

**An Analysis of the Testimony of Judge John G. Roberts on Issues
Relating to Privacy, Reproductive Rights, and *Roe v. Wade*
Before the Senate Judiciary Committee**

Judge Roberts testified before the Senate Judiciary Committee for almost three days. He faced extensive questioning about his views on privacy, reproductive rights, *Roe v. Wade*, and stare decisis. While his testimony provided some insight into judicial philosophy, Judge Roberts provided only limited information or “hints” about his opinion on such critical issues as a woman’s right to choose and the parameters of the right to privacy.

Judge Roberts testified several times that he believed that the right to privacy was protected under the Constitution. Judge Roberts was willing to express his view on *Griswold v. Connecticut* and testified directly that, “I agree with the *Griswold* court’s conclusion that marital privacy extends to contraception.” In explaining his view of the right to privacy, however, he almost always adhered to a recitation of what the Supreme Court had found in the past, providing little insight into how expansively he viewed the right, including its application to the right to choose. His various explanations of the role of precedent in constitutional review could be read to suggest that he is not looking to overrule *Roe* and its reaffirmation in *Planned Parenthood of Southeastern Penn. v. Casey*, but his testimony provided no hard guidance of how he would approach the issue.

After careful review, the Center for Reproductive Rights finds that Judge Roberts’ testimony indicates that he has a clear respect for precedent and the stability it provides and demonstrates that he is not dismissive of the right to privacy. But his unwillingness to discuss any details of his views on the right to privacy, beyond an agreement with *Griswold*, and particularly his unwillingness to engage in any substantive discussion about his views of *Roe v. Wade* and the right to choose raise troubling questions about how he would approach these issues as Chief Justice of the United States.

This document provides an analysis of Judge Roberts’ testimony on areas relating to constitutional interpretation, privacy, and reproductive rights. The document cites and compares Roberts’ testimony with that of other recent nominees.

I. Roberts recognized that the framers intentionally used broad language in certain parts of the Constitution including the word “liberty” in the due process clause and seemed to endorse a relatively fluid style of constitutional interpretation.

Judge Roberts’ recognition that the framers intentionally used broad terms such as “liberty” and his apparent rejection of a narrow originalist style of interpretation suggest that he may not be hostile to the right to privacy as it has developed in Supreme Court jurisprudence over the past few decades.

Judge Roberts was not asked directly about his view of unenumerated rights – those not explicitly identified in the Constitution – and he did not volunteer his view of such rights. But at several instances in his testimony he spoke of the framers’ intentional use of “broad” language and what that means for constitutional interpretation. A strict textual or “originalist” style of interpretation is less likely to apply flexible interpretations of some of the constitution’s terms, which may mean a justice is less likely to have an expansive view of the right to privacy. Indeed, some justices, such as Justice Thomas and Justice Scalia who lean toward narrow interpretations of many constitutional terms, are quite hostile to the right to privacy as it has developed.

In response to questions from Sen. Specter about whether he agreed with Justice Harlan that “the tradition of liberty” in the Constitution is a “living thing,” Judge Roberts testified that in using “broad language like ‘liberty,’ like ‘due process,’ like ‘unreasonable’... [the framers] were crafting a document that they intended to apply in a meaningful way down the ages.” (9/14 a.m.). He also testified that when the framers “adopt[ed] broad terms and broad principles, we should hold them to their word and [apply] them consistent with those terms and those principles. When they adopted principles like liberty, that [phrase] doesn’t get a crabbed or narrow construction.” (9/14 a.m.).

Judge Roberts testified that he rejected a narrow means of interpreting these phrases: “I depart from some views of original intent ... some people view it as meaning just the conditions at that time, just the particular problem. I think you need to look at the words they use, and if the words adopt a broader principle, it applies more broadly.” (9/14 a.m. Sen. Specter).

