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DAVID HACKETT SOUTER

A WOMEN'S RIGHTS ANALYSIS

SEPTEMBER 4, 1990

Since David Souter was selected by President Bush as his Supreme Court nominee to replace retiring Justice William Brennan, the NOW Legal Defense and Education Fund has researched Souter's judicial opinions, spoken with attorneys who appeared before him while he was a judge on the superior court (1978-1983) and the state supreme court (1983-1990) in New Hampshire, and reviewed his opinions and briefs as New Hampshire Attorney General (1976-1978). Contrary to popular media pronouncements, Souter is not a blank slate. Although there is not a long paper trail, all of the information about him indicates that we have ample reason to fear what his appointment would mean to the future of reproductive and other women's rights, civil rights and individual rights.

NOW LDEF has serious concerns about this nomination and will oppose it unless these concerns are addressed satisfactorily by Souter upon questioning at the Senate Judiciary Hearings. If Souter does not recognize that the Constitution guarantees the fundamental right to privacy and gives women the right to equal protection of the law, he does not belong on the U.S. Supreme Court.

JUDICIAL PHILOSOPHY ON THE CONSTITUTION

The Bork confirmation hearings were noteworthy for the Senate Judiciary Committee's thoughtful and thorough questioning of Judge Bork as to his judicial philosophy. Bork's adherence to extremist theories of constitutional and legislative interpretation doomed his nomination. Evidence suggests that Souter's theories are similarly troubling.

Souter's record on the New Hampshire Supreme Court reveals that he is a judge who apparently believes that perplexing constitutional law issues of our time should be decided solely by reference to the intent of the framers of the Constitution. This posture has dramatic negative implications for equal protection and privacy rights, which are rights of citizens not written into or interpreted as part of the Constitution until long after the document was originally framed. Throughout the nineteenth century and the first seventy years of this century, equal protection challenges were rejected by the U.S. Supreme Court to such obviously discriminatory sex-based classifications as laws denying women the right to enter into contracts or practice as lawyers. Only in the 1970's did the Court develop a new test for evaluating such challenges, the application of "intermediate scrutiny," which resulted in many sex-discriminatory laws being struck down.

Souter has questioned the development of this level of scrutiny, which requires the Court to find that a sex-based classification in a law is substantially related to an important government interest or to strike it down. This level of scrutiny is not as rigorous as that applied to race-based classifications or those based on national origin, alien status or being born out of wedlock. It is, however, more likely to result in a statute being struck down than "rational relationship" scrutiny, which is applied to all other types of legal classifications and which requires a challenger to show that the classification has no rational relationship to the legitimate government interest allegedly served by the statute.

In one case in 1978, Helgemoe v. Meloon, while Souter was Attorney General of New Hampshire, the Attorney General's office filed a petition for a writ of certiorari with the U.S. Supreme Court requesting that the Court review a decision by the U.S. Court of Appeals for the First Circuit. The brief was submitted under the names of Souter and an assistant Attorney General, but given the importance of petitions for writs of certiorari to the nation's highest court, it is likely that Souter approved all the contents. The appellate court had struck down the New Hampshire "statutory rape" law which criminalized sexual intercourse regardless of consent between a man and a female less than fifteen years old. The court had done so after applying intermediate scrutiny to the law, which it found to contain a

sex-based classification because only females could be victims and only males could violate the law. The Attorney General's brief to the Supreme Court argued that the intermediate scrutiny test, which had been fully articulated by the Supreme Court two years before for the first time in Craig v. Boren, 429 U.S. 190 (1976), "lacks definition, shape or precise limits," that it would "permit subjective judicial preferences and prejudices concerning particular legislation," and that "the instant case represents an opportunity for the Court to define, shape, limit, or even eliminate the new standard." Helgemoe v. Meloon, petition for writ of certiorari at 18-19.

This is strongly negative language about a test which ended nearly two centuries of state sanctioned sex discrimination. While the intent of the petition for review may have been to argue for upholding laws protecting young women from being coerced or manipulated into sex by older men, this legal approach would have sacrificed the larger goal of protection for women from sex discriminatory laws. The Supreme Court chose not to review the case, but ironically, in 1981, in Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464 (1981), when the Court did review the equal protection issues raised by sex-specific statutory rape laws, intermediate scrutiny was applied and the identical Californian statute was upheld.

