NATIONAL WOMEN'S LAW CENTER

Statement Of The National Women's Law Center
In Opposition To The Confirmation Of Judge David Souter
Submitted To The Senate Committee On The Judiciary
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Katherine Connor
Nancy Duff Campbell
Marcia D. Greenberger

1616 P Street, NW • Suite 100 • Washington, DC 20036 • (202) 328-5160

On September 11, 1990, the National Women's Law Center issued its report, Judge Souter and the Confirmation Process: The Future of Women's Constitutional Rights, focusing on the serious concerns raised by Judge Souter's record on two issues of critical importance to women -- the fundamental right to privacy that includes contraception, pregnancy and termination of pregnancy and especially searching judicial scrutiny of sex discrimination under the equal protection clause of the fourteenth amendment. Because these two constitutional rights are the core principles upon which women must depend when the government draws distinctions based on sex, the report concluded that Judge Souter should not be confirmed unless he allays the concerns raised by his record and demonstrates his commitment to these bedrock principles.

The National Women's Law Center has carefully listened to all of Judge Souter's testimony and must conclude that he has failed to allay the substantial concerns raised by his record and to demonstrate a commitment to core constitutional principles of fundamental importance to women. Thus, we must oppose the nomination of Judge Souter to the Supreme Court.

The application of the right to privacy to women has been achieved through a long line of Supreme Court cases recognizing that courts must subject laws that interfere with contraception, pregnancy and termination of pregnancy to strict judicial scrutiny. In the hearings, Judge Souter recognized that there is a fundamental constitutional right to privacy and that the right extends to procreation in marriage. However, he refused to state whether the right extends to contraception generally or termination of pregnancy in or outside of marriage. The implications of his position for the continued constitutional protection of pregnancy are also unclear. Judge Souter based his refusal to respond to these central questions on his unwillingness to indicate his position on the validity of Roe v. Wade. However, these core principles could be and should have

been affirmed by Judge Souter; his doing so would not have compromised his independence on the ultimate question of whether he would overturn Roe v. Wade. Thus, Judge Souter failed to allay the concerns raised by his record and failed to demonstrate a commitment to women's fundamental privacy rights.

So, too, Judge Souter failed to allay the substantial concerns raised by his record on equal protection. Until the middle tier heightened scrutiny standard for measuring sex discrimination was developed by the Supreme Court, beginning in 1971, no law treating men and women differently had ever been invalidated under the equal protection clause. Yet, as Attorney General and as a New Hampshire Supreme Court judge, Judge Souter repeatedly criticized the heightened scrutiny standard, and during the hearings he reiterated several times these criticisms.

Judge Souter stated that the middle tier level of scrutiny is too loose a standard, allowing judges to slip toward the lowest rational basis standard of review for equal protection challenges. Yet, Judge Souter described his problem with the current middle tier test in connection with its use in older cases (Royster Guano Co. v. Virginia (1920) and Reed v. Reed (1971)) where a less rigorous standard was in place than is now the law, thereby leaving the impression that he viewed the middle tier test as less rigorous than it currently is. Moreover, he refused to commit to any test for sex discrimination challenges under the equal protection clause beyond stating that he would apply a test more stringent than the lowest rational basis standard of review. His description of the current standard, in combination with his refusal to articulate a test he would adopt in place of the current standard or in any way to commit to a standard at least as rigorous as the current test, leaves women in the country without any assurance of meaningful protection against sex discrimination.

Moreover, Judge Souter's failure to demonstrate an understanding of the nature of discrimination and the ways in

which it is eradicated does not bode well for his interpretation and enforcement of equal protection guarantees. Judge Souter acknowledged that as Attorney General of New Hampshire he defended the refusal of the state to file statistical data on the racial composition of its workforce against a challenge under Title VII of the Civil Rights Act of 1964, and the state's use of a literacy test against a challenge under the Voting Rights Act. He stated, however, that his positions in these cases were not positions he would have agreed with at the time if they were presented to him as a judge, or positions that validly could be asserted today by a state. Despite distancing himself from his earlier positions, Judge Souter continued to defend his advocacy of these positions on the grounds that a state without racial discrimination, absent considerations of a uniform national rule, should not be required to file statistical data on race, or prohibited from using a literacy test in a nondiscriminatory manner. The suggestion that such an argument is an appropriate defense evidences a lack of understanding about the way discrimination may be revealed, since, for example, until statistical data is collected discrimination may not be apparent. Moreover, Judge Souter's assertion that New Hampshire was free of discrimination in the mid-1970s when the state took these positions lacks credibility and suggests an Attorney General insensitive to very real problems of New Hampshire's minority population. Rather than allay concerns about Judge Souter's understanding of the nature of discrimination and the ways in which it is eradicated, his statements at the hearings serve to intensify them.

Judge Souter's persistent refusal to state his position on key privacy concepts, and his failure to articulate his commitment to an equal protection standard at least as strong as the standard currently employed by the Supreme Court stands in sharp contrast to his statements of adherence to basic principles in other areas of the law, not only in cases representing settled

law, like Brown v. Board of Education (1954) and Bolling v. Sharpe (1954), but also in areas where the basic principles are still subject to controversy, like the key first amendment establishment clause case, Lemon v. Kurtzman (1971), and cases challenging the constitutionality of the death penalty. Judge Souter's failure to commit to core principles of privacy and equal protection for women is no more acceptable than would be a failure to adhere to the key constitutional principles established in Brown, Bolling and Lemon.

After carefully evaluating Judge Souter's testimony, we conclude that he has not met the burden incumbent upon him to allay the serious concerns raised by his record and to demonstrate his commitment to bedrock constitutional principles of fundamental importance to women. We therefore oppose his nomination.

NATIONAL WOMEN'S LAW CENTER

Judge Souter and the Confirmation Process:

The Future of Women's Constitutional Rights

A Report by the

National Women's Law Center

Katherine Connor
Nancy Duff Campbell
Marcia D. Greenberger

September 11, 1990

1616 P Street, NW • Suite 100 • Washington, DC 20036 • (202) 328-5160

The authors of this report wish to thank Ilyse Levine, a third-year law student at the University of California, for her assistance in its preparation.

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INTRODUCTION AND SUMMARY

The Supreme Court has interpreted the Constitution to contain two core principles upon which women's access to the full panoply of rights and opportunities in this country rest. These principles are first, that sex discrimination must be subjected to especially searching scrutiny under the equal protection clause of the fourteenth amendment; and second, that there is a fundamental right to privacy, which includes pregnancy and termination of pregnancy. Any nominee to the Supreme Court who does not fully support these two core principles should not be confirmed to the Supreme Court. Therefore, Judge Souter should not be confirmed unless he puts to rest questions raised by his record and demonstrates his commitment to each of these key doctrines of constitutional law.

The first of these principles, that any governmental distinctions made on the basis of gender must be subjected to searching, or "heightened" scrutiny under the equal protection clause of the fourteenth amendment, establishes that courts must be more demanding of the government to defend policies or practices which discriminate on the basis of sex than is the case when most government policies are reviewed by the Court. Under the heightened scrutiny standard, a state must demonstrate that an important governmental interest is substantially served by the discriminatory practice. Further, the test must be applied free of fixed or stereotyped notions concerning the roles and abilities of males and females.

Until this heightened scrutiny principle was established by the Supreme Court in 1971 in Reed v. Reed, 404 U.S. 71 (1971), no law treating men and women differently had ever been invalidated under the equal protection clause by the Court. Thus, Supreme Court decisions upheld state laws which excluded women from the practice of law, from juries, and even from holding certain jobs unless a male relative was present.