Sen. Biden asked Judge Roberts whether he believes that the correct method for identifying a liberty interest requires adhering to “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J.),¹ or whether he endorses a more flexible approach such as that described by Justice O’Connor in her concurrence in *Michael H.*²

Roberts seemed to endorse the broader approach. Using *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia’s statute prohibiting interracial marriage), as an example, Roberts testified:

¹ In *Michael J. v. Gerald D.*, the majority of the Court held that a biological father does not have a constitutionally protected liberty interest in a relationship with a child conceived through an adulterous relationship. While Justices Kennedy and O’Connor joined most of Justice Scalia’s opinion, they pointedly did not join his articulation of this method of assessing a due process right, which has become known as “famous footnote 6”. *Michael H. v. Gerald D.*, 491 U.S. at 132 (O’Connor J., concurring).

² Although Justice Scalia wrote the majority opinion, only Chief Justice Rehnquist joined the view he expressed in footnote six. Justice O’Connor, joined by Justice Kennedy, wrote: “Requiring specific approval from history before protecting anything in the name of liberty . . . squashes freedom.” 491 U.S. at 132.

Do you look at the history of miscegenation statutes or do you look at the history of marriage? ... And I'm saying you do not look at it at the narrowest level of generality, which is the statute that's being challenged, because, obviously, that's completely circular. ... So you look at it at a broader level of generality. (9/14 a.m. Sen. Biden)

Judge Roberts did not explicitly reject the approach favored by Justice Scalia. Judge Roberts' answer arguing for "a broader level of generality" for the tradition supporting the right at issue leaves a lot of room for interpretation, but he seems to reject the narrowest approach available.

Other nominees have been asked to address this question and their responses provide a helpful context for considering Judge Roberts' analysis. Notably, Justice Thomas took a position not too different in substance from that articulated by Judge Roberts:

Justice Thomas: I am skeptical of any – when one looks at tradition and history to narrow the focus to the most specific tradition. I think that the efforts should be to determine the appropriate tradition, or the tradition that is most relevant to our inquiry. And to not take a cramped approach or narrow approach that could actually limit fundamental rights. I think that Justice Kennedy's reference to *Loving v. Virginia* was a very catching reference to his objection to . . . was a very telling reference. And one that certainly caught my attention. But I think that I would be skeptical of that kind of approach Senator. . . . The Scalia approach. (Thomas, 9/16/91).³

Because this discussion took place at such a level generality and because Judge Roberts was always so careful to avoid speaking about particular cases or justices, it is difficult to assess how his approach would play out on any specific issues relating to privacy, more generally, or choice, more specifically.

II. Judge Roberts believes the Constitution includes a right to privacy and that this right encompasses a guarantee of marital privacy and use of contraception, but he refused to discuss how far that right might extend.

A. Privacy Generally

Judge Roberts testified explicitly in response to questions from several different Senators that he believes that the Constitution includes a right to privacy -- a substantive right to privacy. This statement alone provides little insight into Judge Roberts' views since every confirmed nominee after Justice Scalia has testified that there is a right to

³ Justice Souter also addressed this question: "I could not accept the view that, as a rule always to be applied, the most specific evidence is the only valid evidence [I]t has got to be a quest for reliable evidence, and there may be reliable evidence of great generality." (Souter, 9/14/90)

privacy in the Constitution.⁴ In addition, Judge Roberts was reluctant to expand on his view of the right beyond that assertion and his explanation of what the Court had found in the past. Indeed, in responding to a question from Sen. Biden, Judge Roberts said, “I believe that every member of the court subscribes to that proposition” that liberty is not limited to freedom from physical restraint and includes privacy. (9/13 a.m.) This testimony provides little insight into Judge Roberts’ views and indicates that the “proposition” leaves substantial room for interpretation.

In a colloquy with Sen. Schumer, Judge Roberts reiterated his testimony that “there is a right to privacy, protected as part of the liberty under the due process clause,” but he refused to reject or comment on Justice Thomas’ comment in his *Lawrence v. Texas* dissent that he could find no “general right to privacy” in the Constitution or the Bill of Rights. 539 U.S. 558, 603 (2003) (Thomas, J. dissenting) (quoting Justice Stewart’s dissent in *Griswold v. Connecticut*, 381 U.S. 479, 530). Under sharp questioning from Sen. Schumer, Judge Roberts declined to explicitly disagree with Justice Thomas’ statement, testifying, “I would not use the phrase general, because I don’t know what it means.”