Souter's reliance on an extremist original intent method of

analysis can also be seen, for example, in In Re Estate of Dionne, 518 A. 2d 178 (N.H. 1986). Souter was the lone dissenter in this case arising from a will contest. Under a New Hampshire legislative scheme, the parties are required to pay a fee to the judge if the will is probated at a contested hearing on a day the probate judge is not scheduled to sit. In this case, both parties argued that the lower court ruling was null, void and unconstitutional under the state constitution because they were required to pay for the probate judge. The relevant section of the state constitution, part I, article 14, provides the "right to obtain right and justice freely, without being obligated to purchase it." The majority of the state supreme court held that the imposition of such fees was unconstitutional. Souter makes several interesting statements in his dissent. He first concludes that although he disagrees with the fee system, the system is not "subject to the regulation of the judicial branch in accordance with its own notions of good public policy," Dionne, 518 A.2d at 183, and is subject to review only under the state constitution. Souter then rejects the constitutional argument based on his analysis of the legislative history and the intent of the New Hampshire Constitution's framers. He writes, as to the framers' intent, that,

> "the language of the Constitution is to be understood in the sense in which it was used at the time of its adoption." ...We confirmed the vitality of this interpretive principle as recently as five years ago...and it is just as applicable today in the construction of article 14 as it was in that recent

> case, construing the article 15 right to jury trial. The court's interpretive task is therefore to determine the meaning of the article 14 language as it was understood when the framers proposed it and the people ratified it as part of the original constitutional text that took effect in June of 1784.

Dionne, 518 A.2d at 181 (citations omitted). Under Souter's analysis, the payment of a special fee to judges for contested hearings does not violate the state constitution because the fee scheme was reenacted at about the same time as the relevant constitutional provision was being considered and ratified, leading Souter to believe that the constitutional framers did not find the fee system unconstitutional. Although the parties in the case did not allege inability to pay, it is noteworthy that Souter's constitutional analysis contains no discussion of whether the fee system might be inappropriate in modern times, or of whether such a fee requirement might deny access to probate court to the poor, a group not protected and perhaps not even considered when the statute and the constitution were being written.

This "original intent" approach is entirely inappropriate for Supreme Court Justices. The most important cases facing a Supreme Court Justice are those of first impression requiring constitutional interpretation. Some decisions are dictated by stare decisis, the doctrine requiring decision-making consistent with past Supreme Court precedent, but many require the Justices to decide what is constitutional with only the language of the

Constitution to guide them. If the Justices are guided by the framers' specific intent, they will necessarily undermine or eliminate constitutional protections recognized or given substance since the eighteenth century, some as recently as two or three decades ago, for women, the poor, and minority groups. It is impossible to ascertain the "intent" in all situations of the men who wrote the Constitution, the Bill of Rights and all later amendments until the 19th Amendment which gave women the right to vote, but they certainly did not envision that their protections would extend to women. The 18th century framers expressly excluded women and African-Americans from such protection. A framers' intent analysis is also worthless on important issues for women that the framers could not even imagine, such as conflicts over surrogate parenting and new reproductive technologies.

More is required from a Supreme Court Justice than a literal understanding of laws. Laws are an embodiment of the values we adhere to as a nation. The interpretation of those laws requires a connection with the world we live in today. The beauty of the Constitution lies in its ideals of a free and just society. It continues to guide us, not because the framers were wiser than we are today, but because of those ideals. The Supreme Court needs justices who understand their obligation to apply those living ideals flexibly to modern society. Souter must be required to explain his beliefs about the ambit of equal protection of the

law and other vital constitutional guarantees.

SOUTER AND ABORTION

Clearly, abortion, and the right to privacy more broadly, will be issues upon which searching questioning will be required at the hearings. Such questioning will not seek answers about Souter's personal beliefs on abortion and contraception or his views on particular pending cases - the irrelevant litmus test President Bush unnecessarily fears - but must rather focus on Souter's method of analysis of the Constitution and his understanding, or lack thereof, of the fundamental nature of the well-established privacy right.

In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court recognized, by a 7 to 2 vote, that the fundamental right to privacy provided by the U.S. Constitution encompasses a woman's decision whether or not to terminate her pregnancy. The decision cited and relied on earlier cases finding a constitutional right to privacy. Since the case was decided, Republican appointments to the Supreme Court have created a new conservative majority which places the Roe holding at risk. Justice White and now-Chief Justice Rehnquist were the two dissenting votes in Roe, and they have continued to uphold all statutes regulating abortion. In Webster v. Reproductive Health Services, 109 S.Ct. 3040

(1989), Justices White, Kennedy, and Rehnquist rejected further use of the Roe trimester framework, Justice O'Connor called it "problematic", and Justice Scalia stated that he wants to overrule Roe v. Wade and eliminate the right of privacy that it (and prior and subsequent cases) set forth.

