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Will Roe v. Wade Survive the Rehnquist Court?

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Will *Roe v. Wade* Survive the Rehnquist Court?

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Whether the Supreme Court will overrule *Roe v. Wade*[1] has been the subject of a great deal of speculation during the months following the election of George Bush as President of the United States. This sudden and dramatic concern for women's reproductive freedom is well founded. A few weeks before the opening of the Supreme Court's term last October, Justice Blackmun, author of the decision, issued a dire warning: "The next question is, 'Will *Roe v. Wade* go down the drain?' I think there's a very distinct possibility that it will — this term. You can count the votes."[2]

By the beginning of January 1989, the Court had been presented with requests to hear seven abortion cases. Each case was filed as a result of actions by state courts or legislatures seeking to severely restrict women's access to abortion services. The Supreme Court has thus far agreed to hear one of these cases: *Webster v. Reproductive Health Services*.[3] Both the United States Justice Department and the State of Missouri have asked the Court to use *Webster* as a vehicle for overturning *Roe v. Wade.*

What can we expect the Supreme Court to do in *Webster* and other abortion cases? What is the likely future of women's constitutional right to choose abortion? How have we come to the point where women's right to choose is in jeopardy?

The Supreme Court issued its historic decision in *Roe v. Wade* on January 22, 1973. In *Roe*, the Court declared for the first time that the constitutional right of every woman to liberty and privacy includes the right to make the highly personal decision, free from government interference, whether to have an abortion. The Court's recognition of

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1. Roe v. Wade, 410 U.S. 113 (1973).
2. Wash. Post, Sept. 1, 1988, at A3, col. 4.
3. Reproductive Health Servs. v. Webster, 851 F.2d 1071 (8th Cir.), *prob. juris. noted*, 109 S. Ct. 780 (1989).

women's right to choose abortion flowed logically and directly from its 1965 and subsequent decisions ruling that every American has the right to decide whether and when to have children, including the right to use birth control.[4]

Since 1973, and as recently as 1986,[5] the Supreme Court has consistently applied this principle in striking down a variety of state laws restricting abortion. Throughout these cases, the Court has never wavered from the position that women have a fundamental right to choose to end an unwanted pregnancy. The government may not interfere with a woman's abortion decision in order to protect fetal life until after the fetus is viable — that is, potentially capable of "meaningful life"[6] outside of the woman's womb — which occurs at approximately the end of the second trimester.

Given the Supreme Court's consistent support for women's right to choose, the existence of a credible threat to reproductive freedom in the Court is extraordinary. A fundamental tenet that guides the Court's decisionmaking is a firm adherence to the principle of *stare decisis*: once the Court has decided a legal issue, that decision becomes precedent which the Court will apply in all future cases. Because of the great importance of stability and predictability in the law, as well as the impracticality, indeed impossibility, of continually deciding the same legal issues anew, the Court will not overrule precedent even if it believes that its prior treatment of an issue was incorrect. Although the Court has the power to overrule its prior cases and has on occasion departed from the rule of *stare decisis*, it does so only in extraordinary circumstances, such as where a clearly wrong decision is causing grave injustice.

In a 1983 decision, the Court specifically addressed the application of the principle of *stare decisis* to *Roe* and women's right to choose abortion, finding "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*."[7] The Court noted that *Roe* "was considered with special care" and that the Court has "repeatedly and consistently" reaffirmed *Roe* in subsequent decisions.

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4. Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

5. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

6. *Roe*, 410 U.S. at 163.

7. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 420 n.l (1983).

Grave injustice would result *not* from reaffirming *Roe* but from overruling the decision. No other judicial decision has had a more profound and positive effect on the lives and health of American women than *Roe v. Wade*. Before the Court recognized that abortion is a constitutionally protected choice, an estimated one million women each year resorted to illegal abortion, risking their lives and health in order to retain control over their futures. Prior to 1973, thousands of American women died as a direct result of criminal abortion. Denying women access to legal and safe abortion would guarantee two things: that many women would die or find themselves seriously injured because of botched illegal abortions, and that more children would grow up in an environment where they were not wanted. Far from causing injustice that would argue for reversal, *Roe* has saved women's lives and preserved their families.

