "Jane Doe." The State of Minnesota was represented by Attorney General Hubert Humphrey III.

A review of the trial court file reveals there was no evidence "Jane Doe" existed. When Attorney General Humphrey attempted to question her, he was told she had disappeared. Rather than move to dismiss the case, he accepted all her allegations without any evidence. When asked, "Do you know whether Jane Doe is real or make-believe?" he replied, "…we did not want to get into the details of all of that." The Center then filed 10 affidavits, all signed in fictitious names and as such inadmissible. One of the affidavits, signed "Dorothy Doe," stated "I am currently scheduled to have an abortion at Ramsey Hospital on January 31, 1994." The affidavit also stated, "Ramsey could not schedule me for an abortion until January 31 because they are so busy. By then I will be in my second trimester and will have to undergo a two day procedure which is more expensive."[5] Ramsey County Hospital is in St. Paul, Minnesota. Dorothy Doe would, therefore, be in Ramsey County Hospital on January 31 and February 1, 1994, having an abortion. The affidavit was signed and notarized on February 1, 1994, in New York. The attorney general never objected to these affidavits being placed in evidence. When asked, "Do you know who signed the affidavits and whether the statements in them are true?" his answer was "No."[6]

The trial court judge certified the suit as a class action. The certified class was "all women eligible for Minnesota's Medical Assistance…who seek abortions for health reasons." Contrary to the rules of court, no one was appointed as representative party, but "Jane Doe" was treated as such. However, in the complaint, it was alleged "Jane Doe" wanted an abortion

4 542 N.W. 2d 17 (Minn. 1995).
5 Transcript of Record, Dorothy Doe, Women of the State v. Gomez, 542 N.W.2d 17 (Minn.1995) (No. MC-93-3995).
6 *Barbara Carlson Show*, (KSTP AM 1500, Jan. 13, 1995).

because she was pregnant as a result of rape, not for a health reason.[7] Therefore, she did not belong to the class of which she was presumed to be the representative party, again contrary to court rules. The remaining named plaintiffs failed to state any cause of action on their own behalf and, thus, had no claim in the suit.

Since Minnesota Medical Assistance does not pay for many procedures, including life-saving operations, the burden on the plaintiffs' lawyers was to establish abortion was somehow different from other operations. They claimed abortion was a state constitutional right. No Minnesota court had ever so held. The attorney general, Hubert Humphrey III, had ambitions to be the Democratic candidate for governor. Two months before the suit was filed, he put out a press release stating he was switching sides on the abortion issue and he was now "pro-choice."[8] While the suit was pending before the trial court, Humphrey wrote directly to Paula Wendt, the executive director of one of the abortion clinics that was a plaintiff in the suit, telling her she need not argue abortion was a state constitutional right, because he would take the same position.[9] It is an ethical violation for an attorney on one side to contact a party on the other, but such considerations did not bother Attorney General Humphrey, and the major issue in the case was decided by agreement between the lawyers for the parties.

The trial court judge ordered the state to begin paying for "health-related" abortions. Not to do so, he said twice in his opinion, would violate the "equal protection" clause of the Minnesota Constitution. Interestingly, the Minnesota Constitution does not have an equal protection clause.[10]

The appeal was taken up directly by the Supreme Court of Minnesota, bypassing the Court of Appeals. When the attorney general was asked why he did not find out whether the plaintiffs were real or make-believe, he stated he did not want to delay the action but wanted to get the issue before the court[11] since he knew what the outcome was going to be. Prior to the filing of the suit, three new justices had been appointed to the Court by the allegedly pro-life

7 Amended Complaint at *Women of the State of Minnesota v Gomez.*
8 Press Release, Office of Attorney General Hubert Humphrey III Regarding Abortion (Dec. 29, 1992).
9 Letter from Hubert Humphrey III, Attorney General of Minnesota to Paula Wendt (July 6, 1993).
10 MINN. CONST.
11 *Barbara Carlson Show*, cited above.

governor, Rudy Perpich.

On January 1, 1991, an article appeared in the *Star Tribune*, the Minneapolis daily paper, which stated the Court had been considered pro-life because it had upheld the state feticide law but that the new appointments had shifted the balance. Under the headline "Abortion Rights gets Boost from Perpich's Pick for Court," the article stated, citing Connie Perpich, the director of public affairs for Planned Parenthood of Minnesota and the sister-in-law of Governor Rudy Perpich as their source, that the new appointments had shifted the balance.