The justice who replaces Justice Brennan, a staunch advocate of women's reproductive rights, could be the swing vote on future abortion cases. As a state supreme court justice, Souter wrote only once on reproductive rights. This decision, together with his adoption of the framers' intent theory of constitutional interpretation and the consistent deference he has shown as a judge to the claimed right of states to legislate without judicial monitoring, discussed below, warn us that he might dismantle Roe v. Wade and our fundamental rights if given the opportunity.

While David Souter was a member of the New Hampshire Supreme Court, the court issued an opinion in a medical malpractice case which included a discussion of abortion, Smith v. Cote, 513 A.2d 341 (N.H. 1986). Much of the media attention on this case has focused on the concurrence written by Souter; however, a close analysis of the majority opinion is also warranted, since Souter joined in both its holding and its reasoning.

In Smith v. Cote, a woman sued her obstetrician for failing

to warn her of the potential birth defects her child could suffer as the result of the mother's exposure to rubella during pregnancy. The child was born severely disabled with congenital rubella syndrome. Prior to ruling on the defendant's motion for summary judgment, the trial court sought a ruling by the New Hampshire Supreme Court on several issues, under a New Hampshire procedure called an interlocutory review of questions.

The state supreme court was asked to address the four specific questions summarized below:

A. Will New Hampshire law recognize a wrongful birth cause of action against a physician who failed to test, detect, and give counsel regarding the risks of potential birth defects, thereby depriving the mother of the information about rubella, based upon which she might have decided to have an abortion?

B. If the answer to question A is in the affirmative, what type of damages are recoverable?

C. Will New Hampshire law recognize a cause of action for wrongful life? (Wrongful life actions are brought by the child suffering from birth defects; in contrast, wrongful birth actions are brought by the child's parents.)

D. If the answer to question C is in the affirmative, what general and specific damages may the child recover?

The issue of abortion arose in the case in the context of the potential wrongful birth cause of action. In explaining the trend toward judicial acceptance of wrongful birth actions, the majority opinion finds that there are two main causes for the trend: medical advances which allow doctors to predict and detect fetal defects; and the principles of choice in pregnancy outcomes outlined in Roe v. Wade, 410 U.S. 113 (1973) and later cases. Based on these factors, the Court finds that a cause of action for wrongful birth exists.

Although the ultimate holding is pro-choice, the language neither affirms nor supports women's privacy rights or any fundamental right to choose abortion. Instead, the opinion is replete with language that suggests that the outcome would be very different if Roe v. Wade, a United States Supreme Court case, were not controlling.

> In Roe the Supreme Court held that the constitutional right of privacy encompasses a woman's decision whether to undergo an abortion. Roe, 410 U.S. at 153, 93 S.Ct. at 726. During the first trimester of pregnancy, a woman may make this decision as she sees fit, free from state interference. Id. at 163, 93 S.Ct. at 731. The Court has repeatedly adhered to this holding in the face of regulatory attempts to circumscribe the Roe right of privacy. See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists ___ U.S.___, 106 S.Ct 2169, 90 L.Ed.2d 799 (1986). **As we indicated above, we believe that Roe is controlling; we do not hold that our decision would be the same in its absence.**

Cote, 513 A.2d at 346 (emphasis added). Later in the opinion, the court once again makes it clear that it does not independently support this fundamental right:

> 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.

Cote, 513 A.2d at 348. This majority opinion is joined and accepted by David Souter. By writing a separate concurrence, he had an opportunity to base his holding on different reasons or to state his views on the constitutional basis of Roe, but he did neither. Instead, he agreed with the majority's subtle attack on abortion rights and went on to address the needs and concerns of doctors morally opposed to abortions. This anti-choice issue was totally unrelated to the facts presented in Smith v. Cote and was not raised, briefed or argued by either of the parties.

Furthermore, there is no explanation as to why Souter raised this issue at all, other than the statement in his concurrence that the directed "questions fail to raise a significant issue in the area of malpractice litigation that we raise today." Cote, 513 A.2d at 355. This was not, however, a burning issue in the medical community, a community with which Souter was familiar. Souter served as a board member of Concord Hospital and as an overseer to the Dartmouth Hitchcock Medical

Center. Interviews with other members of those boards published in a July 25, 1990 article in the Manchester, New Hampshire Union Leader, provide evidence that this issue never arose in the context of hospital meetings.