Since 1971, and the later Supreme Court cases which developed and refined the precise contours of the heightened standard for review of gender-based discrimination, profound changes have occurred in our laws and practices. The Supreme Court has struck down a wide variety of laws disadvantaging women in many diverse areas of life, including women's right to serve as executors of estates, secure Social Security and other government benefits for their families, be supported by their parents to the same age as their brothers, and manage jointly-owned community property with their husbands.

So, too, after 1971, key laws prohibiting sex discrimination in areas such as employment, education and credit were passed by Congress and in the states. These laws both implement the Supreme Court's interpretation of women as specially protected under the equal protection clause and also build on that constitutional core principle to eliminate sex discrimination broadly. As a direct result of Supreme Court precedent and these anti-discrimination laws, substantial progress has been made in opening opportunities to women, although much remains to be done.

The constitutional fundamental right to privacy mirrors the equal protection clause in its importance to women. As interpreted and developed by the Supreme Court over many decades, the right to privacy protects such central concerns as family integrity, marriage and reproductive rights.

The application of the right to privacy to pregnancy and termination of pregnancy assures that its basic protections are fully available to women, as they are to men. The Supreme Court's 1973 landmark decisions in Roe v. Wade, 410 U.S. 113, and Doe v. Bolton, 410 U.S. 179, extended to women the privacy-based right to abortion. Because the right is "fundamental," the government must demonstrate a "compelling" state interest in order to justify its restriction. So, too, the Supreme Court relied on this right to protect women who chose to continue a pregnancy as employees, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), and to receive unemployment benefits, Turner v. Department of Employment Services, 423 U.S. 44 (1975).

However, women's right to privacy is under serious threat. Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989), has called into question whether a majority of the Supreme Court will interpret the constitutional fundamental right to privacy to apply to abortion, certain forms of contraception, and by this questioning, to pregnancy itself. The new justice on the Court could be the deciding fifth vote to overturn Roe v. Wade's inclusion of abortion and contraception in the fundamental right

to privacy, thereby eliminating the need of states to demonstrate compelling reasons for restricting the right.

Further, the Supreme Court has signaled a serious retreat in the constitutional protections afforded to young women's access to abortion in Hodgson v. Minnesota, 110 S.Ct. 2926 (1990), and Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990). The Hodgson case highlights the danger, for in that case four justices would have upheld a state requirement that two parents be notified before a minor could obtain an abortion, without even the safety valve of a requirement that a court be available as an alternative where notice to both parents would be harmful to the minor.

The aspects of Judge Souter's record which bear on equal protection and privacy raise serious questions about the nature of his commitment to these two core principles. In the case of equal protection, he has articulated legal theories and approaches in written opinions which are antithetical to the application of the heightened scrutiny test to sex discrimination as we know it today. Legal briefs and statements he made while Attorney General of New Hampshire add to the concern. Similarly, with respect to the right to privacy as applied to abortion for adult and young women, Judge Souter, both when on the bench and as Attorney General, has articulated legal theories and approaches which undercut the right.

Because these two constitutional rights are the core principles upon which women must depend when the government seeks

to draw distinctions on the basis of sex, there can be no more important rights to which a nominee to the Supreme Court must be committed. The absence in Judge Souter's record as it has come to light of a clear sign of commitment to these constitutional rights, coupled with the disturbing aspects of his record that address them, makes it imperative that he provide the needed commitment if he is to be confirmed.

I. JUDGE SOUTER MUST DEMONSTRATE A COMMITMENT TO THE HEIGHTENED SCRUTINY STANDARD FOR SEX DISCRIMINATION UNDER THE EQUAL PROTECTION CLAUSE, AS SHOULD ANY NOMINEE TO BE CONFIRMED TO THE SUPREME COURT

The Supreme Court's determination that women have a special status under the equal protection clause of the fourteenth amendment stands as a critical development in providing bedrock constitutional protections for women. In practice, the constitutional protection against sex discrimination has been accomplished through the Court's use of a "heightened scrutiny" standard to evaluate governmental classifications that discriminate on the basis of sex. Any nominee to the Court must recognize both that women are accorded special status under the equal protection clause and that heightened scrutiny is critical to eradicating unconstitutional gender discrimination.

A. The Supreme Court Has Established A Heightened Scrutiny Standard For The Review of Sex Discrimination Cases

Before 1971, the Supreme Court was of the view that the government could treat men and women differently under the equal protection clause as long as any "rational basis" could be advanced to justify the discriminatory treatment. This analysis gave the government virtually unlimited leeway in treating people differently on the basis of sex. Under the rational basis standard, no sex discrimination challenge brought to the Court succeeded. The Court upheld blatantly sex-discriminatory statutes against fourteenth amendment challenges based on rational basis review.

In Muller v. Oregon, 208 U.S. 412 (1908), the Court rejected a fourteenth amendment challenge to a law limiting the hours that women employees, but not men employees, could work, holding that the need for a woman to "properly discharge . . . her maternal function," justified a law "protecting" women by limiting their employment opportunities. As the Court explained in Goesaert v. Cleary, 335 U.S. 464 (1948), upholding a Michigan law providing that women could not work as bartenders unless they were the wives or daughters of male bar owners:

> Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. . . . The Constitution does not require legislatures to reflect social insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.

Id. at 465-66.[1] It is this complete deference to the legislature that makes rational basis review fatal to a challenge to a sex-discriminatory statute.

In its landmark decision in Reed v. Reed, the Court departed from the rational basis standard of review that had permitted wholesale governmental discrimination against women. In Reed, the Court for the first time struck down a sex-discriminatory statute on equal protection grounds, holding that a state could not automatically prefer men over women in administering a decedent's estate, 404 U.S. at 75-76.

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[1] See also Hoyt v. Florida, 368 U.S. 57 (1961) (finding a rational basis for a law giving all women an automatic exemption from jury service that resulted in all-male juries).

Beginning in 1971, the Court has evolved an analysis, which has come to be known as the "heightened scrutiny" test, or an "intermediate" standard of review. It is called intermediate because it is in the middle between the highest level of scrutiny, strict scrutiny, which is the most rigorous standard of judicial review of governmental actions,[2] and rational basis review, which is the most deferential standard.

Under the intermediate standard, a party seeking to uphold a gender-based classification must show an "exceedingly persuasive justification" for the classification. This burden is met only when the differential treatment is "substantially related" to the achievement of "important governmental objectives." Moreover, this test must be applied "free of fixed notions concerning the roles and abilities of males and females;" the statutory objective cannot reflect "archaic and stereotypic notions" about men and women. Mississippi University for Women v. Hogan, 458 U.S. 717, 724-25 (1982) (state-supported nursing school violated equal protection clause by denying enrollment to men). At the heart of this approach is the requirement that courts undertake a more probing examination of governmental classifications than would be required under rational basis review; the government's

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[2] Strict scrutiny review is applied to laws that infringe on fundamental interests, see discussion infra, and laws that classify on the basis of race, alienage or national origin. See, e.g., In Re Griffiths, 413 U.S. 717 (1973) (holding unconstitutional a state's exclusion of aliens from admission to practice law). This strict scrutiny is critical to the elimination of discrimination against minority women.

justification cannot be taken at face value but must be carefully reviewed.