That Gardebring and Keith favor abortion rights is taken for granted by activists, and is discussed on the record without hesitation. Keith is said to have accompanied her to a Planned Parenthood board meeting before he became judge and to have made his views clear…In the case of Tomljanovich's position, prominent feminists are cagier. Said Kim Mesun, president of Minnesota Women Lawyers, "I know, but I'm not going to tell you."[12]

The Supreme Court of Minnesota was fully aware the case was a sham. In their decision affirming the trial court's decision, they wrote of the lead plaintiff, "The complaint asserts she sought an abortion for a pregnancy resulting from rape."[13] They used the word "asserts" because they knew there was not the slightest evidence to support the allegations in the complain

The trial court had held the fantastic idea that the Minnesota Constitution incorporates the rights the U.S. Supreme Courts finds in the United States Constitution, writing "…because the United States Supreme Court has held that there is a federal constitutional right to an abortion, the Minnesota Constitution also protects that right." The Minnesota Supreme Court dropped the trial court's claim of a nonexistent "equal protection" clause and instead relied on a nonexistent "privacy provision" in sections 2, 7, and 10 of Article 1. They did not explain whether the "privacy provision" that incorporated a right to abortion was found in each clause of the three articles, for example, whether it exists in the clause stating, "All persons before conviction shall be bailable by sufficient sureties" (section 7) and equally in the clause "no

12 STAR TRIBUNE, Abortion Rights gets Boost from Perpich's Pick for Court, Jan. 1, 1991.
13 Women of the State v. Gomez, 542 N.W.2d 17 (Minn. 1995). Note bene: the Defendant was sued in her official capacity as Commissioner of Human Services. Natalie Haas-Stephen was replaced by Maria R. Gomez during the

warrant shall issue but upon probable cause" (section 10) or whether the "right to abortion" is only found in a combination of clauses from the three sections, perhaps a combination of the clause in section 1 holding that no person shall be "disenfranchised' without the "judgment of his peers" with "the privilege of the writ of habeus corpus" in section 7 and the "probable cause" provision of section 10.

Because both parties had agreed that abortion was a right under the Minnesota Constitution, the Court made no effort to explain how it could be a right when it had been a crime since the inception of the state constitution. What the court in fact did was simply to follow the lead of the trial court and to incorporate the federal "right to abortion" into the state constitution.

Protection of the Unborn from Criminal Violence

In 1985, the court held the state fetal homicide statute, which prohibited the killing of a "human being," did not criminalize the killing of an 8-month-old fetus, deciding in effect that a child in the womb was not a "human being."[14] The Minnesota legislature then passed a fetal homicide state criminalizing the causing of the death of an "unborn child," which was defined as "the unborn offspring of a human being conceived but not yet born."[15]

In *State v. Merrill*[16,] the defendant was charged with killing a woman and her unborn child. The Court upheld the statute, holding the state may criminalize the act even if the child in the womb is not a human being. The Court did not attempt to explain how the "offspring of a human being" could be anything other than a human being. Three justices, however, dissented, including Alexander Keith, who was soon after that elevated to Chief Justice. Since the statute prohibited "causing the death," the child must be "alive" prior to the prohibited action. The majority held life meant biological life shared in common with plants and animals. One dissenter held that since "life" was undefined by the statute, juries would differ on when life began and, therefore, when "death" ended it. Two dissenters, including Keith, went further and held "A non-viable fetus is not a human being, nor is an embryo a human being, nor is a

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pendency of the litigation.
14 State v. Soto, 378 N.W.2d 625 (Minn. 1985).
15 MINN. STAT. § 609.266 (2000).

fertilized egg a human being. None has attained the capability of independent human life." It further stated "The state does not have a compelling interest in this potential human life until the fetus becomes viable."[17]

The statute was again upheld by the Minnesota Court of Appeals in *State v. Chao Yang*[18], in which the defendant was sentenced to 25 years in prison for killing his unborn child, in addition to the 25 years in prison for killing his girlfriend, who was pregnant with their child. The Minnesota Supreme Court denied a petition for review of the opinion.[19] If the Supreme Court of Minnesota was ever pro-life, it was pro-life by only one vote and on the narrowest of reasonings.

