Testimony of

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June 23, 2005

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on
"The Consequences of Roe v. Wade and Doe v. Bolton"
before the
U.S. Senate
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights

June 23, 2005
Senator Brownback, Senator Feingold and members of the committee,
Thank you for this opportunity to address the committee on the past, present and future significance of the 1973 Supreme Court decisions in Roe v. Wade and Doe v. Bolton. My name is Alta Charo, and I am associate dean of the University of Wisconsin Law School and the
Elizabeth S. Wilson Professor of Law and Bioethics with appointments to the faculty at both the Law and Medical Schools of the University of Wisconsin at Madison.
Roe v. Wade's broad vision of the right to privacy is our constitutional bulwark against legislation mandating a Chinese-style one-child policy; governmental eugenics policies that penalize parents who choose to have a child with disabilities; state prohibitions on home-schooling our children;forcible intubation of competent but terminally ill patients; and the issuance of a state-approved list of permissible forms of sexual intercourse between husband and wife. If we reject the core
holding of Roe v. Wade that some activities are too intimate and some family matters too personal to be the subject of governmental intrusion, the we also reject any significant limit on the power of the government to dictate not only our personal morality but also the way we choose to live, to marry, and to raise our children.
Roe v. Wade is at the core of American jurisprudence, and its multiple strands of reasoning concerning marital privacy, medical privacy, bodily autonomy, psychological liberty and gender equality are all connected to myriad other cases concerning the rights of parents to rear their
children, the right to marry, the right use contraception, the right to have children, and the right to refuse unwanted medical treatment. Overturning Roe would unravel far more than the right to terminate a pregnancy, and many Americans who have never felt they had a personal stake in the abortion debate would suddenly find their own interests threatened, whether it was the elderly
seeking to control their medical treatment, the infertile seeking to use IVF to have a child, the woman seeking to make a decision about genetic testing, the couple heeding public health messages to use a condom to reduce the risk of contracting AIDS or other sexually transmitted
diseases, or the unmarried man who, with his partner, is trying to avoid becoming a father before he is ready to support a family.
As a legal matter, the right of the government to regulate, or even prohibit, reproductive choices depends both on whether they are considered an exercise of especially protected personal liberties and whether their absence has a sufficiently disparate impact on women's lives that it amounts to a denial of equal protection of the law.

Various aspects of reproductive privacy rights have been articulated in a number of landmark cases in the US Supreme Court. The earliest case limited the right of the government to order involuntary sterilization. In the 1960s and 1970s, the Court issued other landmark rulings that protected access to contraceptives and abortion services, declaring that the 'decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices' and that 'if the right of privacy means anything, it is the right of the individual... to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child'.

The earliest cases, such as those concerning forced sterilization, were grounded in a traditional, common-law concern about bodily integrity, but the later cases incorporated concerns about marital privacy and psychological autonomy. For example, a right to contraception for men -- for whom conception is a psychological and potentially economic burden, but not a physical one -- implicitly endorsed a theory of reproductive liberty that went beyond mere bodily integrity and included a more general right to set the course of one's future. This is a notion of reproductive liberty that embraces a variety of activities that have no physical implications but are at the core of the right to self-determination, for example the right to marry, the right to rear one's children in the manner of one's choosing, or the right to use medical services to predict one's risk of having offspring with devastating diseases.

Subsequent abortion decisions have recognized the scope and implications of this expansive notion of personal liberty. Where psychological autonomy was raised, as in Justice Sandra Day O'Connor's statement that 'at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life', it was ravaged by some of her colleagues, as when Justice Scalia wrote that this 'collection of adjectives... can be applied to many forms of conduct that this Court has held are not entitled to constitutional protection... (for example) homosexual sodomy, polygamy, adult incest and suicide, all of which are equally 'intimate' and 'deeply personal' decisions involving 'personal autonomy and bodily integrity', and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable'. Left unsaid in Justice Scalia's dissent, however, is an equally strong historical tradition of banning contraception and interracial marriage, which would once again be an option for individual states should personal and psychological liberty no longer be constitutionally protected.

These comments by Scalia did presage a series of doctrinal struggles within the Supreme Court, and subsequent abortion cases have emphasized instead gender equality or bodily autonomy. Similarly, cases concerning control over the manner of one's death backed away from expanding upon Roe v. Wade's vision of personal liberty. But by the same token, the Court has steadfastly upheld the right to refuse unwanted medical treatment as consistent with the right to privacy and bodily autonomy enunciated in Roe. Overturn Roe and one risks losing the constitutional grounds with which to challenge a state law that forces hospitals to inflict painful and even futile medical interventions on competent, protesting patients.

Thus, the implications of overturning Roe v. Wade are difficult to predict but certainly go beyond the narrow question of abortion. Much depends upon how the court would choose to identify the key justifications for the right to privacy deployed in Roe and which they would now propose to overturn.

If the court reverses Roe v. Wade and limits the right to privacy to intimate marital relations, then technologies such as artificial insemination and in vitro fertilization that often use a third party may not be protected, because they represent a departure from the purest form of marital privacy. Perhaps even more alarmingly, the longstanding right of unmarried persons to obtain contraceptives would be undermined, as would the right of unmarried persons to be free of coercive state efforts to prevent them from bearing children, for example, through forced sterilization or exorbitant tax penalties for having children outside marriage.