The Court most recently reaffirmed the "fully established principles" by which to evaluate claims of gender discrimination in Heckler v. Matthews, 465 U.S. 728 (1984), reviewing and applying the heightened scrutiny standard set forth in Mississippi University for Women v. Hogan.[3]

B. Heightened Scrutiny is Critical to Eradicating Unconstitutional Sex Discrimination

Employing heightened scrutiny, the Court has struck down many sex discriminatory laws. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating a statute which required female, but not male, Army personnel to prove that their spouses were dependent in order to receive benefits); Craig v. Boren, 429 U.S. 190 (1976) (invalidating a sex-based age differential for the legal consumption of beer); Califano v. Westcott, 433 U.S. 76 (1979) (invalidating a provision which provided aid to Families With Dependent Children to children with unemployed fathers, but not mothers); Weinberger v. Wisenfeld, 420 U.S. 636 (1975) (invalidating a Social Security provision providing payment to widows, but not widowers, with children); Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating a statute

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[3] In Heckler the Court held that the temporary application of the Social Security pension offset provision invalidated on sex discrimination grounds in Califano v. Goldfarb, 430 U.S. 199 (1977), was substantially related to the important governmental interest of protecting individuals who planned their retirements in reasonable reliance on the law in effect prior to Goldfarb. See 465 U.S. at 750-51.

providing higher age of majority for males than females so that males were entitled to parental support for a longer period of time); Kirchberg v. Fenestra, 450 U.S. 455 (1981) (invalidating a statute giving husband exclusive authority over community property); and Califano v. Goldfarb (invalidating a Social Security provision granting survivor's benefits to any widow but only to widowers who had been receiving half of their support from their wives).

In a number of these cases, Chief Justice Rehnquist dissented and applied a rational basis test under which he would have upheld as constitutional laws that discriminated on the basis of sex. See, e.g., Frontiero v. Richardson, 411 U.S. at 691; Craig v. Boren, 429 U.S. at 217; Califano v. Goldfarb, 430 U.S. at 224.[4] Thus, heightened scrutiny is critical to the Court's determination that a law unconstitutionally discriminates on the basis of sex. Any nominee to the Court must unequivocally support the special protection of women under the equal protection clause through the use of the heightened scrutiny standard.

C. Judge Souter And Sex Discrimination Under The Equal Protection Clause

Judge Souter's writings and statements raise questions about his commitment to the constitutional protection of women under

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[4] Justices Scalia and Kennedy have not yet addressed any sex-based equal protection challenge, so that their position on the proper standard of review is not known.

the equal protection clause which must be the basis for further inquiry during his confirmation hearings.

First, Judge Souter has employed a theory of constitutional interpretation known as "original intent" which, if applied to the federal Constitution, could effectively eliminate the equal protection clause's application to women. Under this theory, courts must interpret the Constitution only as the men "who drafted, proposed, and ratified its provisions and its various amendments" would have applied them in the historical context in which they were written and written and ratified. See Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823, 826 (1986). Since the framers of the fourteenth amendment were not concerned with discrimination against women, if Judge Souter applied an original intent approach to a claim of sex discrimination under the equal protection clause, rational basis and not heightened scrutiny review would be employed, with devastating results for the hard-won constitutional gains made by women under the equal protection clause.[5]

Second, Judge Souter's writings suggest that he may have reservations and problems with the heightened scrutiny standard itself, both as applied to cases of gender discrimination and as part of any equal protection analysis.

Third, Judge Souter's writings and statements reflect a lack of understanding both about the nature of discrimination and

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[5] For a discussion of the implications of the original intent approach for the right of privacy, see section II-C-1 infra.

about the role that sexual stereotyping can play in the development of discriminatory classifications.

Judge Souter must allay the concerns raised by his record about his commitment to the special protection of women under the equal protection clause and the necessary and appropriate use of heightened scrutiny in cases of gender discrimination.

1. **The Original Intent Theory, as Reflected in Judge Souter's Dissent in Dionne, is Inconsistent with Heightened Scrutiny Standard for Sex Discrimination**

The majority opinion in Estate of Dionne, 518 A.2d 178 (1986), struck down a law requiring litigants to pay special fees directly to probate court judges for holding hearings on days other than the ones fixed by statute. Writing that this method of compensating probate judges in addition to their salaries "smacks of the purchase of justice," the court held that it was repugnant to the state constitutional guarantee that "[e]very subject of this state is entitled ... to obtain right and justice freely, without being obliged to purchase it." Id. at 179. In reaching this conclusion, the majority looked not only to historical evidence of the meaning of the constitutional guarantee but also to contemporary factors: heightened public sensitivity to the appearance of impropriety, as recognized in rigorous standards of conduct under supreme court rules and codes of judicial conduct; and evidence that the system had severe problems in practice, including a report of the Judicial Council concluding that it was "inconsistent with a professional judiciary." Id. at 180. Based on all of this evidence, the majority struck down the law as unconstitutional.

Judge Souter agreed with the majority's condemnation of the fee law. He dissented, however, because he found that the law was constitutional as interpreted under "this court's clear rule that 'the language of the Constitution is to be understood in the sense in which it was used at the time of its adoption,'" and

only this historical evidence is relevant to the court's inquiry. Id. at 181, quoting Opinion of the Justices, 44 N.H. 633, 635 (1863).[6] Judge Souter looked to two sources to ascertain the intent of the framers of the constitution: the body of commentary on the Magna Carta of 1215, from which the constitutional language was derived; and the history of other New Hampshire laws regarding probate fees. Delving into this historical evidence in detail, he concluded that the framers did not intend to preclude such a fee system, and therefore, the court could not find it unconstitutional.

It is not the purpose of this review to offer a lengthy critique of the original intent doctrine. Others have shown that the philosophy of original intent is not shared by judges in the mainstream of the American constitutional tradition -- both liberal and conservative -- who accept the responsibility the framers clearly imposed on them to continue to develop and apply

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[6] Judge Souter also cited Opinion of the Justices, 121 N.H. 480, 483, 431 A.2d 135, 136 (1981), "as confirming the vitality" of the original intent method of constitutional interpretation. However, this case did not advocate relying only on the framers' intent in interpreting the scope of the state constitution.

The court was called on to address the constitutionality, under the state and federal Constitutions, of a bill that would reduce the number of persons serving on juries in civil cases from twelve to six. While finding that the law might pass muster under the federal Constitution, the court held that it would violate the state constitution. In reaching this conclusion the court did not stop after determining the intent of the framers but went on to assess the vitality of their conclusions today. Citing a number of empirical studies that raised concerns about the impact of smaller juries on group deliberation, the court held that the bill would be unconstitutional. Id. at 137.

legal principles, which are necessarily imbued with moral sense and values, to protect the rights of individuals against the government.[7]

Rather, the emphasis of this report is on the potentially devastating consequences of Judge Souter's theory of original intent if he were to use it to interpret the scope of individual rights guaranteed by the constitution. When the original Constitution and the Civil War Amendments, including the fourteenth amendment, were drafted, women were not considered

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[7] In the words of Chief Justice Hughes, written over half a century ago:

> If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: 'We must never forget, that it is a Constitution we are expounding; a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.' When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U.S. 416, 433 (1920), 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in light of what was said a hundred years ago.'

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934). See also Thornburgh v. ACOG, 476 U.S. 747, 789 (1986) (White, J., dissenting) ("[T]his Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the 'plain meaning' of the Constitution's text or to the subjective intention of the Framers."); H. Jefferson Powell, "The Original Understanding of Original Intent," 98 Harv. L. Rev. 885 (1985).

full citizens.[8] Contemporaneous interpretations of the Civil War Amendments denied their applicability to women.[9] Because the framers of the fourteenth amendment clearly were not concerned with sex-based discrimination, under an original intent analysis there is no place for women in the equal protection clause.