This is judicial activism of the type we have been told that Souter rejects. In the judicial questionnaire he completed for the Senate Judiciary Committee prior to questioning for his federal judicial appointment to the U.S. Court of Appeals for the First Circuit, Souter wrote: "The obligation of any judge is to decide the case before the court, and the nature of the issue presented will largely determine the appropriate scope of the principle on which its decision should rest." In Cote, the New Hampshire Supreme Court was given a very specific area of inquiry, and Souter's concurrence clearly exceeds that boundary. Thus, the questions become, is Souter a judicial activist to the detriment of the rights of women, minority and other disenfranchised groups? How does Souter equate his statement of principle to the Senate Judiciary Committee and his practice?

In the Cote concurrence itself, Souter affirms that women have the right to abortion counselling, but only because it is "necessarily permitted under Roe v. Wade", Cote, 513 A.2d at 355. He then discusses what is the appropriate course of action for physicians with "conscientious scruples against abortion." Cote, 513 A.2d at 355. He finds that a physician must consider

counselling about abortion as an option because of Roe, but the physician does not have to provide such counselling personally. Doctors in this situation should disclose their moral convictions and refer the patient to another physician.

Souter's response to the possible conflict between pregnant women and physicians opposed to abortion is reasonable, but he clearly went out of his way to address this hypothetical. Moreover, it is notable that in the entire opinion, majority and concurrence, there is no indication from Souter that he believes that the woman's right to choose arises from any fundamental right or constitutional imperative.

Souter's other significant writing on abortion was completed when he was a superior court judge. In 1981, the New Hampshire legislature was considering a bill requiring parental consent for abortions on unmarried minors. Under the pending bill, an abortion could be performed on an unmarried minor without parental consent only when a justice of the superior court determined that performing the abortion would be in the best interests of an immature minor. Souter, writing a letter to the legislature at its request on behalf of the members of the superior court, addressed the constitutionality of the judicial bypass option contained in the bill.

This letter is curious not only for the issues it addresses,

but also for those left unanswered. The judges refused to take a position on parental consent but did find two fundamental problems with the bypass provisions. The first was that the bill left it to judges "to make fundamental moral decisions about the interests of other people without any standards to guide the individual judge." In many ways this posture is puzzling. The standard the bill envisions is one frequently used when cases involve minors: the best interests of the minor. Other applicable standards would be those set forth in Roe v. Wade, 410 U.S. 113 (1973), and many later cases which created a framework for ensuring protection of the rights to privacy of all women. Souter's letter does not distinguish this situation from many others in which the judiciary is forced to make similar decisions by balancing interests, such as child custody cases.

The second problem anticipated by Souter was judge shopping. The letter anticipated that minors would try to avoid judges who find abortion morally wrong and judges who believe that the assessment of the best interests of the pregnant minor requires moral decision-making of a type the judge should not make. There is no mention of the constitutional validity of the parental consent bill without a judicial bypass and no suggestion of a simple recusal procedure to ensure that only unbiased judges would sit.

In analyzing a judicial bypass provision, Souter

inexplicably restricted his response to a discussion about judges. There is no real discussion of the minor who would be involved in the process. It is the discomfort of judges rather than the hardship of young women which garners all the attention. The focus is entirely on the problems faced by anti-choice judges who are unable to fulfil their judicial responsibility to put aside their personal biases, rather than on the problems of minors facing perhaps the most important decision of their lives. Even assuming the judges felt they were not knowledgeable enough to write about pregnant minors, Souter's analysis is chillingly lacking in compassion and empathy.

Although the tone of this letter is anti-choice, in practice it was an important tool in the fight against parental consent laws in New Hampshire. This letter was used to defeat parental consent legislation on several occasions because many parental consent supporters would not vote for a bill without a judicial bypass option. The Supreme Court recently clarified in Hodgson v. Minnesota, 58 U.S.L.W. 4957 (U.S. June 25, 1990), that a parental consent bill is unconstitutional without a bypass provision, but Justice Brennan provided the fifth vote for the plurality on this point.

The final written evidence on Souter's abortion position is more tenuous. In 1976, the New Hampshire Attorney General's Office submitted to the U.S. Court of Appeals for the First

Circuit, a brief which argued that the state should not provide Medicaid funds to pay for what the brief alleged that New Hampshire residents see as the "killing of the unborn." (Coe v. Hooker, Civil Nos. 75-206, 75-244, 75-253.) The assistant attorney general who wrote the brief, upon which Souter's name also appears, denies speaking with Souter specifically about the brief. Given the small size of New Hampshire's Attorney General's office and the importance of the case, however, it is likely that the assistant attorney general was reducing to writing what was office policy. The fact that Souter's staff filed a brief containing such explicit anti-choice rhetoric reflects either his failure as a professional to supervise his direct subordinates on an important policy matter, or else his willingness to adopt biased extreme rhetoric against women and to argue that alleged majority opinion should override fundamental rights, in direct contravention of the Constitution's mandate.

