

**Current Supreme Court Justices' Answers to Questions  
About *Roe* and Abortion During Their Confirmation Hearings**

**Justice Samuel Alito**  
2006

**Summary:** Judge Alito provided little substantive information about his judicial philosophy regarding constitutional protection for abortion rights.<sup>1</sup> In contrast to his willingness to identify *Brown v. Board of Education* and *Griswold v. Connecticut* as well-settled, Judge Alito consistently refused to say that *Roe* and *Casey* were settled law.

**Excerpts:**

**Senator Schumer.** . . . You never, in the Third Circuit, were squarely presented with the question that I asked, which is a decisive question, which is whether the Constitution protects a woman's right to choose. You were never asked in the court, you were never asked to overturn *Roe v. Wade*. And even if you were in the Third Circuit, you could not, because you were bound by the precedent of the Court. I do not think your Third Circuit rulings are dispositive on what you would do should you become a U.S. Supreme Court Justice. . . .<sup>2</sup>

**Judge Alito.** If the matter were to come up before me on the Supreme Court, I would consider the issue of *stare decisis*, and if the case got beyond that, I would go through that entire judicial decisionmaking process that I described. That's not a formality to me. That is the way in which I think a judge or a Justice has to address legal issues, and I think that is very important, and I don't know a way to answer a question about how I would decide a constitutional question that might come up in the future, other than to say I would go through that whole process. I don't agree with the idea that the Constitution always trumps *stare decisis*—

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**Senator Durbin.** This is what troubles me, that you do not see *Roe* as a natural extension of *Griswold*, that you do not see the privacy rights of *Griswold* ended by the decision in *Roe*, that you decided to create categories of cases that have been decided by the Court that you will concede have constitutional protection, but you have left in question the future of *Roe v. Wade*. . . . But let me just ask you this. John Roberts said that *Roe v. Wade* is the settled law of the land. Do you believe it is the settled law of the land?

**Judge Alito.** *Roe v. Wade* is an important precedent of the Supreme Court. It was decided in 1973, so it has been on the books for a long time. It has been challenged on a number of

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<sup>1</sup> Complete excerpts of all questions and answers related to *Roe*, *Casey* or abortion available from CRR upon request.

<sup>2</sup> Complete transcripts of the nomination hearings are available at:  
<http://www.gpoaccess.gov/congress/senate/judiciary/scourt.html>.

occasions, and I discussed those yesterday, and the Supreme Court has reaffirmed the decision, sometimes on the merits, sometimes in *Casey* based on *stare decisis*, and I think that when a decision is challenged and it is reaffirmed that strengthens its value as *stare decisis* for at least two reasons. First of all, the more often a decision is reaffirmed, the more people tend to rely on it, and second, I think *stare decisis* reflects the view that there is wisdom embedded in decisions that have been made by prior Justices who take the same oath and are scholars and are conscientious, and when they examine a question and they reach a conclusion, I think that's entitled to considerable respect, and of course, the more times that happens, the more respect the decision is entitled to, and that's my view of that. So it is a very important precedent that—

**Senator Durbin.** Is it the settled law of the land?

**Judge Alito.** It is a—if settled means that it can't be re-examined, then that's one thing. If settled means that it is a precedent that is entitled to respect as *stare decisis*, and all of the factors that I've mentioned come into play, including the reaffirmation and all of that, then it is a precedent that is protected, entitled to respect under the doctrine of *stare decisis* in that way.

**Senator Durbin.** How do you see it?

**Judge Alito.** I have explained, Senator, as best I can how I see it. It is a precedent that has now been on the books for several decades. It has been challenged. It has been reaffirmed, but it is an issue that is involved in litigation now at all levels. There is an abortion case before the Supreme Court this term. There are abortion cases in the lower courts. I've sat on three of them on the Court of Appeals for the Third Circuit. I'm sure there are others in other courts of appeals, or working their way toward the courts of appeals right now, so it's an issue that is involved in a considerable amount of litigation that is going on.

### **Chief Justice John Roberts**

2005

**Summary:** Judge Roberts refused to discuss his view of *Roe*, *Casey*, or any aspect of the right to privacy that is implicated in the right to choose (beyond *Griswold*). Judge Roberts identified *Roe* and *Casey* as settled law, but he refused to discuss how he would apply the rules of precedent to review a challenge to *Roe* or *Casey*.