The Senate must inquire into Judge Souter's views on original intent and whether he would use this theory to evaluate a claim of sex discrimination under the equal protection clause. Because the doctrine of original intent is inconsistent with a heightened scrutiny standard for evaluating claims of sex discrimination, Judge Souter's views on original intent are critical to evaluating his commitment to the heightened scrutiny standard. Although he has not articulated the original intent theory in other cases,[10] its potential consequences for women are

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[8] When a woman married, her legal identity merged into that of her husband; she was civilly dead. She could not sue, be sued, enter into contracts, make wills, keep her own earnings, or control her own property. Her husband had the right to restrain her freedom and force her to engage in intercourse. 2 Blackstone's Commentaries 440, 442-444 (1803); See Williams, Reflections on Culture, Courts and Feminism, 7 Women's Rights L. Rptr. 175, 176-77 (1982).

[9] See, e.g., Bradwell v. Illinois, 83 U.S. 130 (1873) (holding that a statute excluding women from the legal profession did not violate the Fourteenth Amendment).

[10] In a recent interview with Judge Souter published in The Massachusetts Lawyers Weekly, the paper reported him as viewing the Constitution as a living document, quoting him on the subject of original intent: "On constitutional matters, I am of the interpretist school. We're not looking for the original application, we're looking for the meaning here. That's a very different thing." Legal Times, Aug. 31-Sept. 3, 1990, p. 10. The relationship between this statement and the approach taken in Dionne must be carefully examined.

so significant that the Senate must be assured that he will not use this doctrine to limit the fourteenth amendment's protection against sex discrimination.

2. The Briefs Filed by the Attorney General's Office Under Judge Souter's Name in Helgemoe v. Meloon Directly Challenge the Appropriateness of the Heightened Scrutiny Standard for Sex Discrimination

In practice, the constitutional protection of women has been accomplished through the Court's use of a heightened scrutiny standard. Judge Souter's record as Attorney General directly calls into question his support for the application of heightened scrutiny to claims of sex discrimination.

While Judge Souter was Attorney General, he decided to appeal a federal trial court ruling that New Hampshire's "statutory rape" law -- a law that prohibits intercourse with a minor female regardless of whether she consents -- violated equal protection because it punished males but not females who engaged in sex with minors. See Nashua Telegraph, May 14, 1977. The brief filed by Judge Souter and an assistant attorney general in the Court of Appeals for the First Circuit primarily focused on arguing that the statute was constitutional under the intermediate scrutiny test. However, the brief took a passing swipe at intermediate scrutiny in arguing that the test was simply a variation on the lowest level of scrutiny, rational basis review:

> The State submits that the Reed - Craig substantial relation test is merely a heightened form of the traditional rational basis test. It is not an independent and median-level standard. Rather, it

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> is a creation of the rational basis test, and on a graduated scale would fall much closer to that test than to the strict scrutiny standard.

Brief for Appellants, Meloon v. Helgemoe, No. 77-1197 (1st Cir. 1977) at 16. The Court of Appeals affirmed the trial court, holding the law unconstitutional. Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977).

The Attorney General's Office made its most vigorous attack on the intermediate scrutiny standard in its Supreme Court petition for certiorari.[11] The brief advocated limiting or even abandoning the heightened scrutiny standard:

> In sum, this Court has created a new equal protection test which resides somewhere in the "twilight zone" between the rationale [sic] basis and strict scrutiny tests. This new standard lacks definition, shape or precise limits. The instant case is a perfect example of what Justice Rehnquist feared most - the abuse of a standard so "diaphanous and elastic" as to permit subjective judicial preferences and prejudices concerning particular legislation. The instant case represents an opportunity for the Court to define, shape, limit, or even eliminate the new standard. In all events, it presents the opportunity for the Court to correct a situation which invites subjective judicial judgments and possible abuses.

Petition for a Writ of Certiorari, Helgemoe v. Meloon, No. 77-1058 at 18-19, cert. denied, 436 U.S. 950 (1978)(emphasis added).

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[11] The petition, too, was filed under the names of then-Attorney General Souter's and an assistant attorney general. Whatever may have been the level of review he afforded the brief his office filed in the Court of Appeals in Helgemoe, it seems unlikely that a petition for certiorari filed in the United States Supreme Court would not have received his careful attention. This is confirmed by the fact that Attorney General Souter ran "a tightly-knit, tightly-run organization." See "Next AG Plans Little Expansion," Massachusetts Union Leader. (Dec. 28. 1975).

The Supreme Court denied certiorari but in 1980 ruled on an equal protection challenge to a similar statute from California, Michael M. v. Superior Court, 450 U.S. 464 (1981). The Court's opinion reaffirmed that heightened scrutiny was appropriate and upheld the law's gender classification finding that it was substantially related to important governmental objectives.

3. **Judge Souter's Opinion in City of Dover Raises Concerns About His Willingness to Apply the Heightened Scrutiny Standard for Sex Discrimination**

As a member of the New Hampshire Supreme Court, Judge Souter was bound by United States Supreme Court decisions that interpreted the scope of protection of individual rights under the federal Constitution. In several cases, Judge Souter briefly referenced the heightened scrutiny test for gender, see, e.g., State v. Heath, 523 A.2d 82 (N.H. 1986), but he has not applied it to evaluate a claim of sex discrimination.

However, in a dissenting opinion he authored in City of Dover v. Imperial Casualty & Indemnity Company, 1990 N.H. Lexis 39 (1990), a case that did not involve sex discrimination, Judge Souter called for reexamination of the state's "somewhat heightened scrutiny" test. This standard, which under state law applies to laws that restrict the right to recover in civil actions, see Carson v. Maurer, 424 A.2d 825 (N.H. 1980), is less rigorous than the federal standard for gender discrimination. While Judge Souter has not indicated whether he would reconsider the federal standard that applies to gender discrimination, the strong criticism in the Attorney General's petition for

certiorari in Helgemoe, as well as this dissent, raise concerns about his commitment to heightened scrutiny that must be examined during the hearings.

4. **Judge Souter's Statements in Connection with United States v. State of New Hampshire Reflect a Lack of Understanding of the Nature of Discrimination Essential to the Proper Application of the Heightened Scrutiny Standard.**

The Supreme Court's recognition in the 1971 case Reed v. Reed that sex discrimination must be accorded special scrutiny under the equal protection clause was central not only to the development of constitutional law, but also to the enactment and enforcement of such basic laws as Title VII of the 1964 Civil Rights Act (prohibiting employment discrimination on the basis of sex, race, national origin and religion);[12] Title IX of the 1972 Education Amendments, prohibiting sex discrimination in federally-funded schools; and the Equal Credit Act of 1973. These laws both implement the Supreme Court's interpretation of women as specifically protected under the equal protection clause and also build on the core principle that sex discrimination should be eliminated.

In the almost two decades since Reed was decided and these laws were passed, the Supreme Court has many times been faced with interpreting the scope of discrimination protections, both under the Constitution and statutes, and often these

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[12] Title VII was amended in 1972 to include public and professional employees within its ambit, specifically recognizing for the first time the special problems of sex discrimination which Title VII had to address. See 42 U.S.C. § 2000e-16.

interpretations are related.[13] Therefore, Judge Souter's record regarding his understanding of discrimination in the context of these anti-discrimination statutes is highly probative of his adherence to the fundamental equal protection principles in the Constitution.

In United States v. State of New Hampshire, the United States filed a complaint against the state of New Hampshire for failure to comply with EEOC regulations interpreting Title VII which required employers, including states, to file yearly reports documenting the race and gender composition of their workforces.[14] Before Judge Souter became Attorney General, a federal trial court ruled against the state. United States v. New Hampshire, No. 75-197 (D.N.H. Dec. 22, 1975). In 1976, when Judge Souter held the position of Attorney General, the state appealed the trial court's ruling.