The preceding opinions appear to constitute Souter's writings on abortion and reproductive rights. The following analysis of other cases is integral to prediction of how Souter would rule on any future abortion and women's rights cases.

LEGISLATIVE DEFERENCE IN SOUTER'S OPINIONS

Another disturbing trend in Souter's opinions is a marked

deference to legislative judgment, even when the legislation is quite restrictive of individual rights. He also believes, as noted above, that the Constitution should be interpreted solely by reference to the framers' intent, an analysis which precludes intermediate scrutiny of sex-based classifications under the equal clause, which has been guaranteed only since the 1970s. Moreover, he sometimes applies an overly strained and technical interpretation of the law.

These tendencies may be critical in any prospective abortion case. The more recent Supreme Court pronouncements, while maintaining Roe, have allowed states to legislate more and more restrictions on a woman's right to choose.[1] Thus, even if Souter has no personal or professional bias against abortion, which is unlikely, he can be very dangerous if he continues his pattern of unqualified judicial deference to the other branches

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[1] The executive branch under the Reagan/Bush administrations has also been attempting to regulate and restrict access to abortion. One example of this type of executive regulation is the current abortion rights case pending before the Supreme Court. In Rust v. Sullivan, Nos. 89-1391, 89-1392, at issue are Title X federal family planning regulations which prohibit physicians at clinics receiving Title X funding from discussing the option of abortion with their patients. If the patient inquires about an abortion, the response must be, "The project does not consider abortion an appropriate method of family planning and therefore does not cousel or refer for abortion." 42 C.F.R. To let regulations like this stand is to make reproductive choice a mere illusion for low income women with no funds to seek unbiased medical counsel. Rust may also be the type of case which provides the court the next opportunity to overturn Roe v. Wade. If Souter is intellectually consistent, his reasoning in Smith v. Cote, 513 A.2d 341 (N.H. 1986), would require him to either to find the Title X regulations unconstitutional or to vote to overturn Roe v. Wade.

of government.

As described above, in In Re Dionne, 518 A.2d 178 (N.H. 1986), Souter is willing to give a great deal of deference to legislative decisions, even if those decisions were made hundreds of years ago. Another case in which the legislative branch was given undue consideration is In Appeal of Bosselait, 547 A.2d 682 (N.H. 1988). Souter, writing for a unanimous court, upheld a law that required unemployed workers to be available for a full-time job to qualify for New Hampshire's unemployment compensation. The plaintiffs, two elderly brothers in their seventies, had been denied unemployment compensation after losing the full-time janitorial job they had shared for 22 years. Both brothers could only work part-time because of health problems. Souter rejected their age discrimination claim, because it had not been adequately raised at the lower level, and rejected their disability discrimination claim because the plaintiffs' inability to work longer hours due to their age did not constitute a "handicap".

Souter also addressed the plaintiffs' equal protection argument. He found that the requirement of availability for full-time employment as a condition for receiving unemployment compensation did not violate the state equal protection rights of those who were only able to work part-time.

Employing the rational relation standard, Souter found that the plaintiff brothers would have to prove "that the restriction of benefits to those able and willing to accept full-time work is not rationally related to the advancement of any legitimate governmental interest." Bosselait, 547 A.2d at 690. The court held that the plaintiffs did not meet this burden because the state had two legitimate government interests which it found were rationally served by the statute. The first was to conserve government funds for the benefit of those who need them the most. Souter found it reasonable for the government to conclude that unemployed people available to work full-time would be the most needy based on the assumption that those only able to work part-time must have another source of income.

The second government interest was in limiting unemployment payments to the shortest time possible. Souter wrote that the restriction to persons available to take a full-time job accomplished this end because the government stated that there are more full-time jobs available and thus, a person is likely to get a full-time job more quickly than a part-time job.