The colloquy continued with Sen. Schumer asking: “Your reading of Justice Thomas’ [opinion] in *Lawrence*, that he does not believe in that [a substantive right of privacy]?” Judge Roberts answered, “No. I think his statement obviously focused on general. And his conclusion in that case was that the right to privacy protected under the due process clause that you noted he acknowledged at his hearings did not extend to include the activity at issue in *Lawrence*.” (9/14 p.m.).

Judge Roberts appears to be trying to narrow Justice Thomas’ statement in *Lawrence* to make it more consistent with Justice Thomas’ testimony, yet Justice Thomas’ statement, while in one sense addressing the particular activity at issue in *Lawrence* is not limited in its terms. Certainly, Justice Stewart’s dissent in *Griswold* isn’t so limited – as Judge Roberts likely knows. Although Judge Roberts’ unwillingness to directly criticize Justice Thomas’ statement is consistent with his general refusal to comment on issues that may come before the Court, his unnecessarily narrow construction of Justice Thomas’ statement raises questions about how he would approach issues of privacy.⁵

On the other hand, in a colloquy with Sen. Specter about a memorandum he wrote for Attorney General William French Smith in 1981, Judge Roberts seemed to disavow the dismissive view of the right to privacy that was popular among some conservatives at that time. In a short cover memo, Roberts wrote of the “so-called right to privacy” and

⁴ Sen. Biden: Is there such a thing as a constitutionally protected right to privacy?
Judge Scalia: I don’t think I could answer that, Senator, without violating the line I’ve tried to hold. (Scalia 8/5/86). Judge Bork, of course, was famously skeptical of the right to privacy and was not confirmed.

⁵ Judge Roberts also refused to answer whether he disagreed “with Justice Thomas’ interpretation of privacy in any decided case,” stating “that would be commenting on whether that decision was correctly decided or not.” (9/14 p.m. Sen. Schumer).

noted that Dean Erwin Griswold's attached article "argues as we have that an amorphous right is not to be found in the Constitution." Judge Roberts testified that this was the view of Attorney General Smith and Dean Erwin Griswold, who is a subject of the memo. When questioned by Sen. Specter about the memorandum and the apparent skepticism it expressed about the right of privacy, Judge Roberts testified that it did not reflect his views now.⁶

B. *Griswold and the Right to Privacy*

Judge Roberts testified explicitly that he agrees that *Griswold v. Connecticut* was correct to extend the right of marital privacy to the use of contraception. Sen. Kohl asked Judge Roberts if he agreed that "there is a fundamental right to privacy as it relates to contraception." Judge Roberts testified, "I agree with the *Griswold* court's conclusion that marital privacy extends to contraception and the availability of that." (9/13 p.m.) He also noted that the Court, "since *Griswold*, has grounded the privacy right discussed in that case in the liberty interest protected under the due process clause."

In a later colloquy with Sen. Schumer, Judge Roberts agreed that *Griswold* was "on the same plane" as *Brown v. Board of Education* and *Marbury v. Madison* – in that it was so thoroughly settled as to seem untouchable. (9/13 p.m.)

Notably, and by way of comparison, 15 years ago, Justice Souter declined to endorse the decision in *Griswold* because it called into question the underpinnings of *Roe v. Wade*. Although Justice Souter explained that he believed the Constitution protected marital privacy, he volunteered: "It is clear to me [that there is a right to marital privacy but] I suppose that everyone assumes that if there were a successful attack on *Roe v. Wade*, that would then call into question prior privacy cases. So I suppose one simply cannot say that it is inconceivable that it could be challenged." (Souter 9/13/90)

Sen. Feinstein pressed Judge Roberts on the parameters of the right to privacy as set out in *Griswold*.

Feinstein: Do you think that right of privacy that you're talking about there extends to single people, as well as married people?

Roberts: The court held that in the *Eisenstadt* case, which came shortly after *Griswold*, largely under principles of equal protection, and I don't have any quarrel with that conclusion in *Eisenstadt*. (9/14 p.m.)