In addition, public opinion is strongly in favor of women's right to choose abortion. The vast majority of women and men in the United States believe that a woman, and not the government, should decide whether and when she will bear a child. A 1988 poll commissioned by the National Abortion Rights Action League and jointly conducted by Hickman-Maslin Research, Inc. and American Viewpoint found that 78% of Americans agreed with the statement: "Abortion is a private issue between a woman, her family and her doctor. The government should not be involved."[8] Given the many lives that *Roe* has saved, the many more lives that *Roe* has improved, the overwhelming popular support for the decision, and the sixteen years of Supreme Court precedent affirming women's constitutional right to choose, how has this right come under such an enormous and immediate threat?

The anti-abortion movement has developed and vigorously pursued a legal strategy for depriving women of their constitutional right to choose abortion. The strategy is summarized in an essay by Victor Rosenblum and Thomas Marzen in *Abortion and the Constitution: Reversing* Roe v. Wade *Through the Courts*:

> There appear to be only three essential prerequisites [to overturning *Roe*]: statutes that confront the judiciary with abortion-related issues must continue to be enacted; these statutes must be compe-

8. This question was part of a poll of 1202 registered voters in the continental United States which was conducted from December 13 through December 17, 1987. A full report containing an analysis of the results of the survey was released on January 18, 1988 and is available from NARAL.

> tently and vigorously defended; and the membership of the Supreme Court has to be altered so at least five justices are reasonably open to the possibility of reversing *Roe*.[9]

The anti-choice minority has proven extremely resourceful and creative in pursuing the first two steps of this plan: they have lobbied successfully for the enactment of unconstitutional anti-abortion legislation at the state level, which has enabled them to bring the issue repeatedly before the Supreme Court. Although seven Justices joined the decision in *Roe*, by the time of the Court's most recent abortion decision in 1986, the pro-choice majority had narrowed to five. President Reagan's subsequent appointment of Justice Kennedy to the Court may have achieved the crucial third step in the anti-choice strategy — the creation of a majority on the Supreme Court willing to contemplate overruling *Roe*.

During his two terms in office, President Reagan appointed three Supreme Court Justices and over half of all lower federal court judges. Both Ronald Reagan and George Bush were elected President upon Republican Party platforms that make hostility toward women's reproductive rights a requirement for nomination to the federal judiciary. The 1988 Republican Party platform calls for "the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life." The "innocent human life" that the platform refers to is fetal life; notably excluded and implicitly deemed unworthy of respect and legal protection are the lives of women.

While anti-choice extremists lobbied to push unconstitutional "test" legislation through state legislatures, and President Reagan appointed Justices and judges with an eye toward an anti-choice position on abortion, the pro-choice majority remained relatively silent. The public did not, and largely still does not, recognize the gravity of the threat. This is in part because the vast majority of anti-abortion legislation and litigation since *Roe* has not sought to criminalize abortion outright, but to impose restrictions that would make the abortion procedure less available and more costly, or would somehow interfere with women's decisionmaking process. Even now, neither the press nor the public adequately appreciates the harm that would result were the

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9. Rosenblum & Marzen, *Strategies for Reversing* ROE V. WADE *through the Courts*, in ABORTION AND THE CONSTITUTION: REVERSING *ROE V. WADE* THROUGH THE COURTS 195, 209 (D. Horan, E. Grant & P. Cunningham eds. 1987).

Court to uphold such restrictions on access to abortion. Political commentators fixate on whether the Court will overrule *Roe* or "just" chip away gradually at the right to choose. Implicit in this question is an assumption that to overrule *Roe* the Court must deny the existence of any constitutionally protected right to choose abortion. This is a flawed and dangerous interpretation of *Roe* that seriously minimizes the harms that would result from allowing state restrictions on abortion.

Anti-abortion activists recognize that criminalization is not the only way to eliminate choice. Instead of directly attacking the existence of women's right to choose, their strategy has focused on imposing onerous regulations that interfere with women's access to abortion until all choice is effectively eliminated. If the Supreme Court were to uphold such restrictions, it could overrule *Roe*, at least in part, without any public admission that it was depriving women of their constitutional rights.

In the past, the Supreme Court has vigorously rejected backhanded attempts to undermine the foundation of the right to choose. The Constitution prohibits not only laws that would criminalize abortion, but also, as the Court recognized in *Roe* itself, unwarranted government "regulation" and "interference" with abortion services and women's abortion decisions. That is why the very day the Court struck down a Texas abortion law in *Roe*, it also declared a more liberal Georgia law to be unconstitutional in *Doe v. Bolton*.[10] In *Doe*, the Court ruled that a state could not require that all abortions be performed in hospitals or that a woman secure the approval of a hospital committee and three doctors before she could obtain an abortion.