Souter's opinion contains no discussion of the validity of either of these ideas, and no supportive evidence. While rational relationship scrutiny often results in the upholding of statutes, this case is notably overly deferential to government rationales. Unemployed people who can only work part-time

because of disability, age or responsibility for care-giving to children or the elderly are likely to be at least as needy if not more needy than those available for full-time work, and no more likely to have additional sources of income. The court does not even consider the possibility of partial payments to part-time employees. The opinion seems to grasp any legislative reason to uphold the regulation. It is not enough for the judiciary merely to require statement of some alleged reasons for legislative actions; the judiciary must truly judge how rationally the statute and interests are related.

ABSTRACT REASONING IN SOUTER'S OPINIONS

While Souter has been hailed for his presumed legal acumen, his opinions demonstrate a tendency to take abstract reasoning to an unreasonable level. People are not machines. Any legal analysis which fails to take the realities of normal people's daily lives into account risks undermining the law and can lead to absurd conclusions.

State v. Denney, 536 A.2d 1242 (N.H. 1987) is a typical case illustrating this error. In Denney, the defendant was arrested for drunk driving and given Miranda warnings. He refused to take a blood alcohol test but was not specifically informed that his refusal could be used against him at trial. He

was advised that a refusal could result in license revocation. The New Hampshire Supreme Court reversed Denney's conviction, finding that his due process rights under the state constitution were violated when his refusal to take the test was admitted into evidence at trial. Justice Souter dissented. He felt that the Miranda warning that "any statement could and would be used against him" should have been sufficient to inform the defendant that his refusal to take the test would be used against him, even though immediately prior to the test he was informed of only one consequence of refusal: loss of license. Souter's argument is based on abstract legal thinking and ignores the fact that most of the population has not been taught to think like a lawyer. After being told, at a separate time, that any statement may be used against you, most people, as the majority realized, would not understand that such statements include a negative response to a later police request to take a test.

STEREOTYPICAL VIEWS OF WOMEN IN SOUTER'S OPINIONS

Souter also appears to have an anachronistic and stereotypical view of women. The most glaring example is in the case of New Hampshire v. Colbath, 547 A.2d 682 (N.H. 1987). In Colbath, the defendant was convicted of aggravated felonious sexual assault. The defendant met the victim in a tavern. They went to the defendant's trailer, where he raped her. The

defendant's girlfriend came upon them and violently assaulted the victim.

The court admitted evidence by a state witness that the victim had left the tavern in the company of various men during the afternoon and had been "hanging over" men and "making out" with the defendant and others, but would not allow defense witnesses to testify about the victim's behavior. In his jury instructions, the trial judge stated that the testimony presented about the victim's conduct was not relevant to the issue of consent.

Writing for a unanimous court, Souter found that the jury should have been allowed to consider the victim's behavior toward men other than the defendant in the hours preceding the incident. He found the defendant had a right to have the jury consider the victim's "sexually provocative behavior" toward the group, which he considered relevant to the issue of consent. Souter intimated that, given the facts that intercourse was not denied by the defendant and that all the victim's injuries could possibly be explained by the defendant's girlfriend's attack on the victim, he believed that the victim might have falsely accused the defendant of rape to explain her "undignified predicament."

This case required Souter to interpret New Hampshire's rape

shield law. Rape shield laws were introduced in response to the injustices inflicted on rape victims as a consequence of gender bias and stereotypical notions about women prevalent in the criminal justice system. It is a basic rule of evidence that irrelevant information is inadmissible. Yet without rape shield laws, many trial judges fail to understand why the victim's prior sexual history is irrelevant. The stereotypical view is that a woman's prior sexual activity is relevant because a woman who will have sex with one man is more likely to consent to have sex with another and that a woman who has had sex with a number of men is not a credible witness. It was in response to this type of thinking that rape shield laws limiting admissible testimony about the victim's sexual history were designed. However, these laws are typically designed not to be an absolute bar, but to yield to the rights of the defendant if in the view of the trial judge, exclusion of such evidence would unduly prejudice the defendant's case. The irony of such provisions is that they leave the ultimate decision to the same trial judges who are often unable to understand why the evidence was irrelevant in the first place.

Colbath was not a case of first impression in interpretation of the rape shield law in New Hampshire. The rape shield law was first interpreted by the New Hampshire Supreme Court in People v. Howard, 426 A.2d 457 (N.H. 1981), before Souter was appointed to the court. In Howard, the court ruled that the defendant must be

given the opportunity to prove that the probative value of the victim's prior sexual activity outweighs its prejudicial effect on the victim. At first blush, this holding appears reasonable, but subsequent cases demonstrate that the New Hampshire courts tend to give an unusual and offensive degree of latitude to defense proffers of evidence of the victims' sexual history. See Baker v. Cavanaugh, 508 A.2d 1059 (1986).