If it reverses Roe v. Wade and limits the right to privacy to preventing the government from casually interfering with the physical bodies and reproductive capabilities of its citizens, although there might still be protection from involuntary sterilization, there would be only a far weaker claim of any right to access medical services such as IVF that depend on extra-uterine maintenance or diagnosis of embryos. And again, perhaps more alarmingly, an interpretation narrowly focused on bodily autonomy would no longer support the more expansive notions of privacy and liberty that support parental discretion to choose the language of instruction for their

children or to make other fundamental decisions about how to rear their children.

But however it chooses to reverse Roe v. Wade, it would be necessary to reject existing case law, which singles out human reproduction for the profound way in which it reflects individual choices, aspirations and self-identity. This is because neither marital intimacy nor bodily autonomy rights could explain the right of men to use a simple condom to avoid unintended pregnancy or the right of parents to freely choose whether or not to use genetic testing, that is, to freely choose whether to avoid or embrace the possibility of having a child with genetic disabilities. Rejecting the notion that our liberty rights encompass a right to control the path our lives would clear the way for a broad range of government intrusions into both reproductive decisions and other matters of personal life.

Of course, it is possible that the Court might overturn Roe v Wade not by backing away from its principle of a fundamental right to privacy but rather by a claim that the fertilized egg and developing embryo have competing rights that outweigh even a fundamental right to privacy. One hears this point of view in the claim that the founding fathers listed "life, liberty, and the pursuit of happiness" in that order. But to accept this argument, however, the court would be forced to redefine the egg or embryo as a "person" for the purposes of the 14th amendment; without that status, the interests imputed to the embryo could not outweigh the undisputed interests of an adult woman.

If the courts conclude that embryos are protected as persons by the 14th amendment, it is not only the abortions that follow unprotected sex that could be outlawed. It is not only the abortions following failed contraceptive efforts that could be outlawed. It is also abortions following cases of rape and incest that could be outlawed, because the effect of ruling that embryos have the same rights as children is to rule that nothing short of a threat to a woman's life could justify their destruction.

And re-defining the egg or embryo as a 14th amendment person, entitled to equal protection under the law, has implications that go far beyond the legality of abortion. Now viewed as legally equivalent to a live-born child, a parent would be required to provide nurture, to avoid undue risk, and to effect a rescue when the conceptus was in danger, just as a parent must do for a child. In practical terms, providing nurture and avoiding undue risk might well mean that women would lose the right to choose midwives over physicians, or to use herbal remedies and nutritional supplements rather than prescribed drugs during pregnancy. Indeed, they might even lose the right to treat their own illnesses, such as epilepsy or slow-growing cancer, if such treatments might destroy the embryo but foregoing the treatments would merely interfere with the health, but not the life, of the woman herself.

Even contraceptive techniques such as breast feeding and the rhythm method might be banned, as they not only reduce the odds of fertilization, but when fertilization nonetheless occurs, they reduce the chances that the fertilized egg will successfully implant in the uterine wall. This is precisely the reasoning by which many abortion opponents advocate a ban on birth control pills, IUDs and all other forms of hormonal contraception. Indeed, given that in most months a sexually active woman will lose a fertilized egg during her menstrual cycle, abandoning Roe v. Wade would mean, at least theoretically, that the government could prescribe the precise time of the month when sexual activity is permitted, in order to reduce the chances that a fertilized egg will fail to implant in the uterine wall. More realistically, a duty to rescue an embryo in danger could mean that women would be forced to have every IVF embryo they create put back in their bodies, even if additional embryos posed a threat to fetal and maternal health, and even if pregnancy attempts were likely futile.

Practical consequences such as these demonstrate not only the moral, ethical, and logistical challenges that await us if Roe v Wade is overturned, but also the tremendous implications this would have for women's equality interests. A blanket principle that accords equal rights as between embryos and adults functions, in fact, to place virtually all responsibility and burden upon women. It is women who will be vulnerable to state mandated medical interventions. It is women whose educations will be interrupted, with potentially lifelong consequences. It is women whose jobs and careers will be at risk, with all the economic losses that entails.

That men and women are biologically different is a physiological fact. For some, this suggests that it is women's lot to bear the cost of intimate relations. For others, however, and for the Supreme Court in many of its decisions that go far beyond Roe v Wade, it means that it is the duty of the government to avoid adopting policies or announcing principles that forever place women at the

service of the state rather than as the mistresses of their own lives.
Overall, Roe v. Wade represents the culmination of decades of constitutional law on the need to restrain over-zealous governmental intrusions on personal decisions concerning our families, our bodies, and our lives. In turn, it has formed the basis for yet more decades of constitutional law on the importance of maintaining a zone of personal liberty and privacy, in which individuals may flourish. In a century that will bring ever greater temptations and technological capabilities for governmental surveillance and control of its citizens, maintaining the integrity of this zone of personal liberty and privacy is more important than ever.