In the sixteen years since *Roe*, the Supreme Court has applied the reasoning in that decision in striking down a wide variety of restrictive abortion laws. For example, the Court has invalidated state laws that required women to obtain their husbands' consent prior to having an abortion,[11] that forced women to wait a specified period of time before obtaining abortion services,[12] that required the procedure to be performed in hospitals,[13] and that imposed biased or lengthy and inflexible informed consent requirements.[14] The Court's decisions since 1973

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10. Doe v. Bolton, 410 U.S. 179 (1973).

11. Planned Parenthood v. Danforth, 428 U.S. 52, 69-71 (1976).

12. *Akron*, 462 U.S. at 450-51.

13. *Id.* at 433; Planned Parenthood v. Ashcroft, 462 U.S. 476, 481-82 (1983); *Doe*, 410 U.S. at 195-200.

14. *Thornburgh*, 476 U.S. at 759-63; *Akron*, 462 U.S. at 442.

make absolutely clear that *Roe* protects women from state laws that seek to interfere with their access to abortion services or with their decisionmaking process, as well as from laws that criminalize abortion.

Nevertheless, the Supreme Court has rejected challenges to abortion laws in two important areas: the rights of minors to obtain abortions without parental involvement[15] and public funding of abortions.[16] Although these decisions undeniably are contrary to the reproductive freedom of young women and poor women, in each of these areas the Court reaffirmed the basic principle that the government may not interfere with an adult woman's right to decide whether to end a pregnancy. Although the Court ruled that a state may require some "immature" minors to obtain parental consent prior to having abortions, this decision was based on a subsequently disproved factual assumption that government-mandated parental involvement is beneficial to some minors who are too immature to make decisions about abortion on their own.[17] In the public funding cases, the Court reaffirmed that the Constitution prohibits the government from imposing obstacles in the path of a woman's choice of abortion. The Court found, however, that the government may refuse to remove obstacles to abortion that the government did not itself create, such as a woman's indigence. Thus, even in these cases the Court declared again that the Constitution guarantees women's fundamental right to choose abortion.

The seven abortion cases that have been presented to the Supreme Court this term follow the pattern of indirect attempts to deprive women of their reproductive rights. Each of the cases involves severe state-imposed restrictions on abortion, many of which are identical to those that the Court has already held unconstitutional in prior cases. If the Court were now to declare that these restrictions are constitutional, it could drastically curtail women's reproductive choices without ruling explicitly that women have no constitutional right to choose abortion. Some state legislatures would restrict abortion to the point that not a single facility that performed abortions existed in the state, while in other states regulations could drive the cost so high that many women

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15. *Ashcroft*, 462 U.S. at 490-93; *see also Akron*, 462 U.S. at 439-42; H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird, 443 U.S. 622 (1979).

16. Harris v. McRae, 448 U.S. 297 (1980); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977).

17. Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986), *aff'd*, Nos. 86-5423-MN, 86-5431-MN, slip op. (Aug. 27, 1987), *vacated and reh'g granted*, 835 F.2d 1545 (per curiam), *rev'd*, 853 F.2d 1452 (8th Cir. 1988) (en banc), *petition for cert. filed*, Jan. 5, 1989.

could not afford the procedure.

Pro-choice attorneys were successful in convincing the Supreme Court not to hear the first three abortion cases presented this term, *Conn v. Conn* from Indiana and *Lewis v. Lewis* and *Myers v. Lewis* from Michigan.[18] These cases were orchestrated by anti-abortion activists and filed on behalf of men seeking court orders to prevent their wives from obtaining abortions. The men sought to create a constitutional right that would enable a man who has impregnated a woman to obtain a court order forcing that woman to bear a child for him against her will. A woman, in their view, should be able to obtain an abortion only after disclosing to a court her highly personal reasons for wanting to terminate her pregnancy. After the woman has testified for the public record and submitted to cross-examination, if she has convinced the judge that her reasons for not wanting to bear a child are "better" than the man's stated motive for seeking to compel the childbirth, the judge may then permit the woman to have an abortion.