In Colbath, Souter showed exactly this sort of insensitivity and stereotyped thinking about rape victims. He found that evidence of the victim's flirting with another man suggested a "contemporaneous receptiveness to sexual advances," and that perhaps the victim falsely accused the defendant of rape as a way to excuse her "undignified predicament." Such language is unacceptable in any context. The case could have been decided on the basis of the interpretation of the state rape shield law with simple language to the effect that exclusion of the evidence would unduly prejudice the defendant's case, without speaking at length and in such derogatory terms about the victim. The language is reminiscent of the age-old stereotype that women are either "whores" or "madonnas" and that any woman who flirts with one man is sexually available to all men.

Souter's bias is also shown in Colbath in the facts he discloses in the opinion and those he leaves out. His recitation of the facts essentially presents the defendant's point of view.

This is peculiar because any factual disputes had been resolved by the trial jury, which chose to believe the victim and convicted the defendant. His opinion fails to mention the facts in the trial record that the victim had gone to the tavern to meet her sister, that she had sat on the lap of an old friend for approximately five minutes, that she was talking with the defendant about a recent fight with her boyfriend when they went to his trailer for a quieter place, and that the defendant's girlfriend, whose attack could supposedly explain the victim's bruises on her breast and upper arms, was several inches shorter than the victim and had filed several assault and domestic violence complaints against the defendant. Finally, Souter fails to mention that the victim displayed all the classic symptoms of rape trauma.[2] (From Hoffman, Rape: Judge Souter for the Defense, Village Voice, Aug. 7, 1990, at 24).

Bias held by a judge is likely to permeate all of her or his decisions. If a Supreme Court justice cannot view women free of stereotypical notions of propriety, it is unlikely that the justice can decide cases on a host of other issues in such a

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[2] Souter's holding for the defense in Colbath is also unusual in that in most of his other criminal law opinions he finds for the state and the prosecution. See State v. Koppel, 127 N.H. 286 (1985), in which Souter dissented from an opinion which held roadblocks to catch drunk drivers a violation of the Fourth Amendment and Coppola v. Powell, 130 N.H. 148, 536 A.2d 1236 (1987) rev'd in Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989), in which Souter, writing for a unanimous court, found that the admission into evidence of the defendant's statement that he was too smart to confess to police was not a violation of the Fifth Amendment.

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manner as to accord equal justice to women.

STEREOTYPICAL VIEWS OF FAMILY IN SOUTER'S OPINIONS

Another area in which the appointment of a new Supreme Court justice could have a significant impact on women's rights is family law. Issues raised by surrogate parenting, newly-discovered fertility methods, and non-traditional families may reach the Supreme Court.

As a member of the New Hampshire Supreme Court, Souter had an opportunity to write on family law issues. Generally, his opinions reflect traditional notions of family responsibility and composition. The most controversial opinion is In Re Opinion of the Justices, 430 A.2d 21 (N.H. 1987), in which the New Hampshire Supreme Court held that it was not unconstitutional to deny lesbians and gays the opportunity to become adoptive or foster parents.

In In Re Opinion of the Justices, the New Hampshire Supreme Court was giving an advisory opinion on a proposed statute which would have prohibited lesbians and gays from adopting children, becoming foster parents, or running childcare centers. It would accomplish this end by denying a license to those foster parents and childcare applicants found to be "unfit by reason of being

homosexual." The court was asked to rule on whether the bill violated the equal protection and due process clauses of the United States or the New Hampshire Constitutions, and the right to privacy.

Although no author of the opinion is given, since Souter joined in the majority, its reasoning can be imputed to him. The court held that lesbians and gays constitute neither a suspect class nor a "middle tier" requiring heightened scrutiny with respect to questions of equal protection. Thus, the government need only demonstrate a rational relation between the proposed legislation and a legitimate government purpose. The court found that the need to provide appropriate role models is a rational government purpose, the furtherance of which justifies the exclusion of lesbians and gays from adoptive and foster parenting. The opinion cites but then chooses to disregard several studies which show no connection between the sexual orientation of parents and the sexual orientation of their children.