#### **Excerpts:**

**Chairman Specter.** Well, do you see any erosion of precedent as to *Roe*?

**Judge Roberts.** Well, again, I think I should stay away from discussions of particular issues that are likely to come before the court again. And in the area of abortion, there are cases on the courts docket, of course. It is an issue that does come before the court.

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**Chairman Specter.** Judge Roberts, in your confirmation hearing for the circuit court, your testimony read to this effect, and it's been widely quoted: "Roe is the settled law of the land." Do you mean settled for you, settled only for your capacity as a circuit judge, or settled beyond that?

**Judge Roberts.** Well, beyond that, it's settled as a precedent of the court, entitled to respect under principles of *stare decisis*. And those principles, applied in the *Casey* case, explain when cases should be revisited and when they should not. And it is settled as a precedent of the court, yes.

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**Senator Feinstein.** This morning, there was a discussion about *stare decisis*. You pointed out there were factors in a consideration of *stare decisis*. I think one of the things you said was workability of framework is one of the main principles you look for in *stare decisis*. Well, in its decision in *Casey*, the court specifically affirmed the doctrine of *stare decisis*, as it applies to *Roe*. The court reviewed prudential and pragmatic considerations to gauge the respective costs of reaffirming and overruling a case, that case. In doing so, the court unambiguously concluded that *Roe* has in no sense proven unworkable. . . . Do you agree with this conclusion?

**Judge Roberts.** Well, that determination in *Casey* becomes one of the precedents of the court, entitled to respect like any other precedent of the court, under principles of *stare decisis*. I have tried to draw the line about not agreeing or disagreeing with particular rulings. But that is a precedent of the court. It is a precedent on precedent. In other words, it has examined *Roe* and . . .

**Senator Feinstein.** So you agree that the court said that, obviously.

**Judge Roberts.** Well, it said that and that is a precedent entitled to respect under principles of *stare decisis* like any other precedent of the court. But in terms of a separate determination on my part whether this decision is correct or that decision is correct, my review of what other nominees have done is that that's where they draw the line and that's where I've drawn the line.

**Justice Stephen Breyer**  
1994

**Summary:** Judge Breyer stated that the decisions in *Roe* and *Casey* are settled law, but refused to address specific applications of those precedents.

**Excerpts:**

**Senator Thurmond.** Judge Breyer, it is likely that Justice Blackmun is most widely known to the public as the author of *Roe v. Wade*. What was your impression of his majority opinion in that landmark decision? In particular, give us your thoughts on where he draws the line at different points during pregnancy as it relates to the State's interest in the regulation of abortion-related services? For instance, do you agree that the first trimester of pregnancy is distinctive and that the State should not be able to prohibit abortion during that period?

. . .

**Judge Breyer.** Yes; the case of *Roe v. Wade* has been the law for 21 years or more, and it was recently affirmed by the Supreme Court of the United States in the case of *Casey*. That is the law. 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.

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**Senator Moseley-Braun.** The notion of liberty arises, obviously, in a number of different areas, . . . but I just would like for my own edification to really get a specific response from you. This goes to the issue of a woman's right to choose. Justice Ginsburg a year ago said that she believed that a woman's right was part of the essential dignity of the individual; and of course, the notion of privacy has also been referred to as the right to be left alone. And I guess my specific question is whether you would believe that a woman's right to be left alone means the right to be left alone with regard to as intimate a decision as whether or not to be pregnant.

**Judge Breyer.** That is the determination of *Roe v. Wade*. *Roe v. Wade* is the law of this country, at least for more than 20 years, that there is some kind of basic right of the nature that you describe. Recently, the Supreme Court has reaffirmed that right in *Casey v. Planned Parenthood*. So, in my opinion, that is settled law.

**Justice Ruth Bader Ginsburg**  
1993

**Summary:** Judge Ginsburg responded to questions regarding statements she had made that were seen by some as criticisms of the *Roe* decision. She also addressed her views as to how the *Casey* decision differs from *Roe*.

**Excerpts:**

**Senator Metzenbaum.** . . . I am frank to say that I am puzzled by your often repeated criticisms of the decision in *Roe v. Wade*, that the Court went too far and too fast. . . . Would you be willing to explain your basis for making those statements about *Roe* and the state of abortion law at the time of the *Roe* decision?