Men have brought over a dozen cases like these in state courts since May 1988. Although some men were "successful" in obtaining temporary court orders and delaying women's abortions, every appellate court to address the issue ruled in favor of the woman's right to make the abortion decision. The men argued that they could prevail without an overruling of any of the Supreme Court's abortion cases. All appellate courts agreed, however, that what the men were requesting directly conflicted with *Roe*, as well as with the 1976 Supreme Court decision, *Planned Parenthood v. Danforth*, in which the Court struck down a Missouri law prohibiting married women from having abortions without the consent of their husbands.[19] As the lower courts recognized, a decision in favor of one of the men would have taken the abortion decision away from the pregnant woman and placed the power to decide in the hands of her husband or sexual partner and the state court.

Moreover, despite their rhetoric about men's rights, the ultimate goal of the anti-choice lawyers behind these cases was clear: once they

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18. Conn v. Conn, 526 N.E.2d 958 (Ind. 1988), *cert. denied*, 109 S. Ct. 391 (1988); Lewis v. Lewis, No. 111440 (Mich. Ct. App. Sept. 15, 1988), *appeal denied* No. 841469 (Mich. Sup. Ct. Sept. 22, 1988), *cert. denied*, 57 U.S.L.W. 3376 (U.S. Nov. 29, 1988) (No. 88-683); Myers v. Lewis, No. 111440 (Mich. Ct. App. Sept. 15, 1988), *appeal denied* No. 841469 (Mich. Sup. Ct. Sept. 22, 1988), *cert. denied*, 57 U.S.L.W. 3376 (U.S. Nov. 29, 1988) (No. 88-555).

19. *Danforth*, 428 U.S. 52.

reached the Supreme Court, they asked the Court to overrule *Roe v. Wade* and declare that women possess no right to choose. This would obviously deny every woman the right to choose abortion (even where her husband or sexual partner agreed with her decision) and give that power to the government. The Supreme Court's refusal to hear the husbands' cases left undisturbed state decisions that protected women's constitutional right to decide whether or not to have children.

The facts of those cases graphically demonstrate why the abortion decision must be left to the woman in each and every instance and not subject to the review of a court. At the time Mr. Conn and Mr. Lewis filed their lawsuits, their marriages had failed. Their wives were in the process of filing for divorce and each was already caring for an infant. One of the women was desperately trying to escape an abusive relationship with her now ex-husband, who has been arrested repeatedly for physically beating, harassing and threatening to kill her. Although both women ultimately were free to have abortions, the lawsuits cost them a great deal: in addition to the violation of their constitutional rights, these women suffered increased medical risk because of the delay in obtaining abortions — one woman was under court order for seven weeks and the other for five weeks. Moreover, both women were forced to endure the extreme emotional trauma that results from an unwanted pregnancy and a court order preventing abortion, as well as extensive unwanted publicity about their private lives and decisions.

The Supreme Court's decisions not to take these cases, although clearly a victory for supporters of reproductive rights, provide little indication of what the Court is likely to do in the *Webster* case,[20] or the other abortion cases pending before the Court. In *Lewis* and *Conn*, the anti-choice lawyers had particularly weak legal arguments. The men were arguing for the creation of a wholly unprecedented constitutional right; their claims were not based on a state law seeking to give husbands a right to interfere with their wive's abortion decisions. By contrast, the abortion restrictions at issue in *Webster* and other cases the Court may consent to hear are not dependent on some nonexistent constitutional right; rather, they have been enacted by State legislatures into law.

The Missouri legislature enacted the law at issue in *Webster* in 1986, despite the fact that some of the abortion restrictions it contained were identical to provisions that the Supreme Court had already de-

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20. Reproductive Health Servs. v. Webster, 851 F.2d 1071 (8th Cir.), *prob. juris. noted*, No. 88-605 (U.S. Jan. 9, 1989).

clared to be unconstitutional. The statute's assault on women's right to choose abortion begins in the preamble, which states that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health and well-being." This statement clearly conflicts with *Roe*, in which the Supreme Court unequivocally declared that a state may not adopt a theory of when life begins in order to restrict abortion. Although the preamble acknowledges that Missouri must follow the Supreme Court's decisions and cannot create fetal rights that override women's reproductive rights, this provision makes evident what motivated the Missouri legislature in enacting the law.