The court found that the bill did not violate due process because there is no property or liberty interest in being a foster or adoptive parent. The court also held that the bill did not violate the right to privacy, relying on the United States' Supreme Court's ruling in Bowers v. Hardwick, 478 U.S. 186, (1986). The Court held in that case that because there is "no

connection between family, marriage, and procreation on one hand, and homosexuality on the other hand." Bowers, 106 S.Ct. at 2844, lesbian and gay sexual activity does not fit into the Supreme Court's definition of privacy. The New Hampshire opinion also rationalizes that, in the case of foster care and adoption, there is no intrusion into a person's privacy because the person voluntarily invites scrutiny by submitting an application. Lastly, the bill was found not to violate the freedom of association clause because, pursuant to Bowers, no freedom of association for the purpose of engaging in lesbian or gay sexual activity exists.

The one aspect of the bill found to be unconstitutional is the exclusion of lesbians and gays from employment as child care workers. The court holds that this exclusion is not sufficiently "rationally related" to the government purpose of providing role models for children in state-licensed care because the person holding the license to the facility is not necessarily in close enough contact with children to provide a model. Also in the childcare context, parents are responsible for making the choice as to what is best for the child, whereas in a foster care or public adoption context, the state must do so.

The basic assumption underlying this decision is that it would be bad public policy to allow children to become lesbians and gays. No evidence is offered to support this homophobic

proposition. Although, unfortunately, this reasoning is not unique to the New Hampshire Supreme Court, it is a clear indication that the opinion is based on bias rather than reason. Other evidence of this fact is the acceptance of the proposition that the sexual orientation of parents is the primary determinant of their children's sexual orientation, in the face of overwhelming evidence to the contrary. By joining this opinion, Souter demonstrates that he does not always act as a legal scholar ruled by facts and reason rather than bias and emotion.

The dissent written, by Judge Batchelder, indicates that the New Hampshire Supreme Court received no relevant evidence

> to show that homosexual parents endanger their children's development of sexual preference, gender role identity or general physical and psychological health any more than any heterosexual parents. The legislature received no such evidence because apparently the overwhelming weight of professional study concludes that no difference in psychological and psychosexual development can be discerned between children raised by heterosexual parents and children raised by homosexual parents.

In Re Opinion of the Judges, 430 A.2d at 28. Disregarding the weight of the evidence, for illogical and emotional reasons, is not, we hope, the way in which Supreme Court Justices make decisions.

This opinion also exhibits a very narrow view of due process. As Judge Batchelder's dissent indicates, the New Hampshire Supreme Court had previously recognized that a person may be entitled to due process "even when his or her interest was not 'natural, essential, and inherent'," In Re Opinion of the Judges, 430 A.2d at 28, and had even held that a person was entitled to due process in a state athletic board's determination of his eligibility to compete. Duffley v. New Hampshire Interscholastic Athletic Association, 446 A.2d 462 (N.H. 1982). By refusing to hold that parenting is entitled to some type of due process protection, the opinion essentially holds that playing a sport is more fundamental than parenting a child.

Souter's other opinions on family law issues such as divorce and child custody are unremarkable, because he has been very reluctant to overrule the discretionary rulings made by the trial judge. They generally reflect traditional notions that the husband should support the family and the wife should be given custody of the children if she wants them. See Doubleday v. Doubleday, 551 A.2d 525 (N.H. 1988), and Kayle v. Kayle, 565 A.2d 1069 (N.H. 1989).

While the obligation of both parents to support their children after divorce, and the resolution of custody disputes in favor of the primary caretaker before divorce (which in our

culture frequently results in the mother gaining custody), are ideas which should be embraced by the judicial system, it is important that this stem from the recognition that both partners share the responsibility to support and nurture their offspring, and not merely from traditional notions that a man's role is to provide financial support and a woman's role is that of nurturer.

The ramifications of such traditional notions could be tremendous. When the Supreme Court is asked to rule on modern family law issues, it must do more than merely reaffirm what have been our traditional notions of family. The Court must be sufficiently open to receive and adopt evidence that the traditional view is not necessarily the correct view.

CONCLUSION

The issues and concerns raised in this paper should serve as a starting point for intensive questioning of David Souter. As a prospective lifetime appointee to the U.S. Supreme Court, Souter's methods of constitutional and legislative analysis could determine the Court's views on life and liberty well into the next century. This is no single-issue litmus test but a question of his judicial philosophy. Particularly in the absence of any non-judicial legal writings, the American people have a right to demand that he answer questions about his judicial philosophy.

David Souter must explain the ambit of his framers'intent reliance and how he would apply framers' intent to modern issues the framers could not foresee. He must address how a framers' intent analysis functions within the concept of stare decisis. The people also have a right to know whether David Souter is committed to the fundamental constitutional principles of privacy and equal protection of the law for women.

If David Souter cannot or will not address these concerns, he should not be confirmed.