The decision to uphold the state fetal homicide statute in *State v Merrill* was made on a four-to-three vote. Then Chief Justice Simonett wrote the majority opinion. The statutes made it a crime to kill an □unborn child,□ and □an unborn child□ was defined as □the unborn offspring of a human being conceived but not yet born.□ In the *Merrill* case the unborn child was 28 or 29 days from conception. The defendant citing *Roe* argued that the unborn child, at least prior to viability, was not a person. The Court held that the right established by *Roe* was the mother□s right and that the state still retained the right to protect the potentiality of human life from assault by another party. Three justices dissented, one of the grounds that the statute did not define when death occurred. Two justices, including then Associate Justice Alexander Keith, dissented on the additional grounds that a non-viable fetus is not a human being and that the state did not have compelling reason to protect a non-viable fetus.

Assisted Suicide

Minnesota has a statute, Minn. Stat. 609.215, which prohibits assisted suicide.[20] No case has come before the state Supreme Court interpreting this statute.

Healthcare Rights of Conscience

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16 450 N.W.2d 318 (Minn. 1990).
17 State v. Merrill, 450 N.W.2d 318, 326 (Minn. 1990).
18 533 N.W.2d 81 (1995).
19 *Id.*
20 MINN. STAT. § 609.215 (2006). This statute provides, AWhoever intentionally advises, encourages or assists another in taking the other=s own life may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than $30,000 or both.≅

Minnesota has a statute protecting the right of conscience not to participate in an abortion. Minn. Stat. 145.42.[21] No case has come before the Court interpreting this statute.

Cloning

While Minnesota has major medical research centers at the University of Minnesota and the Mayo Clinic, no Minnesota Supreme Court opinion has addressed the issue of cloning.

Destructive Embryo Research

Minnesota has a statute providing "Whoever uses or permits the use of a living human conceptus for any type of scientific laboratory research or other experimentation except to protect the life or health of the conceptus … shall be guilty of a gross misdemeanor."[22]. A "human conceptus" is defined as "any human organism from fertilization through the first 265 days thereafter."[23]

The University of Minnesota has a Stem Cell Research Institute, which has been conducting embryonic stem-cell research. The statute defines "living" as "the presence of the evidence of life, such as movement, heart or respiratory activity."[24] The Institute alleges stem cells are not "living" within the meaning of the statute and asserts they have an informal opinion from the state attorney general supporting that reading. No effort has been made to enforce the statute, and no court decision has interpreted the application of the statute. While a majority of the numbers of the Supreme Court of Minnesota have been appointed recently and have not established a record on life issues, there is nothing to suggest that they would alter the decision in *Doe v Gomez* holding that the Minnesota Constitution incorporates and expands *Roe v Wade*.

II. JUDICIAL RESTRAINT

The Supreme Court of Minnesota, particularly during the time Alexander Keith was

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21 MINN. STAT. § 145.42 (2006). This statute provides, ANo physician, nurse or other person who refuses to perform or assist in the performance of an abortion and no hospital that refuses to permit the performance of an abortion upon its premises, shall be liable to any person for damages allegedly arising from the refusal. No physician, nurse or other person who refuses to perform or assist in the performance of an abortion shall, because of that refusal, be dismissed , suspended, demoted or otherwise prejudiced or damaged by a hospital with which the person is affiliated or by which the person is employed.≅

22 MINN. STAT. § 145.422 (2006).

23 §145.421.

Chief Justice (1990 to 1998), has developed a reputation of being an activist court. The power of the Minnesota courts is spelled out in the Minnesota Constitution and statutes.[25] The Supreme Court of Minnesota has also claimed "inherent authority" simply by its position of being a court to assume powers not given either by the Constitution or the law.

John Derus was a candidate in the Democratic primary for the state senate in 1996. On the day of the primary election, the *Star Tribune* published his picture under a headline referring to charity fraud. Derus lost the election. He unsuccessfully sued the paper for libel. The *Star Tribune* admitted Derus had absolutely nothing to do with the article on charity fraud and claimed the placement of his picture was simply a mistake. One commentator suggested the *Star Tribune* was the only paper to successfully defend itself in a libel action by pleading incompetence.