One of the questions before the Supreme Court in *Webster* is the basic question, first decided in *Roe*, whether women have a fundamental right to choose abortion. The Missouri attorney general has asked the Court to uphold the law's restrictions on abortion by overruling *Roe*. In an extraordinary move, just two days after the presidential election, the U.S. Solicitor General filed a brief urging the Court to hear *Webster* and arguing that the case was an appropriate vehicle for overruling *Roe*: "If the Court is prepared to reconsider *Roe v. Wade*, this case presents an appropriate opportunity for doing so."[21]

Although a majority of the Justices are not likely to rule in *Webster* that women have no constitutionally protected right to choose abortion, even a "narrow" win in the Supreme Court for Missouri would greatly interfere with women's access to abortion services. The Missouri law forbids public employees to participate in the performance of abortions even if a woman pays for the full costs of the procedure and no public funds are involved. The law also prohibits women from having abortions performed at public health care facilities, even in cases in which the procedure is performed by a private physician and is fully paid for by the woman. The effects of this law would be devastating in areas where public facilities are the sole abortion providers. In Missouri, for example, one public facility was responsible for ninety-seven percent of all post-fifteen-week, hospital-based abortions in 1985, the year before the statute was enacted.[22] Obtaining an abortion in such areas would require traveling long distances, many times to other states, which would in turn cause delay, increased health risks and higher costs. Another provision of the law that was invalidated by the

21. Brief for the United States as Amicus Curiae Supporting Appellants at 12, *Webster* (No. 88-605).

22. *Webster*, 662 F. Supp. at 428 n.57.

lower courts but not appealed by the state mandated that all abortions performed after fifteen weeks gestational age must be performed in a hospital. The combined effect of this hospitalization requirement and the provision prohibiting the performance of abortions at the one hospital responsible for virtually all post-fifteen-week hospital abortions, would have been to render abortion completely unavailable in the state of Missouri after fifteen weeks.

The statute also attempts to restrict the availability of information about abortion by prohibiting the use of public funds "for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." This would prevent some women from obtaining information they need in order to make informed and intelligent medical decisions. A woman who is dependent upon public support for her medical needs, and suffers from a medical condition that makes pregnancy extremely dangerous to her health, could suffer irreparable physical harm as a result of this restriction.

The final restriction involved in Missouri's appeal requires that prior to performing an abortion in cases in which a physician "has reason to believe" that the fetus is of twenty or more weeks gestational age, the physician must first determine fetal viability by "such tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child." Requiring these specific findings would raise the cost of abortions and force women to undergo invasive tests, often without any possibility of gaining any useful information about fetal viability. Both the Missouri district court and the U.S. Court of Appeals for the Eighth Circuit ruled that all of the provisions of the law involved in this appeal are unconstitutional.

The second case currently before the Court, *Turnock v. Ragsdale*, involves a series of Illinois statutes and regulations that, like the law in *Webster*, interfere with women's access to abortion services.[23] The laws demand that all facilities performing abortions be licensed and comply with onerous structural, equipment, and staffing requirements. Both the Illinois district court and the U.S. Court of Appeals for the Seventh Circuit found that the requirements demand the construction of "the functional equivalent of small hospitals" and are unrelated to the performance of safe abortions. Complying with the regulations is very costly and would force some would-be abortion providers out of the field. Among other anti-abortion provisions is a requirement that the

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23. Turnock v. Ragsdale, 841 F.2d 1358 (7th Cir.), *appeal filed*, 57 U.S.L.W. 3378 (U.S. Nov. 29, 1988) (No. 88-790).

individual giving abortion counseling "have no financial interest in the patient's decision." This would typically preclude the doctor performing the abortion from providing counseling, again raising the cost of providing the abortion as well as disrupting the physician-patient relationship.

The two remaining cases differ significantly from *Webster* and *Ragsdale* in that they involve the abortion rights only of minors. At issue in *Ohio v. Akron Center for Reproductive Health* is an Ohio law that severely restricts minors' access to abortion services.[24] The statute requires a physician to give twenty-four-hour notice to a minor's parent or guardian before performing an abortion. A minor may avoid parental notification only by using a "judicial bypass procedure," through which she must convince a court that she is mature enough to make her own abortion decision or that having an abortion is in her best interest. The U.S. Court of Appeals for the Sixth Circuit ruled that the statute is unconstitutional because the judicial bypass procedure is extremely difficult to implement, it does not protect the minor's anonymity, and it would result in dangerous delays because the procedure can take up to twenty-two days to complete.

Because the Court believed that some minors may be incapable of making the decision independently, it has held that states may require some minors to involve their parents in the abortion decision. The Court also has ruled, however, that if a state requires a minor to obtain her parent's consent before having an abortion, it must provide a bypass procedure through which a minor may demonstrate that she is mature enough to make her own decision or that her best interests would not be served by parental involvement. The state of Ohio argues in its current appeal not only that its judicial bypass procedure is constitutionally adequate, but also that it need not provide any bypass at all. If the Court adopts Ohio's reasoning, states could require *every* minor to involve her parents in her decision to have an abortion, even a minor whose parents are physically abusive or whose pregnancy was the result of a rape by her father.