It is not clear what Judge Roberts meant when he testified that he has no "quarrel" with the conclusion in *Eisenstadt v. Baird*. Superficially, it appears to mean that he agrees with the decision. But some commentators have raised concerns because Justice Clarence Thomas used similar language in his confirmation hearing and, while he has not

⁶ This exchange reflected one of the few times in his three days of testimony that Judge Roberts would comment on his views as reflected in his writings from the Reagan administration.

Sen. Specter: So they weren't necessarily your views then, but they certainly aren't your views now?

Roberts: I think that's fair, yes. (Sept. 13, a.m.)

directly confronted this issue, Justice Thomas has expressed some hostility to the right of privacy in other contexts, including the right to choose.

C. Refusal to Discuss Extension of the Right to Privacy

Judge Roberts consistently refused to discuss or indicate how far he believed the right to privacy should extend. In discussing how he would determine the parameters of the right, Judge Roberts resorted to his hallmark style – explaining what the Court has done in the past and the appropriate process for analyzing unsettled questions.

In response to a question from Sen. Schumer about how he would “divine what the right to privacy means” in the future, Judge Roberts turned first to *Washington v. Glucksberg*, 521 U.S. 702 (1997), in which Supreme Court held there was no constitutional right to assisted suicide, noting that the Court “talked about the necessity of considering the nation’s history, traditions and practices.” In cases that present an issue under the due process clause, Roberts explained, “you begin with precedents . . . and analyze them under principles of stare decisis.” Justice Roberts noted that “all of the justices recognize that” assessing rights under the due process clause “presents particular challenges” because “[y]ou’re not construing the text narrowly, you’re not looking at a particular statute with legislative history.” (9/14 p.m.) This very general exposition provides little guidance into how Judge Roberts will actually go about assessing a claim presented under the due process clause. Indeed, his reference to “all the justices” indicates that he was giving himself wide berth in his answer.

In response to a question from Sen. Feinstein about whether the right to privacy applies at the beginning of life and the end of life, Judge Roberts refused to answer because “the exact scope of it, with respect to the beginning of life and the end of life, those are issues that are coming before the court . . . and I don’t think that I should go further to elaborate upon whether or not it applies in those particular situations.” (9/13 p.m.)⁷

In short, Judge Roberts has provided little indication of how expansively he views the right to privacy.

III. Abortion, *Roe v. Wade*, *Casey*, and Stare Decisis.

Judge Roberts’ refusal to discuss his view of *Roe* or *Casey* leaves Senators with almost no understanding of how he will approach the issue of a woman’s right to choose when it comes before the Court. The discussion of his view of precedent generally and his identification of *Casey* as “a precedent on [the] precedent” of *Roe* would appear to suggest that he is not looking to overrule *Roe*. But his unwillingness to address the factors of stare decisis more specifically as they apply in this context leaves Senators with little

⁷ Interestingly, about the “implied right of privacy” in this context, Roberts took issue with her terminology. “I don’t necessarily regard it an implied right. It is the part of liberty that is protected under the due process clause...” It is not clear whether he has a substantive objection to considering it an implied right, which is quite common, and, if so, how that would play out.

assurance as to whether he believes *Casey* is now sufficiently settled to withstand challenge.

A. Judge Roberts refused to discuss his view of Roe v. Wade or the substantive holding in Casey

Judge Roberts refused to discuss his views on *Roe v. Wade*, *Planned Parenthood of Southeastern Pennsylvania v Casey*, or any aspect of the right to privacy that is implicated in right to choose – beyond the right to marital privacy in *Griswold*. Although several Senators tried to approach the issue from several different angles, Judge Roberts refused to explain his view or, aside from a kind of hornbook recitation of constitutional interpretation, his approach to the issue.

For instance, in the second round of questioning, Sen. Specter asked if Judge Roberts agreed with a line in Chief Justice William Rehnquist’s dissent in *Casey* that “A woman’s interest in having an abortion is a form of liberty protected by the due process clause.” Roberts responded, “That does get into an area where cases are coming up I don’t think I should opine on the correctness or incorrectness of particular views in areas that are likely to come before the Court.” (9/14 a.m.)

When Sen. Biden confronted Judge Roberts with statements made by Justice Ginsburg at her confirmation hearing expressing her views on the constitutionality of abortion restrictions, Judge Roberts responded: “Well, that is in an area where I think I should not respond.” (9/13 a.m.)