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[13] The Supreme Court, for example, decided that both the Constitution and Title VII had the same meaning regarding the inclusion of pregnancy within the ambit of sex discrimination. General Electric v. Gilbert, 429 U.S. 125 (1976). Further, anti-discrimination statutes have been challenged as unconstitutional violations of the Equal Protection Clause. See, e.g., Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding the constitutionality of a congressional set-aside program for minority businesses); Metro Broadcasting v. FCC, 110 S. Ct. 2997 (1990) (Five-to-four decision upholding the constitutionality of two congressionally-mandated FCC policies favoring minorities and women, although the constitutionality of the preference for women was not addressed).

[14] New Hampshire was the only state that failed to comply with these EEOC regulations. Washington Post, August 1, 1990.

In the brief filed with the First Circuit, then-Attorney General Souter argued[15] that the regulations went beyond the authority of Title VII, were unconstitutional under the equal protection clause, and violated other constitutional guarantees including the right to privacy. See Brief for Appellant, United States v. New Hampshire, No. 76-1018 (1st Cir. 1976).

First, the brief objected to the requirement for gathering statistics on the grounds that such data could be used to implement a quota system in violation of Title VII. Id. at 11. The First Circuit dismissed this argument, stating that the statistics were "highly useful" in investigating and proving discrimination and that "the possible and purely hypothetical misuse of data does not require the banning of reasonable procedures to acquire such data." United States v. New Hampshire, 539 F.2d 277, 280 (1st Cir. 1976). Second, the brief objected to the regulations on the grounds that they unreasonably exceeded the authority of Title VII. Brief for Appellant, United States v. New Hampshire, at 14. Again, the First Circuit disagreed:

> We have no doubt but that the information sought by the EEO-4 form is both reasonable and fully consistent with the overall purpose of Title VII, viz. "to achieve

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[15] The available evidence suggests that Judge Souter was involved in the framing of the arguments on appeal to the First Circuit and Supreme Court: the name of Attorney General Souter and one assistant attorney general appear on both briefs, and that assistant has reported that Judge Souter was "supportive of and involved in the effort." Legal Times, August 27, 1990, at 10. In addition, then-Governor Thompson has stated that "I know [Judge Souter] did not discourage me" from pursuing the EEOC case to the Supreme Court. Washington Post, August 1, 1990.

> equality of employment opportunities and remove barriers that have operated in the past..."

539 F.2d at 280 (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

The final argument, also rejected by the Court of Appeals, was that the regulations violated the equal protection clause because they require an employer to be color-conscious rather than color-blind. Brief for Appellant, United States v. New Hampshire, at 38. The Court held that the regulations were consistent with Title VII's clearly constitutional purpose -- to achieve equality of employment opportunities. 539 F.2d at 281.

Despite the opinions of the federal district court and First Circuit Court of Appeals holding in favor of the United States, the Attorney General's office filed a petition for certiorari with the Supreme Court reiterating the arguments made in the First Circuit. The Court denied certiorari.

As Attorney General, Judge Souter personally expressed views consistent with the state's position in United States v. New Hampshire in a May, 1976, speech. At a commencement speech at a New Hampshire College, Judge Souter denounced the EEOC regulations as "affirmative discrimination," which he defined as "a policy whereby a person achieves eligibility for some service strictly by virtue of his ethnic background." In the same speech he asserted that affirmative action does not help those who need it, and government should not be involved in it: "there are some

things that government cannot do, and our whole Constitutional history is a history of restraining power."[16]

The briefs in United States v. New Hampshire and Judge Souter's comments on the EEOC regulations at issue in the case evidence a fundamental lack of understanding about the broad anti-discrimination purposes underlying Title VII. Without the ability to collect statistical information on the racial, ethnic and gender composition of the workforce, the EEOC would be unable to ascertain possible instances of discrimination and assure equal employment opportunity, as Bush nominee and EEOC Chair Evan Kemp has noted. See "Souter as State Official Opposed U.S. Racial Breakdown Rule," Washington Post, August 1, 1990, at A4. This evidence of Judge Souter's lack of understanding of discrimination and lack of commitment to its eradication, raise questions about his adherence to the fundamental equal protection guarantees of the Constitution.

5. **Judge Souter's Opinion in State of New Hampshire v. Colbath Evidences a Lack of Understanding of the Nature of Sexual Stereotyping That is Essential to Application of the Heightened Scrutiny Standard for Sex Discrimination**

Judge Souter's opinion in State of New Hampshire v. Colbath, 540 A.2d 1212 (N.H. 1988), raises questions about his ability to follow the Supreme Court's mandate that heightened scrutiny be applied "free of fixed notions concerning the roles and abilities of males and females," and free of stereotypes.

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[16] "Souter Raps Ethnic Preferment," Manchester Union Leader, May 31, 1976.

See Mississippi University for Women v. Hogan, 458 U.S. 717, 725 (1982).

In Colbath, Judge Souter atypically reversed a defendant's conviction[17] for aggravated felonious sexual assault based on the trial judge's instruction that evidence of the victim's behavior with men other than the defendant in a bar the night she was raped was irrelevant to the question of whether she consented to sexual intercourse with the defendant. Judge Souter held that the victim's behavior could be relevant to the issue of consent despite New Hampshire's rape shield law which, like its counterpart in forty-seven other states, precludes evidence of "[p]rior consensual sexual activity between the victim and any person other than the [defendant]," when offered to prove a sexual offense. 540 A.2d at 1215.

Rape shield laws have a dual purpose -- they protect a victim's privacy and help to assure that the jury considers only relevant information, free from the erroneous stereotypical belief that if a woman has engaged in sexual relations with other men in the past, she is more likely to have consented to sexual intercourse with the defendant. See Tanford and Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U.Pa.L. Rev. 544 (1980); Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L.Rev. 1 (1977). See also State v. Howard, 426 A.2d. 457 (N.H. 1981). However, rape shield laws

[17] A review by the National Association of Criminal Defense Attorneys found that Judge Souter ruled in favor of the prosecution in all but five of 75 criminal cases.

are not an absolute bar to the admission of evidence of the victim's prior sexual activity. Under New Hampshire case law, as in most other states, in order to protect the defendant's constitutional right to confront the witnesses against him, the defendant "must be given an opportunity to demonstrate that the probative value [of the statutorily inadmissible evidence] in the context of [the] particular case outweighs its prejudicial effect on the prosecutrix." State v. Howard, 426 A.2d 457 (N.H. 1981). Judge Souter applied this test in Colbath to find that, under the facts presented, the defendant had sustained his burden and the rape shield law must give way to his right to present potentially-exculpatory evidence.

In reaching this conclusion, Judge Souter weighed only one of the rape shield law's purposes -- that of protecting the privacy of the victim -- against the probative effect of the defendant's evidence. Finding that the public nature of the victim's conduct in the bar placed it outside any privacy interest she might have, he proceeded to discuss at length the defendant's interest in presenting evidence of the victim's behavior. At the end of this discussion he concluded summarily that "little significance can be assigned here ...to a fear of misleading the jury," but failed to explain the basis for his conclusion. Id. at 1217. This failure ignores the second important purpose of the rape shield law -- to protect against an assumption by the jury, based on sexual stereotyping, that a woman who consents to sexual activity with one partner may be

found to have consented to sexual intercourse with the defendant. By focusing his discussion almost exclusively on the probative effect of the defendant's evidence, Judge Souter effectively assigned no role to, and gave no weight to, the potential for prejudicial effect on the jury that arises out of such sexual stereotyping. His apparent lack of understanding of the role that sexual stereotyping can play in jury deliberations does not bode well for his assessment of the role it can play in legislative classifications based on gender that, as a Supreme Court justice, he will certainly be required to review.[18] The Senate must assure that Judge Souter understands the effect of sex-based stereotyping on legislative judgments, and that such stereotyping cannot withstand heightened scrutiny under the equal protection clause's protection against sex discrimination.