The final case currently pending before the Court, *Hodgson v. Minnesota*, involves a law that requires a minor to notify both of her parents prior to having an abortion, even if her parents are divorced or

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24. Akron Center for Reproductive Health v. Rosen, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd sub nom.* Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988), *appeal filed sub nom.* Ohio v. Akron Center for Reproductive Health, 57 U.S.L.W. 3378 (U.S. Nov. 29, 1988) (No. 88-805).

have never married and even if one parent objects to the notification of the other.[25] The statute makes no exception for non-custodial parents who have never met the minor, or who have been barred by a protective order from visiting her. In addition, the statute prohibits a doctor from performing an abortion until at least forty-eight hours after written notice of the pending procedure has been delivered to the minor's parents. Delays caused by the Minnesota law have forced some minors to have more expensive, riskier procedures, and the percentage of minors having second trimester abortions has increased since the law was enacted.[26]

During the five years the law has been in operation, nearly one-half of all minors resorted to petitioning the court under the statute's judicial bypass procedure, because they were either afraid or unable to notify both parents of their abortion decision.[27] At trial, judges who collectively had heard over ninety percent of the minors' petitions testified that the minors were indeed the best situated to consider their own unique family circumstances and decide whether they should notify their parents.[28] Prior to the law's enactment, a "sizable proportion of minors seeking an abortion in Minnesota voluntarily notified at least one parent," this proportion did not change after the statute took effect.[29] Twenty to twenty-five percent of those who used the judicial bypass procedure had already notified one parent, the vast majority of whom were divorced women who had not seen their husbands in years.[30]

After reviewing the evidence, the district court concluded that the statute did not promote the state's interest in protecting minors or promoting family integrity.[31] The Eighth Circuit panel agreed, finding that "although family relationships benefit from voluntary and open communication, compelling parental notice has an opposite effect . . . [i]t is almost always disastrous."[32] The pro-choice victory was short-lived: the Eighth Circuit (on which a majority of the judges were appointed by

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25. Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988) (en banc), *petition for cert. filed*, No. 88-1125 (U.S. Jan. 4, 1989).

26. Petition for a Writ of Certiorari at 13, *Hodgson.*

27. *Hodgson*, 648 F. Supp. 756, 765 (N.D. Minn. 1986).

28. *Id.* at 775.

29. Petition for a Writ of Certiorari at 114a-115a, 123a, 126a, *Hodgson.*

30. *Id.* at 769.

31. *Hodgson*, 648 F. Supp. at 775.

32. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 13 (8th Cir. Aug. 27, 1987).

President Reagan) agreed to hear the case *en banc* and held, in the face of overwhelming evidence to the contrary, that the law was constitutional.[33] Nevertheless, the statue remains enjoined by order of the Eighth Circuit, pending the review by the United States Supreme Court.[34]

If the Supreme Court were to uphold the laws in *Webster*, *Ragsdale*, or *Akron Center*, it inevitably would have implications far beyond those cases for women's ability to choose and obtain abortions. It will signal to anti-choice activists and legislators across the nation that the Court will no longer uphold women's constitutional rights against their assaults. Many states would enact highly restrictive abortion laws, as they have in the past, aimed at barring women's access to the abortion procedure. Hospitalization requirements, mandatory waiting periods, and onerous licensing requirements would all be employed in an effort to eliminate entirely women's right to choose abortion. For women who lack the money or ability to travel long distances, a law that in effect prohibits all hospitals in an area from performing abortions, and at the same time demands that the procedure be performed in hospitals, could be as devastating as a law criminalizing abortion.

Will the Supreme Court overrule *Roe v. Wade*? Obviously only the Court itself can provide the ultimate answer to that question. But it is essential that the Court, the press and those who support reproductive freedom recognize that there is more than one way to overrule *Roe*. Women's lives depend on the Supreme Court protecting women's access to legal and safe abortion; it is not enough for the Court to profess support for a constitutional right that it has in fact rendered meaningless.

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33. *Hodgson*, 853 F.2d 1452.

34. Hodgson v. Minnesota, Nos. 86-5423-MN, 86-5431-MN (8th Cir. Oct. 7, 1988) (en banc) (order).