In response to a question from Sen. Brownback about whether an “unborn child is a person or a piece of property,” Judge Roberts declined to answer: “Because cases are going to come up in this area and that could be the focus of legal argument in those cases, I don’t think it would be appropriate for me to comment on that one way or another.” (9/14 a.m.)

Responding to a question from Sen. Specter about the *Casey* decision, Judge Roberts briefly expressed an opinion touching on the topic of the right to choose:

Sen. Specter: The joint opinion [in *Casey*] says, “The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.” Do you agree with that statement?

Judge Roberts: Well, yes, Senator, as a general proposition, but I do feel compelled to point out that I should not, based on the precedent of prior nominees, agree or disagree with particular decisions.

Judge Roberts was not asked explicitly whether the argument he authored or co-authored in the Solicitor General’s *Rust v. Sullivan* brief that *Roe* was wrongly decided reflected his views then or today. When asked more generally about the brief, he

described it is a “position advanced by the administration” and noted that he was one of nine lawyers on the brief. (9/13 p.m. Sen. Kohl)

Judge Roberts repeatedly invoked what he called the “Ginsburg rule” to defend his refusal to answer questions on abortion and certain other issues that he believed would come before the Court again. His refusal is in keeping with a recent trend in which nominees, except for Robert Bork, refuse to discuss certain issues.⁸ For instance, Justice Souter refused to discuss his view of *Roe* at the time of his confirmation hearings or at the time it was handed down. (Souter, 9/14/90). Justice Thomas also refused to discuss his view of the decision – indeed, he claimed he could not remember discussing the case and had never “debated” it. (9/12/91).

Justice Breyer, too, declined to answer questions about *Roe* and *Casey* beyond noting that *Casey* is settled law. Sen. Thurmond asked Justice Breyer for his opinion of *Roe* and whether he agreed that “the first trimester of pregnancy is distinctive and that the state should not be able to prohibit abortion during that period.” Justice Breyer noted that *Roe* was recently reaffirmed by *Casey* and declined to answer further: “The questions that you are putting to me are matters of how that basic right applies, where it applies, under what circumstances. And I do not think I should go into those for the reason that those are likely to be the subject of litigation in front of the Court.” (Breyer, 7/12/94).

Justice Ginsburg’s testimony presents a different circumstance than the others. She willingly discussed some issues surrounding abortion, mostly linked with her explanation of a lecture she had given raising the issue of whether *Roe* could have been decided on equal protection grounds and other public comments she had made about the decision. Her explanation of the views expressed in her writings, linked with the way she explained the Court’s holding in *Roe* and *Casey* seemed to provide significant insight into her views. For the most part, however, she also declined to provide her view of how she would address a case that raised *Casey*. For instance, when Sen. Metzenbaum asked directly about whether *Casey* stands “for the proposition that the right to choose is a fundamental constitutional right,” Justice Ginsburg said, “What regulations will be permitted is certainly a matter likely to be before the Court. Answers depend, in part, Senator, on the kind of record presented to the Court. It would not be appropriate for me to go beyond the Court’s recent reaffirmation that abortion is a woman’s right guaranteed by the 14th amendment; it is part of the liberty guaranteed by the 14th amendment.” (Ginsburg, 7/20/93).⁹

Neither Justice Souter nor Justice Breyer had any real record on abortion when they came before the Senate Judiciary Committee. Justice Ginsburg, of course, had a fairly substantial record of commentary on the subject. Judge Roberts falls somewhere in between. He had made several comments as a young lawyer working for Attorney

⁸ Of course Justice Scalia, who also would not discuss *Marbury v. Madison*, refused to discuss *Roe*.

⁹ Similarly, in response to a question from Sen. Hatch about the abortion funding cases, *Maher* and *Harris*, Justice Ginsburg said, “I agree that those cases are the Supreme Court’s precedent. I have no agenda to displace them and that is about all I can say.”

General William French Smith, and, as deputy solicitor general, he co-authored a brief arguing that *Roe* should be overturned. When pressed about his earlier work, on this topic and others, Roberts generally deflected the inquiry by contending that he was representing the views of his boss or client. Thus, he was never called upon to explain those views and whether his views had changed.