Derus also filed a challenge to the election. Under the Minnesota statute governing elections, the Minnesota Supreme Court is required to submit a list of district court judges, from which the parties are required to eliminate names until they arrive at a judge they consider neutral.[26] The Court, rather than comply with the law and provide a list of judges, took the case itself and dismissed it on the grounds the misconduct was not committed by a candidate or his supporter but rather by a third party, the newspaper. The Court based its action on its "inherent authority," an authority not found in the Minnesota Constitution or statutes and in direct contradiction to statutory requirements.[27]

On the other hand, the Supreme Court felt no inherent compulsion to address a major constitutional issue when the lower court outcome corresponded to its own social philosophy. Since the 19th century, Minnesota has had a criminal sodomy statute. The American Civil Liberties Union (ACLU) brought a challenge to the statute in Hennepin County District Court, alleging the statute violated a state constitutional right to privacy. The District Court judge agreed, declared the statute unconstitutional, and certified the plaintiffs as a class on the dubious claim that, as a class action, her ruling would have an effect statewide, rather than merely in

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24 §§ 145.421–.422.
25 MINN. STAT. § 209.10 (2000).
26 Derus v. Higgins, 555 N.W.2d 515 (Minn. 1996).

Hennepin County. Mike Hatch, the Minnesota attorney general, refused to file an appeal, allowing one judge to overturn the entire state legislature. Hatch, a Democrat with ambitions to be governor, ran for the position in 2006 but lost. The Minnesota Supreme Court felt no need to exercise its "inherent authority" to review the decision of the District Court.

The Court has also gone so far as to attempt to control the rules under which judges are re-elected. In 1996, in revising the rules governing the conduct of candidates for judicial office, the Board on Judicial Standards omitted a provision prohibiting candidates from seeking the endorsement of political parties. Gregory Wersel, an attorney and candidate for Associate Justice, sought the endorsement of the Republican Party. The board then redrafted the rules and applied to the Supreme Court to adopt a new prohibition on party endorsements. The Supreme Court determined candidates for judicial office—that is to say, their own opponents—could not accept the endorsement of political parties. It is important to note there was nothing in the Minnesota statutes prohibiting such endorsements. Rather, it was judicial fiat. The Court made the rules for their own re-election.

Wersal and the Republican Party challenged this prohibition and prohibitions on soliciting funds and stating positions on particular issues. The U.S. Supreme Court, in *Republican Party v White*[28], and the lower courts on remand struck down the three prohibitions. However, the structure by which the Minnesota Supreme Court promulgates the rules for their own elections was left in place. It is notable the rules prohibiting candidates for election to the Court from expressing their opinions on issues that might come before the Court applied only to candidates for election and not to candidates for appointment by the governor, the means by which the great majority of justices came into office.

Dean Johnson, the Majority Leader of the Minnesota Senate, called Russell Anderson, an Associate Justice of the Minnesota Supreme Court, a liar or, more precisely, said Justice Anderson's denial of a conversation with Johnson concerning possible Supreme Court action on gay marriage was "an outright fabrication." Minnesota has a statute defining marriage as a union

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27 *Derus*, 555 N.W.2d at 516; Doe v. Ventura, Fourth Judicial District, Minnesota, File No. MC01-489.
28 536 U.S. 765 (2002).

between one man and one woman,[29] but the decisions of the Massachusetts Supreme Court and later the New Jersey Supreme Court convinced many people traditional marriage would be secure in Minnesota only through a state constitutional amendment. The bill to place the amendment on the ballot passed the Republican-controlled house but could not get to the floor of the senate. As Majority Leader, Johnson, a Lutheran pastor, controlled the agenda of the senate. Johnson spoke to a group of fellow pastors and assured them the amendment was not necessary, as he had spoken to members of the Minnesota Supreme Court, who told him the Court would not overturn the statute. A member of the group recorded Johnson's remarks and released them to the media. Johnson backtracked slightly but affirmed the substance of his remarks.

An ethics complaint was filed against the Justice with the Board of Judicial Standards, which ruled there was no evidence the alleged conversations had taken place. Not only was there Johnson's statement, but two of his aides were present at some of the conversations and had provided depositions to the Board. Johnson later remarked he had "lost a great deal of respect for the court system at the highest level in Minnesota" and that the dispute "made me wonder who else was served an injustice" by the high court.[30]

The Supreme Court of Minnesota has held that the Minnesota Constitution "incorporates" the United States Constitution and the United States Supreme Court's interpretation of it. If, for example, *Roe v Wade* were reversed and there were no U.S. constitutional right to abortion, then there would be nothing to incorporate into the state Constitution and therefore no right to abortion in Minnesota.