**Judge Ginsburg.** Yes, Senator Metzenbaum, I will try. The statement you made about the law moving in a reform direction is taken directly from Justice Blackmun's decision in *Roe* (1973) itself. He explained that, until recently, the law in the States had been overwhelmingly like the Texas law, but that there had been a trend in the direction of reform. The trend had proceeded to the extent that some one-third of the States, in a span of a very few years, had reformed their abortion laws from the point where only the life of the woman was protected. . . . So I took that

statement not from any source other than the very opinion, which I surely do not criticize for making that point. I accept it just as it was made in *Roe v. Wade*.

**Senator Metzenbaum.** . . . After the *Casey* decision, some have questioned whether the right to choose is still a fundamental constitutional right. In your view, does the *Casey* decision stand for the proposition that the right to choose is a fundamental constitutional right?

**Judge Ginsburg.** The Court itself has said after *Casey* (1992)—I don't want to misrepresent the Supreme Court, so I will read its own words. This is the statement of a majority of the Supreme Court, including the dissenters in *Casey*: "The right to abortion is one element of a more general right of privacy \* \* \* or of Fourteenth Amendment liberty." That is the Court's most recent statement. It includes a citation to *Roe v. Wade*. The Court has once again said that abortion is part of the concept of privacy or liberty under the 14th amendment. 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. Perhaps I can say one thing more. It concerns an adjustment we have seen moving from *Roe* to *Casey*. The *Roe* decision is a highly medically oriented decision, not just in the three-trimester division. *Roe* features, along with the right of the woman, the right of the doctor to freely exercise his profession. The woman appears together with her consulting physician, and that pairing comes up two or three times in the opinion, the woman, together with her consulting physician. The *Casey* decision, at least the opinion of three of the Justices in that case, makes it very clear that the woman is central to this. She is now standing alone. This is her right. It is not her right in combination with her consulting physician. The cases essentially pose the question: Who decides; is it the State or the individual? In *Roe*, the answer comes out: the individual, in consultation with her physician. We see in the physician something of a big brother figure next to the woman. The most recent decision, whatever else might be said about it, acknowledges that the woman decides.

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**Senator Feinstein.** If I understand what you are saying—correct me if I am wrong—you are saying that *Roe* could have been decided on equal protection grounds rather than the fundamental right to privacy. . . .

**Judge Ginsburg.** Yes, Senator, except in one respect. I never made it an either/or choice. That has been said in some accounts of my lectures. It is incorrect. I have always said both, that the equal protection strand should join together with the autonomy of decisionmaking strand, so that it wasn't a matter of equal protection or personal autonomy, it was both. . . . I would have had added another underpinning, one I thought was at least as strong, indeed, stronger. But my argument was never equal protection rather than personal autonomy. It was both. I used the *Struck* case as an example, because it was the first time I fully expressed myself on this subject. I urged that it was a woman's choice either way—her choice to bear or not to bear a child. So the only amendment I would make in what you said is that it was never either/or; it was both.

**Justice Clarence Thomas**

1991

**Summary:** Judge Thomas steadfastly refused to answer any questions regarding his views of *Roe*.

**The Chairman.** Well, Judge, does that right to privacy in the liberty clause of the 14th amendment protect the right of a woman to decide for herself in certain instances whether or not to terminate a pregnancy?

**Judge Thomas.** Senator, I think that the Supreme Court has made clear that the issue of marital privacy is protected, that the State cannot infringe on that without a compelling interest, and the Supreme Court, of course, in the case of *Roe v. Wade* has found an interest in the woman's right to—as a fundamental interest a woman's right to terminate a pregnancy. I do not think that at this time that I could maintain my impartiality as a member of the judiciary and comment on that specific case.

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**Senator Leahy.** . . . But am I also correct in characterizing your testimony here today as feeling that as a sitting judge it would be improper even to express an opinion on *Roe v. Wade*, if you do have one?

**Judge Thomas.** That is right, Senator. I think the important thing for me as a judge, Senator, has been to maintain my impartiality. When one is in the executive branch—and I have been in the executive branch, and I have tried to engage in debate and tried to advance the ball in discussions, tried to be a good advocate for my points of views and listening to other points of views. But when you move to the judiciary, I don't think that you can afford to continue to accumulate opinions in areas that are strongly controverted because those issues will eventually be before the Court in some form or another.

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**Senator Kohl.** How do you reconcile your willingness to discuss this area of the Constitution, which is still unsettled law, with your unwillingness to discuss another area of the Constitution, which is the woman's right to choice?