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[18] See also In Re Opinion of the Justices, 530 A.2d 21 (N.H. 1987). In this case the New Hampshire Supreme Court, at the request of the legislature, issued an advisory opinion holding, under a rational basis test, that a proposed law prohibiting homosexuals from being foster or adoptive parents would not violate the equal protection clause, although its application to child care facility operators would violate equal protection. In upholding the validity of the statute's application to foster and adoptive parents, the court, including Judge Souter, based its decision on the stereotypical assumption that homosexuals are unsuitable parents despite, in the words of the dissent, "the overwhelming weight of professional study on the subject [that] concludes that no difference in psychological and psychosexual development can be discerned between children raised by heterosexual parents and children raised by homosexual parents." Id. at 28.

Judge Souter has articulated legal theories and approaches which are antithetical to the application of the heightened scrutiny standard as we know it today. The burden is on Judge Souter to allay the concerns raised by his record.

II. JUDGE SOUTER MUST DEMONSTRATE A COMMITMENT TO THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRIVACY THAT APPLIES TO PREGNANCY AND TERMINATION OF PREGNANCY, AS SHOULD ANY NOMINEE CONFIRMED TO THE SUPREME COURT

The long line of cases recognizing a constitutionally-protected fundamental right to privacy stands for the clear proposition that decisions affecting marriage, childbirth, reproductive rights and family relationships are so fundamental and critical to self-determination that governmental interference must survive "strict scrutiny" judicial review. Under strict scrutiny, the government must demonstrate a compelling interest justifying its interference and that the interest is furthered by means which are the least restrictive on fundamental rights. The Supreme Court's application of the right to privacy to pregnancy and termination of pregnancy, including contraception, assures that its basic protections are fully available to women, as they are to men. Any nominee to the Supreme Court must have a commitment to these core constitutional protections for women guaranteed by the fundamental right to privacy.

A. The Supreme Court Has Established a Constitutional Right To Privacy That Includes Contraception, Abortion and Pregnancy

In a line of decisions stretching back more than half a century, the Supreme Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, exists under the Constitution. Decisions recognizing a fundamental privacy interest have forbidden governmental intrusion into marriage, Loving v. Virginia, 388 U.S. 1, 12

(1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Meyers v. Nebraska, 262 U.S. 390, 399 (1923).

The leading modern case first recognizing the constitutional right to privacy in reproductive decisions is Griswold v. Connecticut, 381 U.S. 479 (1965), in which the Court held invalid a law prohibiting the sale or use of contraceptives, even by married couples. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court extended this right to unmarried persons and defined a constitutional right to privacy broad enough to include "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453.

Against this backdrop, the Court issued its decisions in Roe v. Wade and Doe v. Bolton. In opinions written by Justice Blackmun, the Court recognized that a woman's fundamental right to privacy includes the right to abortion, and thus any governmental interference with that right would be subjected to strict scrutiny. Under Roe, until the time a fetus is viable, in the beginning of the third trimester, the only state interest compelling enough to justify regulation of abortion is protection of the woman's health. The state's interest in fetal life only becomes a sufficiently compelling justification to interfere with a woman's fundamental right when the fetus is viable.

In Cleveland Board of Education v. LaFleur, the Supreme Court relied in part on the fundamental privacy right, articulated the year before in Roe, to protect pregnant women. Citing the long line of privacy decisions, the Court held that "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." Id. at 631. Based on this reasoning and fact that the law created an "irrebutable presumption" of a pregnant woman's incapacity to teach after her fourth month of pregnancy, the Court struck down the law. Id. at 644-48.

The application of the right to privacy to contraception, abortion, and pregnancy assures that its basic protections are available to women as well as men. However, women's right to privacy based on their unique reproductive capacity is under serious threat.

B. The Constitutional Privacy Rights Of Women Are Threatened

After Griswold and Roe were decided, the Supreme Court repeatedly struck down state laws which infringed on women's privacy rights. For instance, the Court invalidated laws prohibiting the sale of contraceptives to minors and limiting their distribution to licensed pharmacists, Carey v. Population Services International, 431 U.S. 678 (1977); laws restricting the availability of unemployment benefits for pregnant women, Turner v. Department of Employment Services; laws requiring that married women obtain their husbands' consent to have an abortion, Planned

Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); and laws requiring physicians to convey intimidating information designed to dissuade women from having abortions, Thornburgh v. ACOG, 476 U.S. 747 (1986).

However, with the changing composition of the Supreme Court, the assault on women's privacy rights -- and especially the strict scrutiny of governmental interference in contraception and abortion, including minors' access to abortion -- has intensified.

The Supreme Court's decision in Webster v. Reproductive Health Services was an unprecedented retreat from the long line of cases recognizing that contraception and abortion are included in the fundamental right to privacy, and thus any governmental interference with these rights must be subjected to strict scrutiny. The Missouri law at issue in Webster began with a preamble, which stated the legislature's "findings" that a human being's life begins at conception, defined as the time of fertilization; and "unborn children" have protectable interests in life, health and well-being. The preamble further directed that the laws of Missouri be interpreted to assure that "unborn children" have the same rights as all other persons in the state, within the limits imposed by the United States and Missouri Constitutions.

Chief Justice Rehnquist wrote for five justices in upholding the preamble, construing it as merely expressing the state's value judgment favoring childbirth over abortion. Since the

preamble by itself did not restrict the activities of the plaintiffs, these justices decided that only when Missouri uses the preamble to restrict an individual's actions would the Court determine whether the particular restriction was constitutional.

The four dissenting justices held that an assault on the fundamental privacy right to contraception and abortion was inherent in the preamble. According to the dissent, the preamble's definition of life as beginning at conception and conception as occurring at the time of fertilization unconstitutionally interferes with a woman's right to abortion and to use methods of contraception that can prevent implantation of the fertilized ovum, including the IUD, the "morning-after" pill, low-dosage oral contraceptives, and the French-produced drug RU-486. Id. at 3068, n.1, 3081. In the wake of Webster, laws proposed in other states have incorporated the Missouri definition of when life begins, with potentially devastating results for reproductive rights.

The preamble to the Missouri law at issue in Webster was enacted as part of a comprehensive law placing onerous restrictions on abortion, including a prohibition on the use of public facilities broadly defined or employees to perform abortions, a requirement of specific viability tests for abortions at twenty weeks of pregnancy, and a prohibition on the use of public funds for abortion counseling. Besides the

preamble, the Court upheld the prohibition on public funding, and the viability testing requirement.[19]

Chief Justice Rehnquist's opinion on these provisions -- joined by Justices White and Kennedy -- did not explicitly overrule Roe but undermined its foundation, by concluding that the viability testing requirement is "reasonably designed to ensure that abortions are not performed when the fetus is viable -- an end which all concede is legitimate -- and that is sufficient to sustain its constitutionality." Id. at 3058. This language suggests the plurality is applying rational basis review, the standard applied to rights granted only minimal constitutional protection, not fundamental rights like the right to privacy. Moreover, the plurality also concluded that there was no reason that the state's interest in protecting fetal life should come into existence only at the point of viability, referring to a "compelling interest" in protecting potential human life throughout pregnancy, from the moment of conception. Under this analysis, even if the rights to abortion and contraception remain in name fundamental rights, strict scrutiny is satisfied by the state's compelling interest in potential life from the very beginning of pregnancy and thus, any governmental interference with the rights could be upheld.