The Court has exercised its judicial review power to serve its political and social ends. In *Doe v. Gomez*,[31] it took review of the case directly from the trial court. In *Derus*, it assumed jurisdiction over and made a substantive decision in a case where the statute only gave it power to provide a list of judges to hear the matter. In *Doe v. Ventura*,[32] it allowed a District Court judge to become the sole arbiter of a major constitutional matter. While the Court in the *Merrill* case took the traditional and limited view of the role of the court, holding that "We do not sit as

29 MINN. STAT. § 517.01 (2006).
30 STAR TRIBUNE, Mar. 24, 28, June 28, Nov. 21 (2006).
31 542 N.W.2d 17 (Minn.1995).

legislators with a veto vote, but as judges deciding whether the legislation, presumably constitutional is so. The Court has since abandoned that position and in *Doe v Gomez* put itself above the procedural and evidentiary rules that control its conduct. The conduct of the Court under the tenure of Chief Justice Keith showed by a pro-abortion activism and a complete disregard for the rule of law.

III. THE COURT

The Supreme Court of Minnesota is composed of one Chief Justice and six Associate Justices. The Justices serve six-year terms. The Minnesota Constitution provides the justices are to be elected by the voters.[33] This provision was placed in the Minnesota Constitution as a reaction to *Dred Scott v. Sanford*.[34] Minnesotans wanted to be sure the justices were chosen by, and accountable to, the voters. Despite the provision, justices are rarely elected to the court. Of the current justices, six of the seven were originally appointed by the governor. The Minnesota Constitution provides that, in the event of a vacancy, the governor may appoint a replacement. A tacit understanding has developed that the justices will resign their position before their term is up, allowing the governor to appoint a replacement. When a sitting judge runs for re-election, he or she is designated the incumbent on the ballot. Judges typically run unchallenged, but even with a challenger, the vast majority of campaign contributions go to the incumbent, who routinely wins.

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32 195 F. Supp. 2d 1146 (Minn. 2002).
33 MINN. CONST. art. IV, §§ 2,7,8.
34 60 U.S. 393 (1857).

Member	Appointed by[35]/Year	Term Expires	Miscellaneous
Alan Page	Elected/1993	2010	-Biographical information: B.A. University of Notre Dame,1967; J.D. University of Minnesota Law School, 1978; Assistant Attorney General 1987-1993. -Opinions: Voted with majority in *Doe v. Gomez*
Paul H. Anderson	Governor Carlson/1994	2008	- Biographical information: B.A. Macalester College, 1965; J.D. University of Minnesota Law School , 1968; Associate & Partner, LeVander, Gillen & Miller 1971-1992. - Opinions: Voted with majority in *Doe v. Gomez*
Helen M. Meyer	Governor Ventura/ 2002	2010	-Biographical information: B.A. University of Minnesota; J.D. William Mitchell College of Law; Private practice in civil trial law and mediation; - Professional/social affiliations:

35 Two justices were appointed by Governor Jesse Ventura, an Independence Party of Minnesota candidate, who was pro-abortion. Three justices were appointed by the current governor, Tim Pawlenty, a Republican who has been considered pro-life. Two of the three justices had previously been appointed either to the Court of Appeals or as an Associate Judge by Arne Carlson, a Republican governor who was pro-abortion.

			Served on Ventura's Judicial Merit Selection Commission, helped in appointment of over 60 trial and five appellate judges.
Sam Hanson	Governor Ventura/ 2002	2010	- Biographical information: B.A. St Olaf College, 1961; J.D. William Mitchell College of Law, 1965; Private practice Briggs and Morgan, 1966-1993; Appointed to Court of Appeals by Ventura in 2000.
G. Barry Anderson	Governor Pawlenty/2004	2012	- Biographical information: B.A. Gustavus Adolphus College, 1976; J.D. University of Minnesota Law School, 1979; Partner, Arnold, Anderson & Dove, 1987-1998; Appointed to Court of Appeals by Carlson in 1998.
Lorie Skjerven Gildea	Governor Pawlenty /2006	2012	- Biographical information: B.A. University of Minnesota, 1983; J.D. Georgetown University Law Center, 1986; Hennepin County Prosecutor's office, 2004-2005; Associate General Counsel, University of Minnesota, 1993-2004; Appointed District Judge by Pawlenty in 2005.
Russell A. Anderson (Chief Justice)	Governor Pawlenty/2006	2012	-Biographical information: B.A. St Olaf College, 1964; J.D. University of Minnesota Law School, 1968;

			District Court Judge,1982-1998; Appointed Associate Judge by Carlson in 1998.

CONCLUSION

The Supreme Court of Minnesota represents the unfortunate spectacle of a court that has allowed politics and policy considerations to overcome respect for the rule of law. Whether the most recently appointed justices will reverse the errors of the past, remains to be seen.