**Judge Thomas.** Senator, I think what I have attempted to do is, to the best of my ability, without judging or prejudging the case, to simply set out in an area that you have requested the analysis of what the Court has done and where it has gone. I have indicated and I think it is important to indicate that the area of *Roe v. Wade* is a difficult, it is a controversial area. Cases are coming before the Court in many different postures. And I think it would—and I think it is a judgment that each member of the judiciary has to make. I think it would undermine my ability to impartially address that very difficult issue, if I am confirmed, to go further than I have gone.

**Justice David Souter**  
1990

**Summary:** Judge Souter acknowledged that a woman has a liberty interest in determining the outcome of her pregnancy, but refused to answer any questions related to *Roe*.

**Excerpts:**

**The Chairman.** Now, you have just told us that the right to use birth control, to decide whether or not to become pregnant is one of those fundamental rights—the value placed on it is fundamental. Now, let us say that a woman and/or her mate uses such a birth control device and it fails. Does she still have a constitutional right to choose not to become pregnant?

**Judge Souter.** Senator, that is the point at which I will have to exercise the prerogative which you were good to speak of explicitly. I think for me to start answering that question, in effect, is for me to start discussing the concept of *Roe v. Wade*. I would be glad . . . to explain in some detail my reasons for believing that I cannot do so, but of course, they focus on the fact that ultimately the question which you are posing is a question which is implicated by any possibility of the examination of *Roe v. Wade*. That, as we all know, is not only a possibility, but a likelihood that the Court may be asked to do it.

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**The Chairman.** . . . Now, my question is this, Judge. . . . if the liberty interest in choosing whether or not to become pregnant in the first instance is a fundamental liberty interest, fundamental right of privacy, is that liberty interest terminated when a woman becomes pregnant?

**Judge Souter.** Mr. Chairman, I think there are two questions in your question. First, is the interest that the woman would assert following pregnancy a liberty interest? Second, having asserted that, what weight should be given to it? Should it be given the same constitutional weight as the liberty interest which she asserts prior to pregnancy? With respect to the first question, the answer is undoubtedly yes. I think that going back to an exchange you and I had yesterday, I think you alluded to that. There are the Supreme Court reports, including dissenting and concurring opinions, that are replete with references to the fact in just such contexts as this that liberty is not limited to locomotion. That is, that is exactly the sense that you have been explaining this afternoon. So, of course, it would be asserted as a liberty interest. The second question, how should that liberty interest be valued, is one of the central questions in the *Roe v. Wade* debate. And with respect to that, for reasons that I mentioned yesterday, I think that is the point at which I must respectfully draw the line.

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**Senator Leahy.** You do not have the same sense, to whatever degree you consider privacy in *Griswold* settled—to whatever extent that is—you do not have in your own mind the same sense of settlement on *Roe v. Wade*. Is that correct?

**Judge Souter.** Well, with respect, sir, I think that is a question that I should not answer because I think to get into that kind of a comparison is to start down the road on an analysis of one of the strands of thought upon which the *Roe v. Wade* decision either would or would not stand. So, with respect, I will ask not to be asked to answer that.

**Senator Leahy.** But you don't feel the same compunction against answering the same question regarding *Griswold*?

**Judge Souter.** Well, I have drawn a fine line on *Griswold*. I have said that I believe there is, in fact, a marital right to privacy which is at the core of any privacy doctrine. I have not endorsed the *Griswold* decision as such. It is a fine line to draw, Senator.

### **Justice Anthony Kennedy**

1987

**Summary:** Judge Kennedy discussed his view of *stare decisis* but did not specifically address *Roe* or any particular application of *stare decisis*

#### **Excerpt:**

**Senator Heflin.** In Judge Bork's hearing, I think we questioned him for a long time before we finally got around to asking him about *Roe v. Wade*. I suppose if there is any one issue, that issue is probably within the spotlight the most. He answered by saying that his position relative to reviewing *Roe v. Wade*, if it came up for a review and if he was on the Supreme Court, would be directed in three different areas. One is looking to the Constitution to find whether or not there was any specific authorization for an abortion; second, whether or not he could find a general right of privacy by which he would base a decision relative to *Roe v. Wade*; and, third, *stare decisis*. . . . In all fairness I think the American people would like for you to give an expression pertaining to that case, your views, how you would approach, without specifying how you might hold, but how you would review and how you would approach that issue.