Justices O'Connor and Scalia did not join this part of the Court's opinion but for very different reasons. Justice Scalia

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[19] The prohibition on the use of public funds for abortion counseling was dismissed as moot and the Court did not rule on its constitutional validity.

argued that the plurality's reasoning had covertly overruled Roe, and denounced the failure to face squarely overruling Roe explicitly. In her separate opinion, Justice O'Connor argued that since the testing requirements aided in the determination of viability, they were within the state's authority under Roe. Seeing no conflict with Roe, she refused to join in what she saw as its unnecessary reconsideration. In the past, however, Justice O'Connor has supported the authority of states to enact restrictions which do not impose "an undue burden" on the right to choose, which she appears to define very narrowly to only include laws which impose "absolute obstacles" or "severe limitations." Thornburgh v. ACOG, 476 U.S. at 828 (O'Connor, J., dissenting). Thus, there are at least four Justices no longer applying the strict scrutiny protection of the rights to contraception and abortion included in the fundamental right to privacy.

Further, Supreme Court decisions issued last term threaten the right of young women to abortion through the imposition of rigid parental notification laws that Justice O'Connor held were not justifiable even under the minimal rational basis test. These cases, Hodgson v. Minnesota and Ohio v. Akron Center for Reproductive Health, stand in sharp contrast to prior Supreme Court cases interpreting minors' privacy rights to abortion. In the 1979 case, Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II), the Supreme Court struck down a Massachusetts law requiring a minor to obtain parental consent to her abortion, or

judicial authorization for the procedure but only after notifying her parents of her decision. The Court declared that a state could only require parental consent if it provided an alternative procedure whereby a minor could obtain judicial authorization for an abortion without parental consultation, either by showing that she is mature or that an abortion would be in her best interests. Because the Massachusetts law allowed parents to completely block a minor's access to abortion by blocking her access to court authorization, the Court struck down the law. Id. at 647.

Later Supreme Court cases focused on assuring that laws restricting minors' access to abortion contained judicial bypass procedures that complied with the Bellotti II framework. For example, in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), Justice Powell, writing for a six-justice majority, struck down a parental consent law because the City failed to expressly create the Bellotti II bypass procedure. And in Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476 (1983), the Court upheld a Missouri parental consent law, finding that the judicial bypass procedure satisfied the Bellotti II requirements by assuring a confidential and expeditious judicial decision.

However, Hodgson v. Minnesota and Ohio v. Akron Center for Reproductive Health signal a threatening departure from the Court's previous focus on assuring that minors for whom parental notification is detrimental or impossible have a viable judicial alternative. In Hodgson, four members of the Court -- Justices

Kennedy, Rehnquist, Scalia and White --voted to uphold a Minnesota law requiring two-parent notification without a judicial bypass procedure, despite the overwhelming evidence that the law had disastrous effects on young women, especially those in homes where parents were abusive and in the vast number of single-parent households, where two-parent consultation was inappropriate or even impossible. Justice O'Connor voted to uphold the law, even though she found that it was irrational to require two-parent notification, as long as there was a judicial bypass procedure for minors who found parental consultation impossible, detrimental or inappropriate.

Thus, there are four justices who are prepared to accept the absence of any judicial bypass procedure in parental notification laws, despite the fact that for some young women the judicial bypass is absolutely critical to their ability to exercise their right to abortion.

It is clear that the next appointee to the Supreme Court will play a pivotal role in determining the continued constitutional protection of women's fundamental right to privacy, including the rights to contraception, abortion and minors' access to abortion. Any nominee must support the inclusion of these rights in the fundamental right to privacy so that this core constitutional protection is available to women.

C. Judge Souter's Record Raises Questions About His Commitment to The Fundamental Right To Privacy In General, and As Applied To Women's Reproductive Rights In Particular

Although there are limited aspects of Judge Souter's record which are relevant to the fundamental right to privacy, they raise serious questions about his commitment to the right and to strict judicial scrutiny of laws that interfere with it. Judge Souter's record on abortion is particularly troubling because it suggests a lack of respect and support for the fundamental nature of this right. Many of his writings focus on the moral concerns of those on the periphery of a woman's reproductive decision but make no mention of the rights of women themselves.

1. The Original Intent Theory, as Reflected In Judge Souter's Dissent In Dionne Is Inconsistent With A Constitutional Right To Privacy

We have discussed Judge Souter's "original intent" theory, articulated in his dissent in Dionne, and its inconsistency with the heightened scrutiny standard for sex discrimination under the equal protection clause. See discussion supra at section I-C-1. For similar reasons, it is a theory which may leave women and men without constitutional protection of the fundamental right to privacy. Because the fundamental right to privacy, including its application to pregnancy, contraception and abortion was not explicitly articulated by the framers of the Constitution, an original intent analysis could suggest no constitutional right to privacy at all.

Proponents of original intent argue that the appropriate forum for the resolution of individual rights that the framers did not intend to address is the political arena, an arena unchecked by constitutional protections and guarantees. The implications for women's privacy rights are severe -- access to contraception and abortion would depend on where a woman lives or whether she has sufficient funds to travel to a state with non-restrictive laws. As our country's history before Roe v. Wade makes clear, a patchwork of laws restricting women's reproductive rights would have devastating effects on women's lives.

Judge Souter must be examined to determine if he would apply the "original intent" theory to the constitutional right to privacy, including the protection of pregnancy, contraception and abortion.[20] Any nominee to the Supreme Court must support strict scrutiny constitutional protection of the fundamental privacy right generally, and the application of that right to pregnancy and the termination of pregnancy in particular.

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[20] When Judge Souter was Attorney General, his office did assert a constitutional right to privacy in New Hampshire v. United States. He argued that EEOC regulations requiring employers to file forms identifying the racial composition of the workforce violated the employees' right to privacy. This novel argument was rejected out of hand by every court that considered it. See discussion of this case supra at section I-C-4.

2. Judge Souter's Writings and Statements On Reproductive Rights Raise Questions About His Commitment To The Right To Privacy As It Applies To Abortion

a. Judge Souter's Concurrence in Smith v. Cote, And The Majority Opinion He Joined, Reflect A Distancing From Roe v. Wade That Raises Concern About His Commitment To The Privacy Right To Abortion

In Smith v. Cote, 513 A.2d 341 (1986), the New Hampshire Supreme Court held that a woman could maintain an action against her obstetrician for failing to test for rubella and to warn her of possible risks to the fetus resulting from the illness, thus depriving her of information that would have been relevant to her decision about whether to continue the pregnancy. The majority opinion, in which Judge Souter joined, held that physicians who provide testing and advice relevant to the constitutionally-guaranteed right have an obligation to adhere to reasonable standards of professional performance, which include advising women of information that might lead to abortion. However, in so ruling the court explicitly distanced itself from the constitutionally-protected right to abortion articulated in Roe:

> As we indicated above, we believe that Roe is controlling; we do not hold that our decision would be the same in its absence.

Id. at 346.

> Notwithstanding the disparate views within society on the controversial practice of abortion, we are bound by the law that protects a woman's right to choose to terminate her pregnancy. Our holding today neither encourages nor discourages this practice . . . .

Id. at 348.

Not only did Judge Souter join the majority's opinion -- and its failure to support Roe -- but he also added his own separate opinion focusing on an issue that the majority stated it did not address because it was "not raised, briefed or argued in the record" -- the proper course for physicians who have moral hesitations about abortion:

> The court does not hold that some or all physicians must make a choice between rendering services that they morally condemn and leaving their profession in order to escape malpractice exposure. The defensive significance, for example, of timely disclosure of professional limits based on religious or moral scruples, combined with timely referral to other physicians who are not so constrained, is a question open for consideration in any case in which it may be raised.

Id. at 355 (Souter, J., concurring).