B. Judge Roberts identified Roe and Casey as settled law, but refused to explain how he would apply the rules of stare decisis to a review of those decisions.

Judge Roberts spent a good deal of his testimony discussing principles of stare decisis and the application of these principles in *Casey*. Indeed, his testimony opened with a long colloquy between him and Sen. Specter about *Casey*, its discussion of stare decisis and how that applies to the right to choose. Roberts, as he did throughout his testimony, willingly explained and even analyzed the rules of stare decisis but he consistently refused to discuss how the principles actually applied to a consideration of the right at issue.

Judge Roberts explained that *Casey* had emphasized the importance of settled expectations in reviewing a challenge to a precedent, but that the Court also looked at “the workability and the erosion of precedents.” But when Sen. Specter asked, “do you see any erosion of precedent as to *Roe*?” Judge Roberts declined to answer, stating, “I should stay away from discussions of particular issues that are likely to come before the court again.” (9/13 a.m.).

Under additional questioning, Judge Roberts explained that *Casey* “went through the various factors on stare decisis and reaffirmed the central holding in *Roe*, while revisiting the trimester framework and substituting an undue burden analysis with strict scrutiny. So, as of ’92, you had a reaffirmation of the central holding in *Roe*. That decision, that application of stare decisis is, of course, itself a precedent that would be entitled to respect under those principles.” (9/13 a.m.).

Seeming to emphasize the precedential value of *Casey*, Roberts testified further, “[T]he *Casey* decision itself, which applies the principles of stare decisis to *Roe v. Wade*, is itself a precedent of the court entitled to respect under the principles of stare decisis. And that would be the body of law that any judge confronting an issue in this area would begin with; not simply the decision in *Roe* but its reaffirmation in the *Casey* decision. . . . It is a precedent on whether or not to revisit the *Roe v. Wade* precedent.” (9/13 a.m.).

These statements suggest a belief that the *Casey* precedent is strong and unlikely to be successfully challenged. In other testimony, Judge Roberts was not quite as direct. For instance in response to questions from Sen. Feinstein about the specifics of the reaffirmation of *Roe* in *Casey*, Judge Roberts called *Casey* a “precedent on precedent . . . [its reaffirmation of *Roe*] is a precedent entitled to respect like any other precedent of the court.” (9/13 p.m.).

Notably, too, in his beginning colloquy with Sen. Specter about stare decisis, Judge Roberts referred to two decisions that overruled recent precedent in other areas: *Lawrence v. Texas*, a 2003 gay rights case that overruled a 1986 decision, *Bowers v. Hardwick*, 539 U.S. 558 (2003); and *Payne v. Tennessee*, 501 U.S. 808 (1991), a 1991 decision on the use of victim impact statements in capital cases that overruled decisions from 1987 and 1989.

C. Like most nominees before him, Roberts assured the Senators that his personal views will not influence his decision on abortion.

Although he refused to discuss his personal view of abortion, Judge Roberts testified that his personal or religious views would have no influence on how he viewed the issue as a judge. In response to a question from Sen. Specter about whether his personal views would prevent him from applying *Casey* as precedent, Judge Roberts said, “there’s nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the court faithfully under principles of stare decisis.” (9/13 a.m.)

Similarly, in response to a question from Sen. Feinstein, Roberts volunteered, “I do know this: that my faith and my religious beliefs do not play a role in judging. When it comes to judging, I look to the law books and always have. I don’t look to the Bible or any other religious source.” (9/13 p.m.)

In light of the fact that most nominees have made similar disavowals,¹⁰ these statements provide little insight into the role his personal views – whatever they may be – will play in his review of these issues.

¹⁰ For instance, Justice Scalia testified, “I think I may have criticized the decision (*Roe*) but I do not recall passing moral judgment on the issue. But I agree . . . that one of the primary qualifications for a judge is to set aside personal views.” (8/5/86, Scalia). Justice Souter, also testified: “Whether I do or do not find it [abortion] moral or immoral, will play absolutely no role in any decision which I make, if I am asked to make it, on the question of what weight should or . . . may be given to the interest which is represented by the abortion decision.” (9/14/90 Souter).