**Judge Kennedy.** In any case, Senator, the role of the judge is to approach the subject with an open mind, to listen to the counsel, to look at the facts of the particular case, to see what the injury is, see what the hurt is, to see what the claim is, and then to listen to his or her colleagues, and then to research the law. What does the most recent precedent, the precedent that is before the Court if it is being examined for a possible overruling, and what does that precedent say? What is its logic? What is its reasoning? What has been its acceptance by the lower courts? Has the rule proven to be workable? Does the rule fit with what the judge deems to be the purpose of the Constitution as we have understood it over the last 200 years? History is tremendously important in this regard. Now, as you well appreciate, and as you certainly know, Senator, *stare decisis* is not an automatic mechanism. We do not just pull a *stare decisis* lever or not pull it in any particular case. *Stare decisis* is really a description of the whole judicial process that proceeds on a case-by-case basis as judges slowly and deliberately decide the facts of a particular case and hope their decision yields a general principle that may be of assistance to themselves and to later courts. *Stare decisis* ensures impartiality. That is one of its principal uses. It



ensures that from case to case, from judge to judge, from age to age, the law will have a stability that the people can understand and rely upon, that judges can understand and rely upon, and that attorneys can understand and rely upon. That is a very, very important part of the system. Now there have been discussions that *stare decisis* should not apply as rigidly in the constitutional area as in other areas. The argument for that is that there is no other overruling body in the constitutional area. In a *stare decisis* problem involving a non-constitutional case, the Senate and the House of Representatives can tell us we are wrong by passing a bill. That cannot happen in the constitutional case. On the other hand, it seems to me that when judges have announced that a particular rule is found in the Constitution, it is entitled to very great weight. The Court does two things: it interprets history and it makes history. It has got to keep those two roles separate. *Stare decisis* helps it to do that.

**Justice Antonin Scalia**  
1986

**Summary:** Judge Scalia declined to answer questions related to *Roe*.

**Excerpts:**

**Senator Kennedy.** Do you expect to overrule the *Roe v. Wade* Supreme Court decision if you are confirmed?

**Judge Scalia.** Senator, I do not think it would be proper for me to answer that question. . . . I mean, if I can say why. Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.

**Senator Kennedy.** Well, that is part of this whole process, giving you an opportunity to speak to those questions. But it is also part of this process to find out what kind of relevancy you give to previous Court decisions, and how significant they are in terms of your own legal experience, and when they might be overturned and when they might not be. And as I gather from your answer, that is kind of a variable, that some have stronger standing than others, and that that is your view. But in terms of that particular view, you are not prepared to indicate, at least in that case, in the *Roe v. Wade* case, where you come out, as to whether you feel that that is a strong precedent or a weak precedent. But evidently you believe that some precedents are weaker and some are stronger in the doctrine of *stare decisis*.

**Judge Scalia.** That is right, sir. And nobody arguing that case before me should think that he is arguing to somebody who has his mind made up either way.

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**Senator Mathias.** Thank you, Mr. Chairman. Judge Scalia, as you well know, one of the special qualities a judge must have is the ability to put aside very deeply held personal beliefs in order to

apply the law and the Constitution fairly and equitably to every litigant who stands before him. Your exchange with Senator Kennedy on the subject of *Roe v. Wade* suggests an area where you have written—and I am not trying now to lead you down the pathways of the future. We will look back to the road of the past. You have written on the subject of *Roe v. Wade*, and while I do not pretend to be an expert on every word you have written, I believe you have expressed doubts about that decision, both on moral as well as jurisprudential grounds.

**Judge Scalia.** I am not sure the latter is true, Senator. I think I may have criticized the decision, but I do not recall passing moral judgment on the issue. But I agree with your opening statement, that one of the primary qualifications for a judge is to set aside personal views.

**Senator Mathias.** However it may be with your article on *Roe v. Wade*, the problem remains. What does a judge do about a very deeply held personal position, a personal moral conviction, which may be pertinent to a matter before the Court?

**Judge Scalia.** Well, Senator, one of the moral obligations that a judge has is the obligation to live in a democratic society and to be bound by the determinations of that democratic society. If he feels that he cannot be, then he should not be sitting as a judge. There are doubtless laws on the books apart from abortion that I might not agree with, that I might think are misguided, perhaps some that I might even think in the largest sense are immoral in the results that they produce. In no way would I let that influence my determination of how they apply. And if indeed I felt that I could not separate my repugnance for the law from my impartial judgment of what the Constitution permits the society to do, I would recuse myself from the case.

**Justice John Paul Stevens**

1975

Justice Stevens was not questioned on *Roe v. Wade* or abortion during his testimony before the Senate Judiciary Committee.