His concurring opinion is silent on the rights and concerns of women. Judge Souter's decision to highlight only the concerns of doctors with moral qualms about abortion, in a case where it was clearly unnecessary, is extremely troubling, especially when coupled with his and the majority's reluctant acceptance of Roe.

b. **The Brief Filed By Then-Attorney General Souter's Office In Coe v. Hooker Reflects a View That The Abortion Rights Of Women May Be Limited By The Moral Objections Of Others That Threatens The Privacy Right To Abortion**

Additional evidence of Judge Souter's views of abortion as a privacy right arises in Coe v. Hooker, a case involving the obligation of the state to fund abortions for poor women. The federal district court enjoined enforcement of a state regulation limiting Medicaid funding of abortions to cases that are "medically necessary to preserve the life or health of the woman."[21] In arguing against Medicaid funding, the brief of the Attorney General's office relies in part on the argument that because "thousands of New Hampshire citizens possess a very strongly-held and deep-seated belief that abortion is the killing of unborn children," their strongly held moral belief could constitutionally interfere with "a women's otherwise unrestricted freedom to decide to have an abortion." Brief of Appellants at 41.[22] This statement is at odds with a constitutionally-

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[21] Judge Souter did not participate in the case at the trial stage, when the injunction was entered. Coe v. Hooker, 406 F. Supp. 1072 (1976), but was Attorney General at the time the case was appealed. The name of Souter and one assistant attorney general appear on the brief. See Appeal of Decision of District Court of New Hampshire, Brief of Appellants, Coe v. Hooker, No. 75-206 (1st Cir. 1976). The assistant attorney general who argued Coe has stated that Judge Souter had little knowledge of the case. See Los Angeles Times (July 31, 1990). This is inconsistent with other information to the effect that he ran a "tightly-knit, tightly-run organization." See "Next AG Plans Little Expansion," Manchester Union Leader (December 28, 1975). Judge Souter's participation in this brief must be examined.

[22] In Maher v. Roe, 432 U.S. 464 (1977), the United States Supreme Court held that a state could constitutionally refuse to fund abortions, not because citizens' moral opposition was grounds for infringing on the right, but rather as an expression

protected fundamental right to aboriton, for it has never been held that moral beliefs of the public rise to the level of a compelling state interest. In fact, the very purpose of a constitutional fundamental right is to assure that politics and popular views of the moment cannot infringe on the right.

c. **Judge Souter's Opposition To Repeal of New Hampshire's Unconstitutional Laws Criminalizing Abortion Using Anti-Abortion Rhetoric Evidences A Lack Of Commitment To The Privacy Right To Abortion**

Judge Souter himself has been quoted as using language commonly employed by opponents of a constitutionally-protected right to abortion. In a 1977 newspaper interview, then-Attorney General Souter in discussing why he opposed a bill that would fully repeal unconstitutional state laws criminalizing abortion stated that "[q]uite apart from the fact that I don't think unlimited abortions ought to be allowed . . . I presume we would become the abortion mill of the United States."[23] The report of the interview suggests that Judge Souter was concerned about the possibility that after repeal New Hampshire law would allow unrestricted post-viability abortions. Id.

Yet, while expressing concern about the need for restrictions on post-viability abortion, the interview with then-

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of "a value judgment favoring childbirth" which did not infringe on the basic right. Id. at 474.

[23] See "Bill is seen making NH an 'Abortion Mill'", Manchester (NH) Union Leader, May 19, 1977. Then-Governor Thomson has reportedly said that he assumes Souter was speaking for himself, but the reporter who conducted the interview thought he was speaking on behalf of the Governor. See "Souter Opposed Unlimited Abortion," Concord Monitor, August 6, 1990.

Attorney General Souter contains no statments from him reflecting support for the general privacy-based right, even pre-viability. Nor does the account contain any statement of support for the Supreme Court decisions which invalidated the state laws at issue. It is important that Judge Souter's role in the state's failure to repeal the criminal abortion statutes be explored, to determine its bearing on his commitment to the privacy-based right to abortion.

d. **Judge Souter's Letter To The New Hampshire Legislature Reflects A Lack Of Understanding About The Significance Of Judicial Bypass To The Exercise Of The Privacy Right To Abortion By Minors**

Finally, a letter that Judge Souter wrote while on the superior court to the New Hampshire legislature suggests a lack of commitment to the fundamental privacy rights of women, and especially young women. The New Hampshire legislature had pending before it a bill requiring a minor to obtain parental consent or judicial authorization before she could have an abortion. At the request of a member of the legislature,[24] Judge Souter wrote expressing the opinion of the court on the bill. He focused only on the bill's judicial bypass provision, raising the following objections, among others:

> First, it would express a decision by society, speaking through the Legislature, to leave it to individual justices of this Court to make fundamental moral decisions about the interests of other people without any standards

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[24] The letter was apparently solicited by a pro-choice legislator who hoped that the judges would "help kill the bill" and this in fact is what happened. See "Souter Note Helped Sink '81 N.H. Bill on Abortion," The Boston Globe, July 26, 1990.

> to guide the individual judge. Judges are professionally qualified to apply rules and stated norms, but the provision in question would enact no rule to be applied and would express no norm.
>
> . . .
>
> The provision that I have quoted from the present bill would force the Superior Court to engage in just such acts of unfettered personal choice.

Letter, dated May 13, 1981, from Judge Souter to Roma H. Spaulding, Chairman of the House Committee on Health and Welfare.

The letter has troubling implications for women's privacy rights. With four justices on the Supreme Court prepared to eliminate the judicial bypass procedure in parental notification laws, Judge Souter's discomfort with judicial involvement in protecting minors' fundamental rights suggests that he may be the fifth vote to eliminate the bypass altogether. Yet, the judicial bypass procedure is an absolutely critical safeguard for many young women who, without a judicial alternative, could not exercise their fundamental privacy right to abortion. Moreover, the letter reveals a very limited vision of the proper judicial role in protecting the fundamental right to abortion of young women. According to Judge Souter, because the issue is a difficult moral one and there may not always exist clear rules and guidelines, judges should not be involved.[25] Judge Souter's reluctance to involve judicial resources in assuring that minor

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[25] Judge Souter's complaint that the bill does not provide adequate standards is without merit. The bill uses the Bellotti II standard that a judge must determine if a minor is mature or if an abortion would be in her best interests. These standards are frequently used by judges in deciding cases involving minors. In a custody case, Judge Souter had no difficulty in determining whether an award of custody to the mother or the father would be "most conducive to [the son's] benefit." See Morin v. City of Somersworth, 551 A.2d 527 (N.H. 1988).

women have access to abortion does not bode well for his willingness to provide strong constitutional protection to women's fundamental privacy rights.

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Any nominee to the Supreme Court must support the fundamental constitutional right to privacy and the application of the right to women through cases recognizing a fundamental right to contraception, pregnancy and abortion, including minors' access to abortion. Judge Souter's record raises serious concerns about his respect for women's privacy rights that he must allay during the Senate hearings. Unless these concerns are allayed, Judge Souter should not be confirmed.

CONCLUSION

While much of Judge Souter's record has little bearing on his views of the key constitutional principles of equal protection and privacy as they apply uniquely to women, there are disturbing aspects of his record which evidence a lack of commitment to these core protections. Because they are the two bedrock constitutional principles protecting women against unjust government laws and policies directed against them, Judge Souter should not be confirmed to the Supreme Court unless he can dispel concerns raised by those disturbing aspects of his record. This country can ill afford to lose the progress made toward equality and individual rights and dignity for women during the last twenty years since the Supreme Court's recognition of the core principles at issue in this nomination.